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Australian Industrial Relations Commission

Junior Rates Inquiry

Report of the Full Bench Inquiring
Under Section 120B of the
Workplace Relations Act 1996

4 June 1999

Justice P.R. Munro
Deputy President D.A. Duncan
Commissioner F. Raffaelli

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AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

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The Honourable Peter Reith, MP
Minister for Employment, Workplace Relations
and Small Business
Parliament House
CANBERRA ACT 2600

Dear Minister,

Re: Report of the Full Bench inquiring under section 120B of the *Workplace Relations Act 1996* (C No. 33985 of 1998)

Under section 120B of the *Workplace Relations Act 1996*, a Full Bench must prepare a report for the Minister, before 22 June 1999, on the feasibility of replacing junior rates with non-discriminatory alternatives. We are pleased to present that report to you.

Sub-section 120B(3) requires that a copy of the report be tabled in each House of the Parliament as soon as practicable after receipt.

Yours sincerely,

Justice P.R. Munro Deputy President D.A. Duncan Commissioner F. Raffaelli

4 June 1999

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Summary

[1] We are required by section 120B of the Workplace Relations Act 1996 (the Act) to prepare a report on the feasibility of replacing junior rates with non-discriminatory alternatives. **Junior rates are classifications in awards or agreements for employees aged less than 21.** The classification makes a distinctive use of age, an attribute that may be used in a hybrid way for positive or adverse discrimination in employment. A non-discriminatory alternative is a classification that provides a pay rate for much the same class of work as a junior rate, but without adverse discriminatory effect. There are at least six possible variables, or constituent factors of a junior rate classification. The mix of them varies between awards and industries, and only the age condition will not be found at all in non-discriminatory alternatives.

- the work description covered and/or the class of junior employees covered;
- the comparator adult classification if any;
- the relativity of the junior rate to the comparator, or the money rate for each age specified;
- the use of age as the condition determining pay rate, and progression between pay rates;
- the value given to extra experience or skill acquired before or during employment in the job being performed; and
- the "exit" age, or condition determining entry to a higher classification.

[2] The essence of our report is that none of the identified non-discriminatory alternatives most closely examined by us were feasible. We give our reasons in **Chapter 7** in the body of the report. We do not close off the possibility that there are feasible alternatives. We explored the possibility of developing our own proposal but did not persevere. We were already persuaded that in the design of replacement of junior rate classifications no one size fits all. The fit of an alternative is a matter of attention to detail and the merits in particular circumstances. The industrial parties and other interested parties would need to be involved, and that procedure fell outside the statutory limits of our Inquiry.

[3] The feasibility of replacing junior rates is conditioned by the process within which it is to occur. Under the Act in its present form it would be an obligation of the

Commission to review awards for compliance with the anti-discrimination requirements.

[4] In **Chapter 1**, we deal with the formal requirements and procedures of the Inquiry, outline the report, and the context of the economic and policy predicaments and issues that led to its commissioning. **The literature discussing that preoccupation lead us to a pragmatic conclusion that overarches our attempt to further inform the debate: if young people are to secure entry level employment and progress to economic self-sufficiency through paid employment, they more than ever need to be competitive in the labour market.** Section 120B reflects an attempt to inform a public debate about whether to resolve the conflict between the continued use of junior rates and the maintenance of anti-discrimination protective legislation. Another dynamic for the Inquiry being conducted is the national and international preoccupation with perceived failures to bring about a labour market for youth employment that ensures an effective school-to-work transition and avoids long term youth unemployment.

[5] Understanding the operational function of junior rate classifications and assigning meanings to discrimination and non-discriminatory alternatives is fundamental to our task. In **Chapters 2 and 3** a basis is laid for that understanding:

(i) We have considered and reported on the formulation of junior rates, their history in arbitral proceedings and in industrial agreements, their operation and the characteristics of their relationship with other discounted rates such as apprenticeships and traineeships.

(ii) **There has been an arbitral concern with junior rates for as long as conciliation and arbitration processes have existed.** Age has been a wage reference for young people since before the advent of formal processes of conciliation and arbitration. From the 1960s to the present, the basis of the Commission's approach to the fixing of junior rates has been that of case by case. Inherent in that approach are the concepts of needs, work value and allocation of employment. The levels of youth employment have become a recurring factor. In keeping with social changes, needs, a concept influential at the beginning of the era, has come to be overshadowed by considerations of internal award relativity between entry level and training contract classifications and application of the work value concept. Since 1985, national wage benches have generally confirmed the case by case approach as a form of response to general issues about junior

rates raised by the parties. An exception to that approach in 1994 resulted in the adoption of the National Training Wage.

(iii) **The concept of discrimination is pivotal to the identification of what is a non-discriminatory alternative.** It governs also the process that will moderate any future removal or replacement of junior rates by "non-discriminatory alternatives". That process involves in effect a rebuttable presumption that the age discriminatory conditions in junior rates should be removed. That presumption or bias in the process is not visibly tied to the equal opportunity and equality of treatment in employment policy objectives that are a hallmark of international and domestic precedents. **There are ambiguities and uncertainties in the anti-discrimination regime of the Act, but resolution of such questions is more a matter for Parliament, or the Courts, than for this Inquiry.**

(iv) **It is appropriate to construe the expressions in section 120B in a way consistent with industrial usage and the apparent parliamentary understanding of some of the terms used.** Implied in that construction are the criteria by which to identify non-discriminatory alternatives to junior rate classifications. The criteria appropriate for the purposes of this report might also usefully be deployed to align the anti-discrimination regime of the Act with the substance of anti-discriminatory measures envisaged in ILO Convention 111 and implicit in the standard implementation of such a policy program in Australia.

(v) The criteria we use to test whether particular proposals are non-discriminatory alternatives: check that it is a pay rate classification; test for discriminatory factors; and, for whether it is a replacement for a junior rate. Juniors must be able to work under the proposed alternative. The alternative must replace an existing junior rate classification in a way that applies principles of equal pay for work of equal value, taking account of any maturation factors likely to be relevant to the employment.

[6] The Act requires us to include assessments of:

(a) whether it is desirable to replace junior rates with non-discriminatory alternatives; and

(b) the consequences for youth employment of abolishing junior rates; and

(c) the utility of junior rates:

(i) for different types of employment; and

(ii) for different industries; and

(iii) in the school-to-work transition.

We have done that.

[7] First in **Chapter 4**, we consider what we have called **desirability**. In summary, our attention to that assessment concludes:

(i) **Junior rate classifications and non-discriminatory alternative classifications are the poles between which an assessment of relative desirability must be made.** The greater the remove from the circumstances surrounding a particular classification in an award and concrete employment under it, the more must that assessment be susceptible to subjective analysis and speculative considerations.

(ii) The submissions, evidence and literature help to identify and refine the considerations most commonly advanced to justify the replacement of junior rates:

- denial of equal pay for work of equal value; endemic low pay outcomes for junior workers;
- inconsistent external and internal award relativities;
- age 18 denotes adulthood but anomalously, not for wages or assessment of needs; and
- systemic and situational exploitation of juniors caused by wage rate discounting and underemployment in casualised 'live working hour" precarious employment.

(iii) Considerations that weigh most in the balance against replacing junior rates are:

- resultant labour cost increases will cause significant disemployment of juniors;
- no alternative classification yet proposed satisfactorily balances equal opportunity policy objectives with the equal pay objectives;
- the simplicity of junior rate classifications adds to their effectiveness; and
- any deficiencies in junior rates would be best remedied by adjustment, not replacement of the classification.

(iv) No useful purpose would be served by our making an abstract assessment that purports to find the point of balance between those sets of considerations. The desirability of replacing or introducing any classification in an award or agreement involves questions of merit peculiar to the employment. The

constituent elements of junior rate classifications can be configured in numerous permutations but not much more so than can options canvassed as non-discriminatory alternatives. Competency-based classification of entry level juniors is difficult, a low priority, and not even the best option. **There is almost a consensus, and it is our assessment, that a discounted pay rate for entry level work continues to be necessary in the areas in which employment under junior rate classifications is most concentrated.** The task is to get right the balance between classification options and two objectives:

- equal opportunity taking account of the competitive disadvantage in employment of school-leavers, teenagers and young employees;
- equality of treatment in employment for all employees taking account of skills, responsibilities, experience and performance.

That is not an easy task. It goes to the substance of pay rate classifications, whether age discriminatory or non-discriminatory in form. Age discrimination measures present an ill-suited process for that task.

[8] Next, in **Chapter 5**, we consider **the consequences for youth employment** of abolishing junior rates. In summary, our assessement concludes:

(i) **A near consensus exists about the state of youth employment. It is the starting point for our assessment of the consequences of abolishing junior rates. Employment for youth is relatively scarce, increasingly casual and part-time, fragmented, and dependent upon retail and service industries:**

"There has been a marked deterioration in young people's position in the full time labour market over the past 15 years. There has been a steady decline in full-time employment opportunities for young people, accompanied by persistently high rates of full-time youth unemployment. At the same time there has been an increase in education participation and in the proportion of young people who combine full-time education with part-time employment. Youth employment is concentrated in a narrow range of industries, with retail trade accounting for around 50 per cent of teenage employment overall, and around 62 per cent of teenage part-time employment.

The available material highlights the importance of participation in employment, both while at school and soon after leaving school, to future labour market outcomes. It suggests that obtaining a job soon after leaving school is an important factor influencing the successful transition into employment; that early workforce engagement can reduce the probability of prolonged unemployment; and that part-time work while still at school improves the chances of getting a job on leaving school."[1]

(ii) Some other characteristics of the labour market that significantly affect youth employment are:

- own-wage elasticities of demand for junior labour cause employment of juniors to be highly sensitive to relative increases in pay rates;
- structural changes and management techniques are substantive and continuing factors in the decline in full-time employment and in the demand for low skill work;
- underemployment of lower skilled adults imports a greater risk of labour substitution of juniors because of the important part that the wage cost differential plays in the utilisation of junior rate employment.

(iii) Today's young people find themselves in a precarious position when unemployment, underemployment and lack of security are increasingly the norm. **Changes that might have the effect of significantly increasing the relative cost of teenage labour beyond its real value to an employer may make teenage employment even more precarious.** A preponderance of opinion is evidenced in Australia, and in overseas studies and reports about the effect and operation of minimum rates internationally. That opinion is at least respectably founded in research and empirical observation. It points to the conclusion that an immediate or general removal of the existing wage-rate discounts for juniors would result in significant disemployment.

(iv) The notion of abolishing junior rates must be commensurate to the degree of change to or replacement of existing junior rates that is likely to result from the Commission's processes. The potential changes include those that would flow from the partial or complete implementation of some of the proposals canvassing non-discriminatory alternatives. So far as we are aware, and we have researched the topic, the Commission has never arbitrated the removal of a junior rate. **An effective removal and non-replacement of the existing discounts for age against adult wages would involve significant relative adjustments of some rates and especially the more heavily discounted rates. Some adjustments would be of a dimension that would result in significant disemploying effects for the corresponding class of employees now in receipt of junior rates, or to be in receipt of the substituted pay rates.**

(v) Each of the particular classifications proposed as non-discriminatory alternatives may overvalue the work performed by young workers, although the degree of

overvaluation may be extinguished at higher age levels and for more experienced workers.

[9] Then, in **Chapter 6**, we consider **the utility of junior rates**. In summary, our assessment concludes:

(i) **The utility of a junior rate is best attested by there being active employment under it**. Junior rates are used predominantly in the retail trade, accommodation and catering, and wholesale trade industries, which account for just under two thirds of teenage employment. Almost the same proportion of it is engaged in casual types of employment on a part-time basis. Employment under junior rate classifications is of most use to:

- student juniors suited to part-time work;
- for creating a high turnover stream of entry level work able to be accessed by young people not able to secure training contract entry to employment;
- for employers, where low cost labour for less skilled work is intensively and consistently required on a flexible and part-time basis. Junior labour at junior rates is the lowest cost, readily available, flexible option.

(ii) **Junior rates are often a useful bridge to full-time employment, especially for the educationally better qualified. They are of relatively little use in securing direct entry to full-time employment.** Cost incentives are not demonstrably conducive of junior employment in full-time work, for which a stable relatively skilled workforce is maintained. For that reason, full-time employment of juniors has almost vanished from government administration, railways and financial services. No resumption of full-time junior employment by employers of that kind can realistically be expected except through training contract employment directed to developing skills required.

(iii) There is very little utility in the almost defunct junior rate classification currently available for the construction and building industries. Instead of reviving it, but before replacing it, identifiable problems of maintaining a reasonable youth share of available employment should be addressed through the training contract classifications considered in relationship to other options for entry level employment of juniors suited to the work. A task of that kind appears to have been provisionally completed for the main metals and manufacturing industry

awards. The existing *Unapprenticed Junior* rate classification is being used and may yet be developed further for that industry.

(iv) As the classification title "*Unapprenticed Junior*" suggests, the entrenched pattern of junior rate classifications and training contract classifications often causes them to be alternative options serving different sets of interests. The growth in adult and late or post teenage entry to *New Apprenticeships* poses a question of whether the age neutral non-discriminatory form of the NTW classifications may operate to the disadvantage of the sub-21 age group and school-leavers, particularly for those marginalised in the school to work transition.

(v) The utility of junior rates in transitional employment, especially in regional Australia is likely to be a function of community level involvement. Employers, including government employers, have an essential role in developing school to work transitions through employment opportunities. Low communal awareness of the need may lessen pressure for it to be met. **Well designed junior rate classifications, framed to reduce capacity to exploit the use of them, may justifiably be used for creating or protecting employment opportunities for young employees.**

Endnote

[1] Joint Governments Submission 38 at p. 38.

1. THE JUNIOR RATES INQUIRY:

1.1 Terms of Reference:

1.1.1 The terms of reference of the Inquiry into junior rates were effectively established by section 120B of the *Workplace Relations Act 1996* (the Act). That Section provides:

> *"120B Commission to report on junior rates of pay*
>
> *(1) Before 22 June 1999, a Full Bench must prepare a report for the Minister on the feasibility of replacing junior rates with non-discriminatory alternatives.*
>
> *(2) The report must include assessments of:*
>
> *(a) whether it is desirable to replace junior rates with non-discriminatory alternatives; and*
>
> *(b) the consequences for youth employment of abolishing junior rates; and*
>
> *(c) the utility of junior rates:*
>
> *(i) for different types of employment; and*
>
> *(ii) for different industries; and*
>
> *(iii) in the school-to-work transition.*
>
> *(3) The Minister must cause a copy of the report to be tabled in each House of the Parliament as soon as practicable after the Minister receives it.*
>
> *(4) In this section, junior rates means junior rates of pay."*

1.2 Procedure:

1.2.1 On 3 August 1998 the President of the Australian Industrial Relations Commission, (the Commission), established a Full Bench required by section 120B of the Act to prepare the report to be made to the Minister for Employment, Workplace Relations and Small Business (the Minister). The Full Bench, (the Inquiry), is constituted by Justice Munro, Deputy President Duncan and Commissioner Raffaelli.

1.2.2 The Inquiry first met on 21 August 1998 to consider the task before it and the procedure it would adopt. In determining a procedure, the Inquiry took into account the positions that had been reached by the industrial parties to the proceedings before the "*Junior Rates*" Full Bench. That Bench was constituted in 1994 by the then

President to deal with training rates and related award issues[1]. Details of the procedure that the Inquiry intended to follow were communicated on 21 August 1998 to a wide list of organisations known to be interested in issues about youth employment and remuneration. Advertisements published in major daily newspapers on 26 August 1998 called for submissions by 30 September 1998. Those advertisements described how interested persons could get access to a fuller statement of the Inquiry's procedure. In response to various requests, the original declared timetable was altered to that set out in paragraph 1.2.3 to accommodate delays to preparation of submissions caused by the Federal election held on 3 October 1998. In particular, an extension of time to allow submissions to be lodged by 6 November 1998 was made available to those who applied for it.

1.2.3 The procedure and timetable adopted by the Inquiry at its meeting on 21 August 1998, as later revised, included the following steps and deadlines:

6 November 1998	Written submissions to be lodged by interested persons.
21 - 24 December 1998	An Issues Paper distributed to all 67 persons or bodies making submissions, and published also on the Commission's web site. Particular persons or organisations selected from those who made a written submission were asked to comment on the Paper.
15 - 17 February 1999 and 22 - 24 February 1999	Oral presentations from 23 selected "participant" bodies about the matters identified in the Issues Paper.
16 April 1999	An "in-confidence" paper indicating "Provisional Findings" distributed to a Consultation Group nominated by the Full Bench.
30 April 1999	Written submissions discussing the provisional findings and recommendations lodged by members of the Consultation Group.
5 May 1999	Conference with the Consultation Group.

Those who made submissions to the Inquiry, the participants in the hearings related to the Issues Paper, and the members of the Consultation Group are listed in **Schedule A**.

1.2.4 Section 120B sets statutory terms of reference for preparing a report on the feasibility of replacing junior rates with non-discriminatory alternatives. This report has

been prepared using a procedure intended to minimise recourse to the industrial party and adversarial hearing model characteristic of most of the Commission's work. Our procedure was intended to encourage participation in the Inquiry by a representative body of interested persons. Our responsibility is to report to the Minister, and ultimately to the Parliament. Although sensitive to the protocol associated with that responsibility, through the Issues Paper and the later consultative process, we gave some of those who may be most interested access to the development of the Inquiry's thinking about the matters upon which we are to report. We sought also to not duplicate work of a kind already done by other institutions in Australia. Aspects of the issues which we are required to address have been examined in various studies both in Australia and overseas. The list of references published in **Schedule B** sets out some of the sources we have used. We sought to draw upon that work, and to attract a critique of it relevant to our task. Through those and other means such as the publication of papers and transcript on the Commission's internet web site, we allowed those who participated in the Inquiry, and others, timely access to most of the sources of information upon which we will draw. For the most part, we have been limited in our research to our own examination of the literature and of the materials made available through submissions. We looked particularly to the resource created by the submissions made in response to notice of the Inquiry.

1.2.5 The Inquiry is indebted to those who devoted effort and resources to assisting us in our task through those processes. The Inquiry operated without addition to the Commission's staffing resources which throughout the Inquiry have been under severe pressure in coping with existing case-loads. We have been assisted also by Ms A. Pendlebury, a member of the Industrial Registry, who served as Secretary to the Inquiry. Ms G. Yeung assisted by two other Associates, Ms L. Luksic and Ms S. Robertson, coordinated the compilation of each of the three documents published by the Inquiry. Through the Commission's Research, Information and Advice Branch, (the RIA Branch) and another Associate, Ms E. Raper, details about the use and non-use of junior rates in federal awards and certified agreements were extracted for our examination. The content and, so far as it can be discovered, the rationale for some particular existing award or agreement junior rate provisions are analysed at **Chapter 2** within. That analysis is taken into account in our assessments and conclusions.

1.2.6 The Issues Paper was conceived to be the first stage in preparing our report to the Minister. In framing the issues, we drew primarily upon the submissions lodged with us, and upon material that our examination of the topic had brought to our attention. At the outset of the hearing about the Issues Paper, we issued a statement in

which we made the following observations about our procedure and collection of material:

> *"Several submissions sought an opportunity to present evidence or to cross-examine. It is apparent that not all participants have yet abandoned the possibility of being permitted to lead evidence. We have given thought to the benefit that might be derived from evidential presentations having regard to the nature of our task and to the time-table available to complete it. We believe it would not be productive for us to receive witness evidence, or to allow cross-examination.*
>
> *We do not doubt that some individuals and some experts could present evidential material that would explain or highlight particular aspects of the work, work relationship, rewards and economic theories and effects we are examining. Once such evidence was adduced, a need to balance it with other evidence would be discovered. Even more important is the fact that we have the advantage of being able to draw upon a very wide range of already published material and opinion. We note that some of that material is based upon direct discussion with and analysis of the experience of classes of young people. We stress that we have had access to what we consider to be a formidable body of academic and institutional analysis of the experiences and predicaments that confront or affect young people in meeting their social, industrial, educational and economic needs. Through the references included in the Issues Paper, we have sought to point the way to some of that material, much of which was referred to in submissions put to us. In particular, and because it was not available to us until after the Issues Paper was published, we note the relatively comprehensive set of papers published in late 1998 by the Australian Clearinghouse for Youth Studies: "*Against the Odds: Young People at Work*". Some of the material and sources to which we have referred make compelling reading. Perhaps better than evidence prepared by individual employees or experts, the array of data, analysis and opinion collected in the general body of material to which we have referred creates a perspective for the relatively narrow subject upon which we are to report."*

1.2.7 Later in that hearing, in association with several of the participants, proposals about alternatives to some or all existing junior rates provisions were identified by us. Those proposals were set out in a paper circulated to the participants. (See **Subchapter 3.4** within.) Our Provisional Findings and Conclusions were consolidated in a publication similar to the Issues Paper and circulated to members of the Consultation Group on 14 April 1999. Those tentative positions were framed with some circumspection and subject to confidentiality. We were concerned lest fuller publication might infringe the conventions associated with any report to be submitted to the Parliament. None the less, through that process, members of the Consultation Group made use of the opportunity to raise issues or points about considerations or likely conclusions. Written submissions were lodged by only three of the six institutional groups represented on the Consultation Group. A conference to discuss the Provisional Findings and Conclusions was held on 5 May 1999.

1.2.8 The objectives and processes of our procedure were stated at paragraph 1.3.2 of the Issues Paper in terms that correspond broadly with the outline at paragraph

1.2.4 above. While we are conscious that it is for others to express conclusive views on the success or otherwise of our procedure, we make some points. What we set out to do has proved workable and efficient. It has assisted the Inquiry to obtain inputs shaping or responding to the development of its own ideas at a stage earlier than would have occurred in more adversarial proceedings; it has given us the opportunity to modify developing views. It resulted in quite a number of those who made written submissions in response to our advertisement and invitation of 26 August 1998 relying on those written submissions. That is, the Issues Paper release brought forward the major contributors who were then reduced to more manageable numbers for responding to the Provisional Findings Paper.

1.2.9 As far as practicable, we have taken into account the wide range of material and opinion made available to us. However we accept, and we emphasise, the limitations of the process we are now completing. We have not taken evidence about the justice of particular uses of junior rates. We have not studied or assessed the needs of each of the several classes of juniors who are more or less dependent upon a junior rate as the means of subsistence. We have not attempted to anticipate the findings about merits and details that need to be made before any determination could be made through due arbitral process to vary or adjust any particular award junior rate.

1.3 Juniors Rates in Perspective:

1.3.1 Why are we having this Inquiry?

1.3.1.1 A junior rate is a classification pay rate in a award or certified agreement. We discuss that definition, the 100 year history of such rates, and the pattern of use of them in **Chapter 2**, providing examples in **Appendix A**, and details of awards containing junior rates in **Appendix B**. The Australian Retailers Association (the ARA) asked in its initial submission to the Inquiry: "Why are we having this debate?"[2] It then answered its own question. The ARA suggested that something in the nature of a legislative accident triggered a compulsory closure on junior rates in federal awards: the counter-productive effects and related debate led indirectly to this Inquiry. Our answer to the ARA's question may be a useful start to the substance of this report. That answer has three parts, each of which needs elaboration:

- the Act, and through it the Parliament, demands a report be made on the matters referred;

- young Australians face a predicament in finding through employment adequate income security and lifechances. The nature and extent of that predicament

generates societal concerns that border on anxiety. Industrial regulation, of the rates of pay applicable to school leavers and young employees, is one of several dynamics affecting youth employment. A more thorough policy analysis of considerations relevant to the impact of junior rates and likely alternatives on youth employment than that available through industrial (adversarial) hearings or parliamentary debate was needed; and

- the Act contains a qualified statutory prohibition of award or certified agreement provisions that discriminate for reasons of age[3]. The way in which that prohibition operates on junior rates is not manifestly conditioned upon achieving a balance between the considerations and principles that are the respective policy rationales for the prohibition on discrimination, and for junior rates.

1.4 The Form and Content of the Report Required by Section 120B:

1.4.1 The first of the points made in paragraph 1.3.1.1, and more generally all of them, are supported by the explanation of the purpose of the Inquiry given on behalf of the Minister upon the introduction of the amendment incorporating section 120B. In his speech to the Senate on 7 November 1996, Senator Campbell stated:

> *"New section 120B requires a full bench of the Commission to prepare a report for the minister on the feasibility of replacing junior rates with non-discriminatory alternatives. The section sets out the matters to be addressed in the report. The report is to be prepared before 22 June 1999 and tabled in both houses of parliament as soon as practicable after the minister receives it.*
>
> *This amendment relates to government and Democrat amendments 27 and 30, which exempt junior rates of pay from the anti-age discrimination provisions of the legislation for a further three years from 22 June 1997. The proposed reporting requirement will ensure that the parliament will have the opportunity to consider the feasibility of replacing junior wages well in advance of the expiration of the across-the-board exemption and that the parliament will be assisted in its deliberations by a report which is required by section 120B to address all key issues relevant to youth wages."*[4]

1.4.2 Thus on the narrowest reading of it, section 120B reflects an attempt to inform a public debate by a report prepared by the tribunal responsible for determining award junior rates. The assessments to be covered by the Commission's report are relevant to the debate about whether and how to resolve the conflict between the continued use of junior rates and the maintenance of anti-discrimination protective legislation. Looming behind that issue is the national and international pre-occupation with the labour market for youth employment. The most acute dysfunction is that an effective school-to-work transition has become increasingly problematic for a steadily growing class of marginalised young people[5]. Long term youth unemployment, and

low-pay experience growing into "no-pay" subsistence have become characteristics of the labour market in Australia and the more developed OECD economies.

1.4.3 A more determinative purpose and effect for the report required by section 120B was argued in the submissions made to us. The parliamentary debate about the introduction of section 120B through the *Workplace Relations and Other Legislation Act 1996* (the WROLA Act) was not extensive. Section 120B was advocated by Senator Murray on behalf of the Australian Democrats who, as we have seen, had proposed the amendment to the Government for acceptance. When moving the amendment incorporating section 120B, Senator Murray stated:

> *"... Placing the onus on the Commission to report on those matters effectively elevates the issue to the level of a major test case. It has a number of advantages. First, it requires the parties, particularly the employers, to put up or shut up on their claims that abolishing junior rates will cost jobs. ...*
>
> *Second, it will allow youth and community groups excluded from the working party process to put proposals to the AIRC. Third, it will allow the canvassing of all the alternatives in the development of appropriate principles to move reform forward. Fourth, it will play an educative role in hopefully turning around the prejudices against the value of young workers which appear to be held by many employers and also a number of unions. Fifth, it will come up with a solution which is practical and fair and which will then flow through to the state commission.*
>
> *...*
>
> *It would be our expectation - and that is why we have entered into this amendment - that the commission will invite submissions from unions, employers, governments, interested community groups, interested persons and, in particular, youth groups and youth organisations. Indeed, we would encourage the commission to adopt a proactive approach to informing itself on these issues, making a decision in principle and reporting its assessment to parliament. ..."*[6]

1.4.4 That and other passages from the parliamentary debates were relied upon as a basis for at least one contention that the Inquiry and our report is in the nature of a "test case" about junior rates. We are unable to accept that section 120B should be construed as requiring a test case of that kind. As previously noted, the obligation on the Full Bench is to report to the Minister. Our task is different in character to that which arises when a Full Bench is obliged to hear and determine a particular application, or several applications, as a test case. There has been at least one instance of a direct statutory duty to conduct a "test case". In relation to carer's leave issues, section 170KAA of the *Industrial Relations Act 1988* directly created such an obligation[7]. But that provision is constitutionally and substantively distinguishable. No such intention is manifest in section 120B. Nor has this Full Bench been allocated the task of establishing through arbitration of a particular matter the principles required under subsection 143(1E).

1.4.5 Our report should not be read as a determination of issues between industrial parties. We construe section 120B to mean that the Inquiry is to do no more than to try to assist in resolving issues about the content of legislation. Less directly, it may serve also to inform debate and future industrial policy in some of the ways envisaged in Senator Murray's speech, although we note that Senators Cooney and Sherry in the same Senate debate both disputed that the proposed section 120B could properly be construed as requiring a process of the same character as a test case[8]. The Inquiry is at large as to how it examines the issues referred and determines the degree of detail of the report. Section 120B does not establish a mandate for the Inquiry to make recommendations. Accordingly, we have framed our report in a way intended to integrate our opinion on the assessments we are required to make with the facts, considerations and other opinions. We do not make recommendations. None the less, we hope that the report may do more than merely assist in resolving issues about the content of legislation. The considerations and circumstances we have reported upon may persuade the industrial parties, and others to revive what was from 1994 to 1996 emerging as a relatively mutually supportive and co-operative approach to the resolution of issues about youth employment without the need for formal determinations about some issues debated in the past.

1.5 The Predicament of Teenagers Confronting the Labour Market; the Dynamics Affecting Youth Employment and Related Policy:

1.5.1 Section 120B reflects an attempt to inform a public debate about whether to resolve the conflict between the continued use of junior rates and the maintenance of anti-discrimination protective legislation. Another dynamic for the inquiry being conducted is the national and international pre-occupation with perceived failures to bring about a labour market for youth employment that ensures an effective school to work transition and avoids long term youth unemployment.

1.5.2 Dissatisfaction with the outcome of the youth labour market has been a relatively constant theme in Australia and in developed economies over at least the last two decades[9]. In March 1999 there were about 624,600 employed teenagers in Australia or about 7.2 per cent of all employment in Australia[10]. That figure is one measure against which to put in perspective the unanimous acceptance that there has been a continuing decline in teenage employment. In January 1979, the 669,900 teenage workers then employed represented 11.2 per cent of all employment[11]. Over the same period full time employment, as a proportion of teenage employment, declined from 82 per cent to 35 per cent[12]. Throughout the past decade, the number of

unemployed people aged 15-19, expressed either as a proportion of all people aged 15-19, (the youth unemployment/population ratio), or as a proportion of people aged 15-19 in the labour force, (the youth unemployment rate), stayed at high levels:

Figure 1.1

	Units	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996	1997	1998*
Youth unemployment rate	%	20.3	18.9	15.7	14.9	20.0	23.8	24.4	23.8	20.9	20.7	20.9	20.3
Youth unemployment/ population ratio	%	12.3	11.2	9.4	9.1	11.7	13.3	13.5	13.3	12.3	12.3	12.3	11.7

Source: ABS Cat 4102.0 1998 at p. 98; * annual average for year ending 30 June 1998 supplied from unpublished ABS data.

1.5.3 Other aspects of youth employment have fuelled public debate. There has been continuing growth in part-time employment. That growth is associated with a general use of casual terms of employment and with a decline in the number of hours offered or paid for. Over the past 14 years, there has been a marked increase in the dependency on families for subsistence of 18-20 year olds in particular. That increase is associated with a significantly higher school retention rate. It is linked also with increased access to tertiary education. Conversely, in-house training of 15-19 year olds fell by almost half between 1989-1993 (the only period for which records are available)[13]. Over about the same period, there is evidence of a significant decline in the average real income of 15-19 year olds, and an overall decline in junior wages relative to adults from about 55 per cent to 47 per cent: young people's earnings from both full-time and part-time employment fell, in the face of an increase in real earnings among employees as a whole. Real earnings from full-time work among 15-19 year olds fell by 6 per cent between the early 1980s and the mid-1990s, and earnings from part-time work fell by 29 per cent[14]. In consequence, as Schneider has observed at the outset of a recent paper:

> *"It is commonly mentioned in youth policy literature that the financial dependency of young people on their parents is increasing and that this is likely to have an adverse effect on the well-being of young people, their families and the community in general. Possible consequences include lower living standards for young people and their families, family conflict, homelessness and crime. Reasons for the increase in young peoples' dependency include reductions in the availability of full-time work, greater participation in school and tertiary education and changes to government income support."*[15]

1.5.4 An estimated 56 per cent of all people aged under 21 years are employed on junior wage rates[16]. The retail industry is the largest employer of teenage workers. At

May 1998, some 292,695 young workers or 49.9 per cent of the total teenage workforce were so employed[17]. In the retail industry a 17 year old typically earns $6.82 an hour or 60 per cent of the adult rate and will be employed for about 12 hours per week. In retail and in industry generally where junior rates exist, the full rate applies only at age 21 in most cases.

1.5.5 Some of the differences between the teenage labour market and the workforce generally reflect the more significant weaknesses in it. Figure 1.2 illustrates this:

Figure 1.2

	Aged 15-19	**Aged 15 and over**
Part-time employment as a % of total employment (1)	64.7	26.2
Unemployment rate (%) (2)	20.6	7.8
Female workers as a % of all workers (3)	49.8	43.1
Duration of unemployment (weeks) (4)	20.3	51.7

(1) ABS Cat 6203.0 Table 16 - at March 1999.
(2) ABS Cat 6203.0 Table 24 - at March 1999.
(3) ABS Cat 6203.0 Table 16 - at March 1999.
(4) ABS Cat 6203.0 Table 27 - at March 1999.

1.5.6 The relatively parlous position of junior employees in the labour force is not peculiar to Australia. Similar declines in youth employment and participation rates in OECD countries have been monitored over the past two decades[18]. The most recent of the OECD studies available to us concluded in June 1998:

> *"The evidence presented in this chapter suggests that the transition from school to work is a turbulent and uncertain period for young people, even if many of them start on the right track. The latter are lucky enough to have a higher level of education or to enter the labour market in a good year. These conditions are necessary, but often not sufficient, for a successful transition as the longitudinal data analysis in Section D shows clearly.*
>
> *Starting off in the labour market as unemployed is the case, on average, for one new school leaver in four in the 16 OECD countries for which data are available. Judging from the longitudinal analysis, such a start foreshadows reduced future employment prospects for men and women and for all educational groups. However, there is a wide variation across countries in the probability of starting off as unemployed and it is unlikely that the differences can be explained solely in terms of the educational attainment youths bring to the labour market.*

> *The damaging effects of persistence in unemployment and inactivity in the first years of the transition process are particularly worrying. Nonetheless, the proportion of youth employed does rise over time, especially among men, in all educational groups. Unemployment is also rather concentrated among a relatively small group of young people, even though in some countries, like Australia and the United States, the experience of unemployment in the early years is more widespread than in other countries. Augmenting the quality of initial education and, especially, reducing early exits from education clearly must remain of prime importance in tackling such problems.*
>
> *But greater success in these objectives, on their own, will not be sufficient. Tackling overall high and persistent unemployment is an essential part of any 'youth-oriented' policy package, but will also not be sufficient. In addition, the large cross-country differences evident in the data points towards the important role of labour market institutions in aiding the integration process, including 'systems' of apprenticeships, collective bargaining, the strictness of employment protection legislation and youth labour market policies. The debate on the appropriate policies to tackle the problems faced by youth in making the transition to the job market needs, in many countries, to be more focused as to objectives. Should they simply seek to 'maximise' short-run employment opportunities? Should they rather be geared to promoting institutional arrangements to assist youth to get into stable employment more quickly? ..."*[19]

1.5.7 The status of youth employment has been in the foreground throughout that debate. A decline in youth employment, a rise in youth unemployment and a growth in under-employment of the working age population generally have become perennial incidents of the deterioration in that status. Since 1980, the school retention and pattern of labour demand for secondary and tertiary education age employees has changed. We examine aspects of that change in paragraph 1.5.8 below. Those changes should be placed in context with aspects of the general work environment. New patterns of working time, notions about "disposable" labour, "precarious" employment, and perceptions of the 1990s heralding "the age of insecurity" are counterpoints to traditional expectations about career employment, "real jobs", "fulfilling" or remunerative work, and individual employees' social needs. Such traditional expectations permeate much of the analysis put to the Commission. We accept that there are points in the contrasted perspective that may not be beyond debate. But there is enough substance in them to establish a substantial alternative basis for the concern expressed in the OECD study about the focus of much of the debate about the problems faced by youth in making the transition to the job market. A realistic understanding of working life options may soon be critical if youth and the community are to make the most of limited employment opportunities and make the best available choices about training and education options.

1.5.8 The changed pattern of demand for secondary and tertiary education age employees, the relative absence of jobs of any kind for workers in some occupations and regions, and the changed reliance on capital substitution for that labour are not transient factors. Employment for all employees is increasingly more competitive, less secure, and susceptible to under-employment or interruption and the need to be versatile. Paid work is becoming both rarer and more unevenly distributed[20]. A polarisation has developed in a form described by Watts:

> *"The distribution of work in Australia, as in most similar societies, has become more unequal. We are becoming a society polarised between the 'work rich' and the 'work poor' (Pixley 1993; Australian Council of Social Service (ACOSS) 1993; Brotherhood of St Laurence 1996).*
>
> *The essential problem facing Australia and many comparable societies, is that paid work is becoming more and more unequally distributed (Probert 1995, pp. 45-52; Dawkins 1996, pp. 272-86). Since the 1980s we have seen a major and long-term increase in unemployment, under-employment and overwork.*
>
> *...*
>
> *We also face a future where 'precarious work' and 'precarious workers' are increasing as a proportion of the total labour force. Precarious work affects mostly young people, women, and migrants. Precarious work refers to all those forms of casual and part-time work that give workers:*
>
> - *lower incomes;*
> - *fewer hours of work;*
> - *reduced job security;*
> - *degraded job conditions ...; and*
> - *less opportunity for career development, promotion and training ..."*[21]

1.5.9 The submissions of the Community and Public Sector Union (CPSU), Australian Rail, Tram and Bus Industry Union (ARTBIU) and Australian Municipal, Administrative, Clerical and Services Union (the ASU) each substantiated the apparent permanence of such structural changes in public administration at national, local government level, and in rail transport. It is misleading to portray contemporary problems of youth employment as predominantly the effect of labour price causes. The assertion that economic theory predicts that increases in minimum wages will reduce the demand for the categories of labour to which the minimum wage applies should not divert attention from the trend in all save a few industries for the demand to fall independently of any effect of relative wage levels. Moreover, concentration on statistical measures of employment and unemployment inhibits adequate understanding of the problems of under-employment. The critical need is that those entering the labour market, and those who intervene in it, adapt to what is increasingly a movement toward a free market rationing or allocation of both working time and work rewards.

Those aspects of a labour market in an accelerating transition justify a greater sensitivity to the need for young people to be given the best possible chance to make their entrance to working life as effective as possible.

1.5.10 In Australia, as in most of the developed national economies, the national policy setting is one in which business values and the free market model of economic theory prevail. Policy about most institutional activity and much human activity is guided by those values. The global effect of the implementation of market economy policy is described in a recent work by Elliott and Atkinson. With some polemic, they depict the 1990s as the commencement of "*The Age of Insecurity*"[22]. That concept of the era is organised around a key notion. Insecurity exists because each national economy must now come to terms with the circumstances created by an economic revolution over the past two decades. Over that period through financial control deregulation, capital has been given freedom to move internationally, but through changes to labour market regulation, labour has been effectively nationalised to serve each national state's domestic interests in economic survival[23].

1.5.11 Less dramatically but more concretely, the statistical and other economic analyses presented to the Inquiry demonstrate fundamental changes over time to junior and other employment in Australia. Underlying those changes are many of the same direct causes and effects that Elliott and Atkinson rely upon to illustrate the insecurity and underlying instability of contemporary employment. The fundamental cause is the exponential assertion of market economy business values. More proximate are the techniques of workforce management: labour inventory control; downsizing or "right-sizing"; contracting out; labour hire contracting; compulsory tendering; market testing; internal bidding systems; payment for only "live working hours" or during peak service utilisation; casualisation of the workforce; and increased use of term contract conditions of employment. Almost everywhere these techniques are being used by employers.

1.5.12 Another comprehensive study published in 1999, "*Australia at Work*" authored by ACIRRT staff, illustrates the effect of the techniques on Australian employment status. The following passages summarise the industrial backdrop to perceptions about employment insecurity:

> *"Job insecurity has become one of the most common sources of social anxiety during the late 1990s. The employee survey from AWIRS 1995 found that nearly one-third of workers reported that they felt insecure about their current job, and focus group participants regularly dwell on this issue as one of their main workplace concerns. The causes for this heightened awareness of job insecurity are not hard to find. Some of the reasons lie in the changing nature of the labour market, while others lie in the process of*

workplace change itself. ... the growth of precarious and other non-standard forms of employment has heightened people's fears about finding and keeping a 'proper job'. For those in work, the turbulence of workplace change - particularly restructuring, downsizing and privatisation - has weakened people's confidence in their own employment future.

...

Over the last two decades job insecurity has closely tracked unemployment ... Interestingly, the peaks in job insecurity precede the peaks in unemployment, presumably because people still in work are aware of increased retrenchments and reduced hirings before they become aware of the extent of unemployment. ... after the 1982 recession, job insecurity settled at a moderate level for about six years (averaging about 18 per cent), whereas after the 1991 recession, job insecurity has remained at a much higher level (averaging about 25 per cent). The reason for this ... is that job insecurity has lost its traditional linkage with business cycles and has become an almost permanent feature of the economic landscape.

...

In conclusion, large amounts of part-time work exist because that is what's being offered. Over one-quarter of part-time workers want more hours - and that's one direct measure of under-employment - but a far larger proportion would probably take up more work if it were being offered - an indirect measure of under-employment.

As well as not getting enough work, the other major problem is the kind of work on offer. Much of the growth in non-standard employment has been in the area termed 'precarious employment'. In many respects, the 1990s is a story about the loss of 'proper jobs', an upward trend in all kinds of non-standard forms of employment which undermine people's job security. These include:

- ❑ *increased casualisation of work;*
- ❑ *increases in the proportion of temporary jobs;*
- ❑ *increases in outsourcing and other forms of outwork;*
- ❑ *increased use of agencies and other labour market intermediaries.*

All of these non-standard forms of employment are responsible for creating what some have called an 'irregular workforce' (Harley 1994). Employers have set out to create such a workforce in order to achieve what is called 'numerical flexibility', a capacity to vary their labour inputs to meet patterns of intermittent demand for their product or service. As one commentator put it, this irregular workforce is 'the employer's equivalent of a just-in-time inventory' (Bittman 1991, p. 17)"[24]

1.5.13 The same array of measures from the human resource manager's repertoire are dynamics in producing more "precarious" employment, more "disposable" labour. The youth employment paradox that is the result of those measures, and of the structural economic and cultural changes that generate them, is discussed also in the Australian Youth Studies Clearing House publication *Against the Odds: Young People and Work*[25]. The relative shift from stable employment in manufacturing, production, and public administration industries to employment and under-employment in service and hospitality industries are common features of developed economies. The dynamics of those changes are likely to be a continuing force in Australia.

1.5.14 Similar dynamics were manifest in the debate that led to this Inquiry, and in the debate that has informed it. Our exposure to the debate has led us to accept that the state of youth employment has been accurately described in the materials to which we have just referred, and that probably that state will be sustained by the factors that created it. One pragmatic conclusion followed, and it overarches the completion of our attempt in this report to inform the legislative and next stages of the parts of the debate with which we are concerned. If young people are to secure entry level employment and progress to economic self-sufficiency through paid employment, they more than ever need to be competitive in the labour market. Moreover, it is also highly probable that some young people are, and increasingly will be, dependent upon what the ILO Convention 111 recognised as "special measures" to reduce their relative lack of opportunity. Article 5.1 of that Convention permits a Member State to determine that special measures designed to meet the particular requirements of persons who, "*for reasons such as ... age ... are generally recognised to require special protection or assistance, shall not be deemed to be discrimination"*. We see no reason why a special measure of that kind may not be designed to allow such persons to be competitive in some sectors of the employment market.

1.5.15 As we shall see in **Chapter 2** below, the arbitral rationale for junior rates discloses some points of principle based on the rates struck being in part intended to provide a degree of assistance or protection to a class of junior employees. From our analysis in **Chapter 3** and **Appendix C**, it can be seen that a protective rationale was recognised and preserved for youth wages in the State legislation which first implemented prohibitions against discrimination for reasons of age. At the time of its enactment, the counterpart federal legislation appears not to have been formulated with similar precision or understanding[26].

1.5.16 In 1999, the class of junior employees to whom that aspect of the rationale of junior rates has greater relevance are the *marginalised* junior employees, those not in education or training and who were engaged in part-time casual work, were unemployed, or were not in the labour force.

1.5.17 The inadequacy of a junior rate wage, especially for a part-time casual working pattern, to supply sufficient remuneration to meet average needs has been another major dynamic in the debate about junior rates. For some of the employed juniors in the marginalised class, but for many more juniors who pass through junior rate employment *en route* to an educational or training credential, aspects of that

inadequacy are of paramount concern. The comments of a young man from Umina in a submission to the Commission illustrate the predicament, even where full-time work is found:

> *"I am a 18 years old am on a rate of 8.28 [per] hour for a casual. I have worked 40 hours a week for the last year and my old boss said there would be no such thing as permanency. ... I have to pay out $36 a week for a train ticket from Woy Woy to Redfern every week. A bus from Umina to Woy Woy every morning and afternoon which is $2.20 one way, works out $22 a week and buses from Redfern to Alexandria every morning and arfo $1.20 one way works out $12 a week. All together $70 a week. I have duties such as cutting graphite and steel ... shafts and using drills and different machinery. If my boss was to have a week off I would be left in charge even though I would be the lowest paid in company and not even permanent."*[27]

1.5.18 Concerns of that kind, to some extent championed by the union movement and welfare advocates, have stimulated a vigorous resistance to increases to junior age rates. That resistance has marshalled a substantial array of opinion based on employer attitudes and economic modelling techniques to demonstrate the likelihood that increases to junior rates will have significant disemploying effects. Important as that demonstration is, the more extreme positions reached by the protagonists for or against have generated a controversy that has reached into the terms of reference set by section 120B. In **Chapter 5** within, we report upon some of the main considerations and opinions in that demonstration as part of our assessment of the consequences of displacing junior rates.

1.5.19 However, another perspective is distorted by the demonstrations and predictions derived from economic modelling concentrated on statistical measures of employment and unemployment. The problems and degree of under-employment of other persons already in employment should not be overlooked. Adaptive solutions are less likely if the problem is not understood. The problems of juniors confronting the labour market are misunderstood if considered merely in terms of issues about the adequacy or disemployment effects of junior rates in isolation. Those entering the labour market may need to adapt to what is increasingly a movement toward a free market rationing or allocation of both working time and work rewards. Those aspects of a labour market, in an accelerating transition, lead us to be highly sensitive to the needs for young people to be given the best possible chance to make their entrance to working life as effective as possible. We conceive our terms of reference to have been framed so as to allow some exploration of those sensitivities, complexities and contradictory interests. Those counterpoints will need to be reconciled or at least addressed in the legislative scheme for prohibiting age discrimination, and in the

process for determining either junior rates or non-discriminatory alternatives. We discuss those aspects under the assessments made in **Chapters 4**, **5** and **6** below.

1.6 The Tension Between Prohibition of Age Discrimination, Equality of Opportunity and Equal Treatment in Employment:

1.6.1 Australia's industrial tribunals are one of the "labour market institutions" of the kind referred to in the passage quoted at paragraph 1.5.6 above. Award rates of pay, particularly junior rates of pay, and other conditions of employment determined by industrial tribunals have long been key components of the wage regulation and employment scheme affecting youth employment. The relative labour cost of employing school leavers, juniors, apprentices, trainees and adults is substantially determined by the awards or agreements that are an outcome of industrial regulation[28]. Aspects of that form of intervention have been covered in a number of submissions and will be developed in later stages of the Inquiry and our report. However, legislation effectively determines the ambit and the objectives of each industrial tribunal's regulatory functions. By that means, or by direct legislative intervention, Parliament increasingly establishes the regulatory framework and determines its orientation.

1.6.2 In the main, the exercise of direct legislative power over youth employment and the protection of young workers has been a State responsibility[29]. Federal industrial legislation has made only isolated direct interventions to influence outcomes affecting youth employment. Albeit perhaps aimed at other award conditions, the relative prohibition on discrimination in employment on grounds of age was a rare and perhaps first instance of such an intervention by federal legislation. It directly affected the permitted content of award provisions as to junior rates. The *Industrial Relations Reform Act 1993*, with effect from 30 March 1994, introduced in Part VIA of the *Industrial Relations Act 1988* provisions giving effect to what were described and defined as the "Anti-Discrimination Conventions"[30]. An amendment required by the Senate included age among other prohibited reasons for discriminatory provisions in awards or certified agreements, or for conduct including termination of employment. However, a further amendment excluded junior rates in agreements from the anti-discrimination provisions and deferred the review of awards for like provisions until at least mid 1997[31]. The inception of the *Workplace Relations Act 1996* with effect from 31 December 1996, carried over that regulatory scheme, but with significant changes and postponed it to June 2000[32]. This report was also requisitioned by that amending legislation. Section 120B demanded an independently conducted canvass of the feasibility of available options to address the interest and policy conflicts about junior rates, a number of which have been apparent for more than a decade.

1.6.3 It is readily apparent from the National Wage Cases and reviews referenced in **Chapter 2** that a number of interest and policy conflicts are associated with the prescription of junior rates. The Joint Governments' submission pointed to the interplay between several factors in the arbitral principles applied to the fixation of junior rates over the past 90 years or so. A quite robust debate about the quantum, if not the form of junior pay rates, is manifest in National Wage Case proceedings from at least 1985 to 1991[33]. Since at least the early 1980s, the level of award wages paid to employees under age 21 has been debated in industrial tribunals. Considerations relevant to that debate influenced the decision to introduce a form of prohibition on age discrimination into industrial legislation. In effect the prohibition was against the retention, in awards or the introduction into agreements, of provisions that offend the qualified notion of age discrimination stated by the legislation. That innovation eventually led to the insertion of section 120B into the Act.

1.6.4 The *Industrial Relations Reform Act* in 1993 was introduced as part of a package of measures associated with the "Working Nation" policies. That Act declared for the first time an object of the Act and introduced two sets of measures intended to eliminate gradually provisions that discriminate against an employee *because of* various reasons. An amendment to the legislation was introduced by the Australia Democrats in the Senate to include age as one such reason, youth access to employment, and the level of junior rates being cited as part of the justification for the amendment[34]. As we shall see, the prohibition of certain forms of discrimination, including discrimination on grounds of age, has foundations in international labour standards and human rights conventions[35]. There are related international obligations to observe policies producing equal remuneration for work of equal value "*without distinction of any kind*"[36]. Paradoxically, other international conventions, notably those about the rights of children, recognise the need for protective discriminations related to age[37]. In that usage, generally a "*child*" is a person below the age of 15 years. Although, for some purposes, the age of 18 is specified[38]. In Australia, a "*junior*" is generally a person over age 15 but less than whatever age is conceived to be the age of adulthood. Usually it is chronological age that defines the boundary between the status of childhood and adulthood. Juniors are therefore a class of persons who straddle the years between childhood and adulthood.

1.6.5 The legal status of childhood and adulthood is each identified by chronological age. In **Chapter 3** below and the associated **Appendix C**, the rationale for implementing a policy against age discrimination in the employment of juniors is

brought into sharper focus. An important but inadequately articulated factor in that rationale should not be overlooked. That factor is the manifest tension between two different categories of "rights" or duties that are asserted. The first is the asserted right to equal remuneration for work of equal value without distinction. The other is the imposed or asserted duty or collective government to protect children, as a section of the labour force, from exploitation or from social neglect of their employment predicament. The tension arises when, on one hand, age is a prohibited reason for discrimination in fixing equal remuneration, but, on the other hand, must be used to define the boundary of childhood for the purpose of the positive discrimination by which regulatory authorities protect the "*child*". Tension also arises because age may be a convenient criterion by which to attempt to accord equal opportunity to a class defined directly or indirectly by reference to age[39]. That tension, and the difficulty in finding an easy reconciliation of it, is an important consideration in explaining the need for the debate implicit in section 120B.

1.6.6 A sometimes selectively constructed antecedent[40], and later history of arbitral determinations of junior rates[41], was developed in several of the submissions. Details of that arbitral history are discussed in **Chapter 2** below. It may be sufficient to start that examination with the attempt made by the Australian Council of Trade Unions (ACTU) in the *April 1991 National Wage Case*[42], to eliminate junior rates from awards on the grounds of age discrimination. That 1991 initiative and its aftermath demonstrate that, for most of this decade, the interest and policy conflicts raised for consideration by section 120B have been dynamics in the regulation of youth wages.

1.6.7 The interest conflicts about youth employment and wages were also elaborated upon in a number of submissions to the Inquiry. A relatively specific indication of the international foundations for protection against discrimination in employment related to age was given in a recently published review prepared for the International Labour Office by Youcef Ghellab[43]. The review examined remuneration for youth employment. It does not attempt to reconcile the minimum wage conventions with, for instance, the ILO Minimum Age Convention (No. 138). The substantive requirements of Convention 138 are concerned with protection of the child and are expressed by reference to age[44]. None the less, Ghellab's paper usefully summarises the principal international labour standards that apply to youth wages. We repeat the summary here. It contains several points that are relevant to, and supportive of, some of the assessments made by the Inquiry in **Chapters 3, 4** and **6**:

*"**3. Minimum wage-fixing mechanisms and treatment of young workers***

3.1 Youth minimum wages and international labour standards

The provisions of ILO Conventions on Minimum Wages (MW) do not provide for the fixing of different MW rates on the basis of age. In this respect, the Committee of Experts on the Application of Conventions and Recommendations of the ILO has expressed no views about whether different wage rates on the basis of age are prohibited by the Conventions on MW fixing. However, while there are no provisions regarding the age criterion, the Minimum Wage Fixing Machinery (Agriculture) Convention, 1951 (No. 99) and the Minimum Wage-Fixing Convention, 1970 (No. 131) provide, respectively that:

> *'Each member which ratifies this Convention shall be free to determine after consultation with the most representative organizations of employers and workers concerned, where such exist, to which, ..., categories of persons the minimum wage fixing machinery, ..., shall be applied';*
>
> *'The competent authority in each country shall, in agreement or after full consultation with the representative organizations of employers and workers concerned, where such exist, determine the group of wage earners to be covered.'*

This means that ratifying member States may decide to exclude some categories of workers from the scope of MW fixing. If so, the Minimum Wage-Fixing Convention, 1970 (No. 131), provides in its para. 3 of article 3, that the member State concerned "shall list, in the first report on the application of the Convention submitted under article 22 of the Constitution of the ILO, any groups of wage earners which may not have been covered in pursuance of this article, giving the reasons for not covering them, …". *It appears from the above that the possibility of choosing, and hence of excluding, certain categories of workers, is subject to the agreement of the social partners or at least to full consultation with them.*

*None of the member States has explicitly reported the use of such a possibility in the case of young workers. The Committee of Experts on the Application of Conventions and Recommendations noted, however, in its 1992 General Report on MW-fixing Machinery, the existence of legal provisions and regulations that allowed the fixing of special MW rates for young workers in member States, including those that had ratified the Conventions on MW (General Survey, para. 177-181). The Committee of Experts has indicated, however, that '*the reasons which were at the origin of the adoption of lower MW rates for some groups of workers on the basis of age … shall be re-examined periodically in the light of the principle of equal remuneration*.'*

However, while the ILO instruments on MW do not forbid explicitly the fixing of different rates on the basis of age, the Committee of Experts stated in the General Survey of 1992 (para. 169) that 'the general principles laid down in other instruments, and particularly those contained in the Preamble of the Constitution of the ILO which specifically refers to the application of the principle of Equal Remuneration for Work of Equal Value have to be observed'. Also, it might be argued that the work performed by a worker, irrespective of his/her age, should be the main criteria in determining the wage paid rather than the age. Moreover, the Minimum Age Recommendation, 1973 (No. 146) stipulates that special attention should be given to the provision of fair remuneration to young people, bearing in mind the principle of equal pay for equal work (Part IV, para. 13(1)(a)). Therefore, the fixing of lower rates of MW for young workers, all things being equal, comes up against the general principles contained in the different ILO instruments. Hence, the key aspect in this context is the value of the work performed. The 1945 ILC resolution provides that the measures taken with regard to young workers pay should aim at guaranteeing them payment consistent with the work they perform, while respecting to the extent possible, the principle of equal remuneration for comparable work'. Furthermore, as the Committee of Experts pointed out 'the quantity and quality of work

carried out should be the decisive factor in determining the wage paid' (para. 111 of the 1992 Survey).

On the other hand, a distinction shall be made between two concepts: young workers who are fully involved in the firm/organization's activities and perform the same work as their adult counterparts, and those young persons who perform work involving training, such as apprentices/trainees.

*Apprenticeship is based on a system of mutual exchange (training against work). Therefore, it warrants the payment of cash compensation and other indemnity calculated on the basis of the MW, which takes into account the training provided. The case of the young worker in training appears more blurred in comparison to the apprenticeship statute, in particular as regards the question of age. Indeed in some countries the notion of young workers retained in legal provisions and regulations setting up lower rates of MW goes beyond 18 years. For example, in France the persons who are eligible for the professional insertion contract (*contrat d'insertion professionnelle*) as provided for in article 322-4-17 of the Labour Code, are those young workers aged 18 to 26. In the Netherlands, the youth MW regulation applies to young workers up to the age of 23.*

The situation appears different in the case of young workers involved neither in training nor in apprenticeship. Like other workers, not benefitting from any training in exchange for the work to be performed, they are entitled only to their pay. The lowering of the wage paid to young workers performing work comparable to that performed by an adult seems unwarranted, unless the age of the worker is considered as a valid criterion of discrimination. All in all, even if the fixing of lower MW rates for young workers is not prohibited by the Conventions on MW, such measures should be implemented in good faith, taking into account the following elements:

- *the principle of equal remuneration for work of equal/comparable value should apply when no formal training or apprenticeship has been provided for by the enterprise;*
- *the notion of 'young workers' shall be determined with precision;*
- *the period during which a lower MW rate is applicable to young workers shall be limited in order to ensure that the application of the age criterion does not lend itself to abuse."*

1.6.8 Reinforcing that acknowledgement of the relative ambivalence of principles about age discrimination in the minimum wages labour standards is another consideration. It appears from several sources that "*formal recognition of discrimination in the workforce on the basis of age is a relatively recent phenomenon*[45]". Regulatory prohibition of discrimination in employment on grounds of age evolved in Australia from the work of the National Committee on Discrimination in Employment and Occupation[46]. It seems likely that the impetus for that evolution came more from reaction to discrimination against older workers than from reaction on behalf of juniors[47]. Thus in the background to the Inquiry under section 120B are several unresolved issues relevant to the substantive effect or purpose of the statutory scheme for eliminating discrimination on grounds of age. Some of those issues are raised by submissions or are inherent to the terms of reference:

- The Australian Chamber of Commerce and Industry (ACCI) in its submission depicted "*the legislative challenge to the continued existence of award age based junior rates* (as) *essentially a legislative accident which occurred with the introduction of the Industrial Relations Reform Act 1993*". As we shall see, the policy objectives to be served by the prohibition of provisions that discriminate in employment on grounds of age are not well articulated.

- The Joint Governments' submission noted that the "*fundamental criticism*" of junior rates is that age, as a sole basis of progression through a minimum wage, scale does not reflect skill level differences amongst employees of the same age[48].

- A necessary element in the construction of section 120B is that the expressions "non-discriminatory alternatives" and "abolishing junior rates" be given a meaning consistent with their place in the context of the Act. In carrying out that requirement it has been necessary to analyse the provisions and arrive at a view about their substantive effect, and bearing upon the assessments we are required to make for purposes of section 120B. In **Chapter 3**, those background issues and points are explored in detail.

1.7 The Questions Posed in Section 120B:

1.7.1 Section 120B which is set out at paragraph 1.1.1 of this Report poses one primary, and three secondary questions for assessment. The primary question upon which we must report is on the "*feasibility of replacing junior rates with non-discriminatory alternatives*". We are directed to make specific assessments about what we term the secondary questions. The topics of the secondary questions are sufficiently general in character to be used as heads around which discussion of subsets of issues may be marshalled. To provide a basis for that examination, we have in **Chapter 2** and **Appendix A** analysed junior rates in awards and agreements.

1.7.2 It emerged quite early in the course of the Inquiry that what is meant by "discrimination" is a question both important and difficult. Important, because of the impact of a definition of discrimination on consideration of alleged non-discriminatory alternatives. Difficult, because we have found little of a conclusive nature in the Act, on the meaning of discrimination in respect of age. **Chapter 3** covers our findings about the anti-discrimination provisions of the Act, and the identifiable non-discriminatory alternatives to junior rates. **Appendix C** is a detailed analysis of the relevant legislative provisions.

1.7.3 Specific consideration of the secondary questions is to be found in **Chapters 4, 5** and **6** of the report. **Chapter 4** deals with the desirability of replacing junior rates with identifiable non-discriminatory alternatives, **Chapter 5** with the consequences for youth employment of abolishing junior rates, and **Chapter 6** with the utility of junior rates. The primary question of the feasibility of replacing junior rates with non-discriminatory alternatives is addressed in **Chapter 7**.

1.8 The Considerations and Concerns Raised in Submissions and the Main Issues and Themes Developed in the Inquiry:

1.8.1 Some 67 submissions were made in response to notices of the Inquiry and the advertised call for submissions. The original submissions were not informed by knowledge of the positions adopted by other persons or organisations making submissions. Therefore the Issues Paper reflected the Inquiry's attempt to specify issues around the main considerations and concerns raised in the submissions and by our reading of the literature related to the subject of the Inquiry. None of the responses made to the Issues Paper took up the opportunity to raise points not covered by the 29 issues formulated by the Inquiry. A number of those issues were formulated as provisional views about the balance of material or considerations relevant to the point discussed. For example, the main issue in relation to the state of youth employment was stated in terms of whether the Inquiry should do other than accept that there is no substantive basis on which to dispute an analysis quoted from a part of the Joint Governments' submission. We intended by that approach to minimise debate and the need for persons interested to produce further position data and arguments on points about which there was no apparent disagreement, or on which we needed little further persuasion in the absence of a substantively based contradiction of the premises stated.

1.8.2 The responses to the Issues Paper did not direct significant further comment to a number of the issues, including several that we posed in the loaded or leading manner we have illustrated. Thus, issues about procedure, construction of terms of reference and the meaning of discrimination were not developed to any significant degree although some points of concern were raised. The most important point taken in that respect was a submission put on behalf of Australian Chamber of Commerce and Industry (ACCI), the Joint Governments and several individual employers. They sought that the Inquiry confine the consideration of non-discriminatory alternatives to options specified in detail by any participant in the Inquiry advocating the replacement of junior rates with non-discriminatory alternative. The direction we issued is reproduced at paragraph 3.4.1 within. The proponents of various options as non-discriminatory

alternatives at no stage of the Inquiry conceded that our consideration should be limited to the options specified in that direction.

1.8.3 The issue that was most debated in the hearings before us related to the practicality of developing adequate competency based or other non-discriminatory classifications for work of the kind most commonly performed by juniors. Aspects of several other issues identified in the Issues Paper were touched upon, but in many instances the participants relied upon statements of position in their original submission.

1.8.4 Our Provisional Findings Paper was issued on a confidential basis on 14 April 1999. It was intended to allow an opportunity for comment and reaction to our tentative conclusions about the main points to be reported upon including the issues as they had emerged to that point. For that purpose, we used a similar structural division to that used in the Issues Paper based on the desirability, consequences, utility and feasibility themes of section 120B. These were set against a perspective formed by a brief outline of the economic and employment context in which junior rates currently operate, the industrial practice with regard to junior rates and, in an Appendix to the Paper, of a consideration of the meaning of non-discriminatory alternatives. The proposals put forward as alternatives were tentatively assessed. This paper was distributed to a Consultation Group as described in paragraph 1.2.7. The written responses from the Consultation Group evinced a common concern that the Inquiry adopt an approach to the meaning of discrimination that would encompass both direct and indirect forms and treat facial discrimination as discriminatory, notwithstanding reservations of the kind explored in the Appendix to the Provisional Findings Paper. Among other points of substance made in the Consultation Group stage of the Inquiry were that:

- details of assessments of the alternative proposals should be retained and developed;

- some of the alternatives offered are industry specific classifications. The Inquiry should not cut off debate by making its overall assessment in a way that generalises particular alternatives proposed or confines assessments to the alternatives actually put;

- the Inquiry had made no analysis of the needs of junior employees and should make it clear that it has not done so; and

- feasibility may vary by degree, and depends on variations in the mix of constituent parts. There is no need for a yes/no answer on feasibility.

1.8.5 The result of the whole process is that we have reviewed the positions put about those issues. It appears to us that the most important issues and contested considerations to emerge from the Inquiry process are those that were always inherent in the terms of reference as formulated in section 120B of the Act. A number of cognate issues are implicit in points made in submissions developed in the hearings and further explored in our examination of the literature. In the circumstances we have used the main components of section 120B as themes around which to group the most relevant considerations and issues debated in the hearing.

1.8.6 We have merged the themes and issues for consideration during the preparation of the report under the headings which follow. They are not an index but a list of matters which have concerned us. They are:

(1) **What is meant by junior rates** including in particular:

- the scope of the expression "junior rates".

- the elements of existing junior rate classifications affecting their application, namely:
  - ♦ the work covered by the classification; and/or the class of junior employee covered by it;
  - ♦ the comparator;
  - ♦ the relativity of the junior rate to the comparator;
  - ♦ the age progression;
  - ♦ the value of experience;
  - ♦ the exit age, or condition determining entry to a higher classification;

  and their relevance, if any, as considerations for the purposes of section 120B;

- to what extent does the history of junior rates disclose a rationale, role and changes of emphasis in the elements of junior rates and the economic, and other dynamics of those changes?

(2) In application to juniors rates, **what is age discrimination**:

- What is the meaning of discrimination in the Act - is it direct or indirect discrimination or both; and, what qualifications are made to deem some otherwise discriminatory conduct or provisions to be non-discriminatory?
- What is the relationship between age discrimination, the principle of equal opportunity and the principle of equal remuneration for work of equal value? Is that relationship of any significance to the Inquiry?
- To what extent is the anti-discrimination measure in the Act based on the principle that age discrimination should not nullify equality of opportunity or treatment in employment?
- What is the proper balance between the principles of avoidance of discrimination on the grounds of age and any need to make juniors competitive in the employment market?
- Do young people have fewer skills and less (life) experience - what is described as the maturity deficit?
- Is age a sufficient or proper measure of such deficit bearing in mind that age discrimination is prima facie contrary to one of the objects of the Act [subsection 3(j)]?

(3) For the purpose of **assessing the desirability of replacing junior rates** with non-discriminatory alternatives, what are:

- the identifiable non-discriminatory alternatives;
- the considerations for and against desirability; and
- do the provisions that withdraw the exemption for junior rates at a fixed date imply the desirability of replacing junior rates?

(4) For the purposes of **assessing the consequences for youth employment of abolishing junior rates** to what extent is it significant in the assessment to address differences about:

- the status of youth employment;
- the extent and degree to which youth employment is sensitive to own-wage elasticities of demand;
- the cost of "abolition" and how it is determined;
- the relevance of the structure, earnings distribution and competitive character of youth employment;
- the effect on youth employment of the various proposals for general or partial removal of the existing wage discount for juniors?

(5) For the purposes of **assessing the utility of junior rates**, do the patterns of use of junior rates establish the degree to which junior rates, as they stand, meet the requirements of:

- employers, or various industries;
- marginalised youth;
- those in full-time education;
- various industries;
- securing skills and overcoming the maturation deficit;
- securing entry to full-time employment?

(6) For the purposes of reporting on the **feasibility of replacing junior rates with non-discriminatory alternatives**:

- what are the appropriate criteria by which to assess feasibility;
- should balancing of differing criteria be attempted as part of the assessment;
- what role has the concept of discrimination adopted to play in an assessment of feasibility.

Endnotes

[1] *Re Furnishing Trades Award: Re Stage 1*: The Full Bench drew substantially upon agreements reached through a Working Party on which the main industrial parties were represented. The first stage decision determined the application of junior and apprenticeship percentage rates to adult minimum rate including supplementary payments and safety net increases: Print L5963: O'Connor P, Watson SDP and Merriman C, 19 October 1994; *Re Stage 2*: Print M7824, 20 December 1995. The same Full Bench noted the industrial parties agreed to an approach arrived at through the Working Party that would lead to a reform junior rates the adoption immediately of a National Training Wage. The Full Bench endorsed a set of "Training Wage Guidelines". It determined provisionally that the National Training Wage formula (established by decisions recorded in Prints L5188 and L5189), met the anti-discrimination requirements in relation to youth wage. By a decision recorded in Print N1418, the Full Bench approved the final installation of supplementary payments to juniors reserved by the decision in Print L5963. In Print N4645, the Full Bench approved traineeship exit rates. An application by the AWU to vary the Rope, Cordage and Thread Award to remove junior rates was referred to the same Full Bench, but not acted upon, pending the outcome of the Working Party. On 6 August 1997, the Australian Council of Trade Unions (ACTU) and the Australian Chamber of Commerce and Industry representatives on behalf of the Working party addressed the then President that: *"Having reviewed the Youth Rates Working Party Terms of Reference, the Steering Committee is of the view that the work of the Working*

Party is now completed: employer parties and some government representatives consider there is no workable non-discriminatory alternative to age-based junior rates, and the ACTU considers there is no prospect of reaching agreement on a way forward."

[2] Australian Retailers Association Submission 23 at p. 13.

[3] Paragraph 143(1C)(f) of the Act.

[4] Hansard Parliamentary Debates: Senate, 7 November 1996, No. 179-181 at p. 5332.

[5] The foundations of that view are developed in **Chapter 6** within but a convenient and up-to-date summation may be found in Ainley, J. & McKenzie, P., *"The influence of school factors on young adult life"* in Dusseldorp Skills Forum 1999: *Australia's Young Adults. The Deepening Divide* at pp. 105-115.

[6] Ibid at pp. 5333-5334.

[7] The relevant duty was in express terms, effectively mandating a form of inter-party arbitration; constitutionally referable to the external affairs power: the Commission was obliged by subsection 170KAA(2) to conduct a hearing to determine the circumstances in which carer's leave should be granted and the entitlements which should be provided to give effect to Families Responsibilities Convention. The Commission, *"after making such a determination"* was obliged to provide recommendation to the Minister with recommendations for legislation to give effect to the determination.

[8] Hansard Parliamentary Debates: Senate 6 November 1996 at pp. 5225, 5229.

[9] Confederation of Australian Industry August 1978 *Youth Unemployment*, A Discussion Paper Waratah Press; Bureau of Labour Market Research March 1983 *Youth Wages, Employment and the Labour Force* AGPS ISBN 0644 02601 4; *National Wage Case April 1985* Print F8100 at pp. 11-15; (1985) 297 CAR 7 at 20; *National Wage Case June 1986* Print G3600 at p. 52; *Re Wholesale & Retail Trade Junior Rates* Print G6038 December 1986 Cox C at p. 12; *National Wage Case December 1987* Print H0100 at pp. 3, 11-13; *National Wage Case April 1991* Print J7400 at p. 57; *Review of Wage Fixing Principles August 1994* Print L4700 at p. 32; *Safety Net Adjustments and Review September 1994* Print L5300 at pp. 51 and 53; *Re Furnishing Trades Award* October 1994 Print L5963; *Third Safety Net Adjustment and Section 150A Review October 1995* Print M5600 at p.88; *Safety Net Review Wages April 1997* Print P1997 at pp. 76-77, 101-102; *Re Metal Industry Award: Junior Rates*: May 1997 Lawson C Print P1371 at p. 8; *Safety Net Review Wages April 1998* Print Q1998 at pp. 68-70.

[10] Tables 11 and 16 *ABS Labour Force Australia March 1999*, ABS Cat 6203.0, January 1999.

[11] Tables 4 and 6 *ABS Labour Force Australia 1978-1995*, ABS Cat 6204.0

[12] Table 6 *Labour Force Australia 1978-1996*, ABS Cat 6204.0 and Table 16: *Labour Force Australia,* March 1999 ABS Cat 6203.0.

[13] Burke, G., *Expenditure on Education and Training: Estimated by Sector and Cause* in Dusseldorp Skills Forum 1998, *Australia's Youth: Reality and Risk - A National perspective on developments that have affected 15-19 year olds during the 1990s*, March 1998 at p. 146 citing ABS Cat. No. 6278.0

[14] Sweet, R., *Youth: the rhetoric and the reality of the 1990* in Dusseldorp Skills Forum, *Australia's youth: reality and risk* 1998 at p. 5; Landt, J & Scott, P., *Youth Incomes* in Dusseldorp Skills Forum, *Australia's youth: reality and risk* 1998 at p. 127.

[15] Schneider, J., *"The increasing financial dependency of young people on their parents"*, Paper delivered at the *Australian Institute of Family Studies Conference*, November 1998.

[16] Issues Paper paragraph 4.2.7 and Figure 7 setting out the details of calculations made by the Joint Governments' Submission 38 at page 12 and Table 2.

[17] Table 4: Joint Governments' Submission 38 at p. 25.

[18] OECD Employment Outlook June 1998 Getting started, settling in: the transition from education to the labour market at pp. 81-122. See also OECD Employment Outlook July 1996 Growing into Work: Youth and the Labour Market over the 1980s and 1990s at pp. 104-159.

[19] Ibid: OECD Employment Outlook June 1998 at pp. 111-112.

[20] Watts, R., *Young people, the union movement and the unequal distribution of work"*; Bessant, J. & Cook, S., "*Against the Odds"*, Australian Clearinghouse for Youth Studies, 1998 at pp. 133-134.
[21] Ibid at pp. 134-135.
[22] Elliott, L. & Atkinson, D., *The Age of Insecurity*, 1998 Verso at p. vii.
[23] Ibid at p. (vii).
[24] ACIRRT, *Australia at Work: Just Managing* Australian Centre for Industrial Relations Research and Training; (1999), Prentice Hall of Australia, at pp. 127-138.
[25] Bessant, J. & Cook, S., *Against the Odds: young people at work,* Australian Clearinghouse for Youth Studies, 1998 at pp. 5-7.
[26] See generally Appendix C, and particularly at paragraphs 8-14 and 43-52 and associated endnotes.
[27] Submission 4.
[28] See generally Borland, J., & Woodbridge, G., *Wage Regulation Low-Wage Workers, and Employment* Paper for Australian Competition and Consumer Commission published by Centre for Economic Policy Research, 1998: Table 3.2 lists several recent studies of Australian experience.
[29] *Review of the Children (Care and Protection) Act 1987* December 1997 Legislation Review Unit; Department of Community Service at 240-242.
[30] The *Industrial Relations Reform Act 1993*: subsection 3(g), section 170BA, paras 170CA(2)(a) and 170DF(1)(f): prohibition on termination of employment for reasons that include age; subsections 170MD(5) and (6): certifications of agreement to be refused if provision discriminates against employee for reasons of age, not based on inherent requirements of employment; subsection 170ND(10): in respect of enterprise flexibility agreements; subsection 150A(4): review of awards to remove discriminatory provisions; regulation 26A: prescribed award review procedure.
[31] *Industrial Relations Amendment Act (No. 2) 1994* inserting section 90AB and varying section 150A, subsections 170MD(5A) and 170ND(10).
[32] *Workplace Relations Act 1996* Subsection 3(j), paragraphs 88B(3)(e), 143(1C)(f), 143(1D)(a), subsections 143(1E), 170LU(5), (6) and (7); *Workplace Relations and Other Legislation Amendment Act 1996* Schedule 5: items 49(8)(f), 51(7)(f) and 54(1) and (2).
[33] See references at endnote 9 above.
[34] Hansard Reports: Senate 7 December 1993 at 4039: Senator Spindler.
[35] *Victoria v The Commonwealth* (the *Industrial Relations Act Case*) (1996) 187 CLR 416 especially at 504-510, and 529-532.
[36] Article 7(a)(i) *International Covenant of Economic Social and Cultural Rights*: reproduced in Schedule 8 of *Industrial Relations Act 1988* inserted by Act No. 8 of 1993.
[37] United Nations Convention on the Rights of Child; ILO Minimum Age Convention, 1973 (No. 138).
[38] ILO Convention 138 Articles 2 and 3.
[39] *Review of the Children (Care and Protection) Act 1987* December 1997 Legislation Review Unit; Department of Community Service at 240-242.
[40] Pitman, D., *The Determination of Junior Wage Rates in Australia: Needs, Work Value and Employment* Bureau of Labour Market Research August 1983 - Attachment 3 to Submission 36: Labour Council of New South Wales.
[41] ACCI Submission 49 at pp. 13-18.
[42] Print J7400.
[43] Ghellab, Y., *Minimum Wages and Youth Unemployment* ILO Geneva: 1998 Employment and Training Paper 26, particularly at pp. 47-48.
[44] See generally Creighton. B., *ILO Convention No. 138 and Australian Law and Practice Relating to Child Labour* Australian Journal of Human Rights (1996) 293 at 297, 301, 304 - 309; and Kalisch, D., Williams, L., *Discrimination in the Labour Force at Older Age* Working Paper No. 17 Bureau of Labour Market Research (1983) at 1.
[45] Kalisch & Williams ibid at p. 1.

[46] Kalisch ibid at p. 2; *Industrial Relations Act Case* at p. 531.
[47] Kalisch ibid; Encel, S. & Studencki, H., *Over the Hill or Flying High*. *An analysis of age discrimination complaints in NSW*, Social Policy Research Centre UNSW August 1998 at pp. 6-7, 9.
[48] Joint Governments' Submission 38 at p. 104.

2. JUNIOR RATES IN AWARDS AND AGREEMENTS:

2.1 What are Junior Rates:

2.1.1 Subsection 120B(4) of the Act reads:

"['Junior rates' defined]. In this section, junior rates means junior rates of pay."

2.1.2 The expression "*junior rates*" should be read as meaning award rates of pay for juniors, and similar rates in certified agreements. The latter are included because of subsection 170LU(5) of the Act. It requires the Commission to refuse to certify an agreement if it thinks that a provision of the agreement discriminates against an employee covered by the agreement for reasons of age, among other grounds.

2.1.3 A junior rate is a classification pay rate in an award or certified agreement. *"Juniors"* in industrial usage are employees aged below whatever is the age, if any, used by the award as the age at which the *"adult"* or other standard full classification rate for work or a job is prescribed. Junior rates are commonly provided for in a distinct classification for junior employees. Generally, juniors are employees who are above the age of 15 and below age 21. Usually the classification stipulates the percentage of a specified "adult" rate, (which we call the *comparator* classification), to apply at particular ages for a junior. Awards and certified agreements have long been, and are still yet, the responsibility of the tribunals empowered to conciliate and arbitrate industrial disputes. Under the Commonwealth Constitution, the section 51(xxxv) basis for these powers has, until recently, barred the way to award provisions being determined other than by the nominated arbitrator. That barrier remains a factor limiting the way in which the legislation may prohibit discrimination in employment, or affect award provisions, or agreements that may vary awards. The use of the corporations and external affairs powers has reduced that factor.

2.1.4 Our report concerns only the classifications that industrial usage identifies as junior rate provisions. Other award or agreement classifications or pay rates may also use age based progression or discrimination in some form. We are not directly concerned with them for purposes of this report. Paragraph 89A(2)(c) of the Act

distinguishes between "*rates of pay generally …, rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage system.*" Those distinctions reinforce the appropriateness of our giving the definition of *junior rates* in section 120B its ordinary meaning in industrial usage. We construe it as not applying to apprenticeship rates, or trainee rates.

2.1.5 Our acceptance that *junior rates* do not include apprentice or trainee rates of pay does not avoid entirely the need to consider those training contract and employment classifications. Non-adult apprenticeship and traineeship in award wages have been developed in close parallel with junior rates or their antecedents. Less experienced employees including juniors and *"improvers"* were initially identified in at least one early arbitral ruling as a category of *"slow-workers"*[1]. Arbitral assessments have regularly pronounced upon the relationship between minimum rates generally, junior rates, and the rates and usage of apprenticeships. Expressions such as "adult" denote a variable but none the less ascertainable and legally specific age. The prohibition of age discrimination in paragraph 143(1C)(f), subsection 170LU(5) of the Act, and subitem 51(7)(f) of the WROLA Act, might conceivably be held to apply to provisions about apprentices, *adult apprentices*, or trainees. Those classifications and award provisions are not within the exemption that shields junior rates until 22 June 2000. Several submissions discussed the relationship between junior rates, apprenticeship and trainee provisions, and adult entry levels to low skill positions[2]. Aspects of those relationships were relied upon to argue points for or against the abolition of junior rates. We refer to aspects of that discussion at paragraphs 3.3.6 to 3.3.8 and 6.3.4 below. For those and other reasons, the existence and content of apprenticeship and traineeship arrangements are relevant to our terms of reference.

2.1.6 What is not within the scope of our report under section 120B are actual rates, meaning what is in fact received by juniors, e.g. on an overaward basis. We do not overlook the possibility of age discrimination in over award situations, or in "*award-free*" employment transactions[3]. Over-award considerations fall outside the definition of junior rates and the award influencing considerations inherent in section 120B.

2.1.7 Junior rates in certified agreements are in a different category. We have examined junior rate and related provisions in both awards and certified agreements. We discuss that examination in **Subchapter 2.4**. The ACCI and the Joint Governments' Submissions each reviewed junior rates in enterprise agreements. In paragraphs 2.3.3 to 2.3.5 we report upon some of our own analyses of agreements. We

did not become aware of any material that would contradict several of the main points made in the Joint Governments' Submission[4]:

- that a relatively small number of agreements removed junior rates that might otherwise have applied;

- a number of other agreements varied the percentage relativity or reduced the age at which adult rates applied.

We have found, or had our attention drawn to, only one significant departure from the varieties of junior pay provisions that are found in awards. The Kentucky Fried Chicken National Enterprise Agreement 1998, (the KFC Agreement), discussed in paragraph 2.3.4 is singular, although the constituent elements of junior rate classifications discussed in paragraph 2.2.55(ix) are no less arrangeable in agreements than they are in awards..

2.1.8 A junior rate is the product of a work and employee classification system whose arbitral origins and current content reflect hybrid functions. One function of junior rates has been to shield, and sometimes to handicap, entry level juniors against competition from older and more experienced employees. Perhaps for that reason, most award junior rates are in the form of a "personal classification" of those who are juniors. Classification of employees by individual attributes may be distinguished from "position" or "work" based classifications, although examples of junior rates as a personal subclassification discount to position or work classifications can be found.

2.1.9 One example of a personal classification junior rate is the current *Unapprenticed Junior* classification from clause 5.5 of the Metals, Engineering and Associated Industries Award, 1998 - Part I (the Metal E & AI Award). We discuss in some detail in later parts of this Chapter arbitration decisions about the antecedents of that award classification:

*"**5.5 UNAPPRENTICED JUNIOR RATES OF PAY***

Except as provided for in sub-clause 3.2.2 of Schedule C, (juniors in foundries) the minimum weekly wage rates for unapprenticed juniors, shall be:

5.5.1 ***Unapprenticed Juniors***

Years of age	*% of C13 level*	*Safety net adjustment*	*Rate per week (payable from 15/5/98)*	*Rate per week (payable from 2/6/98)*	*Rate per week (payable from 2/12/98)*
	%	*$*	*$*	*$*	*$*
Under 16 years of age	*36.8*	*17.70*	*135.70*	*139.60*	*143.60*
At 16 years of age	*47.3*	*22.70*	*174.40*	*179.40*	*184.50*
At 17 years of age	*57.8*	*27.70*	*213.30*	*219.50*	*225.50*
At 18 years of age	*68.3*	*32.80*	*252.00*	*259.30*	*266.50*
At 19 years of age	*82.5*	*39.60*	*304.40*	*313.20*	*321.90*
At 20 years of age	*97.7*	*46.90*	*360.30*	*370.70*	*381.10"*

2.1.10 As can be seen from that example, age is the attribute on which wage progression in junior rates is based for the persons, or sometimes the work, covered by the classification. It is an objectively ascertainable but *"individual attribute"*. Junior rates use the attribute in a way that causes it to be in form a *"personal"* classification. There have been several rationalisations of that usage. Awards providing wage rates for juniors originally used age, or age and years of experience, as the proxy indicators of the degree of discount appropriately made from the needs based primary wage for adults. Age was later treated in Australian practice as an alternative to years of experience when fixing the entry level pay rates and progression for post-compulsory school age workers. That usage conceptually linked age or the experience test with a discount from the needs based wage. That linkage was tied to a recognition that the employee gained through the training and experience that the employer provided. That recognition was a basis on which arbitrators also linked, and not infrequently equated, junior rate classifications with the same use of age or years of experience for apprenticeship rates of pay. More recently, but in economic rather than in arbitral usage, age has been conceived to be an acceptable proxy for an initial deficit and progressive increase in *"human capital"*. That concept covers work related skills and attributes developing with age and general life experience (maturation). Conversely, the age progression in junior rates is an approximation to a generalised rate of development of such "maturation skills" in the absence of any more specific measure suitable for application in minimum rate awards. It is not a proxy for specific job-oriented competencies.

2.1.11 In the submissions to the Inquiry, it was argued that the use of age as the basis of junior wage progression is justified primarily by considerations that have been grouped by some commentators under that notion of human capital growth. As age increases, there is a broadly commensurate growth in the maturation skills that the average junior deploys[5], or, in the terms used by Hamermesh, *"own-wage demand elasticities decrease as the skill embodied in a group of workers increases*"[6]. The detail of the list of maturation skills differs marginally between exponents of the first of those views, but mainly as to emphasis. So far as we are aware, there is no direct precedent in industrial arbitration principle for the adoption of age as a proxy for maturation deficits or skills[7]. That consideration is not a barrier to our concluding that age is an acceptable proxy for an intuitively formulated set of maturation deficits or skills commonly associated with the initial performance of young employees. That conclusion is open, and we make it, because of the nature of the long established use of age progression in junior rate provisions. We shall see in the next part of this chapter, that age progression pay scale adjustment has been compatible with relatively close work valuation, and comparative wage justice assessment, of junior rates in comparison with adult entry level pay rates.

2.1.12 We draw upon submissions by McDonald's Australia Limited (McDonald's) among others for an indicative summary of the general work competencies or "maturation" skills expected to develop through exposure to work as a junior:

- responsibility/reliability;
- possession of a strong work ethic;
- application/concentration;
- punctuality;
- commitment to work, or to the job;
- judgment;
- general life experience;
- attitude to authority;
- diligence.

2.1.13 It is immediately obvious that, in the main, the work "skills" listed are personal attributes generally demonstrable by consistent performance. Assessment of such attributes is not simple. It is unlikely that any form of assessment of such attributes would produce either a constant measure or reading when applied to

individual employees. However, none of the attributes are beyond reach of performance assessment appraisal of the kind that, by the 1970s, was widely used in Australia. We do not agree with a Labor Council New South Wales submission that the attributes are the same or even substantially co-extensive with the five basic "Mayer" competencies[8]. The Labor Council's submission to that effect envisaged two adjustments of junior rate classifications. First, conversion to adult rates in "*low or semi-skilled industries where it is deemed that a junior is as productive as an adult*"; second, a work valuation where a system of competency-based classifications was not fully developed. We note that submission in this context because it contended that arbitral history showed the needs principle to be adjusted "*conveniently with a loose application of the work value principle*". That summation followed a reference to a contention that juniors covered by junior rate classifications may have been work valued on the basis of "*lower maturity and experience*[9]". The key "Mayer" competencies were listed in the Labor Council submission as: "collecting, analysing and organising information; communicating ideas using verbal and non-verbal modes; planning and organising activities; working with others and in teams; using mathematical ideas and techniques; solving problems; using technology; and using cultural understandings[10]". Subclause 8(e) of the National Training Wage Interim Award 1994 nominates a similar, but not identical list of five competencies. That subclause requires training under traineeship agreements to be directed at the achievement of those competencies[11]. There would appear to be no good reason why any such "maturation" attributes could not be converted to components of a competency based classification. Even personal attributes could be expressed as job requirement competencies. Graded for performance assessment and linked with the tasks to be performed in a particular position, the elements of a competency based classification would be established. Thus, the use of age as a proxy for life experience related skills is independent of, and generally stands apart from, other wage fixing considerations.

2.1.14 However, junior rates in their present form may be susceptible to prohibition because they make pay distinctions dependent upon an attribute covered by anti-discrimination legislation. On the face of relevant award or agreement provisions, most junior rates are "facially" discriminatory for reasons of age. The Act by exempting junior rates in paragraph 143(1D)(a) points to that conclusion. Moreover, too sweeping and precipitate an adoption of age as a proxy for maturation deficits in employment skills may illustrate age discrimination in practice. Chief Justice Wilcox made a telling point about the use of age as a proxy for a stereotype set of assumptions:

> *"... A major objective of anti-discrimination legislation is to prevent people being stereotyped; that is, judged not according to their individual merits but by reference to a*

> *general or common characteristic of people of their race, gender, age etc, as the case may be. If the words "based on" are so interpreted that it is sufficient to find a link between the restriction and the stereotype, as distinct from the individual, the legislation will have the effect of perpetuating the very process it was designed to bring to an end. So it is not appropriate to reason that, because extreme fitness is an inherent requirement of the job of an SSO pilot, and younger pilots tend to be more fit than older pilots, therefore the requirement that SSO pilots be under 28 years of age on appointment is "based on" the requirement of fitness. Unless there is an extremely close correlation between the selected age and the fitness requirement, so that the age may logically be treated as a proxy for the fitness requirement, the legislation will have the effect of damning individuals over 28 years by reference to a stereotypical characteristic (less physical fitness) of their age group."*[12]

2.1.15 Assuming a major policy objective of anti-discrimination legislation to be as stated, the use of age, or age substitutes, in the determination of minimum wages is at hazard. We explore the impact of the anti-discrimination legislation in **Chapter 3**. It is sufficient to note one point for present purposes. To the extent that age may be said to be used in junior rates as a proxy for a set of maturation deficits, considerable caution must be applied to identifying what personal or work characteristics are within the notion of the proxy itself, or within the maturation deficit stereotype. Junior rates differ as to an age or condition for allowing progression to standard minimum wages. So also, do lists of stereotypical "deficits". The validity of applying one or other of them to particular employment must differ also. In paragraph 3.1.13, we return to another aspect of justifying the wage discount in junior rates and the technical qualification to the meaning of discrimination.

2.2 History of Junior Rates:

2.2.1 At common law minors or infants were one of the four classes of individuals who lacked legal capacity to contract in some way, but:

> *"... it has been held from a very early date that a minor may be bound by a contract of apprenticeship or of service, since it is to his or her advantage that he or she should acquire the means of earning a livelihood. Such a contract, however, when construed as a whole, must be substantially for the minor's advantage."*[13]

Not surprisingly, that test withered before economic exigencies, as Channell J once observed":

> *"... a contract which contains the only terms on which an infant can reasonably expect to obtain employment must be for his benefit."*[14]

2.2.2 The industrial use of child labour, the level of remuneration for children competing for work with adults, and the schemes of apprenticeships and training

indentures have long been the subject of regulatory concern. The Australian conciliation and arbitration system was instituted at the end of the 19th century. It built upon precedents for distinctive pay scales for "*lads*" or "*boys*" already well established in industrial usage. That usage included industrial legislation such as the Factories and Shop Acts, discouraging the use of sweated labour and child labour.

2.2.3 The junior rates we are concerned with have traditionally been set by arbitral tribunals although often within such tribunals they have been set by consent. An examination of cases dealings with junior rates will assist in identifying principles which have guided the formulation of junior rates. It also illustrates the industrial usage. Observations about the content, operation, or process of adjusting the classifications are likely to be more soundly based if informed by established practice. The general concept is: rates of pay for juniors are award classifications and associated rates for those in the recognised workforce who are not adults. Industrial usage of the term "*junior*" appears to date in Australia from around 1910 - 1917. By the latter date, it was used in awards in a context that began to displace the references to "lads", "boys" or "*youths*" that had earlier been used for age based pay scales in several awards . Traditionally, and for a great number of awards that contain junior rates, a junior is an employee who is under 21 years of age.

2.2.4 The guiding principles for the original federal awards for industries were derived from the notions of the *"primary*" or *needs based basic wage* and the *"secondary"* wage or *margin for skill* and exceptional gifts[15]. Working women were perceived to have different needs and were accorded a lower primary wage. Those foundations for classification practices and structures remained features of the federal award system until the integration of "margins" and basic wage in a new *"total wage"* in 1967, and the *Equal Pay* decisions of 1969 and 1972. At the outset of federal award regulation, the notions quickly resulted in the formulation of separate classification rates for male and female juniors. In the Commercial Printing Award, made in 1925, the then Court dealt with the general printing industry for the first time. Webb DP prescribed a six level weekly rate classification for females under 21 years, and a seven level weekly rate classification for males under 21 years other than apprentices. The male junior classification used age progression. The female junior classification was based on "years experience" progression to the minimum wage prescribed for females for the class of work performed. "Experience" was defined as:

> *"experience in the industry including experience in the employ of more than one employer, and any female employee mentioned in such provisions on leaving or being discharged from her employment shall be entitled to a certificate."*[16]

2.2.5 It was to the Commercial Printing Award framing of junior rates that Dethridge CJ was adverting in the 1934 *Printing Trades* decision that has been treated as a classic statement of the principles applied to the fixation of a junior rate. In that decision, Dethridge CJ said:

> *"The Court has never attempted to lay down any general principle governing rates for juniors. Frequently they have been arrived at by agreement or by adoption of current practice. In many cases rates have been prescribed, no reasons being given.*
>
> *Rates for juniors should be high enough to maintain them, but not high enough for extravagance; high enough to attract juniors to an industry, but not so high as to discourage employers from engaging them. The rates must have some relation to the probable cost of living, and therefore to the amount of the basic wage. Where the advanced junior gives his employer the benefit of skilled work, this may fairly in my opinion be regarded as generally offset by the fact that the skill, which is a lasting benefit to the junior, has been imparted to him by or through the employer. The question, then, in effect, resolves itself into what proportion the rates for juniors should bear to the basic wage for adults. High rates for juniors are frequently desired by unions in order to promote the employment of adults, but this object, quite justified within reasonable limits, may be achieved least injuriously by limiting the proportion of juniors. To unduly close the openings for junior labour by imposing excessive rates would be mischievous. The most advanced junior has not as a rule any family responsibilities, and his rate should be materially less than the basic wage."* [17]

Dethridge CJ's observation disclaiming the promulgation of general principles of junior wage fixation may be generally correct for the greater part of the century. Several significant qualifications must however be made to that conclusion. He was speaking at a time and in a context where rates for juniors were determined, put into, or omitted, from awards very much on an award by award basis. The relative absence of "general principle" did not then denote an entire lack of consistency of approach to the award by award issues that arose. The cases disclose that aspects of relative needs, the relationship of the classification to apprenticeship opportunities and rates, and the likelihood of "inexperienced" juniors being substituted for "experienced" men particularly, were prominent points of reference in the assessment of junior rates. Sensitivity to the benefits and flaws of using experience, or age, as conditions determining when the full primary wage should be paid was also part of the body of principle developed. Concepts such as needs, the desire to moderate competition between juniors and adults, and work value were each applied in particular decisions. Moreover, since the mid-1980s, arbitral concern with the general principles of junior rates has been reflected in a series of decisions. The first in 1985 was a response to national employers' applications. By 1991, the main decisions were responding to the ACTU's policy concerns about the level and operation of junior rates. As will emerge,

the practical result of that arbitral concern has in fact been a continuation of a case by case approach. But that itself was a response to the general issue.

2.2.6 Pitman suggested in 1983 that four "criteria" have been evident in arbitration decisions pertaining to junior wage determination:

- "work value";
- the "needs" principle;
- "capacity-to-pay"; and
- the "allocative" principle[18].

The first two criteria require little explanation. Capacity to pay is a relatively flexible notion. At one time it applied to general economic effects. It is now applicable also to industry or enterprise level financial hardship. Perhaps in that last sense it is a converse of concern about youth employment. The "allocative" principle he defined by reference to the role that the level, structure and rate of change of junior wages may have in encouraging, or discouraging employers, from using junior labour[19]. Contrary to Pitman's suggestion that the tribunals have disclaimed any allocative function or intent[20], there is a consistent reference in arbitration decisions to the effect of the relevant award provisions as an incentive or disincentive for employers to use junior labour.

2.2.7 In one of the earliest leading cases, *Australian Boot Trade Employees Federation v Whybrow*[21] in 1910, Higgins J stated an approach that was consistently applied by him and his successors for a number of years. In that case Higgins J's original award provided for the same rates for *boy labour* by age, as for apprentices by age:

> *"... The scale of wages will appear in my award. I have adopted Mr. Beeby's reasonable proposal that the scale should be higher in proportion towards the end of the term, when the lad becomes most profitable to the employer. This course may tend to prevent the device of supplanting journeymen working on or over the minimum wage by lads who are nearly as efficient, but receiving a much lower wage. Moreover, the fact that the employer has to teach the apprentice, and has to pay him during slack times as well as busy times, must operate as a check upon undue and improper use of boy labour. Indeed, one of the objections to the apprenticeship system put before me by the employers was that the apprenticed boy has to be kept in slack times, whereas the non-apprenticed boy may be told to go. I have not omitted to consider the difficulty which is incidental to a fixed term of apprenticeship in an industry in transition, as this is, to which new and improved machines are being continually added, and in which the operations which were considered essential at the date of apprenticeship may often be superseded or rearranged. I must do nothing to discourage employers in their endeavours to be up-to-date."*[22]

The High Court struck down that part of the award which prescribed wages for boys on the basis of age rather than experience. It held the log did not make a claim appropriate to that award[23]. When first revising his original decision, Higgins J defended the safeguards he had provided by his use of an age basis rather than an experience basis for the wage rates and progression of boy labour relative to apprentices in boot trades production:

> *"...I have been compelled to reduce the number of apprentices who may be employed in proportion to journeymen. This alteration is consequent on the sweeping away of the safeguards which I had provided by my age basis against the unfair use of boy labour."*
>
> *"... Under that basis, I provided for lower wages than demanded by the employees' log during the earlier years of apprenticeship, and for higher wages during the last year or two; and I trusted to this device as enabling me to leave the employers a greater degree of freedom as to the number of apprentices."*[24]

2.2.8 Those and other observations in that series of cases demonstrate a concern that permeated the then Court's approach to setting the limits of an "Unapprenticed Junior" classification in relation to rate of pay and, to a limited extent, the work boundary between it and apprenticeship and other classifications. Such observations were the precursor to what became established principles. One such principle was to regulate the proportions of junior labour in awards where juniors were used. Another was to not include provision for junior or youth rates in awards where it was not intended to allow or encourage the use of juniors.

2.2.9 Perhaps in *Re Bagshaw*[25] is an early but extreme example of one aspect of the allocative principle at work. The parties to that matter in 1907 were representative of agricultural implement makers and relevant unions. The daily rate agreed for youth labourers aged 15 to 16 years was 33 per cent higher, at 10 shillings, than the rate agreed and approved for skilled labourers and steam engine drivers. In other words, rates could be set at levels intended to discourage any junior labour at all. Indeed several later judicial decisions construed the absence of an explicit rate for juniors in an award to mean that the adult rate for the relevant classification should be applied[26]. The *Re Bagshaw* approach did not become general. Conversely, arbitral practice shows evidence of a relatively careful approach to the inclusion of a junior rate in an award classification system for the purpose of allowing junior labour as a type of employment under the award[27]. Also the determinative process has sometimes manifested a similar precision in the prescription of the work or the occupational class to which the junior rate is to apply[28].

2.2.10 In *Australian Workers' Union v The Pastoralists Federal Council of Australia and ors*[29] in 1907, O'Connor P fixed rates for "boys under 18" in various States at flat rates in the region of 20s. per week to 22s.6d per week. The variation was due "*to the special conditions obtaining in those States and portion of States*[30]*"*. A perusal of the decision reveals that those conditions to which the President referred were types of wool, shearing rates and primary producing conditions. There is a trace of work value approach involved here albeit to a primary wage. It is clear that adult rates were payable to those 18 and over. The percentage of the "boys" rates to the adult varied little, on calculation, around 75 per cent. In 1911, the then President, Higgins P in another dispute between the Australian Workers' Union and the Pastoralists Federal Council refused a union application for:

> *"... the same wages for a boy of 16 or 17 as for a man of 30 years. This I refuse to grant. The basic wage is founded on the theory of responsibility for an actual or potential family and it would be ridiculous to apply such a theory to a lad of 17."*[31]

This is the sum of the President's reasoning on the issue and appears to give primary consideration to the needs concept.

2.2.11 The "*Harvester*" decision[32] was not formally an award but it established a standard for the use of unapprenticed youth labourers in metals and engineering establishments. The development of the use of junior male and female classifications in what became the Metals Trades Awards illustrates several important aspects of the development and use of junior rates. We shall trace the history of that award in more detail. Even if it was not always the benchmark award it later became, the variations to the *Unapprenticed Junior* classifications in it reflected the pattern of fixation for trades and physical production workers in the industries for which junior rates were prescribed. The preference stated in *Whybrow*[33] for the use of apprentices over unapprenticed juniors was carried through by Higgins J when in 1920 he made the first award for the metals industry, or more properly the engineering industry. He refused an employer claim for an unapprenticed junior classification. His reasons for that outcome were put in terms that the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (the AFMEPKIU) would like to see more or less replicated in 1999 in the approach it seeks for our adoption:

> *"... The union wants that all youths in the trade should be apprenticed, because it finds a strong tendency to put untrained men or men imperfectly trained to engineers' jobs at lower rates. One of the reasons that employers want apprentices - as well as unapprenticed boy labour - is that boy labour is cheaper; but another reason is that*

> *employers are genuinely embarrassed by the difficulty of getting sufficient skilled craftsmen. In accordance with the usual practice of this Court, I mean to do nothing to encourage the deadly system of 'improvers', such as is found, with variations, in Victoria, South Australia, and Tasmania. I need not recapitulate the reasons which I have given in several cases, including the Boot case. The practice of many employers is to keep the improvers on repetition work without teaching them any trade. If the machine be displaced by some new invention, the boy must suffer. The full rate prescribed for the occupation will have to be paid to all except apprentices; but an exception will be made also for returned soldiers - 'trainees' - employed under the Repatriation Regulations. …"*[34]

2.2.12 Higgins J's refusal to make provision in that award for unapprenticed juniors did not prevail for long. In 1930, Beeby J presided over a case in which metal trades employers sought a general reclassification of labour and other changes to the 1920 award. The ostensible purpose was to cope with changed circumstances, including the expansion of mass production since 1920. Various disputes in metals and manufacturing industries were consolidated to produce the Metal Trades Award with effect from 1 May 1930[35]. The then existing awards, including some State awards, only permitted process work being done by juniors. The unions contended that such work, although unskilled, should be done by tradesmen and apprentices. Beeby J ruled against that contention, reserved the phase of the dispute about placing a limitation on the proportion of adults to non-apprenticed labour, and awarded a relatively comprehensive "*Female and Unapprenticed Junior Labour*" set of classifications[36]. The classifications allowed for female and junior females to be employed on *manufacture by specialised processes and assembly*. The *Junior Female* classification covered females under age 21, with progression by years experience. The same form of progression, but with greater increments after the second year's experience, was applied to unapprenticed male juniors "*in all occupations for which apprenticeship is not provided*". A flat rate of 15 shillings per week was struck for the first year's experienced male and female juniors. That rate equated to 31.5 per cent of the adult female process worker rate of 47.5 shillings for the first year's experience or about 14.6 per cent of the then adult male process worker rate. The decision unequivocally accepted that the effect of the use of the junior rates prescribed would be to make junior male and female process workers competitive with adult workers. The classifications would thereby serve the professed purpose of allowing employer manufacturers to be competitive in the market against imports[37]. The reasoning of the decision illustrates that the allocative principle was foundational to the introduction of the junior rate classification in the form that is a prototype of the current provision in the counterpart award. The reasoning might also be construed as a reflection of a capacity to pay awareness on the part of the Court.

2.2.13 Separate male and female junior rate classifications were products of the differential basic wage, and typical of the developed provisions made in awards that provided for junior employment. The gendered classifications remained a feature of junior rate classifications generally until at least the early 1970s. With some modifications, the 1930 classifications of female juniors and unapprenticed male juniors were endorsed by Beeby J in the *1935 Metal Trades Margins* decision[38]. In that decision Beeby J rejected an attempt by union parties to have the experience based progression removed from the relevant junior classifications. In addressing that aspect of the application, Beeby J accepted a need to modify the progression. He set a higher commencement level, to make it more even, and defined *experience* in a manner similar to that used in 1925 in the Commercial Printing Award. His reasons disclose that the allocative function of the relevant junior rate, and the retention of experience based progression were important considerations:

> *"Strong objection was also raised by unions of employees to the fixation of junior wage rates according to experience instead of age. The experience basis was adopted in order to give the youth of more mature years increased opportunity of starting in some occupation."*[39]

2.2.14 By the late 1940s the practice developed of expressing the wages for apprentices and junior classifications as a percentage of the needs basic wage[40]. For the *Metal Trades Award,* Beeby J in 1937 refused union applications for the deletion of the experience based progression and the substitution of scales based on age instead of experience for juniors engaged in manufacturing. However, he left open the possibility of unions continuing a practice of having individual employers transfer juniors from the experience to the age scale. In discussing a related claim for increases to junior rates based on the basic wage adjustments, he pointed to the present impracticability of an attempt *to arrive at some common principle for the fixation of junior rates*, and hoped that a Full Court would in future devise a uniform percentage system[41]. That hope for a percentage system was soon realised, but it was framed on age progression, and was not uniform across industries. Later in the same year, consent variations to particular parts of the Metal Trades Award introduced age based male junior rates formulated as percentages of the *adult needs basic wage*[42]. In the 1941 consolidation of the Metal Trades Award both male and female junior rates were expressed as age based classification rates stipulated as percentages of the needs basic wage[43].

2.2.15 Apart from some adjustments to the relevant percentages, the Metal Trades Award classifications were not significantly changed in structure until substantially revised through a series of changes made from the mid 1960s to the early 1970s. The

stimulus for those changes was first the working through of the work value relativity principles applied to the secondary wages or *"margin"* federal awards. That process was associated with a need soon after for adjustments required by the adoption in 1966 - 1967 of the total wage replacing basic wage and margins. The removal of differential rates for females and implementation of equal pay for work of equal value phased into federal awards from 1969 to 1972 was the third and major dynamic. The *Equal Pay Case*, which brought in the concept of equal pay for work of equal value simply provided that "*the principle will apply to both adults and juniors*", implicitly accepting the percentage approach to junior rates[44].

2.2.16 In the course of those adjustments the Commission, either by consent or by arbitrated decisions, twice altered the comparator for one or other of the junior rate classifications. Thus from July 1967, in the implementation of the outcome of a work value review and introduction of a "total wage" system, the then existing junior rate classification percentages were applied to classification 292: "*Employee, not elsewhere indicated*" [45]. On the introduction of total wage, the entry level *Female Junior* rate (17 years and under) was $14.54 per week, equivalent to 38.5 per cent of the then male rate for Process Worker. The 17 year old *Unapprenticed Male Junior* rate was $17.80, equivalent to 47.2 per cent of the Process Worker rate. From February 1969, the comparator classification for both male and female junior rates became the Process Worker classification 383 for which separate male and female weekly wages then existed. Adoption of that comparator was assessed upon a work value examination, a review of adjustments to comparators made in cognate awards, and the internal award increases made as part of the work value round[46].

2.2.17 On 24 February 1969, at the height of the Vietnam War for which junior age conscription was in force, Commissioner Winter arbitrated a claim made for new junior rates. The claim sought junior rate adjustments on work value grounds and uniform rates for Females Juniors and Unapprenticed Male Juniors. Winter C had extensive experience in the metals panel of industries. He conducted or made as a member of the Bench the inspections for the *1967 Metals Work Value Case*. He was generally acknowledged to have a compendious knowledge of the minutiae of classificational relativities within the Metal Trades Award. He was also generally acknowledged to have a relatively irrepressible capacity to work into his extensively reasoned decisions his sympathy for the needs of base level employees. The union application initially sought adult rates at age 18, and 50 and 75 per cent of the male rate at 16 and 17 years of age respectively. The application was later amended to specify percentages of the Process Worker rate for age 17 and under, to age 20. Winter C's award (the Winter

Award), with effect from 1 January 1969, substituted the Process Worker classification 383 as the comparator. The age 16, and 16 and under, levels for the Unapprenticed Male Junior classification were deleted. The percentages applicable to the new comparator were increased from the 26 and 38 per cent applying at the former age 16 and under levels to a new standard 48.5 per cent at age 17. The ages 19 and 20 rates were varied from 80 and 96 per cent to 76 and 91 per cent.

2.2.18 On appeal, the Full Bench gave much weight to the undesirability of having the junior rates for the award set at levels above prevailing apprenticeship rates. It varied the Winter Award to restore the age 16 and under classification levels for Unapprenticed Male Juniors. The percentages were reduced. The new levels at the entry ages corresponded with the percentage rate in existence prior to the Winter formula recalculated as a percentage of the new comparator: Process Worker. The Bench determined that 75 per cent and 90 per cent respectively were appropriate levels to set for ages 19 and 20. In stating its reasons, the Full Bench indicated the percentages in the classification were adjusted by "*fixing percentages which we consider reasonable amounts of wages for unapprenticed male juniors in this industry*"[47].

2.2.19 From at least the mid 1960s to 1982, ACTU policy statements about "Equal Pay for Work of Equal Value" included the contention:

> *"Consistent with political and community standards juniors must be defined as workers under the age of 18 years."*[48]

In 1967 the ACTU's declared policy was to achieve adult rates at age 18, and to have age 16 and under rates set at 65 per cent of adult rates. There are suggestions in the literature about the arbitral history of junior rates that the implementation of the equal pay principles in junior rate classifications between 1969 and 1972 was the precursor to a systematic attempt to have adult rates paid to juniors at age 18[49]. The decided cases do not provide much evidence to support the contention. However, 47 of 111 awards with junior rates provide for adult rates to be paid at age 20 or below[50]. That fact indicates that the progress of the policy might be traced. Moreover, the insertion from 1971, of clause 13(c) of the newly named Metal Industry Award, is a point of some importance. It provided that juniors employed on specified tasks, regarded as unsuitable for juniors were to be paid at not less than the appropriate adult minimum rate[51]. The counterpart of that clause is now Schedule C, paragraph 3.2.1 of the Metal E & AI Award. The clause seems likely to have provided leverage against the use of the

Unapprenticed Junior classification in circumstances where employees thought it was inappropriate. Short pointed out in 1988 that although the ACTU had "*a policy to increase youth wages relative to adults, this appears not to have been pursued since the 1970s*"[52].

2.2.20 Recognition of age 18 as the age of majority coincided with some reconsideration of the appropriateness of age 21 as the exit age from employment under junior rate classifications. Figure 2.4 at paragraph 2.5.3 within, shows the relative incidence of awards with junior rates that allow exit to adult rates before age 21. We have not identified the decisions or agreements that caused those departures from the normal age 21 transmission. So far as we are aware no general case was pressed. The nearest approach to such a case, perhaps productive of a determinative outcome, occurred in Victoria. In the *1973 Victorian Storemen and Packers Wages Board Decision*[53], the relevant Victorian State Wages Board had granted an increase to junior rates for packers and in effect provided for adult rates at age 19. On appeal, the Industrial Appeals Court substituted a determination fixing junior rates for junior males and females at percentages of the adult packer rate progressing from 40 per cent at age 16 to 93 per cent at age 20. The latter percentage was precisely the same percentage rate at age 19 as had been agreed for the Metal Trades Award with effect from 15 January 1973. The Court repudiated the Wages Board's view that the effect of the *Equal Pay Case 1972* was to remove any barrier to assessing junior rates on a work value basis by comparison with adults performing the same work. Instead it applied as principles relating to junior rates "*the percentage approach used in the 1967 Metal Trades Case*". The Industrial Appeals Court Bench, in 1969, had applied an approach based on the Commonwealth 1967 Metal Trades decisions. That decision resulted in the implementation in Victoria of adjustments to junior rates to reflect the adoption of the Process Worker comparator[54]. We consider that because of their timing and strategic significance, those decisions effectively set parameters derived from the metal trades outcomes for junior employees that were not significantly exceeded in other industries.

2.2.21 Both those award outcomes should be seen in perspective with the degree of the adjustment made to junior rates for males and females in the Metal Trades Award by the time the gender neutral classification for Unapprenticed Juniors was established in 1972. For instance, the combined effect of the work value total wage and equal pay cases did not increase the percentage relativity of the 17 year old male junior rate to the comparator . It remained at about 47 per cent of the adult male Process Worker, where it had been in 1965. It stayed at that rate until the additional increase to 55 per cent

came with a 1973 agreement. Female Juniors at age 17 did benefit. Their rates were adjusted from about 38.5 per cent of the Process Worker standard to 47 per cent by the end of the phasing in, and then to 55 per cent as indicated. The detail of the adjustments made over the period from 1967 to 1973 suggests that there may have been a juggling of relativities and comparators to ease the way to the eventual integration of male and female junior classifications. For entry level juniors up to age 17, the eventual outcome, by agreement, was about the average that would have resulted from the 1969 Winter Award. Figure 2.1 is derived from extracts of some of the relevant Unapprenticed Male Junior classifications starting from the percentages prescribed on the introduction of the total wage. The Winter Award, the Appeal Bench formula, and the levels set for the Unapprenticed Junior classifications at the completion of phasing in equal pay, and at the commencement of the 1973 consent award rate are then contrasted.

Figure 2.1 Unapprenticed Male (and Female*) Juniors (from 20 September 1972)

	Total Wage	Winter C "Award"	Appeal Bench	1972 Consent Award	
	% of male weekly wage rate for classification 292 - Employees not elsewhere classified - in the area employed [1]	% of male weekly wage rate for classification 283 - Process Worker (all divisions) [2]	% of male weekly wage rate for classification 283 - Process Worker - in the area where employed [3]	% of weekly wage rate for classification 300 - Process Worker - in the area where employed [4]	
	1 July 1967	1 January 1970	1 January 1969	20 September 1972	15 January 1973
Under 16 years of age	26	-	25	25	35.0
16 years of age	38	-	35	35	45.0
17 years of age	51	48.5	47	47	55.0
18 years of age	64	60.8	60	60	65.0
19 years of age	80	76.0	75	75	78.5
20 years of age	96	91.2	90	90	93.0

* After 20 September 1972 single classification of male and female juniors.
(1) (1967) 118 CAR 694.
(2) (1969) 127 CAR 698; under 16 and 16 years levels were fixed at 30 per cent and 40 per cent for period 1 January 1969 to January 1970 and then deleted.
(3) (1969) 127 CAR 704.
(4) (1972) 146 CAR 272.

2.2.22 The junior rate entry level relativity of 35 per cent applied under the Metal Trades Award to the Process Worker rate for age 16 in January 1973 has thereafter been relatively stable. In 1991, a small increase was made in an attempt to ensure that junior rates did not decrease when the C13 base rate was introduced with the fourth minimum rates adjustment. However, in response to an effective erosion of relativity associated with the implementation of supplementary payments, changes were phased in from 1995 to ensure that the relativity was to the total rate inclusive of supplementary payments. (See paragraph 2.2.43.) It is currently 36.8 per cent of the relevant comparator, classification C13.

2.2.23 It is likely that, having regard to that perspective, the effect of the 1973 Victorian Industrial Appeal Court decision discouraged any general pursuit thereafter of an adult wage at age 18 policy. However, adjustments of junior rates and apprenticeship rates in the Metal Trades Award had a marked effect on the relativity of the junior rate classifications to adult rates[55]. A compression of the relativity of apprenticeship rates to the adult trade rate occurred between 1972 and 1974.

2.2.24 The onset of recession in 1974 occurred at a time when *"teenage employment had already been declining, or at best stable, for a number of years"*[56]. After a dramatic increase in teenage unemployment in 1974, youth unemployment soon became a focus of concern and debate in arbitral consideration of junior rate outcomes. In 1978, the Confederation of Australian Industry National Employers' Industrial Council published a discussion paper "*Youth Unemployment*". The paper pointed to a continuing growth in unemployed juniors as a percentage of total unemployed from 14 per cent in 1950 to 33 per cent in 1965 and 38 per cent in 1976. It concluded that the two most significant contributing factors to the disadvantage suffered by youth in their search for employment were the relatively high level of wages applicable to young people entering the job market for the first time, and the increasing labour force participation rate of married females. The paper called for a co-operative approach to develop programs and policies *"which will give young people a competitive advantage in the labour market"*[57]. A research paper issued by the Bureau of Labour and Market Research in 1983, (the 1983 BLMR study), was one form of response to that concern. The OECD in 1980 and again in 1984 drew attention to high and growing youth unemployment in most OECD countries and started to examine causes[58]. That concern was soon manifest in decisions about junior rate classifications, at *National Wage Case* and individual award level.

2.2.25 The 1983 BLMR study appears to have been based in part on the paper prepared for it by Pitman, to which we have referred at paragraph 2.2.6 above. The Bureau noted that two principles had been considered when setting junior rates, the "needs" of junior workers and the "value" of the work they perform[59]. It commented that it was difficult to identify the relative importance of the needs and work value principles underlying the determination of junior wages. As we foreshadowed in paragraphs 2.2.5 and 2.2.6, there are details in the case history which leave open the conclusion that it was not simply arbitrary. There have been conceptual approaches to junior rate wage fixation throughout the century. There was, the Bureau reported, a substantial element of arbitrariness in such fixation. The article also notes a

compression in relativity between apprentices and tradesmen and surmises that this was done (by agreement) "*in the hope of increasing the supply of apprentices and substituting them for tradesmen*"[60]. An important factor in that compression appears to have escaped comment in the BLMR's analysis. That is the adjustment of apprenticeship rates to maintain or improve their relativity to increases that were made to junior rates in the course of implementing the equal pay and work value principles.

2.2.26 Our outline of cases has so far followed the development of the junior rate classification in the metals industry. That industry, as we have noted, has served at times as a benchmark for award purposes. If the interpretation of arbitral principles is to be soundly based, particular award histories must be compiled and analysed in perspective with other award changes. As we have seen, the adjustments and changes in junior rates in the metal industries awards were usually linked with a major development or linkage in arbitral principle affecting other awards. Since 1985, the development of principle about junior rates appears to have predominantly been at national test case, or general wage fixing principle level. It is therefore less relevant to trace each movement since that time in the awards that eventually became the Metal E & AI Award. However, the principal outcome of at least the initial calls for special treatment of junior rates in *National Wage Cases* was a regularly reiterated reference of the issues to be dealt with for consideration on a case-by-case, award-by-award basis. Thus, particular award classifications and the reasons for bringing them into existence, or for varying them are the most reliable basis on which to formulate proposition about arbitral principles as to junior rates.

2.2.27 In relation to the Unapprenticed Junior classification in the Metal E & AI Award, the most significant changes made to the classification, and not yet mentioned, were: the alignment of the comparator with first the C14 and later the C13 classification rates following the award restructuring process resulting in the introduction of competency-based classifications[61]; the linkage of the junior rate to the total wage of the comparator inclusive of supplementary payments[62]; and finally the determination of the "exit rate" level of payment for an employee on completion of a National Training Wage contract of training and employment[63]. In relation to that last determination, Lawson C stated:

> *"I am satisfied that the application, granted and amended in this decision, meets the (work value) principle in that the existing award provides rates of pay for juniors and for apprentices in an established classification structure. The award does not provide for traineeships which reflect the skills acquired and utilised by trainees and their relative value to their employer upon exit from the formal training. To provide for such rates*

merely extends the classification and relatively structure within the award, and thus falls within the above principle.

...

The effect of granting the application will be to ensure the creation of properly structured wage levels relative to trainees' acquired and utilised levels of skill when compared with other groups of employees covered by the award such as unapprenticed juniors, apprentices (both young person and adult apprenticeships) adult skilled classification and tradespersons (and higher).

...

1. Is the application consistent with the National Training Wage decision?

In the furnishing industry test case, the Full Bench said:

> *'In our view the proposed traineeship exit arrangements proposed have a logical relationship with the National Training Wage arrangements in that they relate to the same discrete group of employees. The rates proposed for this group are distinguishable by the completion of the traineeship, the consequent cessation of traineeship training arrangements and the acquisition and utilisation of competencies arising out of the completion of the traineeship. As such we see the proposed exit arrangements as providing a logical bridge between the traineeship rates and the adult skill based classification structure.' (Print N4645)*

That conclusion and rationale applies with equal force to the present application. I am satisfied that the exit rates proposed have a logical relationship with the National Training Wage regime, in that the rates proposed for a distinguishable group of employees reflect both the skills and competencies acquired and utilised."[64]

2.2.28 At Table A4 of **Appendix A**, we publish a comparison of junior rate, apprenticeship, trainee, and traineeship exit rates and classifications. Those rates for the current Metal E & AI Award have been fixed through a process that has taken relatively careful account of the respective levels of the entry level minimum wage, the Unapprenticed Junior rates and the two contract of training classifications. That process replicates to a substantial degree the process that a Full Bench applied in a series of decisions to the Furnishing Trades Award[65]. It may be debated whether that process has come up with the right answer. We think a study of the cases to which we have referred points to a conclusion: that a process of the kind described by Lawson C in the decision last quoted has been associated, sometimes intermittently, with the fixation of rates and variation of the Unapprenticed Junior classification since it was first prescribed for the metals industry over 70 years ago. That point is made in another way by the structure and content of classification provisions of the Metal E & AI Award. The title of clause 5.5 of the Metal E & AI Award is "*Unapprenticed Junior Rates of Pay*". Clause 5.5.1 is entitled "*Adult Rates of Pay*", clause 5.3: "*Apprentice Rate of Pay*"; and clause 5.4: "*Adult Apprentice Rates of Pay*". Now apprentice rates are usually fixed in awards by the year of apprenticeship related to the tradesperson's rate as the comparator, and hence to the experience of the employee. Consequently, the rates are related in that nominal sense at least to the value of the work the apprentice can deliver to his or her

employer. Such rates are not discriminatory because of any direct age progression. For purposes of this report, we are not concerned with questions as to whether any possible indirect discriminatory requirements of apprentice rate classifications are unreasonable in the circumstances. The *Unapprenticed Junior* comparator is not the tradesperson; it is the C13 classification, (Production worker after three months structured training), set at a relativity of about 84 per cent to the tradesperson rate. However, the juxtaposition of the classifications reinforces the point that the junior, training, and adult rates of pay are part of a coherent classification scheme, not an arbitrarily determined assortment.

2.2.29 **Appendix A** sets out also in a relatively detailed way comparative tables of junior rates from 18 of the more important industry awards, including several State awards, and two certified agreements in the banking industry. Table A4 of **Appendix A** is a comparison of junior rate apprenticeship and traineeship classifications from awards in the retail, hospitality, manufacturing and construction industries. We will not trace the history of the differences and similarities between those classifications, except for brief observations on the retail industry and the building and construction industry, each subject to much material presented to the Inquiry. Then we will look only at some more general cases dealing with the recent development of junior rates.

2.2.30 Until very recently, except for the Australian Capital Territory and Northern Territory, the retail industry has been regulated in the main by State awards. The history of State award regulation is less readily accessible to us, but the details we do have disclose many of the same concerns as have arisen in the federal sphere. Macken J of the Industrial Commission of New South Wales outlined the history of the relevant State award up to the time of his report on the opening and closing hours of shops to the Minister of Industrial Relations in 1983[66]. The award classification of "*Shop Assistant*" was from the earliest awards an active form of intervention in the competition for available positions between juniors and adults:

> *"In 1907 the New South Wales Court of Arbitration was concerned with the nature of employment in the retail industry in the case of Shop Assistants Union v. Master Retailers Association and Mark Foy (vol. 6 A.R. 139). The President, while dealing with wages and the proportion of junior to senior employees, said that a shop assistant while not being a skilled craftsman who qualified through apprenticeship, nevertheless needed a certain amount of knowledge of the goods which he had to sell, knowledge and skill in displaying them and in putting them away without injuring them and experience of the conditions of shop life under which the goods had to be sold though it was not really a skilled trade for which an apprenticeship was required (pp.150-151).*
>
> > *'Still we have been very strongly urged to limit the numbers of the younger workers. While the claimants ask for a higher wage they fear that, if it is granted, many employers may meet the difficulty by dismissing the highly paid seniors, and they naturally wish to be guarded against this…'.*

Even in those early days a feature that now exists in the retail industry was recognised, namely, an influx of juniors and a reduction in the numbers of experienced fulltime employees. In an attempt to prevent the replacement of adult staff the President divided shop assistants into two classes, those under 23 and those over that age. The award also provided that there was not to be in any shop more shop assistants employed under the age of 23 than those over 23. (see 1938 A.R. 481)[67]*."*

2.2.31 The Shop Assistants, Confectioners, Etc (Metropolitan) Award originally provided for a single *all employees* classification. It proscribed male and fixed rates for *under 17 years, 17 to 19 years, 19 to 21 years* with the full rate applicable from age 21, except that "*persons under the age 21 but with no experience may be employed at a wage of 20% less for a period not exceeding 3 months"*[68]. By 1930, the principal classification was *Shop Assistant*. By then, as Macken J later noted, the scale of fixed rates provided for 10 pay rates at ages from under 15 to 23 years of age and over. Persons under age 21, without experience, could *for the first 10 months* be paid 20 per cent less than the scale rates[69]. The use of age 23, apparently as the effective exit age to full rate was removed from the New South Wales award "junior" scale by at least 1960[70], but we have been unable to establish the detail of that change. However, it is significant that the wage rate scales using ages 21, 22 and 23 and over were framed to allow the adult basic wage to be exceeded at age 20[71]. It was not until 1968 that the New South Wales awards were restructured to prescribe junior Shop Assistant pay rate as percentage rate scales differentiated by sex. Thereafter, it appears that the percentage relativities were increasingly aligned, if not with federal Metal Trades Award precedents, at least with comparable wage levels under other State retail awards. Thus by the completion of the phasing in of equal pay and removal of female differential basic wage in 1974, the under 16 to age 20 percentage rates were ranged evenly in 10 per cent age progression increments from 40 per cent at age 16 to 90 per cent at age 20; much the same sort of pattern and timing as disclosed for the Metal Trades Award in Figure 2.1 above[72]. Over the following two years that pattern was matched closely in the main retail awards in all States except Queensland. As may be seen from Table A1 of **Appendix A**, it has remained virtually unchanged since.

2.2.32 One of the more significant changes however has been to the junior rate comparator. After 1989 a series of minimum rate adjustment decisions changed classification structures from a growing array of *Shop Assistan*t pay scales to a single broadbanded "*true minimum rate*" for what became *Retail Worker Grade 1*, fixed initially and still today at a relativity of 92 per cent to the trades equivalent. The rate fixed by the Industrial Relations Commission of Victoria (the IRCoV) included supplementary payments. All State tribunals, albeit with some degree of consent, had done or later did likewise[73]. However there was not a similar degree of consent to

attempts by the SDAEA to secure an award giving effect to a nationally promoted policy for a career path classification structure. An IRCoV Full Bench referred to submissions to the effect that only a short period of induction training is necessary in most instances to become a sales assistant, findings based on the employers' evidence, including:

> *"Most employees in the retail industry are regarded by their employers as competent sales assistants within a relatively short period of employment.*
>
> *...*
>
> *The substantive criteria by which most retail employers judge their staff is sales performance rather than experience, length of service or product knowledge."*[74]

The IRCoV concluded that a case had not been made out for an "*on commencement*" grade or progression through the classifications, noting the use of a variety of incentive schemes and bonus payments. Its reasoning was similar to that adopted by the New South Wales Industrial Commission in Full Session in 1985 refusing to reintroduce a 20 per cent discounted "*improver rate*" for junior new starters:

> *"The industry is the largest employer of young persons in New South Wales and is, as Mr Hill claims, a vestibule industry providing initial training and experience to juniors. It is in the public interest that prospects of employment in the industry be expanded if this is commercially possible.*
>
> *...*
>
> *The case presented by the employers did not link the improver concept to any proposal for training or any specific learning structure. ...*
>
> *Existing rates have been fixed however on the basis that they apply to experienced as well as inexperienced juniors on employment. The claim, if granted, would change that position on a State wide basis and affect every new junior employment without any assured consequence that an increase in employment would occur. On the limited material before us, therefore, we do not consider that we should disturb the present structure of junior rates by the insertion of a general improver rate."*[75]

We have noted some points of difference in the development of junior rate classifications in retail awards. Perhaps the most relevant to our task overall is the intermittent use of relatively short periods of "experience" as an offset or qualifying condition for discounting or exiting a discounted rate. That usage, and the observations we have quoted, imply views about degrees of effect of maturation deficits. However, the substantive principles applied to the content and development of retail junior rate classifications are not relevantly distinguishable from those we have described for the metals industry.

2.2.33 Another industry discussed in several submissions was the building and construction industry. Conflicting information provided by the Master Builders Association of Western Australia (MBAWA) and the Construction, Forestry, Mining and Energy Union (CFMEU) has added to our difficulty in understanding the extent and usage of junior and trainee rate classifications in that industry. There seem to be three points of contention in the information received from the CFMEU and the MBAWA: the scope and usage of junior rates in the four major building and construction awards; the usage of the *Construction Worker* competency-based classifications first introduced in 1995 for implementation by agreement; and the success and types of traineeships in operation in the industry. In relation to the first of those points, the CFMEU's response to the Issues Paper contested an assertion that, in practice, the employment of juniors at junior rates was restricted to shop-fitting, stores and related support operations[76]. The CFMEU pointed out that, in two major awards, the junior rate classification applies to work in all trade (subject to the scope of the awards) in South Australia; junior rates exist also for roof tiling in Western Australia. However, it seemed common ground that, even where available, *Unapprenticed Junior* rates are not much used in the building and construction industry.

2.2.34 The building and construction industry has been a field for variegated federal and State award coverage. An array of State or federally registered unions have played important roles. Prolonged efforts were made throughout the 1980s to secure a relatively uniform standard of minimum conditions for the industry. There are now four major awards, the National Building and Construction Industry Award 1990 (the NBCI Award), the National Joinery and Building Trades Products Award 1993 (the NJBT Award), the Building and Construction Industry (ACT) Award 1991 and the Mobile Crane Hiring Award 1996. Only two have junior rates. Even in those awards however the application is limited. The NBCI Award[77] *Unapprenticed Junior* classification applies in South Australia (prescribing the same rates and progression by years of service as apprentices); and the *Junior Worker* classification applies in the roof tiling industry in Western Australia only (prescribing age progression rates based on the year of service progression of the apprentices' rates). The NJBT Award[78] *Unapprenticed Junior* classification applies only in South Australia, prescribing apprentices' rates.

2.2.35 Those relatively isolated junior rate classifications were carried over from awards that were superseded by the making of the NBCI Award. Those awards covered building trades as well as the labour, non-trades construction and fabrication parts of the industry. We examined the Builders' Labourers Federation and the Australian Workers' Union (AWU) federal awards to check for the incidence of junior rates. The only award

to contain an Unapprenticed Junior rate classification was the National Building Trades Construction Award 1975. The *Unapprenticed Junior* classification for South Australia in the NBCI Award can be traced to that 1975 Award, and to a 1967 skilled trades award it had superseded, the Carpenters and Joiners Award 1967.

2.2.36 Thus the arbitral reasoning and principles with which we are already familiar from the review of the Metal Trades Award explain the relative absence of junior rates in the building and construction industry. In 1986, the Amalgamated Society of Carpenters and Joiners of Australia applied to vary the Carpenters and Joiners Award, 1967. The variation sought to give the correct designation of the State Act which governs the training of apprentices in South Australia and to delete the Unapprenticed Junior classification applying in South Australia[79]. Bennett C stated that:

> *"If the Union is successful in its application to have deleted from the Award the provisions for unapprenticed juniors then either those juniors would be dismissed or they will receive the adult rate of pay. The Union has used as its main argument the fact that* ***the South Australian Act now prevents the employment of unapprenticed juniors in the work of declared trades, and it is a fact that carpentry and joinery are declared."*** *(Our emphasis).*

The Commissioner declined the application to delete the junior labour provision because:

> *"In a time of high unemployment among young persons and in the absence of any detailed specific information regarding the number of unapprenticed juniors employed pursuant to this Award, I am not prepared to delete the provision regarding this type of labour."*

We were not able to locate a reason for, or any account of, the history of junior roof tilers in Western Australia.

2.2.37 In contrast, the non-trades *Builders' Labourer* or *Construction Hand* stream of employment in building and construction industry appears, from the outset, to have been conceived as a kind of able bodied trades assistant paid at full rate. No junior rate was provided by the awards. The principle appears to have been that, whether the work was performed by "*lads*" or by adults, the award classification should not be used to deter employers or juniors from making use of the apprenticeship system which offered a way to a skill status not available to labourers and assistants. Thus, the first two federal awards made for builders' labourers contained no discounted rate for "lads" and juniors[80]. The reason for the omission is apparent from Higgins J's reasoning in making

the first award. It implied that "lads" would be among those employed under the *flat rate for all* of 1s. 4½ d. per hour he determined for the labourer's classification:

> *"At first sight, the demand for a rate of 1s. 4½d. per hour for labourers seemed to me, as it must seem to others, to be excessive and unreasonable in view of the rates prescribed for skilled tradesmen. For a week of 48 hours this rate would be 11s. per day or £3 6s. per week; and many skilled workmen have to be satisfied with such wages, or even less.* ***I have to keep steadily in view the recognised practice of treating men of special training or gifts as entitled to higher wages than other workers; and I must do nothing to encourage lads in the idea that they will be as well off in life if they do not apply themselves to the attainment of special skill in industrial work, as if they do so****. But the rate asked is only an hourly rate; and the work is casual - not settled and regular, as in most cases before me hitherto. A labourer, if paid 1s. 4½d. an hour will not earn £3 6s. per week, or nearly so much. ..."*[81] (Our emphasis).

To similar effect, Public Service Arbitrator Westhoven in 1937 said about State railway construction work for juniors:

> *"The youth of 19 or 20 strong enough to be, and who is, employed on ordinary construction work is usually paid as an adult."*[82]

However, his remarks concerned an award that included provision for a "*Juvenile*" classification under which "*Nippers*" were employed[83]

2.2.38 The absence of a junior rate for builders' labourer classifications connoted an entitlement for juniors employed under it to be paid the standard minimum. That construction would appear to be long established. Pitman[84] makes reference to *Stevens v Bolzon* although he appears to have conceived that case to be a leading work value arbitration. That 1969 case, before the Industrial Registrar in South Australia, concerned an employee aged 19. The Registrar construed the relevant award and held that the employee should be paid the adult rate, noting in passing, that if the employer had known this he would not have employed the employee. The report notes:

> *"The awards of the Builders' Labourers Conciliation Committee do not provide special rates for juniors, but merely rates for all builders labourers, irrespective of their age. It followed, the Registrar said, that he must award the unskilled labourers rate to the claimant even though he might consider that this rate was too high for his work."*[85]

2.2.39 We turn now to more recent Full Bench decisions which addressed issues of principle about the level or principles of fixation of junior rates. They evince a continuing concern. In the *National Wage Case April 1985* the Commission noted that it was the first occasion:

> *"... on which the Commission has been asked to review Junior rates* ***because of unemployment of young persons****. The question of junior rates and their relationship to adult rates has for a long time mainly been determined by the consent of parties. In the early 1970s a compression in junior/adult relativities occurred following an agreement for an increase in junior wage rates in a metal industry award in 1972.*[86]*"* (Our emphasis).

The Commission also remarked:

> *"The Australian Retailer's Association noted that 37% of persons between 15-19 years are employed in the retail industry and that it was crucial that the industry be given the best chance of protecting the jobs of young people.*[87]*"*

Thus, concentration on the youth cohort in retail is not a new phenomenon. It was noted as significant some fourteen years ago, and, as we have seen, 80 years before that it was noted by the New South Wales Commission[88].

The Australian Retailers Association (ARA) and Confederation of Australian Industries (CAI) both sought that the general wage adjustment sought by the ACTU in implementation of the Accord with the then Commonwealth Government not be passed on to junior employees. With reference to the 1983 BLMR study already referred to, the Commission said:

> *"While the statistical studies indicate that a reduction in youth wage rates relative to adult rates would tend to lead to increased employment of juniors, the extent of increase is likely to be relatively small and would vary between the sexes and between different industries, occupations, educational levels and ages. Further the study suggests that increased employment of juniors could be largely at the expense of adults.*[89]*"*

The Commission went on to refer to OECD comments on the effect of increases in relative youth wages in a number of countries, to *the Report of the Committee of Enquiry into Labour Market Programs* known as the Kirby Report and concluded:

> *"We have reported on the material before us in some detail because of the great concern we have with the parties and intervenors on the question of youth unemployment. However the wide range of junior rates and the differing provisions for juniors in awards suggest that an award by award consideration, rather than a broad brush uniform action, may be a more appropriate course. Furthermore the indeterminate nature of the statistical evidence in favour of the course proposed by CAI and the fact that the Kirby Report recommendations are currently in train, including the consultations referred to above, have led us to the conclusion that it would be unwise on the submissions before us, to accede to the CAI application.*[90]*"*

This case by case approach has been the approach adopted ever since, and indeed it has always been characteristic of the development and use of junior rate classifications. As noted earlier, however the approach has not been ad hoc. The decisions of single members of the Commission commented on later illustrate the particular application of a number of principles.

2.2.40 In the *National Wage Case June 1986*[91] the Commission noted in regard to junior rates that:

> *"CAI urged us to institute an enquiry into junior rates and asked that it be held by a member of the National Wage Bench who should examine all the issues. It opposed a piece meal approach and submitted that the Commission should determine a common policy. It said that there was an international consensus on the need to investigate fully the effect of labour costs on the level of youth unemployment.*
>
> *The enquiry was opposed by both the ACTU and the Commonwealth."*

The Commission noted that nothing in the submissions made in that case convinced it to depart from the case by case approach it had previously adopted.

2.2.41 In the *National Wage Case April 1991*[92] the Commission said in regard to youth wages:

> *"The ACTU and the Commonwealth and State governments advocated the cessation of the prescription of wage rates by reference to age. Instead, rates should be related to competency and skill. The Commonwealth government propose that there be a separate full bench to consider this reform and issues related to it. In addition, the ACTU asked us to consider what it saw as an 'immediate problem' in the manner whereby junior rates are now specified. This problem concerns alleged inconsistencies between awards, and even within them, in the identification of the adult rates to which junior rates are related. The CAI contended that it would be inappropriate for this bench to determine these issues. Youth wages should be dealt with at another time, when they could be more fully debated. We agree with the CAI that the various issues have been insufficiently discussed in these proceedings for us to contemplate changes to the existing approaches to the prescription of youth wages. The matter can be raised by specific application which would necessarily be dealt with in a special case."*

2.2.42 In the *Review of Wage Fixing Principles August 1994*[93] the Commission again declined to deal with the question of junior rates as part of that general decision but noted that a Full Bench had been constituted to deal with at least some of the issues in junior rates.

2.2.43 That reference was to a Full Bench constituted in May 1994 to consider an application to vary the *Furnishing Trades Award*. The issue was whether the

percentages used in rates for juniors and apprentices should be applied to the total minimum rate inclusive of supplementary payments, not merely the base rate. The Commission issued a draft issues paper of wide implications for junior rates. In the *Furnishing Trades Case 1994*[94], the first stage of the *Junior Rates Case*, the Full Bench determined that aged based juniors rates and apprenticeship rates be applied to adult minimum rates inclusive of supplementary payments and safety net increases. At the same time it established a working party process to consider wider issues.

2.2.44 The working party continued throughout 1995. In September 1995 the working party proposed that the Commission endorse the use of the Australian Vocational Training System (AVTS) guidelines. Further the parties sought a determination that the reforms proposed in an "Agreed Position", met the age discrimination requirements of the *Industrial Relations Act 1988*. The use of trainee classifications below the base level in awards of progression criteria, related to the highest year of schooling completed and time out of school, was an element of the proposed position. In the decision on the second stage of the *Junior Rates Case*, the Bench endorsed the guidelines as the basis for further development by the working party and for guidance to the industrial parties in developing award and enterprise arrangements in respect of the AVTS. On discrimination the Commission said, in part[95]:

> *"During the hearing, the Commission expressed some concern over the potential for the guidelines to lead to a breach of the discrimination provisions in the Act. While the Commission accepted that the guidelines were not directly discriminatory on the basis of age, we wished to ensure that we addressed the potential for the application of the progression criteria to lead to 'indirect discrimination'.*
>
> *For the purposes of these proceedings, we are relying on the definition of 'indirect discrimination contained in the document Section 150A Award Reviews Guide: Discrimination. This is a 'model clause', developed as a guide for section 150A reviews, which states:*
>
> > *'Indirect discrimination occurs when apparently neutral policies and practices include requirements or conditions with which a higher proportion of one group of people than another in relation to a particular attribute, can comply, and the requirement or condition is unreasonable under the circumstances.'*
>
> *Subsequent to the oral hearing, the Commonwealth undertook to provide a further submission on the legal questions involved, particularly in relation to the concept of 'reasonableness'. That submission addressed two specific issues:*
>
> - *whether, in considering the application of 'indirect discrimination', the Commission can take account of broader policy issues such as economic, financial and public policy considerations, including the public interest provisions of the Industrial Relations Act 1988; and*
> - *if it can do so, whether the proposals made by the parties in these proceedings meet the anti-discrimination requirements in relation to the youth and training reforms."*

In submitting that both these questions should be answered in the affirmative, counsel for the Commonwealth relied on *Waters and ors v Public Transport Commission*[96].

The submissions were accepted by the Commission and it concluded:

> *"While we are prepared to endorse the AVTS Trainee Wage Guidelines as we stated above, we would also make some cautionary observations in the context of discrimination. The endorsement is predicated on the fact that this approach and the progression criteria of the National Training Wage follow a structured path and focus on competencies linked with schooling and life experience, rather than on age.*
>
> *If the guidelines and progression criteria are properly framed we believe that, even if they are discriminatory on their face, they will fall within the test of 'reasonableness' as discussed above. The guidelines are designed to promote skills and competence and enhance the opportunities for youth employment. Ultimately, the framework that is proposed, and the setting and operation of rates of pay within it, will be reviewed through the section 150A process.*
>
> *In this decision we have dealt with general guidelines put to us by the parties. In the future specific provisions will be required."*

The Full Bench later implemented that in principle decision by making the National Training Wage Award[97]. The work of the working party was suspended prior to the 1996 federal election and the Act has now changed. This case and its implications for this Inquiry are considered more completely in other parts of the report[98].

2.2.45 In the *Safety Net Review April 1997* decision[99] the Commission was required to address the "needs" concept referred to earlier as a response to the living wage claim of the ACTU. The response was determined, in part, by the requirement of paragraph 88B(2)(c) of the Act to have regard to the needs of the low paid[100] but the bench refused to link the level of the minimum wage to any defined benchmark of needs. Of significance to this Inquiry is that the decision determined that there be proportionate adjustment of junior rates. A selection of junior rate classifications showing the level of rates and comparators is set out in Table A1 of **Appendix A**. Where the classification exists, it is now a recognised part of the safety net minimum standard, and usually will be related to the appropriate classification rate in the relevant award for that purpose.

2.2.46 The *Safety Net Review - Wages April 1998*[101] decision retained the approach adopted in 1997. The relevant principle dictates:

> *"How the Federal Minimum Wage Applies to Juniors:*
>
> *(a) The wage rates provided for juniors by this award continue to apply unless the amount determined under subclause 3(b) is greater.*

> *(b) The federal minimum wage for an employee to whom a junior rate of pay applies is determined by applying the percentage in the junior wage rates clause applicable to the employee concerned to the relevant amount in subclause (2).”*

That principle is continued in the *Safety Net Review Wages - April 1999* decision[102].

2.2.47 Finally, we give several examples of approaches to issues about junior rate classifications adopted in the decisions of single members of the AIRC and its predecessor tribunals. So far as we are aware, and we have researched the topic, the Commission has never arbitrated the removal of a junior rate. We found an instance in which the Commission refused to insert junior rates into a consent award[103], but later varied the related awards generally to include such provisions[104]. In another instance of the introduction of a junior rate classification, exit from the junior rate was abbreviated to age 16 after expressly taking into account the consideration of whether or not the payment of the full award rate at the age would result in a disincentive to employment[105].

2.2.48 In a decision of Gough C in a *Federal Meat Industry Interim Award* application in 1980[106] the Employer Federation sought to vary the award in relation to the use of unapprenticed juniors in butcher shops. The award as it stood illustrates a variant of the allocative principle at work. Gough C said:

> *“Under the Award provisions as they stand the only capacity in which juniors, both male and female, other then clerks and/or cashiers may be employed in retail shops, however the operations therein are organized, is as apprentices or probationary apprentices. The work to which apprentices may be turned is not restricted.”*[107]

The union opposed the application. It complained that the Federation sought to “*usher in a system of cheap labour with no protection for the persons so employed to gain anything to assist them to become tradesmen*”. The Commission noted a shortfall in the number of young people entering the trade of retail butchery. A pilot scheme to test the effects of the new award was set up by the Commission. The award was varied to provide, on a trial basis, an expanded role for unapprenticed juniors.[108]

2.2.49 The case by case approach, and perhaps an arbitral responsiveness to principles that are latent from a perspective confined to an examination of Full Bench decisions, is well illustrated by two decisions in 1985-86. They straddled the delivery of the *April 1985 National Wage Case* discussed at paragraph 2.2.39 above. Cox C dealt with two applications by employers to insert junior rates in awards which did not have them. The first application was in *Re On-Airport Retail Employees Award 1981*[109].

The employers submitted that the absence of junior rates in the award was a serious deterrent to the employment of youths. The union submitted that introduction of junior rates into the award was not the solution to youth unemployment. The Commission refused to include junior rates in the new award. Following the *National Wage Case* decision the situation was revisited. In *On-Airport Retail Concessions Award 1985 and ors*[110] the Commission varied the award. The employers had sought to vary awards covering retail operations at airport terminals to include junior rates. The ACTU, which intervened in the case to present the unions' argument, contended that the employer's approach was "*simplistic and lacks credibility on the problem of youth unemployment*." The union claimed that the Commission had earlier rejected the insertion of junior rates in an award (a reference to the decision just referred to). The Commission was not convinced that employers should be denied an opportunity to engage junior employees at junior rates and varied the award. A continuity of the principle applied seems reflected in a decision of Hancock SDP on 8 February 1994. In *Re Airport Catering Award*[111], the award already provided for junior rates but no juniors were employed. The employer sought to reduce then existing provisions claiming that juniors would be employed if rates were less. The union opposed alteration of the provisions. Hancock SDP adopted the employer's proposal and the award was varied. Other examples of single instance decisions could also be found to illustrate that youth employment has been a tangible factor in shaping the pattern of junior rates.

2.2.50 In *Movie World Enterprises v MEAA*[112] McDonald C was required to decide between an age related scale and one which was not. His decision contains an outline of the principal considerations:

> *"The Company has submitted that the new award should incorporate a graduated scale of payments for juniors ranging from 55% of the relevant adult rate at age sixteen and under, up to 85% of the relevant adult rate at age nineteen. Thereafter the Company proposes that adult rates should apply.*
>
> *On the other hand MEAA proposes that adult rates should apply to all performers aged sixteen and above and that a special junior rate of 55% of the relevant adult rate should apply for performers aged fifteen years of age. It is the evidence of the Company that it does not employ persons aged less than fifteen years of age.*
>
> *The Commission adopts the proposal of MEAA and, accordingly, there will be one junior rate of 55% of the relevant adult rate applicable to employees aged fifteen years. Employees aged sixteen and above will qualify for the relevant adult rate.*
>
> *In reaching this decision the Commission is influenced by a number of factors. In the first instance, the federal theatrical award and the state entertainers award prescribe that adult rates are payable to employees aged sixteen and seventeen respectively, and above. In this respect these two awards appear to be consistent with other awards covering like occupations, as set out in Exhibit N.28, in which there is a consistent pattern of regarding employees aged sixteen and above as adults, for the purposes of determining the relevant rate of pay.*

> *Secondly, the evidence of Mr Dunstone is that employees are selected, both for initial employment and for the roles they perform, on the basis on their individual skills and potential rather than on the basis of age. It appears that age has no influence on the roles undertaken by employees who are still in their younger years.*
>
> *Accordingly the Commission sees the adult rate for employees aged sixteen and above as unlikely to prove a disincentive against the hiring of young people by the Company on the one hand and, on the other hand, as representing a proper reward for work of equal value to the Company.*
>
> *In relation to the question of the appropriate percentage of the relevant adult rate applicable to employees aged fifteen years the Commission notes that both the federal theatrical award and the state entertainers award prescribe 55% as the applicable rate for employees of this age and the Commission adopts this percentage for the purpose of the subject award."*[113]

2.2.51 The decision in *Movie World Enterprises* illustrates several points. In accordance with common practice McDonald C compared like with what was taken to be like in coming to the conclusion that the MEAA's position be adopted. He referred to a number of awards placed before him which regarded employees aged 16 and above as adults. He then relied on evidence which, in short, established that skills potential and the roles played were more relevant than age. His decision reflects an acceptance that that age is not a barrier to the possession of skills. Finally it is noted that reliance was placed on similar awards to fix a junior rate where, at age 15, it was considered appropriate. McDonald C's analysis is a clear example of the application of work value principles and a notable example of the case by case method of allowing each case to turn on its own circumstances.

2.2.52 The decision of Lawson C in *Re Metal Industry Award 1984 - Part 1*[114] dealt with a union application to vary the award to reflect the inclusion of supplementary payments into rates of pay for unapprenticed juniors. The application was granted but of note were some of the arguments advanced by the parties and referred to by Lawson C in his decision. The unions argued that the Full Bench in the *Furnishing Trades Case 1994* had concluded that:

> *"junior and apprentice rates should be applied to the adult rate which reflects the skill, responsibility and conditions under which work is performed."*[115]

The unions argued that the price elasticity in the employment of juniors was a false proposition and if junior rates remained low there would be an incentive for the employment of young people without training. Finally (but not completely) it was argued that to continue to deny young people access to supplementary payments would be discriminatory. Employers argued that wage increases of the order contemplated by the application would be a disincentive to youth employment and, that the *Furnishing*

Trades Case 1994 was a consent decision. It was also submitted that the matter await the outcome of this Inquiry to which the unions responded that the then current application was not concerned with removing age-based discrimination.

Lawson C granted the unions' application. In doing so, he applied both the "value" concept identified by the 1983 Bureau of Labour and Market Research report and the existing pro rata relationship between junior and adult rates:

> *"... the relativity of junior rates to adult rates has declined since the introduction of supplementary payments in 1978 and importantly since the 1989 National Wage Case decision. Since 1989 supplementary payments have formed an integral part of the award - recognised rate for skill and competencies."*[116]

2.2.53 The Full Bench in *Re Vehicle Industry - Repair, Services and Retail Award 1983*[117] later observed that Lawson C's decision had adjusted Unapprenticed Junior rates to reflect a skills based classification structure.

2.2.54 We have confined our examination of the development of junior rate classifications to a description of approaches to the arbitral fixation of junior rates. A historical review of junior rates in certified agreements would not be likely to be productive of significant additional insights. We make use of some analytical material about the kinds of junior rates classifications to be found in agreements in **Subchapters 2.3** and **2.4**.

2.2.55 The historical background to arbitral determinations that we have sketched allows several conclusions:

(i) There has been an arbitral concern with junior rates for as long as conciliation and arbitration processes have existed.

(ii) Age has been a wage reference for young people since before the advent of formal processes of conciliation and arbitration.

(iii) The earlier decisions proceed on the assumption that youth employees had no responsibilities and were generally living at home; the "needs" principle.

(iv) It was recognised quite early that there were practical difficulties in the way of basing youth wages on experience (a proxy for competence) although those difficulties might differ from those canvassed today.

(v) Rates for juniors have been set, in part, with reference to an assumption that the experience gained, on the job, is a benefit for the employee and a cost to the employer.

(vi) From the 1960s to the present the basis of the Commission's approach to the fixing of junior rates has been that of case by case. Inherent in that approach are the concepts of needs, work value and allocation of employment. The levels of youth employment have become a recurring factor. In keeping with social changes, needs, an influential concept at the beginning of the era, has come to be overshadowed by considerations of internal award relativity between entry level and training contract classifications and application of the work value concept.

(vii) Since 1985, national wage benches, in response to general issues on junior rates raised by the parties about junior rates, have generally confirmed the case by case approach. The main exception was initiated by the *Furnishing Trades Case 1994*. This initiative resulted in the adoption of the National Training Wage and the making of the National Training Wage Award.

(viii) There are instances where the Commission and parties have been conscious of the possibility of discrimination and have taken tentative steps to address the matter.

(ix) Junior rates are not consistently formulated. There are at least six possible variables, or constituent factors of a junior rate classification. These were set out embryonically in paragraph 1.8.6. We repeat them here in developed form. The case history in this Subchapter, and the classification details in **Appendix A** demonstrate a variety of ways in which the constituent factors can be of importance to an assessment of the role and rationale of the classification.

- the work description covered and /or the class of junior employees covered;
- the comparator adult classification, if any;
- the relativity of the junior rate to the comparator, or the money rate for each age specified;
- the use of age as the condition determining pay rate, and progression between pay rates:
- the value given to extra experience or skill acquired before or during employment in the job being performed; and
- the "exit" age, or condition determining entry to a higher classification.

2.3 Distribution of Junior Rates in Awards and Agreements:

2.3.1 The incidence of junior rate classifications in awards and agreements and the content and pattern of use of those that exist are important considerations in the assessments required under section 120B. There is no readily available data about them. We found that a direct physical examination of award or agreements content was necessary to isolate classifications that meet the criteria for a junior rate classification. That approach gave no indication of whether any junior was employed under classifications that were not junior rates. The information which we have gathered is drawn from material provided through the submissions to the Inquiry, from our own analysis of samples of awards and agreements, and from a mix of statistical sources. We have used it to attempt to distinguish the incidence of junior rate classifications that allow transition to "adult" classification rates of pay, to establish the pattern of use in industry of the classifications, and to identify the more important operational functions and characteristics of junior rate classifications in practice. That task has been relatively labour intensive. Neither we, nor those upon whose work we relied in various ways, could hope to bring to account all factors that may affect the operation of classifications that are often no more than a small part of award and staffing establishment systems.

2.3.2 Of the 100 "*key*" federal awards analysed in the Joint Governments' Submission, 76 contain junior rates and 11 contain provisions for the adult rate to be paid at age 18, whereas 43 specify age 21 for the adult rate[118]. For the purpose of the Inquiry, the Commission's RIA Branch examined some 196 awards including those perceived to have the largest coverage. One outcome was a written "*Conspectus*" extracting the junior rate provision and in most cases any provision specific to the position of juniors[119]. An electronic copy of the Conspectus was attached as an adjunct to the Issues Paper on the Commission's internet Home Page which can be found at http://www.airc.gov.au. It may be down-loaded by those who may be interested in the detail. One hundred and eighteen of the awards examined for the Conspectus contained a junior rate provision in the sense of an age based condition for payment under the provisions of the award. Seventy eight did not. Table B1 of **Appendix B** is an index of the awards in the "*Conspectus*". That index shows the awards by industry and by the presence or not of a junior rate, apprenticeship or trainee provision. Table B2 of **Appendix B** lists awards that do not contain any junior rate provision. Table B3 of **Appendix B** lists 12 awards that have a form of junior rate provision. Those awards are not included in the 111 awards that were first identified as having an age at which the junior was to be paid an adult rate. The awards listed in Table B3 of **Appendix B** have relatively singular forms of experience or competency based progression, linked in

seven of the awards with some age based conditions, or other features that set them apart as relatively innovative and perhaps less discriminatory than the more typical junior rate classifications.

2.3.3 Enterprise agreements have a significant impact also on the effective distribution of junior rates. Through the Commission's RIA Branch in Sydney, an examination was undertaken of a selection of certified agreements. The original was made through a search of the OSIRIS data base intended to identify agreements which contain junior rates provisions. The search parameters used were to seek agreements that make reference to juniors aged "*16 years*" and "*17 years*", but do not contain provisions for apprenticeships or traineeships. The sample was therefore not comprehensive of junior rates provisions in general. From 274 current or expired agreements identified with junior rates so defined, data was then compiled as to:

- the age at which a person earns adult wages under the agreement;
- the presence of an enabling provision allowing payment of adult wages to a junior on "*competency*" grounds; and
- for the presence of a "*proportion*" provision as to the number of junior employees who may be employed per adult employee.

A preliminary analysis shows that of the 274 agreements, 118 or 43 per cent stipulate age 21 as the exit condition. Only one instance of age 17 exit was found. Age 18 was stipulated in 28 per cent of the agreements, age 19 in 19 per cent, and age 20 in 9 per cent. Thus agreements in which exit age to adult rates was lower than 21 outnumbered, by 57 per cent to 43 per cent, the agreements stipulating exit age 21. There was also a significant presence, (15 per cent of agreements), of proportion clauses. An electronic copy of the information compiled was published as an adjunct to the Issues Paper on the Commission's internet Home Page[120].

2.3.4 Since the majority of juniors are employed in the retail sector we thought it may be informative to undertake a second study. A sample comprised of 51 certified agreements in the retail industry, based on the Commission's panel system, was examined. The sample comprised the most recent certifications from about January 1999 until the sample was complete. From those that contained a junior rate, the rate effective on 30 July 1998 was selected to coincide with the rates in **Appendix A**, as a comparison if need be. Of the 51 agreements, 23 had junior rates in them. A selection of 18 agreements are set out in Table A5 of **Appendix A**. Of the 51 agreements, 24 made no reference to juniors at all. The statutory declarations for two of the 24

agreements without junior rates indicated that there were juniors employed in the subject workplaces but there was no reference to them in the agreements. The KFC National Enterprise Agreement 1998 was relatively singular. It was the only agreement that based discounted pay rates on years since enrolled in Year 10. Clause 6 of the KFC Agreement, 6 reads:

> *"6.1.1 In this subclause, employees are deemed to be "enrolled" in a particular school year from the first full pay period to commence on or after Australia Day each year.*
>
> *6.1.2 The full-time weekly ordinary time rates of pay for employees who satisfy the level of educational competence in accordance with Table A below shall be paid the appropriate percentage of the rates in Table B ($434 per week as from 18 December 1998) from the first full pay period to commence on or after the dates shown.*

Table A

	%
Enrolled in Yr 10 or less	*40*
1 year since enrolled in Yr 10	*50*
2 years since enrolled	*60*
3 years since enrolled	*70*
4 years since enrolled	*80*
5 years since enrolled	*90*
6 or more years since enrolled	*100*

> *...*
>
> *6.4 Trainee employees other than delivery drivers shall be paid at 90% of the appropriate weekly rate."*

2.3.5 Our study examined all provisions in those agreements referring to juniors. Generally, there were 4 types of conditions that dealt with juniors, all of which impact on the income the junior would receive. Those conditions varied between agreements:

- some agreements stipulate situations where juniors will receive the adult rate because of the type of work or the level of responsibility that they are performing;
- agreements vary in the stage at which a junior becomes eligible for superannuation benefits;
- there are some instances where a junior's minimum engagement period varies from those set for adults; and,
- in some agreements, the proportion of overtime required to be worked is limited, (either by the institution or by the wishes of the junior).

2.4 Operation of Junior Rate Classifications - Junior Rate Formulae:

2.4.1 One example of a junior rates provision in an award is clause 5.5.1 of the Metal E & AI Award which has been set out at paragraph 2.1.9.

2.4.2 A more typical example, because simpler, is taken from the Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998 (Hospitality Award) clause 15.5.1:

> *"**15.5 Juniors***
>
> ***15.5.1 Junior employees (other than office juniors)***
>
> *The minimum rate of wages for junior employees are the undermentioned percentages of the rates prescribed for the appropriate adult classification for the work performed for the area in which such junior is working.*

Age	*Per cent*
17 years of age and under	*70*
18 years of age	*80*
19 years of age	*90*
20 years of age	*Full adult rate"*

2.4.3 The effect of those awards, and of a key retail award, in ordinary time weekly and hourly rates appears in Figure 2.2. It is based on details extracted from a more comprehensive set of comparisons set out in Table A1 at **Appendix A**:

Figure 2.2

Age	**Metal Engineering And Associated Industries Award 1998[121]**			**Hospitality Industry Accommodation, Hotels, Resorts and Gaming Award 1998[122]**			**SDAEA Victorian Shops Interim Award 1994[123]**		
	per week ($)	per cent	hourly rate ($)	per week ($)	per cent	hourly rate ($)	per week ($)	per cent	hourly rate ($)
Under 16	143.57	36.8	3.79	-	-		216.20	50	5.69
16	184.52	47.3	4.86	-	-		216.20	50	5.69
17	225.48	57.8	5.93	273.07	70	7.20	237.80	55	6.26
18	266.44	68.3	7.01	312.08	80	8.21	291.90	67.5	7.68
19	321.83	82.5	8.47	351.09	90	9.24	345.90	80	9.10
20	381.13	97.7	10.03	390.10	100	10.27	389.20	90	10.24
Adult	390.10	100	10.27	390.10	100	10.27	432.40		11.38

2.4.4 It is convenient to note a distinction of substance between awards which is reflected in the extracted clauses. It is illustrative of the comparator's influence. The Hospitality Award ties the percentage relativity for junior employees to the "*rates prescribed for the appropriate adult classification for the work performed for the area in which such junior is working*". The junior rate age scale is thereby applied to skill differentials reflected in the classification structure. In that award, the relevant adult classifications range in base wage from $373.40 per week for the classification Introductory Level 1 to $506.90 per week for the classification Security Officer Sheraton Brisbane Hotel. In the Metal E & AI Award, on the other hand, "*unapprenticed juniors*" are nominally a distinct classification. Their relativity is at all times a percentage of one rate in the award, the C13 level for Production Employee Level 2. Thus, the two awards differ in the way in which they require the work actually performed by a junior to be taken into account in reckoning the rate of pay. There appears to be an at times haphazard selection of such comparators to establish the work covered by an award junior rate classification. Generally, the comparator also sets, perhaps less haphazardly, the rate of pay to which the junior employee's relativity is fixed. That observation must be qualified, more heavily than some commentators would allow, to take account of arbitral determinations which have explored the reasons for selecting the comparators[124]. However, there is a sufficiently self-evident basis in the detail we have supplied to afford a foundation to pose here an issue raised in various forms in several submissions: can it be established that in particular instances, if not in general, the same work is being done, with the same results, by a junior as by an adult worker? If that proposition can be established in particular instances, or in general, why is it justifiable to not pay the different-aged employees the same rate for the job?[125] The responses to that issue when we first posed it were at best general. On one side age-related classification rates were perceived to be discriminatory. The other side replied that there would be a disemployment effect if such rates were abolished.

2.4.5 Another aspect of junior rates that emerges from a comparison of the Metals and Hospitality Awards is that both awards require adult rates to be paid in certain occupations. Thus, clause 5.5.4 in the Metal E & AI Award states:

> ***"5.5.4*** *Juniors engaged on certain operations are entitled to receive the adult award rate. The relevant operations (and phasing arrangements for this provision) are set out in paragraph 3.2.1 of Schedule C."*

The Hospitality Award, at clause 15.5.3(b), states:

> *"**15.5.3(b)** Junior employees, on reaching the age of eighteen years, may be employed in the bar or other places where liquor is sold. However, where a junior is employed the adult award rate for the work being performed must be paid;"*

2.4.6 It was once suggested that awards which provide that juniors employed should be paid not less than the appropriate adult minimum rate made such provision because the work involved was regarded as unsuitable for juniors to perform[126]. Barriers to juniors performing certain work, and similar uses of age based provisions relating to juniors, each raise issues which go beyond simple questions of cost and lack of experience. The provision in the Hospitality Award is influenced by the operation of legislation which restricts the employment of persons under 18[127]. Presumably, in relation to "*bar work*", the age qualification might be accepted to be an inherent requirement of the work. However, questions may remain about whether such provisions would be adjudged discriminatory, or are still within Commission jurisdiction to award. Provisions of that kind, prescriptions of the proportions of juniors to adults, or the effective exclusion of unapprenticed juniors from work on which apprentices might be engaged have long been almost integral to junior rate regulation in awards[128].

2.4.7 The mere presence of a junior rate in an award is not an effective indicator of the operative impact of the rate. There may be aspects within or collateral to a junior rate classification that confine its scope. We have mentioned instances of collateral qualifications to use of the Metal E & AI Award junior rate classification. Another is detailed in paragraphs 2.2.33 to 2.2.38 in relation to building and construction awards. Similarly, those who have analysed the effect of junior wage levels on unemployment appear often to have paid little attention to either the purpose or possible operation of "*proportion clauses*" in many awards and agreements. The operation of junior rates provisions in awards and the operation of restrictions on juniors performing some classes of work demand attention to the detail of the incidence of the classification and to the effect of any certified agreement that may prevail over the award.

2.4.8 A proportions clause typically sets the maximum number of juniors to be employed in an establishment as a proportion of adult employees. Clause 3.3 of the Queensland Coles/Woolworths Supermarket Meat Employees' Award 1995 provides: "*The number of unapprenticed juniors in any establishment shall not exceed one to every three (1:3), or fraction of three adult weekly packer/cabinet attendants*". It seems likely that the age discrimination prohibitions in subsections 143(1D) and 170LU(5) operate on such provisions.

2.4.9 Limitations on proportions of employees that may be employed in a particular type of employment are not an allowable award matter. Several have been removed from awards in compliance with subsection 89A(4) of the Act and item 51 Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act 1996* (WROLA Act)[129].

2.4.10 Such limitations could also be objectionable because the limitation is based on the age of employees. If that be the case, it may not be open for enterprise agreements to effectively limit in that way the employer's capacity to make employment available to juniors. Of the 274 certified agreements examined on the Inquiry's behalf by the RIA Branch, 41 were reported to contain clauses that specify the proportion of junior employees to adult employees. Employment may also be limited through provisions that stipulate the number of apprentices, and/or the number of trainees who may be employed to the number of ordinary (adult) employees. Apprenticeships and traineeships are open to adult employees as well as those under 21 years of age. While we are aware of instances of such provisions in agreements, we have not examined agreements to test for the presence of clauses stipulating such proportions. It may be appropriate for closer attention to be paid to the effect of the relatively recent removals of limitations on the proportions of juniors able to be employed. The acceptance by industrial parties of similar limitations in enterprise agreements is relevant to the operation of junior rates and perhaps to assessment of aspects of junior employment, including safety and other policy considerations. However, no issue directly bearing on our terms of reference appears to arise from the past or continuing effect of proportion clauses, or of their removal.

2.4.11 Our report is perforce limited to a consideration of the definition in subsection 120B(4). We have noted that scope exists for considerable variation, even for some flexibility, in the content and conditions of the age based progressions in the junior rate classifications currently found in awards and agreements, and in provisions that influence the pattern of use or payment of junior labour. That aspect of the operation of junior rate classifications is an important consideration. It leaves open the possibility that the potential inequity of a pay rate progression based on age alone could be moderated by the inclusion of more definitive work valuation, experience or competency grounds.[130] Illustrations of those possibilities may conceivably have been developed in some of the award provisions cited in Table B3 of **Appendix B**, in the submission of the Pharmacy Guild of NSW discussed in paragraph 6.3.19, and in some of the agreements to which we referred in paragraph 2.3.5.

2.5 Operation of Junior Rate Provisions: The Exit Age or Condition from Junior Rates:

2.5.1 Age 21 was the age of adulthood in awards, with few exceptions prior to the 1970s so far as we are aware[131]. At common law a person was an adult when he or she was of full age, and that age was 21. Until that point of time, he or she was in law an infant[132]. In 1973, the age at which an Australian citizen became both eligible and compellable to vote was reduced from 21 to 18. At around the same time the age of majority in all States and Territories was made 18 years[133]. There does not appear to have been any associated alteration at that time to the industrial concept of "*juniors*". Although, a number of awards were altered from around that time to allow for the "adult rate" to be paid to employees on attaining age 18.

2.5.2 As we have noted at paragraph 2.1.3 and in **Subchapter 2.2**, junior rate classifications now typically stipulate the percentage of a comparator rate to apply by age level. Usually age 21, or some other age, is prescribed as the "exit" condition from the classification after which expressly or implicitly an "adult" classification rate, the standard rate for the job, applies to whatever work or position the employee is engaged for. The importance of the use of age as the exit condition for the standard rate, and the variability of the percentage paid by age level, may be seen from **Figure 2.3**. It sets out the average percentage of the relevant adult rate payable by age for the 111 awards selected in the *Conspectus* referred to in paragraph 2.3.2, and grouped within the industries used for AIRC panel allocation. We caution against any use of the averages stated or the industries beyond the limited purpose for which we publish them to illustrate the pattern of age progression in junior rates. **Figure 2.3** illustrates the relatively wide variation between awards in the percentages used at different age levels of the comparator rate. It also gives some indication of industries in which awards use junior rates but specify 18 as the exit age from the junior rate.

Figure 2.3 Selected Awards with Junior Rates: Average percentage of adult rate by industry and age

Industry	Less than 16 Years	16 Years and over	17 Years and over	18 Years and over	19 Years and over	20 Years and over	Number of Awards
Agricultural industry	45.0	50.0	55.0	65.0	75.0	90.0	1
Airline operations	50.0	60.0	62.5	67.5	77.5	95.0	2
Aluminium industry	N/A	60.0	70.0	85.0	100.0	100.0	1
Brass, copper and non-ferrous metals industry	60.0	60.0	60.0	100.0	100.0	100.0	1
Building, metal and civil construction industry	N/A	42.0	55.0	75.0	88.0	100.0	1
Business equipment industry	60.0	60.0	75.0	100.0	100.0	100.0	1
Catering industry	70.0	70.0	70.0	80.0	90.0	100.0	1
Chemical industry	40.0	40.0	50.0	60.0	72.5	85.0	1
Clothing Industry	49.5	60.0	70.5	81.0	93.0	97.0	2
Defence Support	50.0	50.0	60.0	70.0	81.0	91.0	1
Educational services	50.0	50.0	60.0	70.0	80.0	90.0	1
Engine drivers and firemen	36.8	47.3	57.8	68.3	82.5	97.7	1
Entertainment and broadcasting industry	58.8	81.3	86.3	91.3	97.5	97.5	4
Finance and investment services	55.0	55.0	65.0	75.0	85.0	100.0	1
Food, beverages and tobacco industry	70.0	70.0	82.5	100.0	100.0	100.0	2
Furnishing industry	N/A	46.0	55.0	65.5	80.3	94.5	2
Glass industry	38.6	45.4	59.1	77.6	91.3	99.3	7
Graphic arts	30.0	40.0	50.0	60.0	75.0	90.0	2
Health and welfare services	50.0	50.0	60.0	70.0	80.0	90.0	1
Insurance industry	N/A	50.0	60.0	70.0	80.0	90.0	1
Liquor and accommodation industry	47.3	56.7	66.1	78.3	87.6	98.2	6
Local government administration	55.0	55.0	60.0	70.0	80.0	90.0	1
Meat industry	58.3	58.3	68.3	83.3	90.0	100.0	3
Metal industry	45.4	50.7	56.3	65.8	77.8	89.6	3
Oil and gas industry	40.0	50.0	60.0	85.0	100.0	100.0	1
Port and harbour services	45.0	50.0	55.0	65.0	75.0	85.0	1
Private Transport industry	N/A	70.0	70.0	70.0	80.0	100.0	2
Pulp and paper industry	53.0	53.0	58.8	72.5	85.0	100.0	1
Rubber, plastic and cablemaking Industry	47.5	47.5	57.5	67.5	82.5	100.0	1
Storage services	38.5	46.0	53.5	67.0	87.8	93.8	2
Textile Industry	N/A	50.0	59.0	69.0	80.0	100.0	1
Travel industry	64.0	64.0	64.0	74.0	87.0	100.0	1
Vehicle industry	59.7	62.0	72.3	87.7	92.8	96.5	12
Wholesale and retail trade	48.6	50.4	59.4	71.4	81.6	91.6	40
Wool industry	50.0	50.0	60.0	70.0	80.0	90.0	1
All industries	50.0	54.2	63.0	75.5	85.5	94.5	111

2.5.3 A breakdown by age at which adult rates start to be paid in the 111 awards with junior rates examined in the Commission's *Conspectus*, appears at **Figure 2.4**:

Figure 2.4 Cumulative percentage of 111 awards with Junior Rates showing Age by which adult wages are first paid*

16 Years	17 Years	18 Years	19 Years	20 Years	21 Years
1.8% (2)	1.8% (2)	18.0% (20)	22.5% (25)	42.3 (47)	100% (111)

* The figure in brackets denotes the number of awards upon which the accumulation is based.

2.6 Operation of Junior Rate Classifications: The Interface with Traineeship and Apprenticeship:

2.6.1 Award provisions for trainee rates of pay and apprenticeship rates of pay are two other forms of classification. The standard provisions of the classification known as the National Training Wage (NTW) use conditions based on experience since leaving school and make no use of age. One or two of the submissions made to the Inquiry suggested that the trainee classifications, or elements of the NTW classification progression were a possible source of a formula for a non-discriminatory alternative to junior rates[134]. The criteria that determine pay progression in the NTW, experience plus level of schooling, have been taken to be criteria equivalent to competency based progression[135]. The Australian Retailers Association (ARA) and the ACCI questioned whether the NTW formula is, in point of law, a form of indirect discrimination because of age[136].

2.6.2 Table A3 of **Appendix A** sets out some details of the NTW classification and notes the junior rate and apprenticeship counterparts in some awards. Aspects of the operation of the NTW in the building and construction industry in particular were raised in a number of submissions to the Inquiry. In particular the Master Builders' Association of Western Australia (MBAWA) contrasted the commencing rate of pay under the NTW with the rate payable to apprentices, claiming that the NTW rate constitutes a disincentive for young employees to undertake an apprenticeship[137]. That comment directed attention to the NBCI Award which evinced an apparently greater disparity than is normal between the unapprenticed junior rate and the NTW contract employment rate. The base rate for Trainee under the NBCI Award is comparable to the NTW. However, it is inconsistent because it provides for a single all purpose "*base rate*" for skill levels A and B respectively. The *base rate* is the maximum, (Year 10 plus 5 years) NTW classification point rate for the respective skill level, augmented by the industry and special allowances payable under the NBCI Award. There is no

variation to that rate for the number of years schooling completed, or years out of school. The Award initially introduced the provision for trainees in 1995. Clause 9D(b) stated that: *'The terms of the National Training Wage Interim Award 1994, as varied, shall apply to employment under this award so as to prevail over inconsistent clauses in this award"*.[138] As a consequence, the trainee rate in the NBCI Award appeared to be inconsistent with, and therefore subordinated to the number of the years schooling achieved, despite the fact that clause 9D only specified the base rate. A consent order issued by Jones C at the end of 1998[139], amended subclause (b) to read: *"The terms of the National Training Wage Award 1994, as varied, shall apply to employment under this award except where inconsistent with this clause"*. The effect was that the base rate applies to all trainees. The consent order making the provision in its current form was said to reflect "*what has always been industry practice"*. We note that the rates struck more or less correspond to the adult minimum wage. In that respect, industry practice to pay juniors at the adult rate for work not covered by a trade apprenticeship seems to be well established by the case law history to which we have referred at paragraphs 2.2.33 to 2.2.38 above.

2.6.3 The MBAWA contended further that experience in Western Australia disclosed no uptake of trainees in the industrial-commercial sector. The wage rates of the scheme were said by employers to be far too high to pay juniors with little or no experience. The MBAWA announced that it had developed its own 12 month *Construction Worker Traineeship*. The trainee wage level was set at 65 per cent of the classification of Builders Labourer Group Three under the State Building Trades (Construction) Award 1987, being the equivalent to the NBCI Award 1990 in Western Australia, (which translates to a trainee rate of approximately $299 per week if fully comparable to the NBCI Award rate). No material, evaluating the results of that system, has been received by the Inquiry. However, in response to that criticism of the NTW rate in the NBCI Award, the CFMEU contended that the higher rate for trainees relative to apprentices took account of the substantial difference in the commitment from employers as to the length of employment offered. Statistics of a kind are now available about the incidence of traineeship in the construction industry in Western Australia. We are not in a position to resolve some of the issues raised. As we shall discuss in **Chapter 6**, our overall view is that the take-up of traineeships in the building and construction industry, and the apparent decline in apprenticeships are relevant background to a consideration of the optimal form of using or replacing junior rate classifications in that industry.

2.6.4 In its submission, the State of Queensland gave emphatic support to a reiteration of principles, known as the MOLAC Principles, which underlie the scheme for traineeships[140]. The submission commended those principles as a product of Federal and State consultation with tripartite involvement. The principles had been foundational to the Commission's adoption of the NTW[141]. The relationship between junior rates, apprenticeships and traineeships in particular industries or generally were also touched upon in a number of other submissions[142]. Thus, the National Children's and Youth Law Centre (NCYLC)[143] echoed a point made by the Restaurant and Catering Industry Association of NSW (R&CIA)[144]. It suggested that any alternative to junior rates must be industry sensitive because "*some industries by their nature do not allow for developing scope, and a skills based structure could restrict wages to low levels"*. The R&CIA placed greater emphasis on the unsuitability of variants on the NTW model for entry level work in "*a non-structured training environment*".

2.6.5 As we have noted, there are some points of general agreement about a need for either traineeship or special entry level payment for lower grades of work competency. There are sharp differences between submissions about what competencies should be assessed, and about whether and how they can be assessed for particular work or industry demands. Thus, there appears not to be much disagreement about the utility of junior rates for junior employees who need time to develop work skills. The advocacy of the NTW model as the basis for a non-discriminatory alternative to junior rates is a recognition of that need. That advocacy and other aspects of the use of the NTW discounted rates of pay prompted the Inquiry to seek comment on an issue about the effect of the NTW formula.

2.6.6 The issue upon which we sought comment was directed to an aspect of the operation of traineeships or "*new apprenticeships*" in interaction with junior rates. Concern about an observed effect of the NTW arrangements was raised in a submission made by the State of New South Wales but was more fully expressed in one general study of the situation of young Australians:

> *"... In 1996, 28,157 of those who commenced a traineeship were aged 20 or older, and teenagers constituted only 41 percent of all trainees. Data for financial year 1996-97 show that 45 percent of trainees are aged 21 years and over with 26 percent aged 25 years and over (Allen Consulting Group 1997:8).*
>
> *...*
>
> *In summary, the outcome for the vocational education and training sector are: no growth in overall participation; declining apprenticeship numbers: traineeships being increasingly captured by adults; and a decline in the provision of extended and broadbased courses. This record cannot be said to be positive for youth, and stands in*

marked contrast both to the rhetoric of government policy during the 1990s and to public expenditure priorities[145] *."*

The trend disclosed, together with the decline in all forms of full-time employment for juniors, fuelled concern that traineeships of the kind available under the NTW model are increasingly less available to those who would be displaced by abolition of the junior rates regime, or by the substitution of training wage provisions. Moreover, if age neutral conditions of the kind used for the NTW classification are susceptible to capture by adults, a similar capture might be the result of using such criteria for the purpose of devising non-discriminatory alternatives to junior rate classifications.

2.6.7 In the Issues Paper, we queried whether some existing junior rates and training classifications place the same value on a year of experience in the job, a year at school or an extra year of age. *Thus, for example, a classification based on school departure level, plus work experience, with progression thereafter by annual increments of experience in the job to a level equivalent to the entry level of an employee with one additional year at school, does that.* So does a classification based solely on entry age and age progression. We asked can there properly be said to be significant differences in either the equity or the utility of those two classification models?

2.6.8 Responses to that query varied but did not directly challenge the force of the observation. Thus ACCI[146] stated that the NTW system and similar derivatives are simply age achieved by other means. The Joint Governments' response[147] was that the NTW progression framework uses age by another name but was of inferior utility because more complex. The New South Wales Government[148] did not see any major difference in either the equity or the utility of the two classification models identified for comparison. Among the comments received was one to the effect that the NTW progression schedule starts with Year 10 completion, progresses the employee on the basis of all time passed after Year 10 whether that time is spent in school, unemployed, or in a jail. On the other hand, the SDAEA[149] repeated a justification widely accepted when the NTW material was agreed: a framework based explicitly on schooling and related criteria provides a direct association with skill formation and competencies central to lifelong job prospects, whereas a framework based upon age can only proxy for these attributes. We consider that the ACTU implicitly addressed one of our concerns. The scheme proposed by the ACTU as a non-discriminatory alternative, outlined in paragraph 3.5.3.2, is "capped" at age 18. That cap, provided by suggesting adult rates at 18, precludes competition for remaining discounted junior rate employment from persons over age 18.

2.6.9 The aspects of the NTW discussed are relevant to the interface between training contract and junior rate classifications and the operational function of each of them. That interface has been a concern of the arbitral authorities for many years: Higgins J's "preference" for the use of apprentices over unapprenticed juniors[150]; Beeby J's contrary ruling discussed in paragraph 2.2.12; and the decision of Lawson C when determining the "exit rate" payment for an employee on completion of a NTW training contract[151]. We discuss aspects of the relationship and interface between training contract and junior rate classifications in **Subchapters 4.4, 6.3** and **6.4.**

2.7 Operation of Junior Rate Classifications: Absence of a Junior Rate and the Interface with Experience, Competency-based, or Other Classification Forms:

2.7.1 Finally in this context, we note that there are awards which do not provide for junior rates. Table B2 of **Appendix B** is a crude list of the seventy awards identified by the Commission's RIA Branch as awards that contain no junior rate provision. The submissions generally, and the extent and nature of the awards in that list alone, provide a foundation for making some further examination of the possible reasons for the scattered incidence of junior rates in awards.

2.7.2 As we shall see in **Chapter 5**, the existence of junior rates in awards and the use of them are now much less significant in industries that do not require low skill entry level employees. None the less, some of the gaps in the coverage of existing junior rate provisions may have an impact upon the pattern of junior employment. That pattern is also affected by uneven usage of apprenticeships or traineeships as alternatives for entry level junior employees, or for any employees including adults, who need or are suited to the structured training requirements of those classifications.

2.7.3 The function of minimum award wages is to be a safety net of fair minimum wages. It is not to ensure that all individual employees are paid wages that precisely reflect their individual value to their employer. However, minimum award wages in Australia are structured as work valued classifications of a hierarchy of work skill and status differentials. The personal classification of juniors according to a simple age progression may deny a junior equal remuneration to that of an adult performing work of equal value. Some of the more extreme instances of such denial, some of them systemic to the classification structure, may justify a higher level minimum wage safety net being applied to eligible juniors. However, there is no uniform pattern of such denials. About 30 per cent of employees aged under 21 at May 1996 were paid at adult rates[152].

2.7.4 We do not assume, and we suggest, it should not be assumed, that the content, as distinct from the concept of junior rates, as now found in federal awards, will be static. It may be important to not lose sight of any potential for reforming or adding to the performance characteristics of junior rates as they now exist. We have noted at paragraph 2.2.55(ix) the main variables used in the formulation of junior rates provisions and need not repeat them.

2.7.5 In that context, it may be helpful to illustrate but one aspect of the claimed potential for adjustment. We note a contention made by the New South Wales Pharmacy Guild in its submission. It expounded the beneficial effect in the pharmacy services industry of the Pharmacy (State) Award 1992. Under Clause 15(2) of that award a classification for three grades of Pharmacy Assistant adds a length of service variable to age for purposes of movement beyond a commencement classification rate. Variants on that approach may be found in the extracted provisions of some of the awards listed in Table B3 of **Appendix B.**

Endnotes

[1] Thus, Higgins J in *Whybrow* for the Boot Trades Award 1990 made one of the first attempts to establish an age based scale of rates for both apprentices and "lads" in the course of which he discussed the relationship between maintaining a minimum wage and the scope for discounted wages for apprentices, unapprenticed "wages" and "improvers": *Australian Boot Trade Employees Federation v Whybrow* (1910) 4 CAR 1 at 15-21, 35, 41 and 45.

[2] In particular the Housing Industry Association Submission 19 at p. 3; Master Builders' Association Australia Submission 30 at p. 2; Master Builders' Association of Western Australia Submission 22 at p. 2.

[3] Some of the possibilities are illustrated in White and Others: *Any Which Way You Can* op.cit. at p.35 in relation to the informal waged economy.

[4] Submission 38 Attachment B, main submission at p. 8.

[5] Joint Governments' Submission 38 at p. 49 citing *Lewis*; and also at 96.

[6] Joint Governments' Submission ibid at p. 49.

[7] We have found no case mentioning the concept. No case was cited in submissions made to us. The Joint Governments' Submission 38 at p. 6 cited Pitman's 1983 study for the BLMR to the effect that a linkage between lower work value outcomes for juniors than adults, "*though never explicitly stated*" implies lower skill and knowledge because of lower maturity and experience.

[8] Labor Council of New South Wales' Submission 36 at p. 2 and Appendix A.

[9] Ibid at pp. 2-5 citing Pitman.

[10] Ibid Appendix A.

[11] Print L5188, clause 8: Training Conditions.
[12] *Commonwealth v HREOC* (1998) 158 ALR 468 at 482.
[13] Cheshire & Fifoot, *Law of Contract,* 6th Australian Edition 1992 at p. 551 citing: *De Francescov v Barnum* (1890) 45 Ch D 430; [1886-90] All ER Rep 414; *Clements v London and North Western Railway Co* [1894] 2 QB 482; [1891-4] All ER Rep 1461; *Hamilton v Lethbridge* (1912) 14 CLR 236.
[14] *Bromley v Smith* (1909) 2 KB 235 at 242.
[15] Webb DP in *Re Commercial Printing Award* (1925) 22 CAR 247 at 252 citing Higgins J in "*A New Province for Law and Order*" at p. 6.
[16] (1925) 22 CAR 247 at 279, 282.
[17] (1934) 33 CAR 581 at 582-3.
[18] Pitman, D., Bureau of Labour Market Research Conference Paper 26, *The Determination of Junior Wages in Australia: Needs, Work Value and Employment* August 1983.
[19] Ibid at p. 12.
[20] Ibid at p. 13.
[21] (1910) 4 CAR 1 at 1.
[22] Ibid 4 CAR at 22-23.
[23] Ibid 4 CAR at 36.
[24] Ibid 4 CAR at 43
[25] (1907) 1 CAR 122 at 130.
[26] *Charles David v Alsop* (1970) AILR 312 per Spicer CJ, Joske and Kerr JJ; *Stevens v Bolzon* (1969) AILR 15; *Harold v Chapple* 50 QIG 263.
[27] *Re Cement Manufacturing and Stone Quarrying Award South Australia* (1977) AILR 181; compare *Re Federal Meat Industry Interim Award 1965* Print E3220, 20 June 1980 per Gough C.
[28] Thus, the *Unapprenticed Junior* classifications often are framed to apply to work not covered by apprenticeships of the kind provided by the Award. Or classification to which the junior rates attaches is delineated narrowly; or broadly as in *Re Fast Food Industry Award - South Eastern Division* (1984) AILR 60, Full Bench of Queensland Industrial Commission: decision to apply adult wages to employees 20 years of age or older, but discounted rates to encourage employment of younger people in the industry but with only one classification in the award because:

"... the fast food industries requires a high degree of flexibility in the work skills of its employees and that it trains employees repeatedly to this effect. There may be at some establishments a tendency for particular employees to remain upon particular duties. In these cases the Commission did not observe any circumstances to justify a higher rate of pay for any particular function. The Commission therefore decides that there will be only one classification in the award and rejects the application by the Union for definitions and wage rates for Cook, Cashier/Counter Attendant and Kitchenhand."

[29] (1907) 1 CAR 62 at 94.
[30] Ibid at 94.
[31] *AWU v Pastoralists Federal Council* (1911) 5 CAR 48 at 96.
[32] (1906) 2 CAR 1.
[33] *Australian Boot Trade Employers Federation v Whybrow & Co and Others* (1910) 4 CAR 1 at 15-23.
[34] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd and Others* (1921) 15 CAR 297 at 325.
[35] *Amalgamated Engineering Union and Others v Metal Trades Employers Association* (1930) 28 CAR 923.
[36] Ibid at 976, 1045: clause 15.
[37] Ibid at 975-976, 1020-1021.
[38] *Re Metal Trades Award 1935* (1935) 34 CAR 449 at 459, 469-471: clause 4.
[39] Ibid at 461.

[40] Youth Wage Rates - Furnishing Trades Award: Historical Overview. Paper supplied to *Junior Rates Case* Full Bench citing C No. 115 of 1947.
[41] (1937) 38 CAR 326 at 342-343.
[42] (1937) 38 CAR 540 at 541.
[43] *Metal Trades Award 1941* (1941) 45 CAR 751 at 762; and see also *Re Metal Trades Award 1950* (1950-51) 70 CAR 474 at 479 applying adjusted percentages to "contemporaneous" basic wages.
[44] *National Wage and Equal Pay Cases* (1972-3) 147 CAR 173 at 179.
[45] (1967) 118 CAR 663 at 694 implementing Total Wage, and from January 1968 implementing the Work Value Inquiry; (1967) 121 CAR 587 (decision and award at 645).
[46] *Re Appeal against Award: Metal Trades* (1969) 127 CAR 664 at 685-689 and 702-704 per Winter C, at 708 per Moore, Williams JJ and Taylor SC.
[47] Ibid at 703.
[48] Australian Council of Trade Unions, *Consolidation of ACTU Policy Decisions 1951 - 1982* Wages 1981 Decision at p. 96; see also BLMR 1983 at Table 3.5 at p. 44.
[49] BLMR 1983 *"Youth Wages, Employment and the Labour Force"* at 39, 45.
[50] See paragraph 2.5.1 and Figure 2.4 within.
[51] (1971) 141 CAR 389 at 415.
[52] Short, C., *The Relationship Between Youth and Adult Wages 1930-1985"* Journal of Industrial Relations December 1988, 491 at 503.
[53] (1973) AILR 633.
[54] (1969) AILR 388.
[55] BLMR 1983 ibid at 44.
[56] BLMR 1983 ibid at 16.
[57] Confederation of Australian Industry, *"Youth Unemployment*", August 1978 Waratah Press at 10-11.
[58] "*Economic Outlook: Do Relative Wage Levels Affect Youth Employment"* September 1984 at p. 69.
[59] BLMR ibid at 36.
[60] BLMR 1983 ibid at 44-45.
[61] Print J0470.
[62] Print P1371, 29 May 1997 per Lawson C at pp. 7-8.
[63] Print P1445, 2 June 1997 per Lawson C.
[64] Print P1408 decision, P1445 order at pp. 6-7.
[65] See in particular Print N4645 *Re Exit Rates from National Training Wage*.
[66] Macken, J., *Report to the Minister of Industrial Relations* No. 1074 of 1982, at 3 and foll.
[67] Ibid at 84.
[68] New South Wales Industrial Gazette 31 July 1920 Vol 18 at 190-191.
[69] New South Wales Industrial Gazette 31 August 1930 Vol 38 at 332.
[70] New South Wales Industrial Gazette 9 September 1960 Vol 138 at 1330.
[71] *Re Chemists State Award* Beattie J (1956) 55 AR 474 at 482.3.
[72] Source: Paterson, M., *History of Junior Rates – Retail Industry*: Memorandum of 16 February 1995 from Retail Traders Association of New South Wales to ACCI.
[73] Industrial Relations Commission of Victoria: *Re General Shops Award*, Decision D91/0320, 2 August 1991, unreported at 12.
[74] Ibid IRCoV Decision 91/0320 at 10.
[75] *Re Shop Employees State Award* (1985) 27 AILR paragraph 314 at p. 277.
[76] CFMEU Response 15 at p. 1.
[77] Clause 46 of the award.
[78] Clause 44 of the award.
[79] Print G5711.
[80] *Australian Builders' Labourers Federation v Archer (No. 1)* (1913) 7 CAR 210; *Australian Builders' Labourers Federation v Archer (No. 2)* (1921) 15 CAR 108.
[81] Ibid *Australian Builders' Labourers Federation v Archer (No. 1)* 7 CAR at 217.

[82] *Amalgamated Engineering Union v Commonwealth Railways Commission* (1937) 17 CPSAR 25 at 163.
[83] Ibid at 82, 163.
[84] Pitman, D op.cit. at p.10.
[85] 1969 AILR 15.
[86] (1985) 297 CAR 7 at 17.
[87] Ibid at 17.
[88] Paragraph 2.2.30.
[89] Ibid at 17.
[90] Ibid at 20.
[91] Print G3600, at p.52.
[92] Print J7400 at 57.
[93] Print L4700, p.32.
[94] Print L5963, 19 October 1994 per O'Connor P, Watson DP and Merriman.
[95] Print M7824, 20 December 1995 per O'Connor P, Watson DP and Merriman C at pp. 4-6.
[96] (1991) 173 CLR 349.
[97] For details of references and stages see endnote 1 to Chapter 1 of this report.
[98] See endnote 1 to Chapter 1; Chapter 3 paragraph 3.1.10; and Appendix C paragraphs 25 – 45.
[99] Print P1997.
[100] Ibid at p.76.
[101] Print Q1998.
[102] Print R1999 at p. 58.
[103] *On Airport Retail Employees Award 1981* Print F9013 (1985) 297 CAR 668 per Cox C.
[104] On Airport Retail Concessions Award, 1985 and others Print G6038 (1986) 303 CAR 741 per Cox C.
[105] Re Movie World MEAA Interim Entertainment Award Print L6617 per McDonald C.
[106] (1980) 240 CAR 216.
[107] Ibid at 216.
[108] Ibid at 220-221.
[109] (1985) 297 CAR 668.
[110] (1986) 303 CAR 741.
[111] Print L1571.
[112] Print L6617.
[113] Ibid at 9.
[114] Print P1371.
[115] Print L5963.
[116] Print P1371 at p. 8.
[117] Print Q6779 at p. 7.
[118] Attachment A: Joint Governments' Submission at p. 3.
[119] *Conspectus of Extracts of Selected Awards Containing Junior Rates*: Australian Industrial Relations Commission's Research, Information and Advice Branch December 1998 at http://www.airc.gov.au.
[120] *Examination of 274 Certified Agreements with Junior Rates Provisions using Ages 16 and 17, and without Apprenticeship or Traineeship Provisions*: Australian Industrial Relations Commission's Research, Information and Advice Branch December 1998 at http://www.airc.gov.au.
[121] Clause 5.5.1: "*Unapprenticed Juniors*" are related to classification C13: Engineering/Production employee who has completed up to three months structured training. (Schedule D: Part 1: 1.2). Note that the C13 classification is one level above the C14 classification used as the Federal Minimum Wage equivalent at per $373.40 per week. Prints Q6779; P1371 and Q1998. Principle 9.3 the Federal Minimum Wage Principle requires the percentage for the junior wage rates clause to be applied to that amount to calculate a minimum wage rate.

[122] Clause 15.5.1: "*Junior employees (other than office juniors)*". The comparator is to whatever is the "appropriate adult" classification for the work. In the example the Level 1 Food and Beverage Attendant Grade 1 is used as the comparator. Their duties include picking up glasses, emptying ashtrays, general assistance with food and beverages; cleaning and tidying areas. (Clause 3.1.1).

[123] "*Juniors*", who are related to the comparator Retail Worker Grade 1; which means a shop assistant, a sales person, an assembler, a demonstrator, a ticket writer, a window dresser, a merchandiser and all others. (Clause 4).

[124] Thus in the Metal Trades Award the relevant comparator had been at various times classification 292: "*employee, n.e.i.*"; classification 290: "*Production Worker*"; and most recently, in the current award, classification C13: the Engineering Production Worker after three months experience; *Re Metal Trades Award 1969* Print B4611; (1971-72) 127 CAR 664 - Moore, Williams JJ and Taylor C on appeal from Winter C; *Re Metal Industry Award: Junior Rates* Print P1371 per Lawson C.

[125] NSW Anti-Discrimination Board Submission 34 at page 4 (adapted freely).

[126] Industrial Information Digest 1967 at p. 1021 ff.

[127] In the *Liquor Act 1982 (NSW)* a minor is described as a person who has not attained the age of 18. Section 114(1) states that a person shall not, in any place whether or not licensed premises, sell or supply liquor to a person under the age of 18 years. Section 116 states that except where the Board has given its consent (proof whereof lies on the defendant) a licensee shall not allow a person under the age of 18 years to sell, supply or serve liquor on his or her licensed premises.

[128] For example Dethridge CJ in the *Commercial Printing Award Case* (1934) 33 CAR 581 at 583 noted *"high rates for juniors are frequently claimed by unions to promote the employment of adults"*. But added that the same objective could best be achieved by the award prescription of the proportion of juniors to be employed. In the simplified Metal Engineering and Associated Industries Award in March 1998, Marsh SDP allowed clause 4.2.6(a) excluding the employment of unapprenticed juniors in a trade or occupation declared or recognised by an Apprenticeship Authority [Print P9311 at pp. 22-25].

[129] *Re Metals, Engineering and Associated Industries Award* Print P9311 at pp. 25-26.

[130] NSW Pharmacy Guild Submission 10; see also award provisions listed in Table B3 of Appendix B.

[131] *Federated Ironworkers v Minister for Navy* (1945) 25 CPSAR 351 at 374-375: Public Service Arbitrator Boniwell refused a claim to pay adult rates to 18 year olds based on the liability of 18 year olds to compulsory war service, but noted the practice of according married 18 year olds the adult rate.

[132] *King v Jones* (1972) 128 CLR 221 at 239, 245, 268.

[133] The age of majority in all States and Territories is 18 years: (ACT) *Age of Majority Act 1974* section 5, (NT) *Age of Majority Act 1974* section 4, (NSW) *Minors (Property and Contracts) Act 1970* section 9, (QLD) *Age of Majority Act 1974* section 5, (SA) *Age of Majority (Reduction) Act 1971* section 3, (TAS) *Age of Majority Act 1973* section 3, (VIC) *Age of Majority Act 1977* section 3, (WA) *Age of Majority Act 1972* section 5.

[134] Thus the State of Queensland: Submission 33 made a submission to that effect but qualified it with a need for any rate used to be appropriately related to the standard rate, at p. 10; ACTU Submission 31 at p. 4.

[135] In the AVTS Guidelines Document referred to at page 6 of *Re Furnishing Trades Award* decision on the NTW formula, Print M7824, the progression criteria are agreed to be a proxy for the achievement of the competencies identified in subclause 8(e).

[136] ACCI Submission 49 at pp. 37 and 86-93; ARA Submission 23 at pp. 23 and 79.

[137] MBAWA Submission 22 at p. 4.

[138] See the order of Gay C in 1995 Print M5238.

[139] Print Q4031.

[140] Queensland Government Submission 33 at pp. 10 and 16.

[141] *Re Furnishing Trades Award* Print M7824, 20 December 1995 per O'Connor P, Watson DP and Merriman C at p. 6; see also *National Training Wage Award* Prints L5188 and L5189, award code N02277CR.
[142] MBA Australia Submission 30; MBAWA Submission 22.
[143] NCYLC Submission 16 at p. 2.
[144] R&CIA Submission 15 at p. 3; J. Murray Submission 24.
[145] Sweet, R., *Youth: the rhetoric and the reality of the 1990s,* in Dusseldorp Skills Forum: *Australia's Youth: reality and risk* - A National perspective on developments that have affected 15-19 year olds during the 1990s March 1998 at pp. 12-13 also see: Anderson, A., *ew Apprenticeships: A panacea in Youth Unemployment*: in *Against the Odds* 1998 at 238, 244.
[146] Response 17 at p.15.
[147] Response 2 at p.18.
[148] Response 18 at p.18.
[149] Response 12 at p.8.
[150] See paragraph 2.2.11.
[151] See paragraph 2.2.27.
[152] See Figure 5.5 within at paragraph 5.2.10.

3. ARE THERE *NON-DISCRIMINATORY ALTERNATIVES* TO JUNIOR RATES?

3.1 What is "discriminatory" in the statutory and employment context?

3.1.1 The "*feasibility of replacing junior rates with non-discriminatory alternatives*" is the paramount term of reference for the Inquiry's report. The expression "*non-discriminatory alternatives*" is not defined in the Act. The initial submissions to us did not raise significant issues about definition of the term. It appeared to be common ground that a rate of pay able to be applied to work performed by juniors without regard to the age of the employee performing the work would be a *non-discriminatory alternative*. However great differences of view soon emerged about whether particular options were, or were not, *non-discriminatory alternatives*. Even greater differences existed about the desirability and practicability of using any of the identified or proposed options to replace junior rates. For that and other reasons it became necessary to establish with some precision the meaning of the expression "*non-discriminatory alternatives*", and other related expressions in the statutory context.

3.1.2 The concept of "discrimination" is pivotal to the construction of the expression "*non-discriminatory alternatives*". We have noted briefly in **Subchapter 1.6** the antecedents of legislation against age discrimination in international treaties. We note there and explain in **Appendix C** that age is a recognised hybrid attribute. In the usage of international labour standard treaties, age may be either a prohibited basis of distinction, or a basis for positive discrimination and protective or special measures. The Act and its predecessor are both bare of some specifics that are the usual concomitants in Australian legislation of a prohibition on indirect discrimination. The Act contains no specific parameters for indirect discrimination, and no direct formula for testing the reasonableness of indirect discrimination. Only in respect of termination of employment is there a specific prohibition against reasons of age being used or included in reasons used for the relevant decision. That one class of decision by an employer in which age discrimination is specifically prohibited or unlawful contrasts with the residual foundation of the Act's anti-discrimination regime. That regime rests upon an allocation to the Commission, (in paragraph 143(1C)(f) of the

Act, and related provisions), of a duty to not make through decisions or determinations provisions that discriminate, or, (in the award simplification process), to remove those that have been made. Decisions and determinations about award provisions, the certification of agreements, and the review of awards are each subject to that duty. However, the duty is expressed with great generality. That causes the subject area, the decisions about "provisions", from which age discrimination is to be purged, to be relatively vague. These gaps, and unusual features of the provisions of the Act, apply to several of the attributes that are not to be a reason for discrimination in employment. However they affect particularly the concept of age discrimination. Age is an attribute ubiquitous to the population but not binary, unlike sexual preference, physical or mental disability and perhaps political opinion. In contrast, a relatively full regime of principles is imported by sections 93 and 93A in relation to discrimination for reasons of sex, race, disability, or family responsibilities; and by subsection 113(2A) in relation to discrimination under the *Sex Discrimination Act 1975*.

3.1.3 Read together, the provisions of the Act approximate a scheme whereby provision for junior rates in awards is deemed prima facie discriminatory on grounds of age, and should not be made, or where made should be removed. A provision is not discriminatory if the Commission decides in respect of particular employment that the discriminatory requirement of the provision ought be allowed on the basis of the inherent requirements of "that employment". It seems that, subsection 113(2A) apart, the relevant anti-discrimination obligation in paragraph 143(1C)(f) is cast in prospective terms. It creates a duty on the Commission to ensure that a decision or determination does not contain provisions that discriminate against an employee because of one or other of the attributes listed, construed distributively. The duty under subitem 51(7) of the *Workplace Relations and Other Legislation Amendment Act 1996* (the WROLA Act) is to review and vary awards to meet the same anti-discrimination criteria. Both those formulations leave to the Commission the task of deciding the fate of junior rate clauses after 22 June 2000. In that task, if the Act remains in its present form, it would be open to the Commission to decide to sustain the exemption of junior rates on a case-by-case basis in conformity with principles to be declared by a Full Bench. It would also be open to the Commission to hold, in respect of particular employment, that determination of an age based rate of pay on the basis of the inherent requirements of the employment does not discriminate against an employee within the meaning of paragraph 143(1C)(f).

3.1.4 Because of the nature of that process, the scheme of the Act is analogous to a rebuttable presumption that after the exemption affecting junior rates in subsections

143(1E), 170LU(7) and subitem 54(2) of the WROLA Act expires, junior rates are discriminatory and must not be approved or ought be removed as part of the review process instituted by subitem 51(7) of WROLA Act. That presumption, or bias of the process, is not visibly tied, although it might be linked tacitly, to the policy objectives of equal opportunity and equality of treatment in employment that are a hallmark of international and domestic precedents for anti-discrimination measures. In that process, a legally valid definition of what is indirect discrimination, and the qualifications to be made to what is direct or indirect discrimination would be of determinative importance.

3.1.5 After a close examination of the Act's provisions we reached several tentative conclusions about the meanings that might be given to particular expressions in the Act, including the term "*non-discriminatory alternatives*". We asked members of the Consultation Group to comment on our provisional view about the legislative scheme of the anti-discrimination provisions. For that purpose we supplied a detailed historical, statutory, and case law analysis. On the basis of that analysis, we suggested that, on our construction of the Act's provisions, considerable doubt existed as to how best to resolve several quite fundamental issues about the prohibition on age discrimination. We have summarised a number of those issues at paragraph 1.8.6(2) above. In particular, we queried whether indirect discrimination for reasons of age was prohibited; and, if so how should it be defined; with what qualification for "reasonableness", or the inherent requirements of employment. The possible applicability of exceptions permitting direct age discrimination was linked to those questions. The analysis on which those and other points are based is developed in **Appendix C,** a draft version of which was made available to the Consultation Group. As will be seen, that analysis is also the basis upon which we explain the meaning of several terms that appear in section 120B. Those meanings are derived by reference to the process required by other provisions of the Act to be applied to the review or adjustment of junior rates.

3.1.6 The written responses lodged by members of the Consultation Group made a soft impeachment of our analysis and provisional conclusions. It was suggested that we had paid too close and too intellectually challenging a regard to the wording of the Act, and too little attention to the Parliamentary Debates and speeches which should be taken to denote the Parliamentary intention. A less stringent analysis and a more informal construction of the meaning of some terms used in the Act appeared to have general support. We have read many Parliamentary Debates and are conditioned to construe or to apply judicial constructions of the legislative outcomes. It is not uncommon for there to be a manifest difference between an express provision of an Act

or Bill and a particular Member's or Senator's apparent understanding of the provision's effect. However in the Senate debate relating to section 120B, several common themes and understandings about the effect of past or proposed legislation are manifest. Those congruencies are sufficiently pronounced, and sufficiently in line with industrial usage for us to accept that we should be guided by those understandings rather than by the letter of the Act. None the less, the ambiguities in the Act await formal construction. It is likely that those ambiguities, and the ambivalences and contradictions inherent in the arguments advanced to us, will eventually have to be addressed in Parliament, in the Commission, or in the Court.

3.1.7 That likelihood reinforces the desirability of the anti-discrimination provisions of the Act being revisited and perhaps revised to take account of the difficulties created by their form and piecemeal nature. Principles derived from specific anti-discrimination provisions and generally worded duties are mingled in the structure of the Act. The antecedent history of age discrimination provisions in federal legislation, and the relatively undeveloped articulation of the elements of the test for discrimination for reasons of age in the Act are therefore relevant to matters that reach beyond the meaning of terms in section 120B. Those considerations are barriers to any confident understanding of how the anti-discrimination regime of the Act in relation to age discrimination should be rationalised, or applied to particular cases. For that reason, and because the notion of discrimination and the qualifications to it is central to the assessments required by section 120B, we have retained an updated **Appendix C.** It contains our examination of questions that arise about the construction of the existing provisions of the Act. Some of that examination may be collateral to the conclusions we now express about the meaning we give to particular expressions used in, or relevant to, section 120B. In this Section, we now confine discussion to those aspects and conclusions that bear most directly upon the function of this report.

3.1.8 For the reasons we have given, it is expedient to adopt, for the purposes of the main tasks to be performed by this Inquiry, a simplified and more or less commonly accepted notion of "discrimination". With such qualifications as are necessary, we will apply in the various contexts and assessments necessary for this report, a definition of discrimination for reasons of age in much the same terms as were used in the *October 1995 Third Safety Net Adjustment and Section 150A Review*[1]. That definition was devised by the industrial parties and would have been current at the time the Senate approved section 120B. For purposes of the similarly worded anti-discrimination duty in section 150A of the then Act, the Commission accepted that "discrimination" covers direct and indirect discrimination. Those terms were defined by the Commission to

allow an exclusion from the prohibition of direct discrimination for age requirements "*based on the inherent requirements of employment*"; and from indirect discrimination of otherwise discriminatory requirements or conditions that are not "*unreasonable under the circumstances*"[2]. We consider it is appropriate to add an indication of the kind of requirements may be unreasonable under the circumstances. That test should in our view be determined by having regard to *embodied principles* relevant to the elimination or prevention of the particular form of discrimination and particularly to whether it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

3.1.9 That notion of discrimination more or less corresponds with a "*purposive*" construction of the anti-discrimination provisions we discuss more fully in **Appendix C**. We would adopt that construction more confidently if the Act itself did not have some gaps and provisions that lessen the likelihood of it being accepted to be legally valid. Subject to that qualification, paragraph 143(1C)(f), subsection 170LU(5) and subitems 49(8)(f) and 51(7)(f) of Schedule 5 of the WROLA Act might be construed and rationalised around a coherent legislative principle. It is that awards and agreements with the force of awards, as legislative instruments, shall not be made with provisions that in substance discriminate against an employee for reasons of, or including, age with the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. Any continuing award that contains such a provision shall be reviewed with a view to the removal of the provision. On that approach, the Act would be construed as proscribing particular kinds of discrimination in awards or agreements dependent upon certification by the Commission to be legislatively effective. In ascertaining whether or not a provision discriminates in a relevant sense, the substance of the provisions would be examined in order to base a judgment about whether the different treatment assigned is appropriate and adapted to the differences that support the distinction made by a direct or indirect discrimination. Such a construction would allow the determination of whether an award provision is discriminatory to be based on "job-weighted" considerations. In the case of a junior rate, several considerations would appear likely to be relevant in determining whether the age based distinction in rate is appropriate and adapted to the differences on which it is ostensibly based. Perhaps the most important would be the weight given to actual work experience of particular juniors covered by the relevant minimum award rate, or agreement rate applicable in respect of a particular employment.

3.1.10 For the purposes of this report, however, we shall resolve questions that may need to be answered about the meaning of discrimination by applying a single definition

spelling out the principles expressed in paragraph 3.1.8. We adopt, with the modifications we have indicated, the terms of the definition first formulated by one of the Central Working Parties established under the 1994 Pilot Award Review Program. That definition was adopted by the Commission in the October 1995 decision for purposes of the then section 150A reviews[3]. The definition we adopt is:

> Subject to exception of direct or indirect discrimination against an employee based on the inherent requirements of a particular employment[4],
>
> *"Direct discrimination occurs when a person is treated less favourably in the same circumstances than someone of a different race, colour, sex, sexual preference, age, marital status, religion, political opinion, national extraction or social origin would be; or is treated differently in relation to pregnancy or physical or mental disability or family responsibilities.*
>
> *Indirect discrimination occurs when apparently neutral policies and practices include requirements or conditions with which a higher proportion of one group of people than another in relation to a particular attribute can comply, and the requirement or condition is unreasonable under the circumstances. For example a job advertisement may contain a requirement that the job applicants must be over 180 centimetres tall, which may exclude many applicants, including most women and most members of particular racial groups. If there is no reasonable explanation for why applicants had to be so tall, the height requirement may be unlawful."*[5]
>
> A determination of whether a condition or requirement is unreasonable under the circumstances shall have regard to embodied principles relevant to the elimination or prevention of the particular form of discrimination and particularly to whether it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

3.1.11 The qualification as to *inherent requirements* was not a component of the original definition but was recognised in the model anti-discrimination clause adopted by the same decision, and it corresponds with paragraph 143(1D)(b) of the Act. We have elaborated on how a determination shall be made of whether a condition or requirement is *unreasonable under the circumstances*. Our elaboration is a paraphrase of section 93A enriched by the specification of the purpose of eliminating discrimination used in the relevant Commonwealth anti-discrimination legislation, the *Human Rights and Equal Opportunity Commission Act 1984*, and ILO Convention 111.

3.1.12 In relation to the "inherent requirements" qualification to that definition, we note that paragraph 143(1D)(b) of the Act is part of the "*explication*" of what is discrimination for purposes of paragraph 143(1C)(f). Subitem 54(1) serves the same function for purposes of subitem 51(7)(f) of the WROLA Act. It is arguable that the

Commission has power to accept that, even in relation to a junior rate that is facially age discriminatory, a decision to make or retain it in an award does not discriminate in respect of particular employment. It would appear that a Commission decision to that effect could be valid, but only if made within strict limits. *Inherent requirements of the employment* in which particular juniors are engaged as employees within the relevant classification would need to be objectively established. Those requirements would need to be of a kind which would justify a finding that the age based pay distinction or discount is based on the inherent requirements of *that employment.* Judicial rulings on variously worded formulae that correspond to that technical qualification to "discrimination" do not encourage a belief that the qualification or "explication" would be construed other than narrowly.

3.1.13 However, it may be important to emphasise and record that paragraph 143(1D)(b) exemplifies an acceptance that a facial use of an age distinction need not be discrimination within the meaning of the Act. We also point out that there are considerations that could be a basis for asserting that an age discount for junior employees is warranted by the inherent requirements of the employment of juniors. Maturation skills of the kind referred to at paragraphs 2.1.10 and 2.1.12 above, among others, may be relevant if applicable. From the evidential materials presented to the Inquiry, a substantive basis can be found for a contention that the engagement of a junior under a particular award often entails a need:

- for a more consistent level of supervision, as might have been evidenced once by the use of proportions clauses in some awards;

- to counter a greater exposure of the junior employee to safety risks;

- to provide training beyond the degree necessary for a mature employee; and

- for the acquisition of experience before full performance standards under the nearest related classification are met.

In respect of a particular employment, one or all of those functional aspects of the employment might plausibly be said to be derived from the inherent requirements of the employment. On the other hand, the same functional aspects of an employment would appear to be capable of being included in an assessment of the valuation of work for purposes of ensuring equality of treatment in employment.

3.2 The Meaning of "*Non-discriminatory Alternatives*":

3.2.1 From the point of view of an 18 or 19 year old employee at work, the identification of what is a *non-discriminatory alternative* to his or her junior rate of pay may be fairly obvious. It could be summed up in the slogan quoted by the Construction, Forestry, Mining and Energy Union's (the CFMEU) submission about junior employees in the timber industry: "*You do a man's job, you get a man's pay*"[6]. In other gender and age neutral words, a classification that accords an equal rate of pay for work of equal value without age or other unreasonable distinction between workers is one form of *non-discriminatory alternative* to whatever classification, if any, would accord a junior rate to the employee. The 18 or 19 year old employee would probably not sympathise with much weight being given to what we have described as maturation skills in determining whether the same job was being done. That slogan is not distinguishable in essentials from the similar call for "*A fair day's pay for a fair day's work*". Each asserts an equality of comparative output from the units of labour being compared. Each is best tested by a measure of such output for which the standard minimum wage is the assumed value.

3.2.2 At least some of the parliamentarians who participated in the short debate about the inclusion of section 120B in the Act might give much the same meaning as suggested in paragraph 3.2.1 to the term "*non-discriminatory alternatives*". There are also repeated references in the debate that appear to identify a "*competency-based*" classification applicable to anyone covered by it as the alternative to junior rates. However in the course of debate in the Senate, the co-sponsor of section 120B, Senator Murray said:

> *"In moving this amendment, the Democrats again commit themselves to the abolition of age discrimination against young workers. We believe that it is abhorrent that a 16-year-old is paid 40 per cent less than a 21-year-old, working side by side with them and doing the same work, just because they are young. ...*
>
> *As I said yesterday, the joint working party established under the Commission to look at junior rates has failed to come up with an alternative which would deliver genuine wage equity for young people. We would prefer a real solution that takes a little longer to a sham solution that still leaves young people being paid less than adults doing the same work. The truth is that junior rate provisions in awards have never been reviewed. The restructuring of adult wage rates under the structural efficiency process basically passed this group of workers by.*
>
> *Indeed, there is great commonality between the ratios of different age based rates to adult rates across different industries, suggesting this is based not on work value or competency assessment but on prejudice. ..."*[7]

In the same speech Senator Murray contemplated that the Section 120B Inquiry would be the path to "*modern, simple awards that totally eliminate discrimination*". The Inquiry process had advantages akin to those of a test case in that:

> *"... it requires the parties, particularly the employers, to put up or shut up on their claims that abolishing junior rates will cost jobs ... it will allow youth and community groups excluded from the working party process to put proposals to the AIRC. ... it will allow the canvassing of all the alternatives to the development of appropriate principles to move reform forward ... it will play an educative role in hopefully turning around the prejudices against the value of young workers which appear to be held by many employers and also a number of unions. ...it will come up with a solution which is practical and fair and which will then flow through to the state commissions."*[8]

3.2.3 Despite those expectations of the Inquiry, the concept of *non-discriminatory alternatives* was not otherwise elaborated upon in Parliamentary Debates. Like the concept of discrimination, it is not free from ambiguity. As we noted in the Issues Paper, the submissions to us reflected a relatively common acceptance that the expression means a rate of pay able to be applied to work performed by juniors without regard to the age of the employee performing the work[9]. However, as we then noted, opinions divided about whether particular options are or are not *non-discriminatory alternatives*. Those divisions exposed fundamental disagreements about elements of the definition of a *non-discriminatory alternative*, or about the application of such a general and abstract notion to the specific options presented. Some of those differences survive but are latent in the relative consensus about the notion of discrimination that was advanced by participants in the Consultation Group stage of the Inquiry.

3.2.4 We are not constrained to act with legal formalism in arriving at a meaning for the expression "*non-discriminatory alternatives*". However, we must determine what we think the expression means or should be taken to mean. The meaning so determined must be one that the wording of section 120B can bear. It is also desirable that this report should be directed to the substantive policy and practical issues debated before us. We consider we are obliged to give the words of the expression their ordinary meaning in its statutory context.

3.2.5 The submissions to us debated with some heat the question of whether part, or all, or none of the particular classifications proposed could be said to be a *non-discriminatory alternative* to junior rates. Thus, could the removal of the age 20 rate, or the age 18 and upward rates, from a junior rate classification specifying separate rates for each age below 21, be conceived to be a *non-discriminatory alternative* to the classification in its existing form? Another contested question echoes parts of the

Senate debate in November 1996. Some speeches implied an issue as to whether a classification that is not facially discriminatory for age could be a *non-discriminatory alternative*. One contention was that a classification conceived around school leaving level plus experience is a "sham" substitute for a junior rate. Behind that contention lies an issue as to whether such a classification makes distinctions in rates that are based on indirectly discriminatory criteria, and if so, can, and how should, a reasonableness test be applied to cause it to be accepted or rejected as a *non-discriminatory alternative*?

3.2.6 As we have indicated, it is not necessary for us, indeed it is not open to us for present purposes, to adopt a firm view about the meaning that a court would give to the legislative provisions as they now stand. We have expressed in paragraph 3.1.10 above a view about the definition of discrimination that we believe to be compatible with the Act, Commission precedent, and industrial usage. It will be open to Parliament, in light of this report, to give consideration to what if any changes to clarify the legislation might be made. For the purposes of this report, our conclusions and findings are based, so far as practicable and consistent with the Act, upon what industrial parties generally appear to have thus far accepted to be the meaning of the expressions used in the Act generally, or in section 120B.

3.2.7 On that view, the expression "*non-discriminatory alternatives*" might have been thought, or even intended by some, to have a restricted meaning. That meaning would admit only a classification form that is at least facially age neutral and not indirectly age discriminatory, and is "competency-based". However, if the competency-based requirement be left aside, a similar requirement might be that the classification would also need to prescribe equal pay for work of equal value in application to work or employment for which an existing junior rate classification discounts the adult award or agreement rate otherwise applicable to the job done by a junior. Generally that meaning would include classifications that are "competency-based". It would include also some classifications where the standard rate for employees other than juniors is not in a formal sense "competency-based". That term is used in the sense that the classification rate and any progression is framed by reference to agreed or independently determined competency standards applicable to the work performed under the classification. Some proponents of a narrow meaning being given to the term *non-discriminatory alternatives*, in their submissions to us sometimes left obscure whether a classification that was indirectly discriminatory for reasons of age could be a *non-discriminatory alternative* if free of unreasonable adverse impact on persons of particular age.

3.2.8 We have outlined elements in that meaning of the expression "*non-discriminatory alternatives*" that are consequential to the definition we have adopted of discrimination. To confine the meaning to those elements would be too restrictive for the purpose of this Inquiry. Such a restriction would give insufficient weight to several considerations. We have given weight also to the history of the provisions, to section 120B in the context of the Act, and to the industrial practicalities of using decisions and determinations about awards, or reviews of existing awards, to prevent or eliminate age discrimination where it is found in junior rates in industrial awards and agreements. Those considerations, and the emphasis given during the Inquiry to the Parliamentary Debate which preceded section 120B, justify a wider and more relative meaning being given to the expression. We construe the expression "*non-discriminatory alternatives*" to cover a wider class of classifications. Essentially, a classification is a *non-discriminatory alternative* if:

(i) it is not directly or indirectly discriminatory within the meaning based on industrial usage we have adopted at paragraph 3.1.10 above;

(ii) it may be used to replace in whole or in part a junior rate; and

(iii) it is founded upon a recognition of the principle of according equal pay for work of equal value.

An existing or a new classification may replace a junior rates classification in whole, or in part. If in part, the new classification may still be a *non-discriminatory alternative* to the rate or rates replaced because it subtracts from the junior rate to that extent. As we have observed, it is consistent with the explication of the meaning of discrimination for a provision to not discriminate if the decision about it discriminates, in respect of particular employment, on the basis of the inherent requirements of that employment. Perhaps also, and more doubtfully, a classification that is indirectly discriminatory on grounds of age may be deemed to be not discrimination because the otherwise discriminatory requirement of the classification is not unreasonable under the circumstances.

3.2.9 However, we will generally exclude a particular classification that is facially discriminatory for reasons of age from being a *non-discriminatory alternative* within the meaning of section 120B. On the premises we have stated about the meaning of discrimination, there is no basis yet on which direct age discrimination would need to be adjudged to be "unreasonable under the circumstances" before it fell within the

prohibition in paragraph 143(1C)(f). Put another way, a direct age condition for a rate of pay can only escape the prohibition on discrimination in paragraph 143(1C)(f) if the age discrimination in the condition is based on the inherent requirements of the particular employment of an employee or employees. For that purpose, only an age related condition in a classification genuinely related to the employment of a class of employees having regard to the inherent requirements, meaning *the essential features or defining characteristics of that employment*, would qualify. That outcome of course assumes that paragraph 143(1D)(b) and subitem 54(1)(b) could and would be construed to that effect. We acknowledge that such a defence for an age discriminatory classification condition is sufficiently remote and problematic in application to particular cases for it to be embraced as a possible enlargement of the notion of *non-discriminatory alternative*. However, for present purposes, some reference needs to be made to the possible use of inherent requirements of the employment to shield particular classifications that are based on external age requirements, or credentials from being adjudged to be discriminatory[10]. So also, we discard the possibility discussed in **Appendix C** that Article 5.1 of ILO Convention 111 might be applied to justify the recognition of some species of age based minimum rates as a special measure for protection or assistance of juniors as a class of persons who are generally recognised to require special protection or assistance.

3.2.10 We conclude this section by reiterating that the points of construction discussed in **Appendix C** are not able to be conclusively resolved at Commission level. Nor can the Commission as constituted resolve questions that may exist about the source and exercise of the power to determine that an award or agreement requirement based on age is not discriminatory because it is based on the inherent requirements of the employment. Questions of whether an award provision may be deemed to be a reasonable protective measure for persons of the relevant age class is not a matter for the Commission at all. We have adopted an approach intended to align our report as closely as practicable with the industrial and parliamentary understanding of some expressions used.

3.3 The Submissions about *Non-discriminatory alternatives* and the Options Discussed during the Inquiry:

3.3.1 A public debate has preceded and accompanied all stages of the Inquiry. The nomination of particular alternatives to junior rates is an important step both in that debate and in the assessments we are required to make under section 120B. It may therefore be expected that the protagonists in that debate seek to bolster their own position by exaggerating the most objectionable option attributable to their opponents.

Thus, many of those who seek to retain junior rates represent the primary position of the abolitionists as one calling for the abrupt and general replacement of all existing junior rates with full adult rates. On the other hand, the retentionist position has not escaped from being represented as supporting not only retention but imminent reduction of existing junior rates. Such contentions exaggerate the substantive positions developed by both sides of the debate in the submissions to us. Neither of the extremes was advocated with sufficient authority or substantive analysis to justify it being considered as a real issue in our assessment.

3.3.2 The Joint Governments' submission noted that the "*fundamental criticism*" of junior rates is that age as a sole basis of progression through a minimum wage scale does not reflect skill level differences amongst employees of the same age[11]. We thought it important to identify with particularity the claimed deficiencies in junior rates. We commenced that task by listing the apparent mischiefs in any age discrimination in employment that the prohibition on age discrimination may be intended to remedy. Over the course of the Inquiry, that analysis has been developed through discussion with those who have participated. The nature and degree of the deficiencies identified in junior rates must, in our view, be a key element in any assessment to be made of the desirability of removing them. Conversely, the effectiveness and utility of any replacement of them would be dependent to a degree on whether it could cure those deficiencies. In **Subchapter 4.2** we have outlined in a developed way what we understand to be the most significant of the deficiencies.

3.3.3 Those who favour the abolition of junior rates seek to serve one or more of the policy objectives associated with the considerations identified in **Subchapter 4.2**. A number of those who favour abolition gave greater weight to what they argued to be a straight forward implementation of equal pay for work of equal value. Several submissions, most of them industry or award specific, called for the removal of existing junior rates classifications. The effect would be to allow all employees covered by the relevant awards, *other than employees engaged under apprentice or trainee classifications*, to be paid at the rate set by the classification structure generally for the work on which they were engaged. The Construction, Forestry, Mining and Energy Union (CFMEU) and Australian Rail, Tram and Bus Industry Union (ARTBIU) put submissions to that effect in relation to the building and construction industry and railway industry respectively. Actual employment under some junior rates is no more than vestigial. As we have noted in **Chapter 2,** a significant number of awards and many agreements are at present free of junior rates. The inference is open, and it may properly be drawn, that the parties to those awards include a number who see no need

for junior rates of pay. It follows that for employment to which those awards or agreements apply, there may be no significant level of junior employment, or no perceived need to discount classification rates to offset whatever lack of maturity or other deficit might be attributed to any juniors employed.

3.3.4 However, a considerable number of those who supported the abolition of junior rates did so on the express basis that the *non-discriminatory alternative* they had in mind was not a simple substitution of the undiscounted adult rate for the work performed. We note in this context that the expression "adult rate" and similar allusions to adult status are cryptic references to age requirements. We have not expunged that term from this report because it is legally meaningful and is widely used in awards and submissions. "*Standard minimum rate*" for the work may cover the same notion as *adult rate*. Submissions favouring abolition of junior rates were in most instances predicated upon classification and pay progression being linked to competency standards, skill acquisition, or various "*proxies*" for maturation[12]. Thus the Labor Council of New South Wales proposed that age 18 should be treated as the age at which pay rates should be linked to adult rate classifications based on competency standards[13]. The Council's submission did not address directly the position of employees aged 16 or 17. Rather, it asserted that the basis for classification of entry level employees to low skill work should be the "*key competencies*", and assessed possession of, or progression toward them. The Shop, Distributive and Allied Employees Association (SDAEA) submission was more direct. It conceded initially that some form of discounted age 16 and 17 junior rate need not be removed for some employees in defined circumstances. In its final submission, the SDAEA modified that proposal. It sought that a series of rates be determined for those age levels by applying the work value principle to value the work being performed[14]. The Australian Council of Social Service, (ACOSS), in its submission and response to the Issues Paper advocated a classification that retained discounted wage levels, some of which were related to age and experience levels[15]. The use of staged competency-based classification progression to replace junior rates was advocated most unequivocally by the ACTU, the Australian Youth Policy and Action Coalition (AYPAC) and the State of Queensland.

3.3.5 AYPAC and the State of Queensland in their opening submissions each asserted that no group advocates the immediate conversion of junior rates to adult wages without regard to competency[16]. That assertion was sound, if "group" is taken to mean a significant body. There was little support for an abrupt move to adult rates for the classes of work in which most juniors are currently employed. The State of New South Wales and the State of Queensland each emphasised that it had no current

intention to remove the legislative exemption of junior rates from the anti-discrimination regime in those respective States[17]. Each supported a gradual movement toward work valued competency-based classification systems applicable to junior workers.

3.3.6 The initial submissions to the Commission associated the notion of competency-based *non-discriminatory alternatives* also with direct adoption of the National Training Wage (NTW) model for classification progression based on experience plus years since leaving school, or variations on that theme. The characterisation of that classification criteria as "competency-based" was not conceded generally. As may be seen from **Appendix C,** the AVTS guidelines and the NTW classification formula reflect an earlier but apparently no longer operative consensus about a characterisation to that effect[18].

3.3.7 Several issues about what is a competency-based classification, and whether a particular classification is so based, were debated before us over the course of the Inquiry. A simplified definition of a competency-based classification appears at paragraph 3.2.7. The award restructuring process instituted after the 1989 *National Wage Case*, and the associated intensification of the development of Australian training institutional qualifications and standards for work competencies has not yet resulted in a uniform implementation of competency criteria into award classification structures. It was made clear to us that even the Metal E & AI Award, which has otherwise been in the vanguard of adjustment to competency-based classification criteria, has not yet had a "competency-based" formulation of the entry level classifications C13 and C14. The relativity of those classifications to competency-based classifications at higher levels of the classification hierarchy is established. It appeared to be common ground that the task of producing competency standards and criteria for entry level work has proved difficult and time consuming. The CFMEU proposal for a non-discriminatory alternative for the NBCI Award Unapprenticed Junior classification was based upon Appendix S of that award. That Appendix may represent a relatively rare instance of an articulated competency-based entry level classification. As we shall see, issues were raised about the extension of that classification to whatever actual work might fall within the existing Unapprenticed Junior classification in the award. More generally, however, any general competency-based system of classification of entry level work of the kind normally performed by juniors would appear, in light of experience generally in the metal industry, difficult to develop, to implement and to have accepted. The development of appropriate competency-based classifications for entry level youth would be a complex task involving settlement of substantial differences of opinion and

considerable time at industry award or agreement level. Otherwise the specific proposals for *non-discriminatory alternatives* first advanced constituted, to a greater or lesser extent, an adoption of existing adult rate classifications upon the cessation of junior rate coverage of part or all of the employment currently covered by junior rates for employees aged from 15 to 20.

3.3.8 Three main categories of *non-discriminatory alternatives* to junior rates were identified and acknowledged in the Joint Governments' Submission[19]:

- removing junior rates causing employees to be eligible for "adult" rates of pay;
- a skill or competency-based alternative;
- other non-skill based alternatives.

3.3.9 Several submissions had proposed emphatically that consideration of the removal or introduction of junior rates should be undertaken in a manner that is industry specific[20]. Building and construction industry employers advanced a developed argument about the use of competency and skill based classification progression in that industry as a *non-discriminatory alternative* to junior rates. They stated a number of reasons for the view that there has been little progress in developing a competency-based classification system for the building and construction industry. Among other reasons had been the difficulty of developing formalised training models linked to the classification criteria, despite the considerable work done on competency standards since the introduction of Appendix S competency-based classifications into the NBCI Award in 1994. That contention may be contrasted with the ARTBIU's contention about the railway industry. In that industry, junior rates are virtually obsolete because of the extent to which competency-based progression has been embodied in the operative classifications. In a commentary covering such differences of view, the Master Builders' Association of Western Australia contended that the task of implementing competency-based progression in classification practices would be enormous, and that: "*even where there has been substantial goodwill, the difficulty of the task has been underestimated*".

3.3.10 As we have noted, issues of substance existed about whether the years since leaving school plus "*experience basis*" for rates of pay of the kind used for the NTW amounted to a *non-discriminatory alternative*. We invited comment in the Issues Paper on what other options for *non-discriminatory alternatives* might exist. We sought greater specification of particular alternatives. We asked also for views on the proposition that the convertibility of work performed under a junior rate classification to

competency-based progression could only be assessed by a virtual audit of progress toward competency-based classification in the particular industries. In that context we pointed to the need to clarify issues about experience in implementing or developing competency-based models applicable to employment at levels at which juniors are or might be employed.

3.3.11 The Issues Paper thus became an attempt to stimulate an acceleration of the development of specific proposals for application at award or industry level. We needed that task to be carried out against the background of an understanding of some of the alternative forms of minimum rates for juniors or young workers that had been mentioned in submissions. We have already noted the function of junior rate classifications as a component of the safety net of minimum standards. That function, and the limitations of it, is sometimes overlooked by critics or/and commentators discussing junior rate classifications.

3.3.12 Moreover, the developing international practice of framing minimum wage standards to address youth employment problems had been given prominence, appropriately, in many submissions. The reports and papers that attracted that comment contain much material that is relevant and persuasive about aspects of the assessments we are required to make. With minor exceptions, the schemes in existence or being developed in New Zealand, the United Kingdom, and Ireland are each framed in terms that discriminate on grounds of age. Age is the basis of differentiation in both the existing New Zealand system and the proposed United Kingdom low pay model. Thus in New Zealand since March 1994, teenagers have been covered by a youth minimum rate. In September 1998, a rate of NZ$3.68 per hour applies to workers aged between 16 and 19. This was equivalent to 60 per cent of the adult minimum wage. The reasoning for this change in New Zealand was stated to be an attempt to increase the opportunities for teenagers[21]. In the United Kingdom, in June 1998, the First Report of the Low Pay Commission on the National Minimum Wage was presented to the Parliament. The Report found that low pay is more prevalent among certain groups especially young people[22]. It advised that the new National Minimum Wage should be discounted by 12 per cent to allow a Development Rate for workers aged 18 to 20 and those on accredited training programs[23]. It further advised that 16 and 17 year olds and apprentices should be exempt[24]. With some adjustments of wage levels, those recommendations were adopted by the Blair Government[25]. The Irish National Minimum Wage Commission in 1998 published advice to broadly similar effect. A proposal for a "*training rate*" for job entrants without experience regardless of age might also be noted. The rates proposed were at 75 per cent of the full-time minimum

rate for the first year of training, 80 per cent for the second and 90 per cent for the third year[26]. Those rates were not to apply to hourly casual work because the training schemes envisaged were predicated on full-time employment. In relation to other countries, a recent OECD report notes:

> *"…The setting of statutory minima wages for younger workers has changed over recent years in several countries. In Spain, the separate rate for under 17-year-olds was abolished in 1990 with the rate for 17-year-olds applying to all workers less than 18. A further change in Spain was introduced at the beginning of 1998 when a single statutory minimum wage was established with no distinction by age. In 1994, New Zealand introduced a separate youth rate (60 per cent of the adult minimum) for workers aged less than 20. In Canada, while youth rates still exist in some provinces, there has been a marked tendency over recent years for these rates to be repealed. In contrast, a youth rate was introduced in the United States at the Federal level as recently as 1996, but it only applies to the first 90 consecutive days of employment."*[27]

3.3.13 That information, and other background material of the kind set out in **Chapter 2** and **Chapter 5**, framed the proposals and issues on which we sought responses through the Issues Paper. The responses to a proposition about the need for award specific attention to competency-based alternatives indicated that there was near unanimity that competency- and skill-based wages must be developed "*industry by industry and work-type by work-type*[28]". The development of a hierarchy of skill levels below base level employment could be expected to be challenging[29]. Significant progress toward competency-based classifications generally had been made in many industries, although it was accepted that there had been significant delays in finalisation of competency standards, that implementation of competency-based classifications had been hesitant in some significant areas of employment, and that the task was far from complete. The position adopted by the ACTU in its response was significant. It implied a movement away from suggestions that had characterised some earlier representations. At one point it seemed that the ACTU may have promoted a view reflected in some contributions to the Parliamentary Debates to which we have already referred. On that view, competency-based classification should be seen as a relatively automatic and readily accessible alternative to junior rate classifications. The ACTU's response to the Issues Paper reflected a variance:

> *"Competency based arrangements are in principle the fairest and most appropriate basis for specifying and defining minimum wage entitlements in a progression framework. Great advances have been achieved over the past decade in many award areas and callings in devising and implementing competency based progression arrangements; this work however remains far from complete and the union movement for its part remains committed to the continuation of those efforts. Nothing in the claim contemplated (to apply SEP to junior rates) is hostile to full competency based arrangements nor to their continuing development and certainly not to those arrangements applying in connection with longer term contracts of training such as apprenticeships."*[30]

3.3.14 We shall return to the discussion of competency-based classifications in the context of identifying criteria for non-discriminatory alternatives, and our discussion of particular proposed alternatives. However it is convenient to record at this point our conclusion from the exchanges that have been made before us about the development of competency-based classifications for entry level employment. We are persuaded that the development of appropriate competency-based classifications for work of the kind performed by entry level youth would be a complex task involving settlement of substantial differences of opinion and considerable time.

3.4 The Criteria for Identifying *Non-discriminatory alternatives*:

3.4.1 Against that background, a tactical initiative at the outset of the public hearing stage of the Inquiry was understandable. ACCI and the Joint Governments generally pressed for the Inquiry to draw adverse inferences from the relative absence of specific proposals for classifications that unequivocally qualified within one or other of the categories of *non-discriminatory alternatives*. On 16 February 1999, we issued a statement and procedural direction about an application made to us by the ACCI and supported by the Joint Governments. It conveniently summarises the main proposals about alternatives to junior rates that were debated in the hearing stage of the Inquiry:

> *"1. We have considered whether we should issue a procedural direction to in effect require any participant supporting the abolition or removal of junior rates to formulate with particularity the non-discriminatory alternative or alternatives to the relevant junior rate or to junior rates generally. ...*
>
> *3. ... we do not consider that it is appropriate for the purpose of this Inquiry for us, at this stage, to in effect direct participants to further develop or declare particular preferences or forms of non-discriminatory alternative. ...*
>
> *5. We note that, on the submissions and presentations to this point, differences exist about what may or may not be a non-discriminatory alternative. Several relatively well formulated proposals bear further examination, including:*
>
> *(1) the Construction, Forestry, Mining and Energy Union proposal for the removal of junior rates and the eventual substitution of the building and construction industry competency based classification structure;*
>
> *(2) the Shop, Distributive & Allied Employees' Association proposal for adult rates to be paid at age 18 and above, leaving other junior rates in abeyance;*
>
> *(3) the ACTU proposal for the review of junior rates on an award by award basis to apply structural efficiency principles for the first time to junior rates;*
>
> *(4) the Australian Council of Social Services (ACOSS) proposal for different classifications for age 15-17 on one hand and on the other for age 18 and above related to what ACOSS described as "a set of proxies for competencies";*

(5) variants of the National Training Wage model, and in particular:

(i) the State of Queensland's submission for the development through consensus of a framework model taking account of industry and regional differences; and,

(ii) the Amalgamated Metal Worker's Union proposal for junior employment to be covered by a training rate and trainee position properly aligned with existing NTW and Apprenticeship classifications;

(6) an approach developed on the Commission's own motion from an observation made by the State of New South Wales in their November 1998 submission. This proposal would allow for the possible development of a hybrid junior rate classification system based upon a relativist or modified reading of what is a non-discriminatory alternative to a junior rate or rates, including possible acceptance that some junior rates might properly be determined to be not discrimination within the meaning used in the ILO Convention against Discrimination in Employment and Occupation ."

3.4.2 Some of those six proposals were formulated elaborately. We have edited details not relevant to the assessments we make and publish an edited version, revised for subsequent amendments, in **Appendix D**.

3.4.3 Section 120B assumes that the Inquiry will proceed first to identify a concept of *non-discriminatory alternatives*. That concept is then to be applied to junior rates for purposes of our assessments. In **Subchapter 3.2** above, we have built some relativity and contingency into the definition of the concept of *non-discriminatory alternatives*. It is appropriate to glean a set of criteria from the meanings of the concept we have selected. Those criteria may then be applied to the various proposals to arrive at a conclusion about whether or not the proposal could amount to a *non-discriminatory alternative*.

3.4.4 To test proposals against the definition of *non-discriminatory alternatives* we have set out in the preceding section, we adopt the following criteria:

3.4.4.1 Is it a pay rate classification of work or employees?

Does the proposal directly, or if implemented would it indirectly, constitute or result in a classification of work or employees for a rate of pay?

3.4.4.2 Is it age discriminatory?

(a) **Direct:** if implemented, is the classification or resultant classification facially discriminatory for reasons of age?, or,

(b) **Indirect:** indirectly discriminatory? Among indicators of the classification not being indirectly discriminatory is that it is competency based. In relation to particular employment, could the discriminatory requirement of the classification, whether facially or indirectly discriminatory, be based on the inherent requirements of that employment? Or perhaps, if the classification is not facially discriminatory, is the discriminatory requirement related to age "unreasonable under the circumstances"?

3.4.4.3 Does it meet junior rate replaceability test?

(a) **Junior Access:** Can juniors be employed under it?

(b) **Work Valuation Status:** Is the classification an alternative in the sense that, if implemented, it would be based upon recognition and application of the principle of equal pay for work of equal value irrespective of age, taking account of maturation factors where appropriate?

(c) **Junior Rate Classification Replacement:** Would it apply in relation to employment for which a junior rate does, or would if it existed, discount the standard award or agreement rate otherwise applicable to the job done by a junior?

(d) **Replacement in Part:** Does the proposal meet the criteria in paragraphs 3.4.4.3(a), (b) and (c) above for some but not all of the classes of juniors covered by it, and not infringe the tests at paragraphs 3.4.4.2(a) and (b) for that class? If so, could the substance of that part of the classification be implemented as an alternative to a junior rate classification for that class?

(e) **Non-discriminatory Residue:** Where paragraph 3.4.4(d) applies, would the excision of the part of the junior rate for which there is a *non-discriminatory alternative,* have the effect that, independently, the remaining part of the junior rate might be determined to be not discriminatory? For that to occur, the tests in paragraph 3.4.4.2 would need to be applied to the residual part of the proposed alternative classification.

3.4.5 The relativity and interdependency of the criteria we have extracted point to an important aspect of the task we have been set. *Non-discriminatory alternatives* to junior rates are to be in prime focus in our report. Paragraph 120B(2)(b) might be read to contain an implication that the process for removing or replacing junior rates under other provisions of the Act is abbreviated to an imminent abolition of junior rates. That

emphasis, and the inference of an abbreviated process leading to abolition, reflects a perception of some participants in the Inquiry. The same perception influenced the enactment of section 120B. However, it is not an accurate statement of the process mandated by the Act now in force. Also it distracts from the fundamental precepts on which anti-discrimination legislation normally operates.

3.4.6 Object 3(j) of the Act envisages the prevention and elimination of discrimination for reasons of age. We have contrasted the provisions of the Act with the usual pattern of anti-discrimination legislation in Australia. That analysis is set out in **Appendix C.** We have explained our reading of the provisions for purposes of section 120B in **Subchapter 3.1.** However, the anti-discrimination framework created by the Act's provisions is the real predicate of the expressions used in section 120B. The criteria we adopt for applying our definition of *non-discriminatory alternatives* might also be deployed to better align that framework with the substance of the anti-discriminatory measures envisaged in ILO Convention 111 and implicit in the standard implementation of such policy programs in Australia.

3.5 Applying the *Non-discriminatory Alternatives* Criteria to the Proposals Identified by the Inquiry:

3.5.1 CFMEU proposal:

3.5.1.1 The NBCI Award[31] has since 1995 included an "Award Restructuring Appendix S"[32]. The CFMEU proposed that the "new entrant" classification in that Appendix be the foundation for a competency-based classification to apply to junior employees. "*New Entrant*" is defined in Appendix S to mean an employee with no prior experience of employment under any of the basket of awards applicable to the building and construction industry. In essence, the proposal is that the definition of the skills and duties of Construction Worker Level 1 be applied without substantial modification, using the three pay point classification to apply to junior employees upon entry to the industry, without discount for age. That classification incorporates a wage relativity of 85 per cent to a comparator tradesperson upon commencement, with progression to 88 per cent after three months, and 90 per cent after 12 months. A skills test equivalent to 16 modules of structured training must then be completed before a Construction Worker Level 1 (CW1) employee is treated as having fulfilled the *substantive requirements* of the CW1 classification. Upon satisfaction of those requirements the CW1 employee will be paid at 92.4 per cent of the trades rate which under the relevant awards is augmented by industry and special allowances[33].

3.5.1.2 The CW1 is the only proposal with a clearly articulated association with an identified competency-based new entrant rate. It may be helpful to set out some details of the skills and duties embraced within the CW1 classification, using "*all up*" rates as we understand them. The skill duty description apparently applies most fully to CW1(d) level upon completion of substantive requirements: a Construction Skills Test, or a structured training progression equivalent to 16 modules:

*"**Construction Worker Level 1 (CW1)***

	Relativity to tradesperson	***"All up" * $ per week***
CW1(a):- (New Entrant)		
Upon commencement in the industry	*85%*	*$438.70*
CW1(b):		
After three months in the industry	*88%*	*$453.30*
CW1(c):		
After 12 months in the industry	*90%*	*$463.00*
CW1(d):		
Upon fulfilling the substantive requirements of Construction Worker 1, as detailed below	*92.4%*	*$474.70*

* *All up rate comprehends several all purpose allowances variously described.*

A Construction Worker Level 1 (CW1) works under general supervision in one or more skill streams contained within this Award.

A employee at CW1(d) will:

(i) have successfully completed, in accordance with RPL principles, a Construction Skills test equivalent to 16 modules of structured training; or
(ii) have successfully completed a relevant structured training program equivalent to 16 modules (inclusive of AVTS training).

Skills and Duties

An employee at CW1 level performs work to the extent of their skills competence and training. Employees will acquire skills both formal and informal over time and with experience, and will undertake indicative tasks and duties within the scope of skills they possess.

An employee at this level may be part of a self-directed Work Area Team (WAT), and may be required to perform a range of duties across the three main skill streams contained within this Award.

An employee at this level:

- *works from instructions and procedures;*
- *assists in the provision of on-the-job training to a limited degree;*

- *coordinates work in a team environment or works individually under general supervision;*
- *is responsible for assuring the quality of their own work;*
- *has a qualification in First Aid.*

Indicative of the tasks which an employee at this level may perform include the following:

- *uses precision measuring instruments;*
- *basic material handling functions;*
- *operate small plant and pneumatic machinery;*
- *inventory and store control;*
- *operate a range of hand tools and oxy welding equipment;*
- *has a knowledge of the construction process and understands the sequencing of construction functions;*
- *is able to provide First Aid assistance to other employees.*

The CW1 classification incorporates the following broadbanded Award classifications: Builders' Labourer Group 4; Plasterer, Terrazzo or Stonemason's Assistant; Stonemason Assistant - Factory (Queensland and Tasmania); Trades Labourer; Jackhammer Person; Mixed Driver (concrete); Gantry Hand or Crane Hand; Crane Chaser; Cement Gun Operator (excluding Victoria); Drilling Machine Operator; Concrete Gang, including concrete floater (as defined); Roof Layer (Malthoid or similar material); Dump Cart Operator; Concrete Formwork Stripper.

An employee at this level may be undergoing training so as to qualify as a Construction Worker Level 1(d) or 2. Where possible, an employee at Levels 1(a), 1(b) and 1(c) shall be provided with access to accredited structured training approved by CTA in accordance with Clause 4.10 of this Appendix."

3.5.1.3 The criteria we identified in paragraph 3.4.4 above may be applied to the following effect:

Classification: CW1 is a pay rate classification of work.

Discrimination: It is not directly discriminatory for reasons of age. Nor does it indirectly discriminate. It is ostensibly competency-based, and is age neutral.

Access: Juniors would have access in the sense that juniors could be employed at CW1(a). However, in a submission commenting on observations we made along the lines set out in this subparagraph, the CFMEU rejected any assumption that work is organised in the building and construction industry in a way that would allow allocation of certain work to entry level juniors. The "*job and finish*" approach to work allocation is said to be based on the skill level: labourer, semi-skilled and skilled workers. "*There is no job for a worker who cannot do the work allocated based on the skill level.*" The

essence of that contention is that only juniors with a work performance capacity comparable from day one of the employment to any other employee performing work valued at 85 per cent of a trades rate would be employed, or be likely to be employable under the proposal. We have no reason to doubt that contention. Watson SDP in his decision implementing the classification acknowledged that "*new entrants were immediately expected to be productive*[34]". The skills and duties listed above are at levels that make that approach to manning seem likely. To the extent that the proposition is valid, it generates questions as to how far the proposed classification would allow access to the class of juniors eligible to be employed under the existing Unapprenticed Junior classifications; or to those who perform duties equivalent to those performed by the apparently small class of employees actually engaged as Unapprenticed Juniors.

Work Valuation Status: There is no evidence that any need for developing personal attributes associated with age and work experience has been assessed among the competency components at the entry and adjacent levels. Hence, it seems probable that the classification is formulated around a level of work performance that could not be achieved by a significant number of juniors who seek entry level employment to the industry. The extent to which the classification would overvalue the work of the kind actually or notionally performed by entry level juniors engaged under the Unapprenticed Junior classification still extant for the building and construction industry cannot be assessed on the information available to us. The margin between the proposed Appendix S classification rate on commencement and the Unapprenticed Junior rate at commencement is currently about 45 per cent all up. It follows that, so far as the classification purports to apply to all work of the class able to be undertaken under the Unapprenticed Junior classification, it could not yet be accepted to be based upon recognition and application of the principle of equal pay for work of equal value in the sense used by industrial tribunals. That possibility is corroborated by statistical data about the relatively low ratio of junior to total employment in the construction industry. The Appendix S Construction Worker Grades are a competency-based classification structure for work under industry awards and agreements. Implementation of the structure is subject to agreement at workplace level. There has been a relatively slow adoption of the structure. Some 46 per cent of persons under age 21 employed in the industry work under non-junior rate classifications at adult rates. It must follow that there would be some work areas in which the Appendix S competency-based classification proposal could operate as a *non-discriminatory alternative*. For that reason, and because of the basis on which we have arrived at a view about the character of the proposal as a *non-discriminatory alternative*, we will include it among the

proposals whose substance is further assessed. We discuss the proposal further in our assessment of the utility of junior rates, and in the feasibility of *non-discriminatory alternatives*.

The work valuation status of the proposal is established in one sense, but no comparable junior rate classification is directly addressed in the formulation of the CW1 classification. No competency-based translation of existing work acknowledged as being, or to be, performed by entry level juniors is apparent. The hypothesis advanced by the CFMEU is to the effect that all juniors to be employed under it will present fully fledged to meet the job requirements. No competency modification for those juniors would be needed. On the other hand, the competency criteria do not evidence any systematic assessment of the competency and performance levels or maturation attributes that are likely to be characteristic of at least a class of younger juniors seeking employment in particular in the construction industry. We do not suggest that those are the same attributes as in all other industries, nor do we assume there are none.

Junior Rate Classification Replacement: Two existing "Unapprenticed Junior" classifications could be replaced. Each of those classifications has a restricted area of operation under the main relevant awards. The *replaceability* of those classifications by the CW1 classification rests on an assumption about the equivalence of the work and the capacity of those who perform it. That assumption is applied to the existing junior classification and the proposed classification to replace it. We are unable to make any such assumption. Nor can we assume that functional aspects of work of the kind we associated with maturation factors at paragraph 3.1.13 above are irrelevant to the establishment of the relativity of the existing Unapprenticed Junior classifications to the tradesperson comparator[35]. In the circumstances, we will accept that juniors have access to the proposed alternative classification but we qualify the extent of any acceptance that the classification would fully replace the existing junior rate classification.

3.5.1.4 On the analysis we have set out, the CW1 classification qualifies as a *non-discriminatory alternative* but not as a full replacement of existing junior rate classifications. We will include it among the proposals whose substance is further assessed. We discuss the proposal further in our assessments of the consequences of abolishing junior rates, of the utility of junior rates, and of the feasibility of replacing junior rates with *non-discriminatory alternatives*.

3.5.2. The SDAEA proposal:

3.5.2.1 The junior rate classification for all major retail industry awards is an age scale adjunct to the generic Retail Worker Grade 1 classification. As we noted in **Chapter 2**, most of those awards are, or were originally, State awards. The SDAEA's developed proposal for a non-discriminatory alternative is a skeletal reclassification of the work of Retail Worker Grade 1. It would vest the standard minimum rate in employees at age 18 and above. The SDAEA put several positions about the classification rate for persons aged 15 to 17 years respectively engaged in the same class of work. It effectively retreated from a submission that age based discounts of 50 per cent, 40 per cent and 20 per cent from the adult rate be applied. Its final position proposed that for those under age 18, rates applied be "*according to the work value principle, reflecting the value of the work being performed*".

3.5.2.2 The effect of the SDAEA proposal, can be transposed to the existing classification of Retail Worker Grade 1. We have adapted clause 4 of the Shop, Distributive and Allied Employees Association (Food and Liquor Stores) Interim Award 1994. For that purpose, we indicated by bold or by strikethrough the modifications that would be necessary. The rates set out are those in force at 20 July 1998. We use that date for all examples in this subchapter. A further safety adjustment of $12 to the Retail Worker Grade 1 level is likely to be incorporated to bring that rate to $444.40 from the time the award may be varied in or after May 1999.

"4 - WAGES

$432.40

RETAIL WORKER GRADE 1 (Adult)

RETAIL WORKER GRADE 1 means a shop assistant, a salesperson, an assembler, a demonstrator, a ticket writer, a window dresser, a merchandiser and all others.

Juniors Age	*Percentage of the rate for "Retail Worker Grade 1"*		*Wages per week of 38 hours* *Award Rate*	
	Existing	*Proposal*	*Existing*	*Proposal*
	%	*%*	*$*	*$*
Under 16 years	***-***	***work value***	***-***	***Work value***
16 years and under	*50*	***work value***	*216.20*	***Work value***
17 years	*55*	***work value***	*237.80*	***Work value***
~~*18 years*~~	~~*67.5*~~	~~*100*~~	~~*291.90*~~	~~***432.40***~~
~~*19 years*~~	~~*80*~~	~~*100*~~	~~*345.90*~~	~~***432.40***~~
~~*20 years*~~	~~*90*~~	~~*100*~~	~~*389.20*~~	~~***432.40***~~

The wages for juniors shall be calculated to the nearest 10 cents, less than 5 cents in a result to be disregarded. ...

(a) Proportion (in any shop or place) Two juniors to one person, four juniors to two persons, and thereafter one additional junior to each additional person receiving not less than the appropriate adult rate of pay; provided that in assessing such proportion a working employer may be counted as a person receiving an adult rate of pay.

(b) Employee acting as Shop or Department Manager An employee, including a junior, who acts as a Manager or Department Manager as defined in the column headed "Adult", for one week or more shall be paid the rate prescribed for a Manager or Department Manager, as the case may be, for the whole of such period.

(c) Apprentice Wages

Year of Apprenticeship	*Retail Worker Grade 1*	*Wage Per Week*
	%	*$*
1st year	*55*	*237.80*
2nd year	*77.5*	*335.10*
3rd year	*90*	*389.20*

(d) The Employer may engage apprentices under the terms of the regulations or provisions of the appropriate State Training Authority or its agent (STA) provided that a person shall not be deemed to be an apprentice until their indenture has been approved by the STA."

3.5.2.3 The criteria for a non-discriminatory alternative identified in paragraph 3.4.4 above may be applied to the following effect:

Classification: The modified Retail Worker Grade 1 is a pay rate classification. The proposed work valuation of rates under age 18 would involve the application of a structured principle of wage fixation.

Discrimination: The classification proposed by the SDAEA is not discriminatory at all for the junior rates that would be effaced for juniors aged 18 and above. It appears to be directly discriminatory in relation to 15 to 17 year olds generally. We are unable to conceive how a class comprised of employees under age 18 can be described and treated differentially without resorting to a facially age discriminatory form. Whether or not that facially discriminatory condition amounts to a discrimination would, on the definition we have used, depend on a finding that the condition did not treat the age class involved, "*less favourably*" than someone of a different age. Presumably, since the difference in treatment would be attributable to work value differences, it would not be less favourable. The SDAEA's initial submission was ambivalent about whether employees in the retail industry under age 18 should continue to receive junior rates if

still enrolled in secondary education. However, on any of the formulations advanced, a definitive finding that facial discrimination exists must depend upon a determination of whether the facial discrimination is not discrimination in a technical sense. It would be necessary to show it is not discrimination because it does not treat the relevant employees less favourably, or because it is based on the inherent requirements of particular employment. Because of the view we have taken that we should discard the possible use of "special measures" to shield junior rate classifications from being discriminatory within the current meaning of the Act, we do not address a proposition put late in proceedings by the SDAEA to that effect.

The SDAEA proposal would not be indirectly discriminatory in any sense.

Access: The proposed classification would apply to juniors and would allow employment to a wider class of juniors. The class of juniors is comprised of those who perform work under the set of existing Retail Worker Grade 1 "position" classifications of work, and within the personal classification of junior workers by age for purposes of a rate of pay discounted from the age 21 rate[36].

Work Valuation Status: For 18 year olds and above, the proposal purports to recognise and give effect to equal pay for work of equal value. It proposes that rates for 15 to 17 year olds be reviewed to bring them into conformity with that principle. The SDAEA did not develop how the work value principle could be applied to that effect. The implicit basis for proposing a review appeared to be an acceptance that maturation attributes justify a discount, albeit a lesser discount than the existing junior rate discounts for those wages. We have reservations of degree about the classification of 18 year old retail workers with no experience at full equivalence to adult workers. Automatic translation seems likely to overvalue the work of such employees particularly the youngest and especially those who are new entrants. The work of junior employees with significant experience by or after age 18 is less likely to be overvalued if paid for at the full rate.

Junior Rate Classification Replacement: The SDAEA proposal would replace in part most of the existing junior rate classifications under awards in the retail industry. It would vary rather than replace those classifications in respect of employees aged 15 to 17, subject to a process that may result in a finding that the rates are not discriminatory in a technical sense. However any such finding is problematical and dependent upon a definition of anti-discrimination measures that is not settled.

Replacement in Part: The SDAEA proposal could satisfy the criterion in paragraph 3.4.4.3(b) for at least some of the class of 18 year olds and above covered by it. The definition of that class would need to be by reference to levels of experience, rate of growth or demonstration of work related attributes, or by the duties performed in the course of employment.

Non-Discriminatory Residue: As we have indicated, the SDAEA proposal would not eliminate facial discrimination in the existing junior rates. However, if the process the SDAEA suggests is carried through, the SDAEA proposal seems likely to "*eliminate the discrimination that has the effect of impairing or nullifying equal opportunity or treatment in employment.*" The work valuation of new under age 18 rates, or the arbitral acceptance of the existing rates as work value compliant, perhaps in the extended sense used by Glynn J in the *Pay Equity Case* to include "*under valuation*"[37], might rid the discrimination of its objectionable purpose or effect.

3.5.2.4 A judgment as to whether the proposal is a non-discriminatory alternative is dependent upon work value judgments about the removal of all 18 years olds from the coverage of existing classifications. The reservations we have expressed do not preclude the proposal from being a non-discriminatory alternative at all, but we pose an issue as to the degree to which it is. For the purpose of further assessment, we shall accept that the proposal qualifies as a non-discriminatory alternative in part. That, and the possibility that the classification might be modified to a degree qualifying some further part of it as a non-discriminatory alternative, will be given further general consideration in context with other assessments.

3.5.3. The ACTU proposal:

3.5.3.1 The ACTU proposal is not in itself a classification for a rate of pay. Rather, the proposal is a set of principles based on a contention that junior rates generally have not been aligned with award restructuring under the 1989 Structural Efficiency Principle for the purpose of establishing consistent skill based rates of pay. The proposed principles are: rationalise inconsistency between junior rates; accept that 18 years olds are adults and phase out discounted rates for ages 18 and above; reset the rate for 15 to 17 years olds by establishing "*a wage scale that makes sense*"; replace age with a modified NTW schedule; make no reduction to existing employee's entitlements. Those principles reduce to three main elements to be applied as an "award restructuring" measure to the development and replacement of junior rate classifications on a case-by-case basis. First, like the SDAEA proposal, the ACTU proposal seeks the removal of existing age discounted rates for 18 to 20 year olds. Second, it proposes a

single general comparator rate: the adoption of retail rates as the benchmark rate for achieving consistency between rates of pay for junior employees. The third element is the adoption of a wage progression scale based on a modified National Training Wage (NTW) schedule. That schedule envisages discounts from the full award rate for students in Years 10, 11 and 12 with full award rate payable one year out from Year 12, two years out from Year 11, and apparently three years out from Year 10. The ACTU principles are incomplete because no actual rate is proposed for the three levels of discounted rate. However, the principles are sufficiently specific to delineate with reasonable particularity the content of a classification that would result from application of them.

3.5.3.2 The ACTU's proposed principles could be applied to result in generic classifications to replace junior rates. To better illustrate the proposal, we have adapted it to fit the classification model we adopted to illustrate the SDAEA proposal at paragraph 3.5.2.2 above:

*"**Constructed**:*

	Total Minimum Rate
	$
ACTU RETAIL WORKER GRADE 1	*432.40*

RETAIL WORKER GRADE 1 means a shop assistant, a salesperson, an assembler, a demonstrator, a ticket writer, a window dresser, a merchandiser and all others. Provided that an employee engaged as Retail Workers Grade 1 who is a school student or who is engaged for a period corresponding to a period ending not more than two years out of school from Year 10 shall be paid the following working wages:

	Year 10		***Year 11***		***Year 12***	
	%	*$*	*%*	*$*	*%*	*$*
At school	*50*	*216.20*	*60*	*259.10*	*80*	*345.40*
Plus 1 year out of school	*60*	*259.10*	*80*	*345.40*	-	*432.40*
Plus 2 years out of school	*80*	*345.40*	-	*432.40*	-	*432.40*

For the purposes of this provision, "out of school" shall refer only to periods out of school beyond Year 10, and shall be deemed to:

(i) include any period of schooling beyond Year 10 which was not part of nor contributed to a completed year of schooling;

(ii) include any period during which a Trainee repeats in whole or part a year of schooling beyond Year 10; and

(iii) not include any period during a calendar year in which a year of school is completed."[38]

3.5.3.3 The criteria identified in paragraph 3.4.4 above may be applied to the following effect:

Classification: The ACTU proposal is sufficiently specific as to principles to be applied to allow a classification to be discerned.

Discrimination: A classification that resulted from application of the proposed principles would not be directly discriminatory.

That part of the resultant classification that would replace age 15 to 17 rates with a modified NTW schedule of progression might be thought, and has been argued to be, indirectly discriminatory. The classification discounts a standard award wage by reference to School Year plus up to two further years. That condition is one with which a higher proportion of teenagers can comply. The condition also is likely to have "*the effect of disadvantaging persons*" of the same ages as those at which most persons undertake Years 10, 11 and 12. Both those circumstances would satisfy part of some tests for indirect discrimination. The "higher proportion" test is that used in the definition we adopted at paragraph 3.1.10. The "adverse effect" is derived by analogy to the definition of indirect discrimination in subsections 5(2), 6(2) and 7(2) of the *Sex Discrimination Act 1984*[39]. The classification, that would result from the ACTU principles, would probably be based on a work valuation of employees to work under it but would not be competency-based. Could the Commission be satisfied that paragraph 143(1D)(b) applied to the decision to introduce such a classification? As noted, the applicability and effect of that paragraph raises some questions of law and the answer is problematic.

Alternatively, the definition of "indirect discrimination" we have derived might be applied. That definition, of course, has to sustain whatever challenge might be made to its authenticity. If it did, is the condition for the discounted wage unreasonable having regard particularly to the effect it has of nullifying or impairing equality of opportunity or treatment in employment? The outcome of a determination of the merits of that question also is open to conjecture. Plainly, the ACTU intends its proposal to accord equal opportunity to age 15 to 17 year olds to compete for employment. Equality of treatment may also be thought to be safeguarded by the process to be used to "reset" the age 15 to 17 year old wage progression, "to make sense".

The age neutral condition for the wage discount would be capable of sustaining equal opportunity for age 15 to 17 years olds, and perhaps some older school students. The

condition is similar to the NTW formula. At the time of its introduction, the Full Bench making the NTW Award explained that the training classification was intended to "*assist in integrating the long term unemployed back into the labour market*"[40]. As we shall see in **Chapter 6**, the use of age neutral conditions for the training wage discounted from standard rates, allows access to mature age workers, young adults, as well as school leavers and teenagers. Thus, the possible "capture" of wage discounted training contract employment by adults is inherent to the use of an age neutral condition for the discount. The use of a similar condition for so called junior employment, without a contradictory use of a facially age discriminatory limitation to 15 to 17 years olds, may defeat the apparent equal opportunity objective. However the ACTU proposal confines access to the classification to Year 10 plus two years before the standard rate is payable. Because the proposal, as we understand it, is effectively confined to 15 to 17 years olds, it may be accepted as not indirectly discriminatory.

Access: Juniors could be employed under classifications that comply with the principles proposed.

Work Value: The resultant classifications could be said to recognise equal pay principles subject to the same observations as were made in relation to the SDAEA proposal. The phasing out of discounted rates for 18 to 20 year olds would not affect those observations, although the cost effect and immediate disemployment effects would be reduced. The proposal acknowledges discounted rates would apply to those meeting the age neutral condition. The level of discount would have to be determined around a benchmark rate derived from the retail industry to establish a progression scale that "makes sense". We take that to mean rates would be sought at levels higher than the current ratio to adult rates for ages 15 to 17 retail workers. We do not understand that aspect of the proposed principle to mean that the progression would be competency-based. The ACTU does not seek a work value equivalent in a formal sense. We assume the work to be covered within the proposed classification is the same as that performed by juniors in the age levels. The observations we have made about the work value factors of the SDAEA proposal in paragraph 3.5.2.3 apply also to the ACTU proposal generally.

Junior Rate Classification Replacement: The proposal is intended to, and would, result, on a case by case basis, in the replacement of junior rate classifications.

3.5.3.4 To the extent that the principles proposed would produce a similar classification to that established in the SDAEA proposal, the observations we have

made in paragraph 3.5.2.4 apply. However, the ACTU principles would be capable of being applied, perhaps in modified form, to determine for all industries a single junior rate classification with a formal exit at age 18, or Year 12 plus one year, Year 11 plus two years, or Year 10 plus three years. We shall assess it as a non-discriminatory alternative on that basis.

3.5.4 The ACOSS proposal:

3.5.4.1 The ACOSS proposal is not in itself a classification for a rate of pay. It also is a set of principles. From them, a classification progression for persons currently covered by junior rates could be refined. No reference rate of pay or comparator was stipulated. However, wage levels "*equivalent to existing age based junior rates*" were proposed. Thus the proposed classifications would derive the pay levels from "existing junior rate" levels. To illustrate the proposal, we assume and apply the levels that currently apply under a typical retail award, in this instance the Shop Employees (State) Award - New South Wales, and also those applicable to Unapprenticed Juniors in the metal industry. The resultant classification schedules are depicted in **Figure 3.1**:

Figure 3.1

Wage Rate	Criteria	Retail		Metals	
		%	$	%	$
Level 1	Up to completion of Year 9	40	172.72	36.8	143.57
Level 2	Completion of Year 10; *or* Year 9 plus one's year full-time equivalent work experience	50	215.90	47.3	184.52
Level 3	Completion of Year 11; *or* Completion of Year 10 plus one year's full-time equivalent work experience; *or* Completion of Year 9 plus two year's full-time equivalent work experience	60	259.08	57.8	225.48
Level 4	Over 18; *and* year 12 not completed; *and* Less than 6 months' full-time equivalent work experience	70	302.26	68.3	266.44
Training wage	In formal training arrangements as part of a recognised traineeship or apprenticeship (including over 18 years of age)	-	-	-	-
Full Rate	Completed Year 12; *or* 18 years of age and Year 12 not completed but has 6 months' full-time equivalent work experience; *or* 21 years of age and over	100	431.80	100	390.10

3.5.4.2 The criteria for a non-discriminatory alternative identified at paragraph 3.4.4 may be applied to the following effect:

Classification: The principles proposed are sufficiently specific to permit a classification to be identified on an award by award basis.

Discrimination: The proposed wage level criteria are facially discriminatory: age 18 is among the reference and progression points for the proposed Level 4 classification rate. Age 18 plus experience, and age 21 are each used as a reference for the Full Rate classification pay rate. At paragraph 3.5.2.3 we made observations about the possibility of facial discrimination being not discrimination in a technical sense. Those observations apply to the requirements envisaged for Level 4 and Full Rate payments proposed.

The proposed requirements for Levels 1 to 3 do not constitute a direct discrimination. The requirements are potentially indirectly discriminatory in form, and in the same sense as we used in our finding in paragraph 3.5.3.3. The completion of school-year requirement is likely to be met by a higher proportion of persons under age 21 than the rest of the population. The requirement may also be perceived to have the effect of disadvantaging persons in the age groups generally corresponding to Year 10 and less than 21 years. However, for similar but stronger reasons, we do not consider that the condition would be found to be unreasonable. We therefore would conclude that part of the classification is not discriminatory.

Work Value: None of the classification points are competency-based. The work value status of the proposal is likely to be in issue. It could only be resolved by a judgment based on matters of fact and degree. The assumed reference rates for Levels 1 to 4 are derived from the retail and metal industry rates. Each of those sets of rates have been set by reference to principles that take into account work value considerations in the way we have described in **Subchapter 2.2**. However, accepting that those principles have been applied, the difference in rates that result from the assessments is quite marked. Work valuation techniques are based on notions of measurement of skills and responsibilities that differ widely between occupations and awards. Differences between award minimum rate classifications are not uncommon. The difference evident here is essentially a difference between the broadbanded Retail Workers Grade 1 classification and the narrow entry level Unapprenticed Junior classification. The value context in which the rates must be taken to have been assessed cannot be overlooked. Industrial principles appear to have tacitly accepted that juniors may not need to be

accorded equal pay for work of equal value where countervailing factors exist such as a demonstrated disincentive to employ juniors without a wage discount from full rates. The ACOSS proposal imports "work experience" criteria, along with an educational level criterion for progression. The proposed classification establishes at least a measure of recognition and application of the principle of equal pay for work of equal value founded upon progressive development of personal attributes associated with work experience and age. The classification structure also gives an approximate effect to the principle of equal pay for work of equal value irrespective of age. Some full rate entitlements may overvalue the work performed by juniors covered. However experience is an ingredient of the condition that delays movement beyond a discounted rate. Also, the work of some inexperienced juniors may be undervalued. Apparently, the Level 1 rate would apply to those completing Year 9 until such time as they acquired the work experience to establish eligibility for the Level 2 or Level 4 rate. That element of the proposal appears to be deliberate. It would have the effect of creating greater opportunities for juniors not able to secure employment experience.

Junior Rate Classification Replacement: The proposed classification could be used to replace existing classifications on an award by award basis. Because the classification uses age 21 and 18 to limit its scope, it would function only in respect of employment normally within the scope of junior rate classifications.

3.5.4.3 The ACOSS proposal is a constructive, and we believe well directed, response to a complex problem. None the less, the use of facial discrimination, and our need to withhold a judgment about the conformity of the lowest and highest rate levels with equal pay for work of equal value principles, are significant considerations. We are unable to be definitive about what if any parts of the ACOSS proposals might be accepted as a non-discriminatory alternative in part. We have noted aspects of the ACOSS proposal that parallel parts of the classifications proposed by both the SDAEA and the ACTU. We shall take those parts into account as options that might be used to fashion a more acceptable alternative to the proposals identified in this chapter. However, we shall not include the ACOSS proposal itself as a non-discriminatory alternative for purposes of the further assessments requirement in **Chapters 4** and **7.**

3.5.5 Queensland Government proposal:

3.5.5.1 The Queensland Government proposal does not constitute a pay rate classification of work or employees. It is premised upon the retention of junior rates until the broadly based MOLAC principles are applied on an industry by industry basis to produce competency-based classification progression in conjunction with the

introduction of structured vocational training through traineeships and apprenticeships. The proposal identifies principles for that scheme. The principles include objectives and processes for arriving at a system of competency-based progression aligned with the use of traineeships in the school to work transition. The proposal concludes by inviting the Inquiry to recommend a set of principles in line with the model proposed and consistent with the MOLAC and AVTS guidelines. We have considered carefully the Queensland Government proposal. It has much to commend it. The proposal promotes a better insight into the practicality of securing community level participation in successfully bringing about school to work transitions. The proposal does not, however, constitute a formula from which a classification form emerges with sufficient clarity for us to accept that the proposal is a *non-discriminatory alternative*. We have not construed the proposal as intending the adoption generally of the NTW framework as a substitute for junior rates. The Queensland Government disavowed any such intention.

3.5.6 The AFMEPKIU proposal:

3.5.6.1 The AFMEPKIU proposal seeks the replacement of junior rates with a "genuine trainee rate". The proposal would limit the use of pay rates discounted from full award standard minimum rates for the work. Only where a young person is under a contract of training, or is a full-time student undertaking part-time or casual work within a maximum hourly limit would a discount from the standard award minimum rate for the relevant work be available. That in-principle proposal is qualified. The AFMEPKIU suggests that a review of appropriate levels and rates for Unapprenticed Juniors may be justified. It proposes any such review should take account of several factors including rates for different outcomes within the Australian Qualifications Framework (AQF), the mix of work and training time allocation, and the historical relationship between the current rate and that of a competent and trained worker.

3.5.6.2 In the form proposed by the AFMEPKIU, the set of principles are not sufficiently specific to be applied in a way that delineates with reasonable particularity the classification that would replace even the existing "Unapprenticed Junior" classification in the Metal E & AI Award. In substance, the proposal would require all work performed under that award to be within an existing award position classification or to be within a trainee classification. Trainee classifications would entail structured training obligations and would involve as yet unspecified changes to the NTW model. Thus, reduced to essentials, the first part of the proposal is similar to that proposed by the CFMEU for the construction industry. The proposal implies the phased replacement of the existing Unapprenticed Junior classification by the ostensibly "competency-based" classifications applying to all other work under the Award. Otherwise the

proposal does not constitute a proposal for a *non-discriminatory alternative* to junior rates.

3.5.6.3 The resultant trainee classification need not be directly discriminatory. However, it is not yet defined with sufficient precision to identify the content of a specific resultant classification. Any resultant classification would automatically be a formal replacement for any Unapprenticed Junior rate that applies to casual or part-time employees who are full-time students. However for employees under a contract of training, the resultant classification would appear to be more a replacement or addition to the NTW provision in the relevant award than a replacement of the junior rate. To the extent that the proposal advances a *non-discriminatory alternative* through movement to adult rates, we will not repeat here the comments made about the CFMEU proposal which apply. We accept the Australian Industry Group's (the AIG) assertion that neither the C13 nor C14 classifications, the entry levels for non-trade adults, are based on competency standards. Apparently, the parties who negotiated the metal industry competency-based classifications judged that the relatively low level of skills possessed by employees at those levels made it difficult to measure competencies[41].

3.5.6.4 We have accepted that the proposal in part is for a *non-discriminatory alternative* along similar lines to those proposed by the CFMEU. Some aspects of that alternative will be brought further into focus in due course. However, the weight of the AFMEPKIU proposal lies in the proposition made about the use of a training contract employment classification. In the circumstances, we will not accept the proposal as a non-discriminatory alternative but we will take aspects of the proposal into account where they may be relevant to the assessment of the proposals that are non-discriminatory alternatives.

3.5.7 The Commission's own motion proposal based on points raised by the State of New South Wales:

3.5.7.1 The proposition formally advanced by the State of New South Wales was that conversion of age-based and training wage models should await the development of suitable competency and experienced based replacements. We explored the foundations of that proposal. In formulating an "own-motion" proposal, the Commission departed from the New South Wales propositions. In effect we identified the following steps as a separate but related proposal:

(a) For purposes of an award by award examination procedure, there ought be a rebuttable presumption that junior rates are not *per se* discriminatory (using the

statutory technical meaning of discrimination as distinct from the *simpliciter* sense of meaning to treat differently).

(b) In a particular case, it ought be open to a party to the industrial process to bring evidence to demonstrate that the junior employees covered by that award do not require "special protection or assistance" that might otherwise justify the differential rates applicable to juniors under that award.

(c) If the presumption is in fact rebutted, the next step would be the removal, the merger, or part retention of junior rates through a work value assessment of the work carried out, if any, by juniors and by other relevant classifications covered by the award. The aim of this step would be to ensure the development of a classification structure with differentiations based objectively on: the skills required for each respective position; the work and responsibility undertaken by those employees; and the conditions under which the work is performed by each grouping.

3.5.7.2 The steps proposed are a set of principles and not a classification. It would appear from responses made during the consultative round that the proposal has assisted in bringing about a better understanding of the anti-discrimination regime and the process that will be applied to further reviews of junior rates. We have set out at paragraphs 3.1.3 and 3.1.4 in summary form our observations about an important aspect of that process. In this context, we do not consider the proposal to be itself a *non-discriminatory alternative* in whatever sense that expression is used in section 120B.

Endnotes

[1] October 1995, Print M5600 at pp. 16, 20.

[2] ACCI Submissions In Response to AIRC Junior Rates Inquiry Provisional Findings Paper: confidential, at pp. 9-10; ACTU's Response to AIRC Junior Rates Inquiry Provisional Findings Paper confidential, at p. 7 of 24; and Joint Governments' Response to AIRC Junior Rates Inquiry Provisional Findings Paper confidential, at pp. 8-9 of 20.

[3] See generally *Third Safety Net Adjustment and Section 150A Review*: Print M5600 at pp. 12-21.

[4] *Third Safety Net Adjustment and Section 150A Review* decision, October 1995, Print M5600, pp. 19-20.
[5] *Third Safety Net Adjustment and Section 150A Review* decision, October 1995, Print M5600, p. 16.
[6] CFMEU Submission No. 37 at 5.
[7] Hansard Parliamentary Debates: Senate 7 November 1996 at p. 5333.
[8] Hansard ibid at pp. 5333-4.
[9] Issues Paper para. 3.4.1.
[10] Paragraph 2.4.6 refers to examples.
[11] Joint Governments' Submission 38 at p. 104.
[12] Examples not specifically mentioned have included the ACOSS Submission 35 which has undertaken to propose a model for discussion; Senator Stott Despoja on behalf of the Australian Democrats Submission 46.
[13] Labor Council of NSW Submission 36 at p. 8.
[14] SDAEA Submission 54 at p. 12.
[15] ACOSS Submission 35; ACOSS response to Issues Paper: see paragraph 3.5.4.
[16] AYPAC Submission 32 at p. 2; State of Queensland Submission 33 at p. 10.
[17] Details of those exemptions may be found in Appendix C, paragraph 40 and associated endnotes.
[18] Appendix C, paragraph 16.
[19] JGS Submission 38 Chapter 6 at p. 99.
[20] ARTBIU Submission 12 at paragraph 2.1 MBAWA Submission 22 at pp. 4-5.
[21] Ghellab, Y., "*Minimum Wages and Youth Unemployment" Employment and Training Papers 26* (International Labour Office, Employment and Training Department) at 32.
[22] *The National Minimum Wage* First Report of the Low Pay Commission at pp.4-5.
[23] Ibid at p. 89.
[24] Ibid at p. 79.
[25] The Government's Response to the First Report of the Low Pay Commission: 18 June 1998: Department of Trade and Industry: http://lowpay.gov.uk.
[26] Report of the National Minimum Wage Commission 1998 referred to in Joint Governments' Submission.38 at pp. 85-86; and see also the *Interim Report of the Inter-Departmental Group on Implementation of a National Minimum Wage* October 1998, Government of Ireland at pp. 19-20.
[27] *Employment Outlook*, June 1998 at p. 32.
[28] Joint Governments' Response to Issues Paper at pp. 10-11; State of New South Wales Response at p. 12.
[29] SDAEA Response at p. 5.
[30] ACTU Response to Issues Paper: Industrial Relations and Legal Affairs Committee – NSW Young Labor, Submission No. 14 at pp. 5-6.
[31] Award Print N0122.
[32] Watson SDP in an arbitrated decision determined the percentages to apply to the tradesperson comparator. He noted that "*new entrants were immediately expected to be productive*". Print L8499 at p. 29.
[33] See Appendix B for comparative table correcting figures published at Appendix 4 of Issues Paper, and Figure 2 within.
[34] Ibid Print L8499 at p. 29.
[35] See Appendix B Part A within.
[36] See Issues Paper at p. 97 for classification details.
[37] New South Wales Pay Equity Inquiry: Reference by the Minister for Industrial Relations, 14 December 1998: Glynn J: see 1999 EOC 92-960 CCH which summarised her Honour's finding on the point as follows:
"… *In particular, her Honour considered the* 1987 Nurses Case *significant because the application of the equal pay principle together with a work value principle requiring the*

demonstration of a change in the nature of work skills and responsibilities was found adequate to address the undervaluation of the work of nurses.

However the Commission did find limitation in the application of these principles to dissimilar work performed by male and female employees. These limitations were particularly evident in NSW cases because of the existence of a rebuttable presumption and the onus on the applicant. Her Honour was of the view that, in future, equal remuneration cases should proceed more in the nature of an inquiry than as litigation between the parties. (Thus the scheme deriving from amendments proposal in this report would not require proof of gender causation for access to the jurisdiction or remedies. Glynn J also emphasised that the scheme would not require an occupation or industry to be female dominated to access the jurisdiction and remedies.)

The Commission found that the establishment of equal remuneration principles within the context of the existing industrial system and the use of non-gender-biased work value principles offered the most effective means of rectifying pay inequity. (These remedies for undervaluation were distinguished from anti-discrimination legislation. However, the Commission added that if it was decided contrary to this report that discrimination should be part of pay equity mechanisms, the adoption of the wide discrimination definition in Convention No 111 was recommended.)"

[38] Subclause 10(c) of National Training Wage Award 1994.

[39] See Appendix A paragraphs 30 and 39-41 within.

[40] Print L5188 at p. 4.

[41] Transcript at p. 416.

4. THE DESIRABILITY OF REPLACING JUNIOR RATES WITH NON-DISCRIMINATORY ALTERNATIVES:

4.1 Concepts and Considerations that Weigh in the Assessment Process:

4.1.1 Our assessment of the desirability of replacing junior rates with non-discriminatory alternatives is required by paragraph 120B(2)(a). Two classification concepts are the poles between which considerations of desirability or undesirability must be marshalled and assessed. In **Chapter 2**, we have isolated the elements of junior rate classifications, and discussed their history, incidence and operational deployment. The other classification concept, a non-discriminatory alternative to the junior rate classification, seems more amorphous. Understandably, it has some resemblance to, and of necessity some common elements with, the classification concept it is designed to replace. In **Chapter 3**, and especially in settling the criteria for non-discriminatory alternatives, the commonality of some elements necessary to both classification forms are exposed. The elements of junior rates are identified at paragraph 2.2.55. Of those elements, only the use of age as the condition for pay rate level, progression, or exit is not compatible with or necessary for any of the non-discriminatory alternatives proposed or conceived. Around those common classification elements, relatively common principles of pay fixation using the work valuation, allocative, and other available techniques for achieving pay equity and employment access are to be applied.

4.1.2 An assessment of the desirability of replacing junior rates with non-discriminatory alternatives must be a relative exercise. It turns upon the weight and mix of considerations and issues that affect the desirability of replacing the junior rate classification concept with at least a non-discriminatory classification form. It is first necessary to articulate the values and objectives that are part of the measure of desirability. The corresponding values and objectives, associated with the form, content, purpose and likely effectiveness of the non-discriminatory alternative classifications, may then be contrasted. Assessment of the desirability of replacing junior rates involves striking a balance between the two sets of considerations. Several major considerations are claimed to justify the replacement: the substance of the mischiefs or deficiencies sought to be remedied by the abolition of junior rates. In the

main, these are general considerations equally or conversely applicable to a greater or lesser degree to most of the non-discriminatory alternatives proposed. The considerations that would reduce the desirability of replacement, either generally or in particular cases turn most upon the perceived benefits of the existing classification forms. Some effects associated with aspects of alternative classification forms also weigh the balance against change. We discuss the respective sets of the considerations that appear to us to have the most weight in **Subchapters 4.2** and **4.3** below.

4.1.3 Our assessment cannot be oblivious of one consideration. The desirability of replacing junior rates with non-discriminatory alternatives is implicit in the Act. That implication and the definition of discrimination we have adopted is founded, in large measure, upon the policy rationale for the anti-discrimination measures in the Act. It was derived from ILO Convention 111. The policy rationale for replacing junior rate classifications with non-discriminatory alternatives therefore cannot be found in the bare consideration that junior rates discriminate facially for reasons of age. Rather, it must be founded also on a proposition that the age requirement condition is integral to a classification practice that may nullify or impair equality of treatment in employment and deny equal pay for work of equal value. It follows that in assessing the balance of desirability between the two classification forms, the degree to which the substance of them may nullify or impair those policy objectives or principles should be no less a test for one form than it is for the other.

4.1.4 Aspects of each classification concept, and of the process of "replacing", are given prominence in our assessment with those principles in mind. As we have noted, absence of age discrimination is the solitary essential difference between the two classification concepts. Put another way, the process for removal of age discrimination is the mode for "*replacing*" one classification and installing another. An expectation exists that removal of discrimination will be more than the catalyst for abolishing junior rate classifications. The expectation is that the removal will also be the means whereby the non-discriminatory replacement will end or at least curtail an impairment of equality of treatment in employment associated with junior rate classifications generally. That is a tall order for the replacing process. The age discrimination removal process of the Act is ill-suited to satisfying it.

4.1.5 Justice Glynn in her Pay Equity Report to the New South Government in December 1998 made a comment to that effect about the process that attends anti-discrimination measures prohibiting gender discrimination. Glynn J was concerned with finding a remedy for disparities in pay and remuneration originating from an

undervaluation of work performed by women. Simmonds C's application of equal remuneration mechanisms under Part VIA of the federal Workplace Relations Act was one precedent for an approach to the problem. Glynn J doubted whether a definition of discrimination was imported by subsection 170BB(2) of the Act[1]. She added that anti-discrimination legislation was not well suited for dealing with pay equity issues:

> *"If a view contrary to either my interpretation of the (Equal Remuneration) Convention and/or the operation of part IVA, is taken then for the reasons I will give shortly I would recommend to the Minister that any importation of equal remuneration processes of the kind contained within the Workplace Relations Act 1996 would make clear that discrimination simpliciter was not the test for establishing equal remuneration for men and women performing work of equal value.*
>
> *In broad terms I have that view for two reasons:*
>
> 1. *Anti discrimination legislation is by its nature and operations unsuited to resolving pay equity issues, and does not adequately address these issues in an industrial context, where there will often be a requirement to establish or create new rights and obligations by awards and/or agreements and in the resolution of disputes (and thereby establish standards at a collective level);*
> 2. *Anti discrimination legislation by and large does not sufficiently address systemic discrimination, or undervaluation, deriving from the operation of a broad range of factors including occupational segregation."*[2]

Glynn J considered that the industrial system was better able to deal with "*the issues of systemic discrimination*[3]". To that end, Glynn J proposed the revocation of the existing New South Wales Industrial Commission Equal Pay principle. She proposed and formulated a new Pay Equity principle. For the purposes of implementing equal remuneration for men and women doing work of equal and comparable value, her proposed principle included the proposition that:

> *"The assessment of value be undertaken on an objective basis with the Commission making an assessment as to the value of work using the Work Value principle. The assessment of work value should be objective, transparent, and non-discriminatory. The only requirement shall be to ascertain the true value of the work rather than the demonstration of whether there have been changes in the value of the work. It is not contemplated that such matters would be ordinarily brought under the Change in Work Value principle unless there were work value changes evidence as contemplated by that principle."*[4]

Glynn J's reasoning could be applied by analogy to the use of a process for removing age discrimination to remedy age stereotype undervaluation of work undertaken in particular employments of juniors.

4.1.6 The high expectation that the removal of discrimination for reasons of age would bring about pay equity for junior employees stems from the disposition to

identify "competency-based classifications" as the complete and only non-discriminatory alternative. We have acknowledged in paragraph 3.2.2 and a perusal of the relevant Senate Debate will demonstrate, that competency-based classifications were generally promoted as the preferred alternative to junior rate classifications. "*Competency-based*" is much but not exclusively used as an abbreviation for founding classifications and/or directing training to assessable skills and responsibilities needed for particular work and work levels.

4.1.7 As we have noted in **Chapter 3**, six proposals for non-discriminatory alternatives were developed. Not one of them is a competency-based classification covering actual work performed or expected to be performed by persons employed under an extant junior rate classification. We doubt, however, that the dearth of competency-based classifications for juniors is attributable to a simple loss of momentum in pursuing the MOLAC principles. The CFMEU proposal was the only one of the four specific proposed non-discriminatory alternatives that could be said to be an instance of a competency-based classification. As we have seen, it is predicated upon the entry level employee to the CW1 classification being "*expected to be immediately productive*" at the competency and skill levels of the CW1 classification. The competencies upon which that classification is based are far from co-extensive with the competencies to be expected of a school-leaver. They are even less co-extensive with any list of maturation factor skills, whether oriented to performance or personal attributes of younger and less experienced juniors.

4.1.8 Plainly, the identification of competencies meaningfully related to a work classification and rate of pay for entry level work seems to be a difficult and time consuming task. We say "seems to be". So far as we can recall there was no evidence to suggest that anyone had as yet tried. What has been tried, with an apparently reasonable measure of success, is the identification of competencies, assessment standards, and classification specifications for work which employers require in particular employments, mostly at semi-skilled worker levels and above. Obviously some juniors gain entry level employment in such classifications, or "exit" a junior rate classification to a competency-based classification. Those instances apart, there is very little to suggest that either employers or unions have made any progress in implementing work competency classification and training principles in respect of work normally undertaken by those juniors who employers identify as most subject to maturation deficits. McDonald's produced an example of a start being made on the linkage of work and training to an AQF standard. However, as we understood McDonald's position, it made no distinction for junior rate classification purposes

between completed structured training for an AQF credentialled competency, and the training that it gave to all employees employed on a junior rate basis. There is a substantial body of opinion to the effect that employers generally place a value on employees who have qualified through experience and training with McDonald's. It appears that all McDonald's employees receive the same training, *officially documented for some but for others it is not*. In response to a comment we made about what we considered to be the anomaly that trainees after qualifying at AQF 2 level were restored to the same age based junior rate as employees not so qualified, it was suggested that it is not surprising that McDonald's juniors who complete a structured training course are on the same rate as all juniors, because they all receive the same training.

4.1.9 Be that as it may, that response draws attention to a practice that throws some light on approaches to competencies and maturation skills. The actual belief and apparent consensus of the industrial parties about the formal identification and development of competencies appropriate to junior entry level employment may be inferred from another source. It is the assignment in subclause 8(e) of the National Training Wage Award of the task of developing the five Mayer competencies. Under that clause, the training program mandated by entry into contracts of training and employment is to be directed to promoting those competencies or the appropriate equivalent of them. The nature of that obligation may be a determinative consideration. It could be used as a form of measuring rod by which to assess issues that may arise about the weight and durability of maturation deficits in particular employments for which NTW "New Apprenticeships" or junior rates may already be an option. The same consideration adds substance to a contention of the Queensland Government, adopted in various ways by the union parties, that greater use should be made of training contract employment at entry level, in association with more flexible forms of training.

4.1.10 We have developed at some length our comments about competency-based classifications. They loomed very large in the expectations that the parliamentarians had of desirable non-discriminatory alternatives. Some of those expectations were fed by the policy and programs linked to the AVTS guidelines. Some details of that linkage to the parliamentary debate, and to the notion of competency-based age neutral classification forms for NTW and junior rates are set out in **Appendix C**[5]. We have not accepted that competency-based classifications are the only non-discriminatory alternative. There are not many examples to be found of competency-based classifications applying to employment within the operative scope of existing junior rates. Development of appropriate competencies for that class of employment is relatively difficult. Moreover, it is low in priority. The NTW is a considered alternative

option specific to the development of some maturation competencies. The NTW option is also readily available. That causes the development of entry level competency-based classifications to not even be the best of the bunch of options available. We do not consider that movement toward, or away from, competency-based classifications has major significance in assessing the desirability of replacing junior rates with non-discriminatory alternatives that are not classifications for contracts of training and employment.

4.2 Considerations Justifying the Desirability of Replacing Junior Rates with Non-discriminatory Alternatives:

4.2.1 The submissions made to the Inquiry, particularly those made by individuals, put cases against aspects of junior rates with passion and conviction. Numerous instances were cited of apparent wage injustice, and of the inadequacy of the discounted rate to meet employee needs. We are sure that had witness evidence been sought it would have been readily forthcoming. Such evidence would also have been contested. No doubt it would have been answered by evidence illustrating examples of junior rate employment having had beneficial effect. There are many such examples. We did not consider that an extended adversarial process of that kind would be of decisive benefit in establishing the details or degree of considerations already adequately delineated in the submissions made. We chose instead to use the submissions and information from other sources. We used it to identify the nature and substance of the mischief or deficiencies sought to be remedied by the prohibition of age discrimination in employment under junior rate classifications. The resultant "points of criticism" of junior rates were listed and submitted for discussion among the issues to be considered. The responses to the Issues Paper and further work prior to and after the Consultation Group stage of the Inquiry have been the basis for revision and development of the original points of criticism. In the form we now state them, we consider they crystallise the principal considerations that justify the replacement of junior rate classifications with non-discriminatory alternatives. We illustrate aspects of criticisms made against the pay equity of junior rate classifications. Otherwise in this subchapter we do not repeat or re-marshal material supportive of the considerations summarised. However support for the propositions can be found in the preceding Chapters and in the Appendices.

4.2.2 The first of the considerations is the inconsistency in the system of junior rates internally, and between junior rates in their application across industries. Different awards use different percentages for each age classification, and differ in the junior exit age or classification at which an employee receives the standard award rate. Many of

the differences in percentages and age determinations appear to be arbitrary. For junior employees who have technical abilities, the award rate of pay is discounted ostensibly because of the employee's personal attribute, age. But that age is used as a proxy based on a stereotypical presumption of less maturity. The age proxy stereotype is used to justify an inference that the junior employee lacks other "workforce skills"; it is not based on any objective measurement of work value.

4.2.3 Pay equity and work value in relation to "*a rate for the job*" are denied where the pay rate at entry, and progression thereafter, is based only on age. As this was a major point in many submissions, it is appropriate to illustrate it. Plainly, the discounted wage rate applying to juniors is a significant incentive to employers to use juniors in those service industries that systematically use casual employment to meet peak workloads created by customer service demand. The personal classification of juniors according to a simple age progression may deny a junior equal remuneration to that of an adult performing work of equal value. About 30 per cent of employees aged under 21 at May 1996 were paid at adult rates[6]. On the other hand, relatively numerous instances were cited in submissions of an employee not being remunerated in a way that an adult would be. One example suffices to demonstrate the circumstances of a particular junior, paid less on the basis that she brings fewer skills to the job, who performs the same work as is done by adults:

> *"My daughter at age 15 began work part time in a local shop. ... My daughter was found to be so reliable, trustworthy and responsible (yes I am a proud parent) that she was given keys to the safe and the shop. She was left to bank takings, open and lock up, stocktake, accept deliveries, order supplies etc. etc. She learnt a lot by doing and assumed a great amount of responsibility which saved the retailer from spending money on other staff. What that retailer gained from her employment was far more than they should have given the pitiful rate of pay. My daughter was and is more competent than numerous older, more experienced people in the retail and hospitality industries. So where is the merit in junior pay rates? Young people are as varied in their capacities as older people why should they be paid less on the basis of assumptions about age related incompetence? Is it necessary to point out the gendered nature of income bias within such a sex segregated work force?"*[7]

4.2.4 We have already mentioned an explanation offered as to why McDonald's adopt a policy of pay uniformity. Some juniors may complete structured training in the Advanced Crew Course (ACC) Traineeship. Upon completion of the traineeship those juniors are returned to operational work and paid at junior rates on the same age progression level as an entry employee whose training is not structured[8]. The ACC Traineeship is based on 12 months full-time experience or equivalent and is accredited at AQF 2 level. In contrast to the approach used by McDonald's, the KFC Agreement we have earlier referred to allows 90 per cent of the adult rate to a trainee. In another

instance verified by statutory declaration in the SDAEA's submission, a Pizza Hut employee described his relegation to the junior rate of pay between intermittent requirements to work for the same employer in managerial or supervisory roles[9]. Performance by a junior of managerial functions is an implicit contradiction of the rationale of junior rates as an offset against a junior employee's deficit in the maturation attributes. The retail award quoted at paragraph 3.5.2.2 includes a provision that would adjust rates during performance of the management role, but reversion to the discounted rate thereafter is assumed. Reversion to the bare age related junior rate after a significant period of performance of duty at managerial level appears to be inconsistent with equal remuneration being given for work of equal value in the sense that that expression is used in Australian industrial principle. The value of work to be assessed under that principle may be affected or modified by the notion of maturation factors. But those factors are not contradictory of the principle itself.

4.2.5 Similar inferences arise from the vagary apparent in several retail agreements or awards. Thus provisions for a higher duty allowance or junior rate exit may sometimes be accelerated if the junior is required to perform higher duties. The *Jewel NSW and ACT Enterprise Agreement 1997*[10] at subclause 7(f) provides that an employee, including a junior, who performs the work of a store manager for one week or more shall be paid the appropriate manager's rate. In contrast, *Franklins Limited - SDA - Victorian Agreement 1998*[11] at clause 31 provides that a junior required to perform a higher duty will receive an allowance equal to the difference between weekly pay and the weekly pay for the age group one year older. Under the *Woolworths Supermarket - NSW/ACT Agreement 1998*[12] at clause 12.1, a junior holding a TAFE ticket-writer's certificate receives 50 per cent of the $14.08 allowance per week payable under the agreement to an adult holding that certificate. Perhaps that example may be explained by the obsolescence of ticket-writing. We turn now to the remaining items in our summary of the main considerations that justify the replacing of junior rates.

4.2.6 The structure and rationale of junior rate classifications generally do not reflect changes that have occurred in:

- a switch of junior employment from a predominant pattern of full-time work to part-time casual working patterns;

- a progressive shift from career path employment in which the junior rate was normally the entry level award classification; and

- the relative de-skilling of employees engaged in work of the kind that is now the work most usually performed by juniors in entry level classifications; and

- a consequential reduction in the likely length of experience required to move from minimal to acceptable performance standards in such technical tasks as are required.

4.2.7 It is apparently anomalous for the rights and duties of the status of adulthood to vest at age 18 for most purposes other than remuneration for work. The magnitude of any actual anomaly depends on the purpose for which age 18 is accepted as conferring eligibility to adult entitlements. There are instances in hospitality and transport awards of the full award rate being applied upon the attainment of that age as the proxy credential for liquor service and transport driver duties. More generally it seems wrong that an 18 year old may enlist, or at one time may have been conscripted, for military service without age discount in service pay rates but, as a civilian, may not be able to work without a discount being applied.

4.2.8 The susceptibility of young workers to systemic and situational exploitation is magnified by the use of age to determine pay status[13]. Such susceptibility is greater because of the increasing concentration of junior employment in low pay occupations[14].

> *"At $290 per week in 1994-95 the average full-time wage of 15 to 19 years olds is very low in comparison to the rest of the population. In August 1994 the average weekly earnings (AWE) for all adult persons working full-time was $661 a week - more than double the average wages and salaries of 15 to 19 year olds working full-time.*
>
> *In 1994-95 young working people tended to be concentrated in service related industries (69%). Around 40 per cent of all 15 to 19 year olds were employed in wholesale and retail trade while only 14 percent were employed in manufacturing.*
>
> *...*
>
> *Not only is the employment insecure but many survive on only a part-time wage when they would prefer full-time work despite their living costs (including cost of work costs such as clothing and transport) being the same as those of full-time workers. Part-time employment may also limit young people's attachment to the labour market, and make it harder for them to become permanent participants in the labour force, while opportunities for work-related training are usually more limited for part-time and casual employees."*[15]

Remuneration for such employment is affected by adverse social valuation of skills required and by the use of systematic labour scheduling techniques to minimise labour costs and staffing requirements[16].

4.2.9 The needs and cost of living of juniors do not differ from those of adults in a way or to a degree that justifies the degree of the discount made from comparator adult wage levels. This is especially the case for most entry level comparator classifications. Generally such rates prescribe low pay entry rates already near or below poverty line levels. The Inquiry has not attempted to assess the living needs of junior employees. We are not able to say the existing rates can be found by us to be needs based in any relevant sense.

4.2.10 Age related progression in junior rates provides an economically rational basis for an employer to dismiss or reduce hours of work of juniors whose age progression entitles them to the adult rates, or to a higher level junior rate. That proposition is a corollary of our acceptance that an increase in the relative unit labour cost of juniors will have disemploying effects for juniors. The evidence before us does not establish that there is a practice of dismissing or reducing hours of employees to avoid progression based pay increases. We do not discount the likelihood of there being occasional resort to such practices. There is some evidential material of a practice of that kind during earlier cycles of low employment and high competition for available jobs[17]. We do not doubt that instances might be found of such practices in 1999. But there is also a body of evidential material to show a significant and relatively high level of natural turnover of older juniors. Several major retail employers place a value on the experience gained by longer serving junior employees. Thus McDonald's and Woolworths each presented submissions to that effect[18]. We are aware also of publicity about initiatives by Coles Myer to reduce use of casuals in some outlets. No significant counter was made to that material. There is a corollary also to our qualified acceptance that there are valid claims that the work value of experienced juniors increases to adult levels by age 18: it would be economically rational for an employer to reward that work value by making the incrementally increased payment in preference to incurring recruitment costs for a new employee.

4.2.11 Discounting entry level adult rates for the job by age based progression in junior rates operates to exacerbate other downward effects on earnings and paid hours. The casualisation of work, the use of "live working hour" techniques, and similar measures produce those effects. For young people with longer work experience, dependency on their families is thereby prolonged. For those young people the life shaping effects of the process of youth are made more circumscribing[19].

4.3 Considerations Reducing the Desirability of Replacing Junior Rates:

4.3.1 In the assessment of the desirability of replacing junior rate classifications, the availability and practicality of a replacement of them is an important consideration. Some aspects of that consideration are brought to account in this report in our identification and analysis of particular non-discriminatory alternatives that might replace junior rates. We shall return to how the practicality aspect of desirability enters our assessment for this purpose. In this subchapter, we set out a number of more general grounds that reduce the desirability of replacing junior rates. Through the process we described in the preceding subchapter, we have refined from the submissions, literature and our own analysis, the principal considerations of that kind.

4.3.2 The effects on labour costs and youth employment of any replacement of junior rates are a primary factor reducing the desirability of replacing junior rates. Cost increases were the major consideration relied upon in submissions opposing removal of age discounted rates. The more extreme estimates of the cost effect presented in submissions to us are exaggerations. But exaggeration is not a necessary ingredient of predictions that significant relative labour cost increases would result from several of the non-discriminatory alternatives proposed. For reasons we explain in **Chapter 5** significant disemploying effects are likely to be associated with the replacement of junior rates by any non-discriminatory alternative that overestimates the value of the work of junior employees to the employer.

4.3.3 Junior rates are simple to understand, and simple to administer. Proof of age, if required, would appear to be a less complex, and perhaps less potentially embarrassing than proof of school year completed. It is also less complex than using performance assessment or experience in employment generally as a condition of advancement. The simplicity of age as the condition for the award rate is an important consideration inducing employers to use juniors at a rate of pay discounted from that which would apply to an adult, and different to that which would apply to a junior or to an adult in a structured training arrangement. All alternatives discussed during the Inquiry's hearing, other than those that substitute an adult rate for a junior rate, are to varying degrees more complex than an age-based system. Instances can be found of a classification provision that is not facially discriminatory and is not very complex. The KFC classification is an illustration set out at paragraph 2.3.4. However, the administrative simplicity of the existing age discounted rate is appreciated and well understood by employers. A more complex non-discriminatory alternative will result in a loss of that simplicity and some of that acceptance. There are however degrees of

complexity. A "*last school year completed*" test cannot be considered complex. More complex alternatives can be expected to be a factor militating against some employers engaging junior employees.

4.3.4 A number of the considerations that justify the desirability of replacing junior rates would be more expediently and justly addressed by adjusting particular junior rates. If the view advanced by the Inquiry about the construction of the anti-discrimination provisions of the Act be accepted or acted upon, such adjustments could result in particular junior rates being adjudged to be not a discrimination, either technically or at all. Pay equity issues could also be addressed by the eventual development of competency-based classifications or by variation of particular junior rate classifications in the relevant award, or through enterprise agreements.

4.3.5 The schemes of almost all the proposed alternatives, including those that are indirectly discriminatory for age, would themselves distort application of the tandem principles of equality of opportunity and equality of treatment in employment. There can be tension between those principles. The principles are foundational to the anti-discrimination measures promoted by ILO Convention 111 and no less demonstrably, of the policy sought to be implemented by the Act.

4.3.6 The considerations that justify the replacement of junior rates with non-discriminatory alternatives also distort a proper balance between those principles. The considerations identified in **Subchapter 4.2** do not make due allowance for the function of the discounted adult entry level as a measure to promote equal opportunity for juniors to enter the workforce. That function is implicit in the rationale of junior rates. It is either not challenged or is explicitly accepted in most proposals for non-discriminatory alternatives. Thus the end result of replacing junior rates with a non-discriminatory alternative may be to retain in whole or part a discounted rate. If that result be the accepted necessary outcome, it would seem neither here nor there if the classification form adopted is facially discriminatory for age. If that be the case, the desirability of replacing junior rates with a technically non-discriminatory form is appreciably lessened. A compelling consideration to reduce that desirability further would be a clarification of the process available to deal with the substance of some complaints made about junior rate classifications. That process might:

(a) allow a direct focus on, and acceptance of, the function of junior rates as a special measure to assist juniors to compete on a more equal basis for entry level employment, and thereby increase equality of opportunity; but

(b) redirect and better align the focus of the prohibition on age discrimination toward the elimination of unequal treatment in more advanced stages of junior employment.

4.4 Applying Notions of Desirability to Concepts and Proposals about Junior Rates and Non-discriminatory Alternative Classification Forms:

4.4.1 Specific points of criticism about a particular award or employment need to be taken into account in assessing the desirability of particular alternatives. The analysis of the desirability of non-discriminatory alternatives is directed to proposed answers to a problem that is, at best, poorly defined. We thought it necessary to see whether a clearer description of the problem might be arrived at. The source of the problem associated with the prohibition of age discriminatory provisions in awards is clarified to some extent by the definition of "*discrimination*" in **Chapter 3.** A clearer definition of discrimination may assist in establishing the nature and source of the problem which is to be answered by replacing junior rates, or to be avoided if they are not replaced.

4.4.2 The considerations we have identified in **Subchapter 4.2** are no less important. Those considerations not only detail the particulars of the problems with junior rates to be answered by non-discriminatory alternatives. They indicate also the answers that non-discriminatory alternatives are expected to deliver.

4.4.3 We are required to make an assessment about the desirability of replacing junior rates with those alternatives. We believe that requires a balance to be struck between the two sets of considerations we have identified. However, it is our assessment that no useful purpose would be served by our making that kind of determination about abstractions. Purporting to find a point of balance between the two sets of considerations begs too many questions specific to particular provisions and employments. The desirability of replacing or introducing any classification in an award or agreement involves questions of merit peculiar to that provision in its context and to the employment.

4.4.4 The complexity and the capacity for the elements of junior rate classifications to be configured in various permutations is more or less matched by options canvassed as non-discriminatory alternatives. It is almost common ground, and it is also our assessment, that some degree of discounted pay rate for entry level work continues to be necessary. It seems needed, at least as an equal opportunity measure, in

the areas in which employment under junior rate classifications is most concentrated. It is probably necessary also as a reflection of the "true value" of the work to the employer, taking account of maturation factors. There is also an issue at the periphery of our terms of reference, but none the less real, that is inextricably linked with replacement of junior rate classification forms by non-discriminatory alternatives. It concerns the extent to which wage discounted entry level employment now needs to be separated at all from contract training employment.

4.4.5 The task facing all those involved in the process is to get right the balance between those options and two objectives:

- equal opportunity taking account of the competitive disadvantage in employment of school leavers, teenagers and young employees;
- equality of treatment in employment for all employees taking account of skills, responsibilities, experience and performance.

4.4.6 That is not an easy task. But it goes to the substance of pay rate classifications, whether age discriminatory or non-discriminatory in form. It would need to be undertaken carefully with co-operation from those most concerned. If it were to be, we expect that there would not continue to be important differences of opinion about the desirability of replacing one form with another.

Endnotes

[1] See *Pay Equity Inquiry Report* Vol II at pp. 90-96, 110-113; compare Simmonds C: *Re HPM*, Print P9210.
[2] Ibid *Pay Equity Inquiry Report* Vol II at p. 122.
[3] Ibid *Pay Equity Inquiry Report* Vol II at p. 135.
[4] Ibid *Pay Equity Inquiry Report* Vol II at p. 175.
[5] See Appendix C paragraph 16.
[6] Joint Governments Submission 38 at p. 12.
[7] Submission No. 2: Leichardt NSW.
[8] Exhibit McD 1 and transcript at p. 323.
[9] See SDAEA Submission 54 Attachment 1.
[10] Agreement 6 in a survey of 51 certified agreements identified as the most recently certified agreement made for retail sector employment.
[11] Ibid Agreement 21.

[12] Ibid Agreement 28.

[13] Submission 46 Australian Democrats at p. 5, referring to White, R. with Aumain ,M., Harris, A. & McDonnell, L., *Any which way you can: Youth livelihoods, community resources and crime*, Sydney Australian Youth Foundation, 1997. The more informative reference would have been White, R., *Young people, wages work and exploitation*, Journal of Australian Political Economy No. 4 December 1997 61 at 63.

[14] "*Wages: winners and losers"* in *Australia at Work*, ACIRRT 1999 at pp. 90-100; Landt, J. & Scott, P., *Youth Incomes* in Dusseldorp 1998: *Australia's youth: reality and risk* at pp. 130-133, 134-135.

[15] Landt & Scott ibid at pp. 134-135.

[16] Sachdev, S. & Wilkinson, F., ESRC Centre for Business Research, University of Cambridge, Working Paper No. 110 at pp. 11, 12, 14-20.

[17] *Against the Odds: Young People and Work*, edited by Bessant, J. & Cook, S., Australian Clearinghouse for Youth Studies: Holbrook, A., *Young and Unemployed in New South Wales in the 1930s*: 30 at p. 35. See also *On Airport Retail Employees Award 1981* Print G6038, (1986) 303 CAR 741 per Cox C at 748-749.

[18] McDonald's Submission No. 21 at page 2 stated: *"Those casuals who do remain with McDonald's after18 years of age work on average more hours than our younger casual employees. ... To us there is no logic in turning people over at 18, - the wage increase is minimal and it is much more expensive to recruit and train a new employee".*

[19] Wyn, J., "*Young people and the transition from school to work: New agendas in post-compulsory education and training*" in *Against the Odds: Young People and Work* at pp. 111-114.

5. THE CONSEQUENCES FOR YOUTH EMPLOYMENT OF ABOLISHING JUNIOR RATES:

5.1 Considerations that Weigh in the Assessment Process:

5.1.1 Our assessment of the consequences for youth employment of abolishing junior rates is required by paragraph 120B(2)(b). The requirement raises (initially) three considerations:

- the state of "*youth employment*", and some characteristics of the labour market that most affect that state;
- what is meant by "*abolishing*" junior rates: the likely form of implementing the abolition and its cost implications; and
- the "*consequential*" effects of any such abolition on youth employment.

5.1.2 In the initial stage of preparing our assessment we were presented with a great deal of statistical material. A substantial body of research and institutional opinion about the disemployment effects of relative labour cost increases to junior employment was supplied to interpret it. We found a good deal of that material to be not seriously in issue. However, it became apparent that the relatively clinical picture presented in statistical material and econometric modelling did not bring into focus some of the factors and characteristics of labour markets in the 1990s that most affect prospects of employment for young people. Nor did the statistical material bring into relief aspects of the predicaments faced by junior employees, their parents, and employers in dealing with the effects of the current state of youth employment.

5.1.3 Statistics may suggest but do not explain the way in which life for teenagers has changed. The degree of dependency of persons aged 16 to 24 on parents and families has increased significantly. For society as a whole severe social problems are linked incontrovertibly with teenage unemployment. The norm (from the 1940s to at least the late 1970s) of a period of education followed by secure full-time employment has been replaced for many teenagers and young adults by a lengthy transition period of unstable and often unfulfilling employment. "Having a job" does, or at least should, mean something different to today's Australia's teenagers than for those in decades past

and for most other persons in the working population. Teenagers are passing through a stage of transition to adulthood. They have to find work, perhaps complete education, leave the family home and establish new personal relationships. In that context, employment and the sort of employment that is secured are crucial to the lives of these young people. We have attempted to develop our assessment in a way that is responsive to the formal analysis of the state of youth employment but sensitive also to the predicament associated with the vulnerability of junior employees in a labour market in which young persons often may find themselves at a competitive disadvantage against more experienced workers.

5.1.4 In making our assessment we look first at the state of youth employment and the relative consensus that emerged about it in the presentations to us. We then bring into focus what we conceive to be some important characteristics of the labour market that affect youth employment and are most relevant to this or later assessments. Among them are some causes and some effects that are part of the dynamics of the state of youth employment: school retention and education population; factors in the decline of full-time employment; underemployment; the level of wage cost differentials accessible through use of junior rates; and own-wage elasticity of demand theories and predictions about the employment effect of relative increases in minimum rates. Our assessment of the consequences for youth employment of "abolishing" junior rates must be moderated by an understanding of the actual process required under the Act. We discuss that process in **Subchapter 5.7**. The next stage for assessment is the examination of the cost effects of some of the non-discriminatory alternatives to junior rates that were discussed in **Subchapter 3.4**. Our conclusions and assessment is then set out in **Subchapter 5.8**.

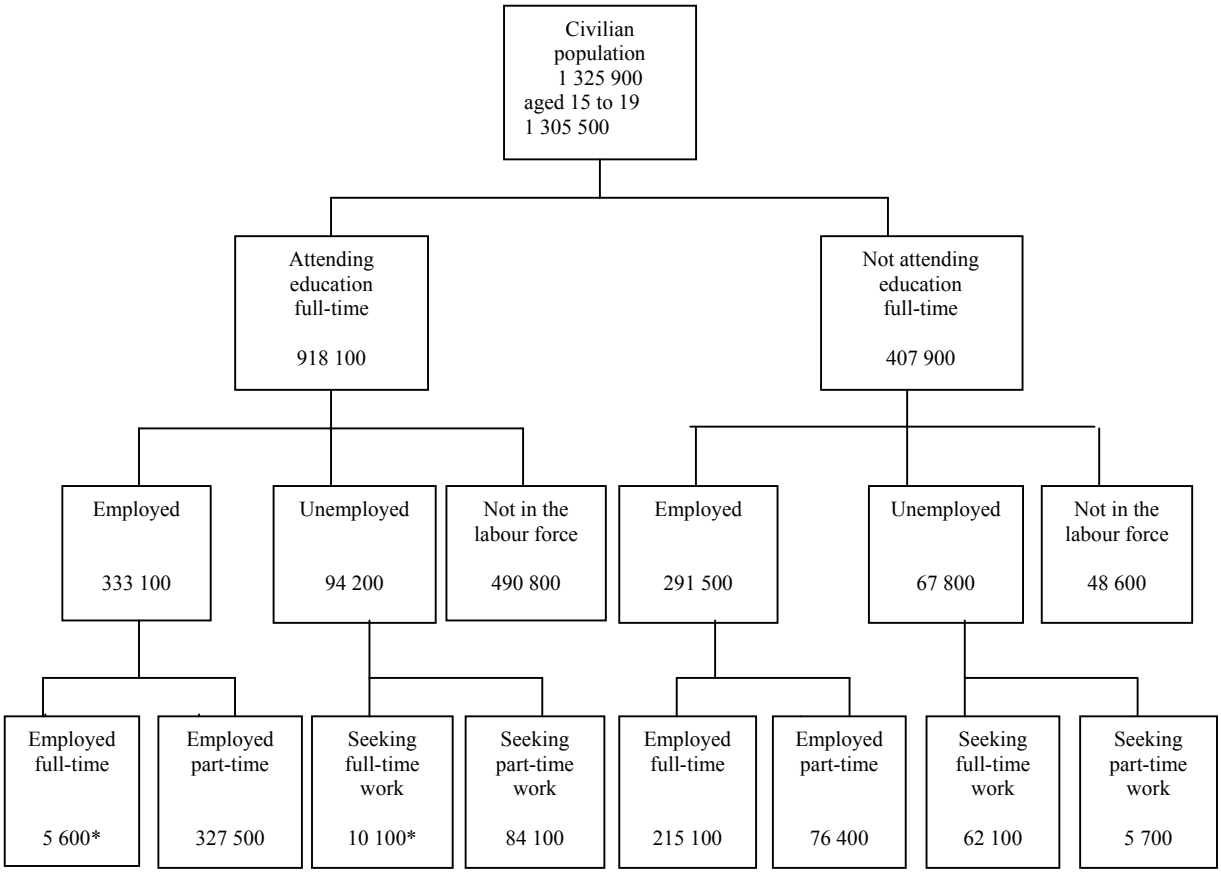
5.2 The State of Youth Employment:

5.2.1 *Youth employment* covers the employment of a wider age class than juniors. The expression in our terms of reference seems directed predominantly to the employment of young people in the age group covered by junior rates, generally from 15 to 21 years of age. There is substantial literature on the subject of youth employment. The submissions to us and the materials upon which they draw are fertile sources of information about observed or anticipated effects of changes of various kinds upon levels of youth employment. Less controversy, but not much less abundant material, exists about the main characteristics of youth employment. A definition of those characteristics is made no easier by the tendency for statistical collections to be subdivided. Teenage employment for 15 to 19 year olds is one category. Youth employment includes that category but extends to another classification for ages 20 to

24. However, despite some variability in the age cohorts being measured, we doubt whether the main propositions about characteristics of employment of persons under 21 years of age are significantly in issue.

5.2.2 Over the past two decades massive changes have altered the structure, earnings distribution and competitive character of youth employment. For the most part those alterations to, and the resultant state of, youth employment are not contentious. The findings we outline in this subchapter have not attracted substantial challenge. The current employment status of the teenage workforce is outlined in snapshot form by a diagram prepared by the ABS and reproduced and updated as Figure 5.1[1]. That representation does not cover age 20 juniors nor does it show changes over time. However, it identifies the main subdivisions of the teenage population and labour force at March 1999:

Figure 5.1 Labour force status, 15 to 19 year olds, March 1999



* ABS advise that sampling variability is too high for practical uses. The 5 600 and 10 100 figures therefore are estimates.

5.2.3 The demand for and placement of youth in employment in Australia has undergone massive change over the past two decades. There has also been a marked increase in participation by young people in education.

5.2.4 Full-time labour force participation among young people has collapsed. In 1966 teenagers comprised 14.1 per cent of the entire full-time workforce with some 615,000 employed[2]. By March 1999 only 220,700 teenagers were employed full-time, although the entire workforce had grown in the meantime one and a half times larger. The proportion of teenage to all full-time workers had plummeted to 3.4 per cent[3].

5.2.5 The decline in youth full-time employment has been partly offset by a growth in the level of part-time employment. Wooden[4] shows that the part-time share of employment of 15 to 19 year old males grew from 5.2 per cent in 1966 to 49.3 per cent in 1995. For all males, the corresponding growth was from 3.7 per cent to 11.1 per cent. Female part-time employment of 15 - 19 year olds grew from 6.0 per cent in 1966 to 72.3 per cent in 1995. For all females, the corresponding growth was from 24 per cent to 42.7 per cent. In those references, and in the statistics generally, "*part-time*" covers work for a period of less than the full weekly hours (taken to be 35 hours per week). It does not denote the standard industrial category of part-time employment: work on a regular basis for less than full-time hours attracting pro-rata entitlements. Part-time employment in that sense is a more secure form of employment usually contrasted with "casual" employment. A high proportion of part-time teenage workers may be taken to be engaged on a casual basis:

> *"The increase in teenage part-time employment has coincided with an increase in adult part-time employment. However, much of the teenage part-time employment is of a casual nature - defined by the ABS as employment which is not entitled to annual or sick leave. Unpublished ABS data in Wooden (1998) reveal that casual employees working less than 35 hours a week accounted for 56 per cent of youth employees in 1996. The comparable figure for adults was 13 per cent."*[5]

Moreover, the proportion of casuals among teenage workers has grown. The Joint Governments' Submission demonstrated from unpublished ABS data, that casual employees as a proportion of all part-time teenage workers increased from 69.3 per cent in August 1984 to 89.8 per cent in August 1997[6].

5.2.6 Figure 5.2 compares labour force participation and employment status for teenage workers and the total workforce over the last three decades. It demonstrates the magnitude of changes that have affected the Australian workplace since the mid-60s.

The pattern of teenage employment has changed the most, and in ways divergent from trends for the older cohort.

Figure 5.2 [7] **Teenage and total workforce employment: labour force participation and status: 1966-1995**

(N = '000)	1966		1976		1986		1995		Change 1966-1995	
Labour force status	N	%	N	%	N	%	N	%	N	%
All persons 15 years +	8 180	-	10 100	-	12 227	-	14 157	-	+5 977	+73.1
Labour force	4 903	59.9	6 151	60.9	7 482	61.2	8 940	63.1	+4 037	+82.3
- Employed	4 824	-	5 898	-	6 886	-	8 218	-	+3 394	+70.4
- Full-time	4 349	90.2	5 037	85.4	5 583	81.1	6 184	75.2	+1 835	+42.2
- Part-time	475	9.8	861	14.6	1 303	18.9	2 034	24.8	+1 559	+328.2
Persons 15 - 19 years	1 038	-	1 231	-	1 341	-	1 267	-	+229	+22.1
Labour force	674	64.9	708	57.5	775	57.8	709	60.0	+35	+5.2
Employed	652	-	607	-	627	-	567	-	-85	-13.0
- Full-time	616	94.5	511	84.3	425	67.8	223	39.3	-393	-63.8
- Part-time	36	5.5	96	15.7	202	32.2	344	60.7	+308	+855.6

5.2.7 The structure of teenage employment has been changed also by an increasing concentration of employment within certain industries. The majority of full-time teenage jobs are in the Retail, Manufacturing and Construction industries. Over the 12 years from 1986 there has been a small growth of full-time employment in the Retail sector, significant growth in the Construction industries, but the share in Manufacturing has been falling. Only in Accommodation/Hospitality and the Property and Business Services sectors is full-time teenage employment significant and growing in its share. The Retail sector dominates in the distribution of part-time work. Figure 5.3, a table extracted from the Joint Governments' Submission, illustrates the point. It also shows the directions of growth and decline by industry:

Figure 5.3[8] **Distribution by industry of teenage employment as a proportion of total teenage employment: May 1986 and May 1998**

Industry	Full-time		Part-time		Total	
	1986	1998	1986	1998	1986	1998
Agriculture, forestry and fishing	4.5	4.5	6.6	2.3	5.2	3.1
Mining	1.4	0.3	0.0	0.1	0.9	0.2
Manufacturing	18.3	16.2	5.4	3.0	13.9	7.8
Electricity, gas and water	1.5	0.1	0.1	0.0	1.0	0.0
Construction	7.0	13.8	1.8	0.7	5.2	5.4
Wholesale trade	5.5	7.1	1.8	2.0	4.2	3.8
Retail trade	24.6	28.7	60.2	61.9	36.7	49.9
Accommodation, café and restaurants	2.5	7.2	7.5	11.5	4.2	10.0
Transport and storage	2.7	3.0	1.2	0.5	2.1	1.4
Communication services	1.2	0.2	0.1	0.4	0.9	0.4
Finance and insurance	9.4	1.4	0.3	0.4	6.3	0.8
Property and business services	5.7	7.1	2.7	3.9	4.7	5.1
Government administration and defence	3.7	0.7	0.3	0.3	2.5	0.4
Education	1.1	1.5	1.4	1.6	1.2	1.5
Health and community services	5.3	2.9	3.1	3.1	4.5	3.0
Cultural and recreational services	1.7	1.5	3.7	4.3	2.4	3.3
Personal and other services	4.1	3.7	3.8	4.0	4.0	3.9
Total (%)	100	100	100	100	100	100
(number of jobs)	(441,200)	(214,217)	(229,300)	(378,283)	(670,500)	(592,500)

5.2.8 Figure 5.4 below shows the proportion of teenage employment by ANZSIC industry divisions in 1966 and 1995. The most severe decline in teenage workers as a proportion of total employment was in the Public Administration and Utilities industry closely followed by Finance and Business. Over that period, as we have seen from Figure 5.2**,** the age 15 to 19 cohort of the population grew at less than a third of the rate of the total population. That factor might explain why no sector increased the proportion of teenagers employed. However, only Wholesale and Retail Trade and Recreation, Personal Services increased the total number of teenage workers employed,

whereas significant employment growth as a whole was manifest in all sectors other than Agriculture and Manufacturing.

Figure 5.4 [9] **Employment, Australia 1966-1995: Total employment and persons 15-19 years (N ='000)**

Industry	1966			1995		
	All employed	Persons 15-19 years		All employed	Persons 15-19 years	
	N	N	% of total	N	N	% of total
All employed	4 823.9	651.7	13.5	8 217.7	567.1	6.9
- Agriculture, other primary industry	429.6	41.2	9.6	404.3	19.1	4.7
- Mining	58.0	4.0	6.9	84.7	1.4	1.7
- Manufacturing	1 232.5	160.6	13.0	1 117.3	56.9	5.1
- Construction	406.0	38.3	9.4	595.2	29.7	5.0
- W'sale and retail trade	993.5	180.1	18.1	1 689.2	292.5	17.3
- Transport and storage	270.0	18.6	6.9	378.5	6.2	1.6
- Finance and business	294.4	66.9	22.7	1 116.8	33.8	3.0
- Community services	486.0	52.4	10.8	1 353.4	23.7	1.8
- Public admin. and utilities	366.9	55.4	15.1	606.5	8.9	1.5
- Recreation, personal services	287.0	34.2	11.9	871.8	94.1	10.8

5.2.9 In their submissions the Joint Governments estimated the distribution of pay arrangements for employees aged under 21. That distribution is a significant factor in several of the assessments required for this report. No submission, and none of the references we have consulted, provided definitive figures for the distribution of juniors paid award or agreement junior rates as distinct from adult rates. The Joint Governments' Submission acknowledged that no single existing data source shows the proportion of employees paid at junior rates. That submission derived an approximate estimate from several sources. In the Issues Paper we questioned the validity of the basis of the calculation. No respondent to the Issues Paper challenged the resultant estimate, although the Joint Government's Response added detail and updated the estimate in ways which we accept and adopt in this presentation of it.

5.2.10 In estimating the proportion of employees paid at junior rates, the Joint Governments' Submission used the ABS "*Survey of Employee Earnings and Hours*" (EEH Survey) data to indicate that 7.3 per cent of all non-farm employees were paid junior rates in May 1996[10]. The Labour Force Survey figures, including unpublished data, were then drawn upon to calculate that around 724,000 non-farm employees were

under age 21 at May 1996. Of those, about 505,000 (including apprentices and trainees) were on junior rates (broadly defined). According to the National Centre for Vocational and Education Research Limited, (NCVER), there were around 97,500 apprentices and trainees aged under 21 in May 1996. The Joint Governments' Submission preferred that estimate to an EEH Survey estimate of the number of apprentices and trainees comprehended within the total survey figure. The resultant calculation of an estimated total coverage of junior rates and other pay arrangements appears in Figure 5.5. As can be seen on that estimate some 56.3 per cent of employed persons under 21 years of age are paid junior rates. We have included total figures as well as estimated proportions of employees by industry. Those industry breakdowns were supplied in broadly similar form by the Joint Governments' Submission. However the aggregate estimate we have supplied must be treated with caution because of a lack of compatibility of the aggregate figure using NCVER data based on the figures derived from the EEH Survey applying the ANZSIC industry divisions.

Figure 5.5[11] **Pay arrangements for employees aged under 21 - May 1996**

	Apprentices and trainees %	**Junior rates %**	**Paid at the adult rate %**	**Total %**
Manufacturing	25.8	27.5	46.7	**100**
Construction	46.8	7.2	46.1	**100**
Retail trade	6.7	69.7	23.6	**100**
Accommodation, café and restaurants	12.7	49.0	38.3	**100**
Property and business services	40.1	43.2	16.6	**100**
Total: All industries (excl Agriculture)	13.5	56.3	30.2	**100**
Estimated number of employees	97,500	407,500	269,000	**724,000**

5.2.11 The Joint Governments provided additional material to show that on the basis of an assumption that all 15 to 17 year olds (excepting apprentice and trainees) are employed on junior rates, among 18 to 20 year olds some 36 per cent were employed on junior rates as at May 1996[12].

5.2.12 Those estimates of the proportion of "*juniors paid award or agreement rates*" may lack definition. Employees who may be described in a survey as being paid junior rates are presumably identified by reference to their age and probably by their

classification being to some extent age-based. It is readily apparent that many employees under age 21 will be in receipt of over-award payments. By reason of their relevant award or agreement junior classification, juniors may be paid at an adult rate equivalent. The calculation of the proportion of employees covered by junior rates supplied in the Joint Governments' Submission would include employees receiving accelerated progression under junior rates. A survey reported in the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AFMEPKIU) Submission adds a dimension to that probability[13]. That survey reviewed unpublished ABS data that showed that in the metal and engineering sector, of a total of 321,263 employees, 35,913 were juniors including apprentices. Of them, 7,872 or 22 per cent were paid over-award rates.

5.2.13 Unemployment among youth has in recent decades been at high levels, both in Australia and in other comparable nations. The foundation for statistics published by ABS are surveys. For those surveys "*employment*" is defined to include "*any paid work of one hour or more per week, while unemployment is restricted to those without work who are actively seeking and available to start work during the reference period*"[14]. The statistically recorded levels of employment or unemployment in that sense can be augmented by recourse to less regularly gathered data. Other surveys indicate "*hours paid*" for, and provide a basis for assessing "*underemployment*", (usually meaning those in part-time or casual employment who would work more hours if available). A convergence of those measures is necessary if an adequate picture of employment status is to be given for a labour market characterised by declining full-time work and increasingly precarious employment. We examine some of that material in paragraph 5.5.1 below.

5.2.14 At March 1999, ABS figures show those unemployed aged 15 to 19 comprised one in five of all unemployed persons although they only made up about one in twelve of the labour force[15]. The unemployment rate for those aged 15 to 19 years stood at 20.6 per cent of that cohort in work or seeking work as at March 1999. This is to be contrasted with an unemployment rate of 11.8 per cent among persons aged 20 to 24 years, 7.9 per cent among all ages (aged 15 to 64) and 6.6 per cent for those aged 20 and over[16]. The unemployment rates for those under 20 have been consistently two to two and a half times higher than for those aged 20 or over as can be seen in Figure 5.6.

Figure 5.6[17] **Unemployment rate - teenage and all ages: 1968 to 1998**

	Aged 15 – 19 Years %	Total %
August 1968	3.4	1.6
August 1978	16.8	6.2
August 1988	15.5	6.8
August 1998	18.8	7.9

Among teenagers looking for full-time work, in March 1999 the unemployment rate was 24.7 per cent while among those looking for part-time work it stood at 18.2 per cent[18].

5.2.15 As we shall discuss in several contexts, the educational status of young people is a significant factor affecting both their employment needs and their employment prospects. While at March 1999 20.6 per cent of teenagers were unemployed, among those not in full-time education the rate was 18.9 per cent. Among full-time school students it stood at 22 per cent while it was 22.1 per cent for full-time tertiary students. Such figures mask a significant difference between students and non-students as to the nature of their unemployment. Among those not in full-time education, 92 per cent were seeking full-time work. Among school students only eight per cent, and among tertiary students only 11 per cent, were looking for such opportunities. Rather the latter two groups were overwhelmingly seeking part-time employment[19].

5.2.16 The dramatic decline in the employment prospects for youth was not in issue. Most of the differences that emerged in the submissions put to us, or in the available commentaries, appear to be matters of emphasis about how to best illustrate the youth employment predicament:

(1) Thus the House of Representatives Standing Committee on Employment, Education and Training, (HRSCEET), in September 1997 highlighted the way in which demand within industries has fallen away:

> *" - Changes in the composition of the labour market have seen the most severe declines occurring in entry level jobs once the domain of teenagers entering the labour market. Employment growth for teenagers in skilled trades has been strongly negative, falling more than 33 percent in about ten years. Banking was once an industry which gave large numbers of teenagers their first job as a teller but technology has transformed the industry and the entry level jobs have disappeared. In the insurance industry the*

proportion of employment for under 21 year olds has fallen from about 18 per cent of the workforce to about 5 per cent since 1987. Technology and policies favouring privatisation, corporatisation and outsourcing have also transformed the state and federal public sectors at the cost of large numbers of entry level jobs."[20]

(2) Similarly, the ARTBIU demonstrated in its submission that the Railway industry's use of junior employment has almost vanished. On the figures presented for the State Rail Authority of New South Wales, there are only 33 persons aged 18 years or less out of a total of 9015 employees[21].

(3) Likewise, the Community and Public Sector Union demonstrated from employment data relating to the Australian Public Service, (see Figure 5.7), that the "*APS has virtually ceased being an employer of people in this age group*"[22].

Figure 5.7 APS teenage employment and recruitment 1988 - 1997

Year	Number of Employees	Percentage of Permanent Workforce	Number of Appointments	Percentage of Total Appointments
1988	2295	1.6	1543	11.9
1997	**84**	**0.1**	**107**	**2.1**

The Joint Governments accepted that there has been a substantial decline in recruitment at the base level which is the usual entry point for youth. The decline, it said *"reflects changing work requirements and practices in the APS that have reduced demand for staff with fewer qualifications and for staff in clerical support roles"*[23].

(4) In relation to Figure 5.3 and Figure 5.4 at paragraphs 5.2.7 and 5.2.8 above, we commented on the relative distribution and growth of industry shares and modes of employment of teenage workers. In June 1998, the Minister's Discussion Paper on Junior Rates observed that for teenage employment:

"The retail industry has been the major employer of teenagers for a number of years. In 1984/85 the annual average employment of teenagers in the retail industry was 200,400 (36.1 per cent of total teenage employment). While the growth in teenage employment in this industry did not fully keep pace with overall employment growth in the industry, in 1996/97 annual average teenage employment in the retail industry had increased to 288,900 (49.4 per cent of total teenage employment).

The manufacturing industry remains the second largest employer of teenagers, with an annual average of 51,600 teenage employees (8.8 per cent of total teenage employment) in 1996/97. However, while overall employment in this industry fell slightly by 9,500 (0.8

per cent) between 1984/85 and 1996/97, teenage employment fell by 47,700 (48.1 per cent) over the same period.

The accommodation, cafes and restaurants industry is now the third largest employer of teenagers with an annual average of 50,400 teenage employees (8.6 per cent of total teenage employment) in 1996/97. While this industry has experienced strong overall employment growth (76.9 per cent) since 1984/85, its growth in teenage employment has been even stronger (103.1 per cent) over the same period.

The property and business services industry is the forth largest employer of teenagers with an annual average of 34,000 (5.8 per cent of total teenage employment) in 1996/97. While this industry experienced a strong growth in employment between 1984/85 and 1996/97 (97.2 per cent), the growth in teenage employment within the industry has been modest (18.8 per cent) over the same period.

While some of the falls in teenage employment in particular industries have been consistent with overall employment trends within the industry, some industries which experienced an increase in employment between 1984/85 and 1996/97, have had a reduction in teenage employment over the same period. These industries include government administration and defence, finance and insurance, and communication services."[24]

5.2.17 The outline we have given is founded upon our satisfaction that there is relatively little room for informed difference about the state of youth employment now and for the foreseeable future. There are differences of emphasis and about cause and effects. But there is no room to doubt that employment for youth is relatively scarce, increasingly casual part-time, fragmented and dependent upon retail and service industries. We adopt the conclusion and the main reasons stated for it in the Joint Governments' Submission:

*"**3.7 Conclusion***

There has been a marked deterioration in young people's position in the full time labour market over the past 15 years. There has been a steady decline in full-time employment opportunities for young people, accompanied by persistently high rates of full-time youth unemployment. At the same time there has been an increase in education participation and in the proportion of young people who combine full-time education with part-time employment. Youth employment is concentrated in a narrow range of industries, with retail trade accounting for around 50 per cent of teenage employment overall, and around 62 per cent of teenage part-time employment.

The available material highlights the importance of participation in employment, both while at school and soon after leaving school, to future labour market outcomes. It suggests that obtaining a job soon after leaving school is an important factor influencing the successful transition into employment; that early workforce engagement can reduce the probability of prolonged unemployment; and that part-time work while still at school improves the chances of getting a job on leaving school."[25]

5.2.18 We have not attempted to summarise or extract the data relevant to each head of that conclusion. Subject to a reservation, we now address, we agree with its content and emphasis. Generally those who responded to the Issues Paper[26] also agreed

that there is no substantive basis on which the analysis should be disputed. Our reservation concerns several characteristics of the labour market as it affects youth employment that we would add either as developments of that summary conclusion, or as additional points.

5.3 Characteristics of Youth Employment: School Retention and Participation in Education:

5.3.1 There has been a marked increase in participation by young people in post-compulsory school education. The school retention rates to Year 12 have increased from 35.1 per cent in 1978 to 71.8 per cent in 1997. While in the 1960s two-thirds of 15-19 year olds had a full-time job, in the 1990s two-thirds are now full-time students (see Figure 5.1 and Figure 5.2). Education rather than employment is now the primary occupation of Australian teenagers. The number of students who combine full-time education with some paid employment has also increased sharply. In August 1986, 15 per cent of full-time teenage students were employed; in August 1998, some 28 per cent were[27].

5.3.2 But also since the early 1980s, Australia has promoted students/school retention as a solution to the decline in employment generally, and as a response to the need to heighten work skills and human capital. Thus some school retention may be acknowledged to be a function of unemployment or underemployment of youth in the labour market. Several commentators have debated the correlation between education level and employment[28], and between education level and wage dispersion[29]. Any weakening of those correlations appears likely to affect the maintenance of school retention rates. Already, school retention and completion rates have ebbed in recent years:

> *"Young people who do not finish school are far more likely than those who stay on to be unemployed. But the proportion of students who remain in school nationally fell more than 5 per cent to 71.8 per cent in the five years to 1997.*
>
> *Northern Territory students are the least likely to complete school. Only 42 per cent of students in the Territory completed Year 12 in 1997. This compared with 91 per cent in the ACT, which has the highest retention rate in the country.*
>
> *Completion rates show the number of students who finish Year 12 as a proportion of their age group. In 1997, completion rates were much higher for females than males (71 per cent compared with 59 per cent). They were much higher for people with high socio-economic status (76 per cent) than low (55 per cent). They were higher in urban areas (66 per cent) than rural communities (64 per cent)"*[30]

5.3.3 Some of the differences in completion rates by region have significant implications. The predicament of young people faced with the choice between more school, or no school but low pay, or no pay if unemployed, is a grave one. Compounding that predicament is the fact that it coincides with much of the period in which young people are attempting to negotiate the transition from parental dependence to self-sufficiency. A peripheral, but not insignificant pointer to the scale of that factor is an estimate made by the Salvation Army that 100,000 young people aged from 12 to 24 experience homelessness each year in Australia. This figure has increased from about 50,000 in 1991[31].

5.3.4 Increased school retention rates mask hidden unemployment, as Wooden has observed in *Australia's youth: reality and risk*[32]:

> *"While there are a number of factors responsible for this growth in participation in education, not least being the expansion of government funding for education, and higher education in particular, during the 1980s (see McCormack 1995, Gregory 1955), the fact that the decline in full-time labour participation rates for teenagers pre-dates the expansion in the education sector, suggests that changing labour market conditions have directly contributed to the growth in educational participation. In other words, part of the increase in school retention and university enrolments must represent a response to the lack of full-time employment opportunities for young people. Support for this hypothesis has been found in a number of economic studies (e.g. Larum and Beggs 1989, Karmel 1995, Lewis and Koshy 1977). Further evidence is provided by the high proportion of teenagers enumerated as being outside the labour force (most of whom, 94 per cent, were involved in educational study) yet who claim they would like to work. In September 1996, almost 44 percent of teenagers outside the labour force were in this situation. This compares with just 25 percent of teenagers outside the labour force in 1977. The rise in education participation thus disguises a rise in 'hidden employment' among teenagers."*

5.3.5 It seems that by continuing at school in partial response to lack of employment options, youth are enhancing their prospects of gaining employment when they leave full-time study. ABS survey figures for May 1996 reveal that of those not engaged in further education, but who left school at the end of the previous year and completed Year 12, only 7.2 per cent were unemployed. Of those school leavers who had not completed Year 12, some 21.1 per cent were unemployed[33]. Similarly in 1996, an estimated 44 per cent of 18 to 19 year olds who had left school before Year 12 were involved in what are termed "*marginal activities*"[34] (those not in education or training and who were engaged in part-time/casual work, were unemployed, or were not in the labour force). Among those who had completed Year 12 those engaged in marginal activities were only 18 per cent. We discuss aspects of that marginalisation in paragraph 6.4.5 and following.

5.4 Characteristics of Youth Employment: the Decline of Full-time Employment and Factors Affecting It:

5.4.1 We have referred at paragraph 5.2.4 and Figure 5.2 to the collapse of full-time employment. In paragraph 5.2.16 we note a reference to the transformation of demand for teenagers in full-time jobs now seen to require more skill, or no longer needed at entry level. It is apparent from an examination of Figure 5.1, as well as from the material in paragraph 5.2.17, that the remaining full-time teenage employment sector is the domain of those not at school or in full-time tertiary studies; the part-time teenage labour market is increasingly becoming the domain of those in full-time studies. Given that polarisation, there are serious implications for those not in full-time study in an employment environment which increasingly provides employment on a part-time (largely casual) basis. As we have noted, full-time employment is in rapid decline, especially for juniors. Some analysts even predicted, we now think too boldly, that by 2001 there would be no full-time jobs at all for teenagers[35].

5.4.2 However the propensity of employers to cease or reduce the employment of juniors or less skilled workers is not divorced from a macro-economic, social or cultural context, even if the anticipated effects can be measured or predicted. The disposition to disemploy is itself an effect of antecedent causes. The reasons that so confidently can be relied upon to motivate employers to shed or reduce junior labour are themselves the observed or anticipated effects of the interplay of a complex of factors. Those factors are associated with the general shift in the structure of both the economy and employment toward what is now considered to be appropriate to a global market economy.

5.4.3 The propensity for employers to react in an economically rational way to any relative increase in the hourly rates of junior labour must be accepted on the evidence and submissions before us. We have commented at paragraphs 1.5.10 to 1.5.13 above on the human resource management measures that produce so much employee insecurity. Those measures must also be seen as integral to the responses made by industry, capital, and employers to the shift in economic policy. Relative wage increases in real hourly earnings for the decreasing number of increasingly older juniors who find full-time employment could have had little meaningful "independent impact" on the decline in full-time employment of juniors[36]. It is superficial and wrong to suggest otherwise: even if the suggestion does concede that factor to be not a "principal reason" for the decline. The decline in full-time junior employment, the volatility of "hours paid" to juniors in part-time and casual employment, and the asserted "hair-trigger" sensitivity of junior employment generally to relative increases in wage cost,

each have some common origins. Those origins are to be found in the dynamics that have made employment for less skilled employees generally less common, more casual and less secure, more precarious, and generally less rewarding. In that perspective, we do not accept that the relative wage increases for full-time juniors would have had much more independent impact than the pay rate of draymen and the price of fodder had in the decline of employment in horse drawn transport; a marginal effect on the speed of the decline perhaps.

5.4.4 The problem faced by young people is clearly broader than unemployment. The predicament created by the changes we have noticed and in particular the melting away of full-time employment opportunities for juniors is brought into sharper focus by an in depth study of an (albeit small) group of 30 young persons carried out by the University of Adelaide[37]. The group was found to be strongly motivated about obtaining work. A "good job" was described as one involving "decent pay, a good boss, a pleasant working environment and that it should be full-time". Work in the fast food industry was regarded as "shit work because pay is poor and it is casual". Several commentators[38] have observed that the new part-time, casual jobs are not necessarily bad or "shit jobs" (as described above) for those principally pursuing education. However, they make clear that for non-students, this restructuring of the market's demands for youth employment brings with it increasing disadvantages.

5.4.5 As we have seen, the restructuring of the workforce has occurred for various reasons beyond the control or influence of Australia's' youth. However, Australia's youth appear to have no option other than to adapt to some of the realities. Too facile a merging of those who seek "good jobs" as "job snobs" adds little to the likelihood of that adaptation being other than arduous. It is clear that relatively few such opportunities remain for teenagers. A preparedness to accept opportunities as they are presented, is vital to them and to those around them. Teenagers may need encouragement to move toward an acceptance that what some have described as "shit work" is not always a bad job. Nor perhaps is it ever a bad job for those who are likely to have no other option for getting a foothold in paid employment.

5.4.6 The importance of getting a good early start in employment is highlighted by a longitudinal survey carried out on a group of young people who made their entry into the labour market around 1990. **Table 5.8** records the average cumulative amount of time working in the first five years after leaving school. The results were classified by gender, educational attainment and employment status in the first year after leaving school:

Table 5.8 Average cumulative time spent employed over the first 5 years after leaving school by labour force status in year one (% of the first 5 years spent employed)[39].

Highest Educational Attainment	Employed full time Year 1	Employed part time Year 1	Unemployed Year 1	Not in Labour Force Year 1
Males				
Less than Year 12	78	63	40	36
Completed Year 12	85	76	51	56
Females				
Less than year 12	85	54	20	8
Completed Year 12	87	76	42	40

The differences are marked. Completion of year 12 at school (particularly for some females) is an important consideration. However, perhaps employment status attained in that first year after school completion is more determinative of durable employment.

5.4.7 We repeat "perhaps" because there is inconclusive but respectable analysis which doubts the generally accepted view we have expressed in the last paragraphs. Based on longitudinal studies, that analysis questions whether low pay casual work is a bridge to more secure rewarding employment for young people who are not already using educational or training opportunities as the main plank for such a bridge. We discuss that material at paragraph 6.2.11. However, we reiterate our very strong view that the generation of speculative "bull" and "bear" market attitudes about employment of young people for purposes of debate is no service to those who must negotiate the passages of youth through the employment narrows that now prevail.

5.5 Characteristics of Youth Employment: Underemployment of Youth and Adults; the Role of Wage Cost Differentials; and Earnings:

5.5.1 An important characteristic of the labour market affecting youth employment is the level of underemployment. The underemployment of juniors is significant, but so also is the underemployment of young adults and women. Underemployment does not qualify for ABS statistical purposes as unemployment. Any employment for one hour or more in the surveyed reference week serves to shift the person from unemployed to employed status. For that reason, other surveys and data should be considered in any assessment of the state of employment and unemployment of youth or the labour force generally. One such source relates to those who would like to participate in the labour force[40]. Another is those who would like to participate more

fully; in other words those, casuals particularly, who would like more paid hours. Many part-timers prefer that form of work, but an increasing proportion of around 24 per cent of the estimated two million part-timers, around 580,000 on the 1995 data, would prefer to work longer[41]. Another vantage point, to similar effect, is provided by studies of those who are called the working poor[42], and by the 1999 Dusseldorp Skills Forum publication demonstrating a relatively high level of underemployment in the age 20 to 24 cohort:

> *"It is important to recognise that a growing proportion of young adults working part time do so involuntarily. Table 6 shows that the problem of involuntary part time employment is particularly acute for young adults, as about two in five part timers want to work more hours. This is compared to one quarter of teenagers and one quarter of prime age workers who indicate they are currently underemployed.*
>
> *When looking more closely at time series data, it is evident that the trend of underemployment has been an upward one. At the beginning of the 1980s, only a quarter of part time workers in this age group reported a desire to work more hours. Among women there is a higher proportion of such young adult part time workers than any other group. Among males only the prime age grouping has a higher proportion of involuntary part timers. Further details are summarised in Table 7."*[43]

5.5.2 Associated with and reinforcing the significance of the adult underemployment that overhangs the employment market for juniors is the wage cost differential between the use of junior rates employees and adult rate employees. That differential was not calculated with any precision in the submissions or material put to us. The level would be subject to many variables. A rough but revealing estimate can be calculated around the minimum earning's threshold for determining an employer's obligation to pay the Superannuation Guarantee contribution levy. The greater the wage discount in a junior rate at a particular age, the greater the hours that may be worked by an employee before the seven per cent superannuation contribution must be paid in respect of the employee. For the retail trade, on that rough estimate the labour cost differential for an age 18 employee is some 30 per cent below an adult for the first nine hours 45 minutes of a regular working shift, growing to 37 per cent for about the next three hours[44]. Put another way, an 18 year old junior casual in the retail industry could work at the junior rate for up to 44.4 hours a month over a Monday to Friday shift before the seven per cent superannuation guarantee contribution by the employer would need to be made, as distinct from 31 hours for an adult on the full award rate. Differentials of that kind and dimension add to the existing incentive the discounted age progression in rates gives to employers to use peak workload scheduling techniques of the kind discussed in overseas literature, and in some 1980s Australian junior rate cases[45].

5.5.3 Several other characteristics that also have an impact upon the state of employment of juniors and are relevant to the assessments we make are:

- The earnings of young workers relative to their adult counterparts have fallen noticeably over the last two decades for both full-time and part-time workers[46].

- That decline, in conjunction with reduced employment opportunities, has compounded the dependency of teenagers on their families. In 1982, 38 per cent of 18 to 20 year olds were dependent on their parents. By 1994, this had risen to 62 per cent[47].

- Employment provided to teenagers is seldom accompanied by formal training. The number of 15 to 19 year old employees who received in-house training more than halved between 1989 and 1993 falling from 147,000 to 65,000[48].

5.6 The Characteristics of Youth Employment: Own-Wage Elasticity of Demand and the Effect of Relative Wage Increases on Employment:

5.6.1 A battle array of economic analyses were marshalled before us about the effects on employment if there were to be an across-the-board replacement of all junior rates with full adult rates. The reliance on the disemployment effects of junior labour unit cost increases made little distinction between the various proposals for non-discriminatory alternatives. Countervailing economic arguments were used by those propounding changes to junior rates. In the circumstances, it is appropriate to identify the characteristic of the youth employment market debated in those exchanges.

5.6.2 The primary debate was whether or not there would be catastrophic labour market effects from the increase to wage rates for juniors that would be brought about by an abolition of junior rates. The presentation of data, analysis and survey material in support of the arguments occupied a substantial proportion of the submissions and reference literature made available to the Inquiry. It is appropriate to identify some of the main sources relied upon. The relative authority of those sources creates in summary form a perspective for what we consider to be the most immediate issue to arise from the primary argument we have outlined.

5.6.3 A key proposition debated is that lower wages are necessary to protect the employment prospects of young people, and that increases, particularly differential increases, in such wages will result in reduced employment of young people. Those

propositions are founded upon economic theory related to the "*own-wage elasticity of demand for labour*". That notion is a measure of the percentage change in employment of a class of employee resulting from a percentage change in the wage for that category of employees[49]. The soundness of the theoretical basis, and the weight of economic evidence about that notion or the application of it, is dealt with in much detail in several of the principal submissions made to the Inquiry[50]. In the main, those submissions drew upon literature surveys or recent institutional studies.

5.6.4 Since about 1995, debate about such economic theory, and about the desirability or otherwise of lifting the quantum of minimum wages, has been enlivened by the empirically based counter arguments of Card and Kruger. In "*Myth and Measurement: The New Economics of the Minimum Wage*", they challenged the conventional view that higher minimum wages reduced jobs for low paid workers[51]. That view was visited in virtually all submissions to us that discussed the economic effects of changing junior rates. Likewise debates about the propositions by Card and Kruger have informed the more recent studies and papers to which we have been referred[52].

5.6.5 In one of the most recent studies, the OECD reviewed the impact on employment of statutory minimum wages in a range of countries. It concluded:

> *"The results suggest that minimum-wage rises have a negative impact on teenage employment, although the magnitude of the reported elasticities varies significantly, from -0.3 to -0.6 when Spain and Portugal are excluded, and from 0 to -0.2 when they are included in the regression. In some of the specifications, negative employment effects are also found for groups of workers other than teenagers.*[53]
>
> *"... a number of tentative conclusions can be drawn, Firstly, the results suggest that a rise in the minimum wage has a negative effect on teenage employment. Secondly, negative employment effects for young adults are generally close to or insignificantly different from zero. Thirdly, for prime-age adults, the most plausible specifications suggest that minimum wages have no impact on their employment outcomes."*[54]

5.6.6 That analysis, and the studies upon which it was founded, have been given persuasive weight in several inquiries of the kind we are making. OECD submissions to similar effect became an influential component in the rationale for recommendations made earlier in 1998 by the United Kingdom Low Pay Commission[55], and by the Irish National Minimum Wage Commission[56]. In Australia, some of the more recent literature has been reviewed in debates during the *Safety Net Review Wages Cases* about the impact of increases to minimum wages. Both the *April 1998 Safety Net Review Wages* decision (1998 SNR decision)[57] and the April 1999 Safety Net Review Wages decision (1999 SNR decision)[58] provide a summary of relevant Australian and overseas

studies. The 1998 SNR decision concluded in respect of employment generally that "*moderate safety net increases are likely to have, at most, limited employment effects*[59]*"*. A similar conclusion was reached in the 1999 SNR decision[60].

5.6.7 The September 1997 HRSCEET Report and earlier debates of the same body of literature, recommended "*that the Department of Industrial Relations undertake or commission empirical research on the relationship between the changes in the level of wages and employment levels*[61]". Presumably in response to that proposal, and to requirements for work on the topic by several government departments and other organisations, the Productivity Commission, in anticipation of this Inquiry, published a staff research study in October 1998.

5.6.8 That study, "*Youth wages and employment*", examined numerous minimum wage studies particularly those carried out overseas and concluded that:

> *"The impact of minimum wage changes on employment remains a controversial issue. While there is disagreement about the likely effects on employment of a small change in the minimum rate, there seems greater agreement that large changes are likely to affect employment. Many of the studies that argue for a limited effect on employment are focused on the short run, but it is important to also consider the longer run implications of minimum wages. There are substantial lags in the adjustment process and it takes time for capital-labour substitution to take effect. Finally, studies that focus on minimum wages - set at low levels and affecting only a small proportion of the workforce - are likely to understate significantly the employment effects of wage changes affecting much larger groups."*[62]

On the basis of their own econometric analysis of a data set derived from a 1995 survey of employees from some 1,800 workplaces, the researchers found:

> *"While there remain many unanswered questions on the relationship between wages and employment, the balance of evidence presented here suggests that a large increase in the relative wages of teenagers could be expected to have a negative impact on their employment."*[63]

That last conclusion was based upon specific findings about youth own-wage elasticities in Australia. Those were interpreted to indicate that a one per cent increase in youth wages would lead to a decrease in youth employment of two per cent in the retail industry, 2.5 per cent in the culture and recreational services industry and five per cent in the accommodation industry[64]. The overall conclusion was expressed as follows:

> *"The purpose of the study was to examine the determinants of youth employment in order to shed light on the possible implications of abolishing junior rates of pay in State and Federal awards. To the extent that replacing such awards with non-discriminatory*

alternatives would lead to an increase in youth wages, the results of this analysis would suggest quite strongly that there would be a more than proportional reduction in youth employment."[65]

5.6.9 Our reference to the passages quoted should not be read as a minimalisation of the points made for and against particular propositions advanced about the employment effects of pay increases in particular circumstances. The literature on the subject is voluminous. Already some of the key propositions advanced in the Productivity Commission research paper have been challenged by other researchers[66]. However, the tentative conclusions expressed by the OECD in the passage quoted at paragraph 5.6.5 above have a broad analytical and empirical basis. They are concordant with a judgement that Card and Kruger themselves acknowledged to be a matter of degree when they stated in relation to the policy implications of minimum wages:

"... Our findings suggest that the efficiency aspects of a modest rise in the minimum wage are overstated. In the diverse set of policy experiments summarised in Table 12.1, we find no evidence for a large, negative employment effect of higher minimum wages. Even in the earlier literature, however, the magnitude of the predicted employment losses associated with a typical increase in the minimum wage are relatively small. This is not to say that the employment losses from a much higher minimum wage would be small: the evidence at hand is relevant only for a moderate range of minimum wages, such as those that prevailed in the U.S. labour market during the past few decades. Within this range, however, there is little reason to believe that increases in the minimum wage will generate large employment losses."[67]

The debate about such questions of degree is still evolving. The advice given by the tripartite United Kingdom Low Pay Commission established by the current British Labour Government may demonstrate that there is none the less a measure of consensus that the competitive position of young people seeking entry level employment merits special consideration when minimum wages are being established or adjusted.

5.6.10 The Joint Governments' Submissions to the Inquiry; the OECD 1998 Economic Outlook; the United Kingdom Low Pay Commission and the Irish National Minimum Wage Commission, (each of which adopt OECD submissions); and the 1998 Productivity Commission: Staff Research Paper, is each supportive of the proposition that movement in the real value of minimum wages relative to other wages is likely to have adverse effects on employment of minimum wage earners.

5.6.11 At **4.4.9** of the Issues Paper, the Inquiry posed the following proposition for comment:

> *"Is it open to the Inquiry to do other than adopt the view that an effective removal and non-replacement of the existing discounts for age against adult wages will involve relative adjustments of a dimension that will result in significant dis-employing effects for the class of employees now in receipt of junior rates, or the class that will be likely to be in receipt of the substituted pay rates?"*

While various participants, particularly trade unions challenged some of the more exuberant comments from some employers as to the imminent catastrophe occasioned by any ending of junior rates, we observed that no response challenged the proposition squarely put. The ACTU[68] questioned the conclusions reached by the Productivity Commission's Staff Research Paper[69]. However we take the ACTU Response, and the critique on which it relies, to be more of a challenge to the methodology, data base and conclusions drawn by the Productivity Commission Paper. The ACTU Response did not seek to address directly our proposition or the substantial weight of economic opinion on which it is based.

5.6.12 We conclude that the view we expressed and repeated in the preceding paragraph describes a characteristic of the youth employment labour market. An effective removal and non-replacement of the existing discounts for age against adult wages will involve relative adjustments of a dimension that will result in significant disemployment effects for the corresponding class of employees now in receipt of junior rates, or to be in receipt of the substituted pay rates.

5.7 "Abolishing" Junior Rates: the Contingent Process:

5.7.1 The "abolition" of junior rates is not an express requirement or directly consequential effect of the expiry of the exemption of junior rates provided for by paragraphs 143(1D)(a) and 170LU(6)(a). Rather, subsection 143(1E) provides that on a case-by-case basis the Commission may decide that the exemption in paragraph 143(1D)(a) should apply. However, for the reasons given in **Appendix C** and stated shortly at paragraph 3.1.3, the mere expiry of the exemption in paragraph 143(1D)(a) does not operate automatically as a termination of junior rate provisions.

5.7.2 Consequently, the notion of abolishing junior rates must be commensurate to the degree of change to or replacement of existing junior rates that is likely to result from the Commission's processes. The potential changes include those that would flow from the partial or complete implementation of some of the proposals about non-discriminatory alternatives. So far as we aware, and we have researched the topic, the Commission has never arbitrated the removal of a junior rate. We found one decision in which the Commission refused to insert junior rates into a consent award[70], but later

varied the related awards generally to include such provisions[71]. On some occasions when introducing junior rates, the exit point from a junior rate has been abbreviated at a particular age after expressly taking into account the consideration of whether or not the payment of the full award rate at the age would result in a disincentive to employment[72].

5.7.3 The proposals about non-discriminatory alternatives discussed at **Subchapters 3.3** to **3.5** above include several that, if implemented throughout industry, could be expected to have a significant cost impact for existing or potential employers of junior labour. However, the contention or hypothesis that a proposal that involves removal of junior rates in a particular award or industry should be assessed on a basis that converts the concept of it to application across all industries is misconceived. Common sense, the history we have sketched in **Subchapter 2.2**, and the reasons we have given at paragraph 3.3.12, **Subchapter 4.4**, and **Subchapter 6.3** above all point to one conclusion. They require that assessments about the replacement of any existing junior rate be founded upon the particular award or agreement in which the rate appears, and far as practicable upon the use that is, or could be made of it. The more specific proposals about award classifications should be read as applicable to the circumstances of the industry covered by the relevant award.

5.7.4 The operative form of any replacement of a junior rate or junior rates generally is problematic. To assess the consequences of a removal of a junior rate one must know, or assume the substance of the provision replacing it. Among other considerations that bear upon any such assumptions are several that should prevent any tendency to oversimplify the process that might result in abolishing junior rates. Those most immediately relevant are:

- The durability in State and Territory industrial regulatory systems of the exemption of junior rates in relevant and federal awards from anti-discrimination regulatory schemes. The Joint Governments' Submissions to this Inquiry confirms there is no current intention on the part of the States of Victoria, South Australia and Western Australia, the Australian Capital Territory and the Northern Territory to remove the current exemptions of junior rates from the respective anti-discrimination legislation. Similarly, the submissions put by the State of New South Wales and the State of Queensland each aver no intention to depart from a status quo in which the youth wages in those States are exempt from the corresponding legislation. In **Appendix C**, we outlined the detail of that legislation. The impact of the exemptions is all the greater because State awards regulate the bulk of the retail sector[73].

- The contingent nature of the availability, or non-availability of non-discriminatory alternative options that may not result in significant alteration to the existing wage discounts in prevailing junior rates.

- The scope for operation of the technical exception from discrimination of provisions based on the *inherent requirements of* (the particular) *employment.* In **Appendix C** at paragraph 56 and following we discuss more fully some aspects of that explication of discrimination. The current regime for bringing award and agreement provisions into compliance with the non-discriminatory criteria are based upon sub-items 51(8) and 54(1) of Schedule 5 of the WROLA Act and the corresponding provisions of sections 143 and 170LU of the Act. Those provisions envisage a determinative process. In the case of existing awards, the Commission is to take whatever steps it considers appropriate to facilitate the variation of the award.

- An absence of junior rates from a significant proportion of awards or agreements; conditions for exits to adult rates for juniors employed under particular awards or agreements; and the disuse of some effectively defunct junior rates provisions because there is no actual junior employment under the award or agreement.

5.8 Cost Effects and Employment Consequences of Particular Non-discriminatory Alternatives:

5.8.1 Before considering the cost effects of particular non-discriminatory alternatives to Junior Rates and their impact on employment, we deal with one development said to be relevant to our assessment. Several participants in the Inquiry, including the ACTU, pointed to the effects of the Equal Pay decisions of 1969[74] and 1972[75] on the levels of female employment subsequent to each decision. The increasing employment of women was not retarded even though those decisions lifted female rates up to male levels and the adjustments involved increases of up to 33 per cent. This was said to be greater than the increases that might emerge for all but one of the age groups (the 18 years old) under the SDAEA's proposed alternative. Moreover, the effect of the Equal Pay decisions was more widespread than any such increase of junior rates both as to the size of the group affected and the fact that Equal Pay affected women for the entire span of their working lives not just, at most, for six years.

5.8.2 We accept that the Equal Pay developments provide a basis for "real-life" application of economic theory. We do not accept that their relevance to the

circumstances at hand is self-evident, and it is certainly not determinative. The economy of Australia (especially unemployment rates and competition for low-skilled jobs in particular) was far different 25 to 30 years ago than it is now. The economic arguments raised against Equal Pay concerned the cost impact of such measures. It was not argued that women would be placed at a competitive disadvantage if men and women were paid the same. That much is evident from the two Equal Pay decisions. In the Equal Pay decision of 1969, employer concerns were as to the cost impact of any increase (which might lead to price rises) and the need to maintain "*the longstanding practice of differentiating on social grounds between males and females*[76]". In the Equal Pay decision of 1972, the cost impact on the economy was referred to by employers. Nowhere in either decision is there reference to issues of competitive disadvantage, or to labour and capital substitution of the kind canvassed before us. In other words, no similar linkage between removal of an existing wage discount and reduced employment opportunities or prospects of existing and potential recipients of the wage discount was made in the equal pay debate.

5.8.3 We turn now to the particular non-discriminatory alternatives. The SDAEA's proposal seeks an adjustment of the junior rate payable to employees aged 18 and above to the standard rate. It also seeks that the rates applicable to juniors below 18 years of age be reviewed on work value grounds. It follows that no quantification of the cost effect of any changes to rates for 15 to 17 year olds can be made. The likely cost of a total adjustment initially proposed by the SDAEA was estimated by Woolworths on the basis that rates for age 15 to 17 year olds would be increased by an average of about 25 per cent. That estimate put the total cost of increases for all age levels in the vicinity of 11 per cent of the total employment costs of the firm[77]. Another estimate supplied by the Australian Retailers Association (the ARA) was that the average wage increase for juniors aged 18 and above currently employed across retail trade awards would be 43 per cent for 18 year olds, 25 per cent for 19 year olds and 11 per cent for 20 year olds[78].

5.8.4 For the younger teenagers, whose rates are to be based on work-value principles, the effect on employment is not able to be assessed. However, if personal attributes associated with age and experience are not comprehended in the "work-valued" rates, a significant (at those age levels) over-valuing of the work performed by such youth may occur. Such significant overvaluing will have consequences for their employment. That will be so because the relevant juniors will not be truly competitive with those who are "fully productive" at the rate. As to that part of the proposal that applies adult rates from 18 years, the level of the increase would overvalue the work. Thus, it could be expected to have significant disemploying effects for 18 year olds,

diminishing as the age approaches 21 or for the most experienced employees in the age 18 to 21 cohort.

5.8.5 On the other hand, some of the proposals, or some options for non-discriminatory alternatives, may involve relatively minimal cost effects. The KFC classification described in paragraph 2.3.4 might conceivably be a non-discriminatory alternative. To be one, it may need to pass the indirect discrimination test, which after 22 June 2000, it would be required to meet if subsections 170LU(5) and (6) remain unchanged . The cost increase effect to an employer of implementing it generally in the retail industry would be negligible. The administrative cost of changing the pay system would appear to be the only cost. Even the general adoption of the system would be unlikely to have an effect on the employment of juniors in the retail industry.

5.8.6 The ACTU's proposed treatment of the under-18 years group differed from the SDAEA proposal. In that regard, the ACTU's modified NTW schedule could be read as seeking that rates be set at levels higher than the current ratio to adult rates for ages 15-17 in retail and probably other awards. The invitation to set rates "*that make sense*" connotes a more even progression from those age levels to the new age 18 rate than would apply if existing discounts were to be retained. However its application of full adult rates at 18 years of age is identical to that of the SDAEA for the purpose of replacing the relevant junior rate classification. A difference is that the ACTU proposal is one which we understand to be intended to apply across all industry where junior rates apply. The junior rates appearing in retail industry awards are not identical to those found in other awards which contain junior rates. However those and other rates in the awards set out in **Appendix A** are fairly representative. In that light, the uniform application of adult rates to all age 18 to 20 year rates, and probable increases for those 15-17 years of age, would have significant effects generally as to cost and disemployment. The universality of that assessment is influenced by the universality of the ACTU proposal. We consider that the effect of that proposal in this context is not sufficiently sensitive to the real differences that exist between awards and industry sectors in the actual use of junior rate classifications. Associated with that use also are differences in the function of such classifications in their effect on the competitive position, or equality of opportunity of juniors employed under them. Differences in the relative significance of experience or age in determining the exit point from any discounted rate are also inherent to the mix of form and content of junior rate classifications across industries.

5.8.7 The ACOSS proposal would appear likely to have mixed cost impact effect. It would allow an effective carryover of discounted rates for the proposed Level 1 rate to ages above 15, the age at which Year 9 is normally completed. If implemented, the result would lower the potential cost of first year employment of persons aged from 15 to less than 18. However, the wage costs for those aged 18 years and above and who have acquired six months full-time equivalent work experience, or, for those who have completed Year 12, would increase significantly if the proposal were to be implemented. We are not able to be conclusive about an estimate of the overall cost of implementing the ACOSS proposal. The Joint Governments did provide us with an estimated percentage of employees in the various categories that would receive the adult rate under the ACOSS proposal. Using unpublished data from the ABS "*Supplementary Labour Force Survey on Career Experience*" for November 1996, a range from 85 per cent of 18 year old part-time workers up to 97.4 per cent of 20 year old workers were estimated to be likely to be entitled to the full adult rate[79]. Because of the potential impact of the work experience requirement, the costs relating to employees above age 18 would be less than those estimated for the SDAEA proposal, but probably would be of significant dimension. Consequently for most 18 year olds and above, the application of full adult rates would cause an overvaluation of the work performed and be expected to reduce the employment prospects of the 18 to 20 years old age group. Conversely, the prolongation of the rates payable for some early school leavers might enhance the employment prospects of that group.

5.8.8 The cost effects of the CFMEU proposal applied as a replacement to the building and construction industry *Unapprenticed Junior* classification are not readily ascertainable. We do not have adequate information about the incidence of employment under the junior rate classifications of the National Building and Construction Industry Award in South Australia and Western Australia. There may be virtually none. If so, any cost of the CFMEU proposal could not properly be attributable to replacement of a junior rate classification. There is no relevant classification operative in other States under federal awards. Having regard to that fact, and to the clearly established practice of engaging some juniors at standard rates, we are not in a position to assess the cost effect of a move to Appendix S rates (85 per cent to 90 per cent of adult rates).

5.8.9 The effect on the current level of employment of youth of applying the CFMEU proposal to the area currently covered by the NBCI Award is beyond our capacity to assess. There is substantial employment of juniors under that award already at adult rates. In one sense the CFMEU proposal might be construed as intended to

bring about an effective "new entrant" level to be applied particularly to juniors capable of performing fully at CW1 standards. Thereby, the proposal would replace perhaps the only other effective non-training entry option: engagement at the 92.4 per cent trade equivalent, "industry rate for the job". We are unable to assess the relative impact on employment of a change of that kind. Moreover it would involve replacement of what is already one form of non-discriminatory classification for another non-discriminatory classification, albeit the replacement may be more congruent to further employment of juniors. However, if the junior rate classifications are used in South Australia and in Western Australia, the application of the Appendix S CW1 classification would have a deleterious effect on that employment of juniors. The size of the increases that would be applied, and the failure of the classification to frame competencies appropriate to whatever personal attributes are associated with the age and work experience of that employment, are our reasons for adopting that view.

5.8.10 The AFMEPKIU proposes that junior rates be replaced by a trainee rate based on the NTW model. Unless a youth is engaged under a contract of training, or is a full-time student undertaking part-time or casual work, no discount from the standard award rate would occur. For the reasons we gave in paragraph 3.5.6.2 and following the proposal is not capable of detailed assessment. We suspect that the conceded exceptions to the standard rate would amount to little if any additional cost to employers and not affect employment in the industry. This is reinforced by the proposed linkage to the NTW model and rates currently applicable to trainees under the Metal E & AI Award. However, for all other juniors the standard rate would apply, drawing upon an existing level from the competency based classification structure. As we have commented previously, the absence of any recognition of the personal attributes associated with age and work in any competencies yet developed and applied will tend to overvalue the contribution of the young worker against older and more experienced workers. This will impact on employment prospects for such youth.

5.8.11 Finally, several proponents of non-discriminatory alternatives[80] suggested that a phase-in period would lessen the impact of the removal of existing rates. We have considered this in our assessments. We have approached this aspect from the view that the "consequences" which we have been called upon to assess are not consequences for the economy including impacts on prices or consequences for employers. Rather we have had to assess the consequences for youth employment. The economic material which we have referred to earlier, and which we accept at least to the extent described

in paragraph 5.6.12, postulates that increases in rates payable to youth will result in youth being substituted by employers either by adult workers or by labour-saving equipment or processes. In that light, a phasing-in process would seem to do little to discourage the anticipated employer reaction immediately, during, or at the end of any phase.

Endnotes

[1] ABS Catalogue 6203.0 March 1999.
[2] ACCI Submission 49 at p. 50.
[3] ABS Catalogue 6203.0 - March 1999.
[4] Wooden, M., *The Youth Marker: Characteristics and Trends* Australian Bulletin of Labour Voll 22 No. 2 June 1996 at p. 149; also see Wooden, M., *The Labour Market for Young Australians* in *Australian youth: reality and risk* Dusseldorp Skills Forum op.cit. at p. 29ff.
[5] Productivity Commission Staff: Research Paper: *Youth Wages and Employment* October 1998 at p. 9.
[6] Joint Governments' Submissions 38 at p. 37.
[7] *Against the Odds* extract from Table 3 p. 77.
[8] Table 4 form Joint Governments' Submissions 38 at p. 25.
[9] *Against the Odds* Table 1 p. 74.
[10] ABS Catalogue No. 6306.0 May 1996.
[11] Table 2 from Joint Governments' Concluding Submission 38 at p. 12 modified by adding the "*all industries"* totals calculated in that submission and based on use of the National Centre form Vocational Education Research Limited (NCVER) estimate of apprenticeship and traineeship instead of the ABS EEH Survey figures for apprentices and trainees used in the industry breakdown.
[12] Appendix A1 of Joint Governments' Concluding Submission 10 March 1999.
[13] AFMEPKIU Submission 48 at pp. 7-9.
[14] ABS Catalogue 6203.0 - September 1998 at p. 3.
[15] ABS Catalogue 6203.0 - March 1999 Tables 10, 11 and 24.
[16] ABS Catalogue 6203.0 - March 1999 Table 24.
[17] ACCI Submission 49 at Table 2 of Attachment 3.
[18] ABS Catalogue 6203.0 - March 1999 Table 24.
[19] ABS Catalogue 6203.0 - March 1999 Table 11.
[20] 1.12 HRCSEET Report - September 1997.
[21] Australian Rail, Tram and Bus Industry Union Submission 12 at pp. 8-10.
[22] Community and Public Sector Union Submission 40.
[23] Joint Govertments' submission in reply to Issues Paper p.17.
[24] Ministerial Discussion Paper June 1998 p. 16.
[25] Joint Governments Submission 38 at p. 38.
[26] See Issues paper at paragraph 4.2.13.
[27] Joint Governments' Submission at pp. 15-16.

[28] For general discussion see Sweet ,R., "*Youth: The rhetoric and the Reality of the 1990s*" in Dusseldorp Skills Forum, *Australia's youth: reality and risk* at pp. 17-20; White. M., "*Education and Youth Unemployment in Australia during the Great Depressio"* in *Against the* Odds, 39 at pp.46-47; Ainley, J., School Participation, Retention and Outcome" in Australia's youth: reality and risk at p. 62.

[29] Borland, J., & Kennedy, S., "*Earnings Inequality in Australia in the 1980s and 1990s"*, A.N.U. Centre for Economic Policy Research, Discussion Paper No. 389, June 1998, at pp. 28-29; and also see Borland, J., *Earnings Inequality in Australia: changes, causes and consequences"* A.N.U. CEPR Discussion Paper No. 309 at pp. 2, 37-43.

[30] Productivity Commission 1999: report on Government Services referred to in the "Australian" 22 February 1999 at p. 18.

[31] *On the Scene: News and Stories* from the Salvation Army Autumn 1999.

[32] Dusseldorp Skills Forum Australia's *youth: reality and risk* at p. 34.

[33] Ainley J, "*School Participation Retention and Outcomes*" in *Australia's youth: reality or risk* at p. 60.

[34] McClelland, A MacDonald, H. & MacDonald F., "The situation of young people not in education or full-time work" in Australia's youth: reality or risk, at p. 110.

[35] Gregory, R.G. & Karmel, T., *Youth in the 80s.* Papers for Australian Longitudinal Survey cited CFMEU Submission 37 at p. 3.

[36] See Issues Paper at paragraph 4.2.13.

[37] Spierings, J., "Promises Promises: Young Australians and the Labour Market" in Against the Odds ibid at p. 233 condensing previous papers.

[38] Ibid Against the Odds at p. 235; Wooden M., "The Labour Market for Young Australians" in Australia's youth: reality and risk p.29, at p. 47.

[39] Ainley, J., McKenzie, P., *"The Influence of School Factors"* Dusseldorp Skills Forum Australia's young adults: the deepening divide. 1999 pp110-111.

[40] ABS Catalogue No. 6220.0, September 1998; and Treasury "Economic Roundup", Summer 1999: reported "Australian" 10 March 1999 at p. 38. And see also Report of Survey mentioned in "Sydney Morning Herald" 10 March 1999 at pp. 1-3.

[41] Buchanan, J & Bearfield, S., *"Reforming Working Time - The Future of Work"*: Brotherhood of St Lawrence 1997 at pp.8 and 66; and *Australia at Work* at p. 102, figure 5.1 and p. 136ff.

[42] ACIRRT *Australia at Work* ibid pp. 90-94, drawing upon work by Buchanan, J. & Watson, I., 1997 Social Policy Research Centre; Richardson, S. & Harding, A., *"Poor Workers? The link between low wages, low family income and the tax and transfer system"*, forthcoming 1999 in Richardson, S (Ed) *Reshaping the Labour Market* Cambridge University Press, Sydney.

[43] Buchanan, J. & Bretherton, T., "*Experience of young adult workers"* in *Australia's young adults: the deepening divide* Dusseldorp Skills Forum 1999 at pp. 59-60.

[44] Assumes New South Wales Retail Award figures for July 1998, compounded by 20 per cent casual loading and 7 per cent Superannuation Guarantee Contribution. Under section 27 of the *Superannuation Guarantee (Administration) Act 1992* to be eligible for superannuation contributions, an employee must earn more than $450 per month. Under section 28, a part-time employee, (a person who work less than 30 hours per week), who is under 18 is not taken into account. Hence a junior, under 18 years, is only eligible for superannuation if more than $450 per month is earned from work for more than 30 hours per week.

[45] Sachdev, S. & Wilkinson, F., ibid at p. 20 citing Neathey and Hurstfield 1995: "*Sophisticated computerised personnel systems - known as 'scheduling engines' have made it possible for employers to estimate with high levels of accuracy (down to sub-fractions of a person hour), their pre-use staffing requirements at particular points in the trading cycle*"; and see also Print G6038 per Cox C; *Re On Airport Retail Concessions Award* (1986) 303 CAR 741 at 745, quoting Macken J. to the effect that such techniques were not unknown in the 1980s.

[46] Wooden M: Dusseldorp Skills Forum, Australia's Youth: reality and risk at pp. 44-47

[47] Schneider J. "The Increasing Financial Dependency of Young People on Their Parents" Social Policy Research Centre Discussion Paper No. 96 February 1999; Spierings, J., *"A*

crucial point in life: learning, work and youth adults" in Dusseldorp Skills Forum, *Australia's young adults: the deepening divide* at p. 6.

[48] Burke G., Dusseldorp Skills Forum, Australia's Youth: reality and risk at Table 4 p. 146

[49] Productivity Commission: Staff Research Paper at pp. 31-32.

[50] ACCI Submission 49 at p. 23ff; Joint Governments' Submission 46 Chapter 4; Australian Retailers Association Submission 23 at pp. 25-28.

[51] Card D. and Krueger A.B. "Myth and Measurement: The New Economics of the Minimum Wages" Princeton 1995.

[52] Apart from the texts directly cited in the following paragraphs see in particular: Borland J. and Woodbridge G.: *Wage Regulation, Low-Wage Workers and Employment* 1998 Australian National University Centre for Economic and Policy Research; Debelle G., Borland J. (eds): *Unemployment and the Australian Labour Market* Conference Economic Group, Reserve Bank of Australia and Centre for Economic and Policy Research, Australian National University 1998 at pp. 85-91, 311-313, 317, 319; Green, P. & Paarch, H., *The Effect of the Minimum Wage of the Distribution of Teenage Wages* Discussion Paper 97-02, Department of Economics, University of Columbia; OECD Submission to Irish National Minimum Wage Commission: *Labour Market and Social Policy* Occasional Paper 28 1997 at pp. 16-20; OECD Submission to United Kingdom Low Pay Commission: *Labour Market and Social Policy* Occasional paper 29 at pp. 15 to 17; Mangan J. and Johnston J.: *Minimum Wages, Training Wages and Youth Employment* December 1997, University of Queensland at pp. 15-16.

[53] OECD Employment Outlook, June 1998 at p. 46.

[54] Ibid at pp. 47-48.

[55] Low Pay Commission: ibid at paragraphs 6.19, 6.66 to 6.87.

[56] Report of the National Minimum Wage Commission April 1998 at p. 31.

[57] Print Q1998 at Attachment C.

[58] Print R1999.

[59] Ibid at p. 104; and see also Joint Governments' Submission 38 at Chapter 4.3.

[60] Print R1999 at pp. 20-22.

[61] HRSCEET op.cit. at p. 75.

[62] Productivity Commission: Staff Research Paper: *Youth Wages and Employment* at p. 39.

[63] Productivity Commission: op.cit. at p. 43.

[64] Ibid at pp.62-65.

[65] Joint Governments' Submission 38 at p. 53.

[66] Junankar, P.N., White, M. & Belchamber, G., *The Youth Labour Market: Anecdotes, Fables and Evidence* November 1998. Paper presented to Joint Workshop Centre for Economic Policy Research, Australian National University and Productivity Commission.

[67] Card and Kruger op.cit. at p. 393.

[68] ACTU Response No. 14 to Issues Paper and Critique of P.N. Junankar et al, "The Youth Labour Market: Anecdotes, Fables and Evidence" November 1998.

[69] Productivity Commission: Staff Research Paper: Youth Wages and Employment.

[70] *On Airport Retail Employees Award 1981* Print F9013 (1985) 297 CAR 668 per Cox C.

[71] On Airport Retail Concessions Award, 1985 and others Print G6038 (1986) 303 CAR 741 per Cox C.

[72] Re Movie World MEAA Interim Entertainment Award Print L6617 per McDonald C.

[73] See Appendix C at paragraph 48 and related endnote.

[74] (1969) 127 CAR 1142.

[75] (1972) 147 CAR 172.

[76] (1969) 127 CAR 1142 at 1151.

[77] Transcript at pp. 341-342.

[78] Australian Retailers Association Submissions in transcript at p 306.

[79] Joint Governments' Response to Provisional Findings pp. 9-11.

[80] ACTU Response to Issues Paper; ACOSS Response to Issues Paper.

6. THE UTILITY OF JUNIOR RATES:

6.1 Background to the Assessment:

6.1.1 The assessment called for under this topic of the terms of reference has a readily apparent purpose. It is to assist in identifying the particular uses and attributes of the function of junior rates in the sets of employment circumstances specified. The assessment requires a consideration of the various uses, advantages and disadvantages associated with the use of junior rates in the industrial or employment circumstances nominated. The basis for our assessment of the utility of junior rate classifications for the various purposes specified in section 120B was primarily the data gathered about the character and incidence of junior rates and of employment under them. We have outlined much of that material in **Chapters 2** and **5**. In our examination of that information we hoped to find an explanation for some of the apparent omissions of junior rates from awards or agreements, or of the relative absence of employment of juniors in industries which had access to award based junior rates. In this chapter, we draw conclusions from information outlined in **Chapters 2** and **5,** and from a number of academic sources.

6.1.2 As we have seen from Figures 5.3 and 5.5 and **Chapter 5** generally, junior rates are used predominantly in the retail trade and accommodation and catering industries. Together, those industries accounted for about 60 per cent of teenage employment overall. Over 60 per cent of that employment is in the part-time category of employment which usually is also casual employment. Full-time employment of teenagers has declined from 67.8 per cent of total employment of teenagers in 1986 to 35.3 per cent in 1999. (See Figures 5.1 and 5.2). Apprenticeship or trainee classifications a year earlier accounted for about 45 per cent of male teenage full-time employment, but only nine per cent of female teenage employment[1].

6.1.3 Apprenticeships constituted about 33 per cent of total teenage full-time employment in 1997. The pattern of apprenticeships, and more recently of "*New Apprenticeships*", which include trainee contract employment, is an important part of a perspective for the overall utilisation of junior rates. The history of determination of junior rates reviewed in **Chapter 2** discloses a consistent theme of concern that for

some industries, employment of juniors should be tied as far as practicable to contract of training employment. There is an inadequately articulated tension between the interests served by the utilisation and relationship of junior rate classifications and training contract classifications. The case law to which we have referred demonstrates that the incidence and coverage of award junior rate classifications has been affected by the application of arbitral principles preferring the use of apprenticeships. The tension between the two classification forms is nowhere more evident and maintained than in the very title and application of one of the most prominent junior rate classifications: "*Unapprenticed Junior*". In **Subchapter 6.4** we refer to aspects of training contract employment pertinent to the school to work transition. Our terms of reference do not extend generally to that form of junior employment. However, it may be important that its sometimes competitive presence in the configuration of award utilisation of junior rate classifications be noted and understood.

6.1.4 Not all junior employees want to contract to a formal traineeship or apprenticeship. We do not know if the reasons why particular employees and employers are disinterested in structured training arrangements have changed much since the framework of junior rate and apprenticeship classifications was established. But opposition to structured training contract employment for juniors being the sole option has hardly changed at all.

6.1.5 For many junior employees, there are positive operational effects of junior rate classifications. The classification helps identify a niche in the labour market. The positive effects are evidenced most particularly for students and for those whose lifestyle is suited or can be adjusted to "part-time" employment in the service industries. But there is a corresponding benefit from the classification's role in the maintenance through high turnover, of a stream of basic entry level employment for many school-leavers. There are useful operational effects also from the provision for entry level employment of young people not able to secure training contract entry, (or for whom such training is not suited, not needed, or not available). Part-time casual employment on junior rates may be an important factor improving the likelihood of later progression to full-time employment, especially for those who attain Year 12 or above in educational standard. It may be inferred that junior rates are now of relatively little use in securing direct entry to full-time employment. Relatively few juniors find full-time employment if only because the full-time job market for teenagers has collapsed[2]. At March 1999 over 90 per cent of the 67,800 unemployed teenage workers and not in full-time education are recorded to be seeking full-time work; about 60 per cent of 15 to 19 year olds not in full-time education and in the labour force are in full-time employment.

Training contract employment would account for a significant proportion of the 220,700 teenagers employed full-time at March 1999. Apprentices in training as a proportion of full-time teenage employment were around 33 per cent in May 1997, and disproportionately male (44 per cent)[3]. We noted at paragraph 5.2.4 that teenage full-time employment constitutes about 3.4 per cent of the overall full-time workforce. Of the group of teenagers who were unemployed in May 1995, only a third reached stable full-time or part-time employment 18 months later. The remainder were either in unstable employment (25 per cent), were unemployed (31 per cent), or had withdrawn from the labour market (12 per cent). The figures indicate some of the profound difficulties facing young people disengaged from education and skilling systems[4].

6.1.6 Several operational effects of junior rate classifications in interaction with the labour market discussed in **Subchapter 5.4** help explain why and where they are of use to employers. The wage cost differential of junior labour combines well with the flexible patterns of work demanded by employers in the service industries, and able to be supplied by juniors. Where low cost labour for less skilled work is consistently and intensively required, junior labour at junior rates is the lowest cost, readily available, probably most flexible option. Those cost advantage factors are not demonstrably a significant incentive for the use of junior employees, with or without junior rate classifications, in full-time work for which a stable relatively skilled workforce is maintained. A workforce of that kind will often be supplemented for peak loads, it now seems, by contract or labour hire employment. Skilled workers would also be likely to be given preference over juniors for that class of short term full-time work.

6.2 Utility of Junior Rates for Types of Employment:

6.2.1 We take "*types of employment*" predominantly to be a reference to types of the kind categorised in paragraph 89A(2)(r) of the Act such as:

- full-time employment;
- casual employment;
- regular part-time employment; and
- shift work.

6.2.2 Our concept of "*types of employment*" is drawn from the industrial usage of an expression whose ordinary meaning might be much more ambulatory[5]. Alternatives could be found. The concept, types of employment, might extend to aspects of the use of junior employees which relate to types of employees in employment, or types of work in which juniors are employed. Junior employment may itself be conceived to be

a type of employment of the class of persons who are junior employees. Both the Full Bench in the *Award Simplification Decision*[6] and the Full Bench in the *Section 109 Reviews Decision*[7] have interpreted "*type of employment*" in paragraph 89A(2)(r) as including junior employees.

6.2.3 The wages and working conditions of juniors have long been established on the basis of a facially age discriminatory differentiation of juniors as a distinct class of employee, and therefore, it would seem, as a distinct type of employment. Conditions such as proportions clauses, restrictions on overtime and shift work, together with the discounted wage rate and age progression of "junior" classifications, have been the main incidents of junior employment as a type, or at least as a subcategory of employment. It is not necessary to develop that notion of junior employment further in this context. It is sufficient to note that the availability of it could be a basis upon which special measures related to inherent requirements of the employment, or to the class of employees defined by age might be formulated and determined. Otherwise, we consider that for the purpose of the assessment, industrial usage is consistent with our reading of section 120B as a reference to the types of employment directly mentioned in paragraph 89A(2)(r).

6.2.4 In industrial usage, the main types, or "categories of employment", are distinguished by reference to subsets of employment for which differential terms and conditions of employment may be applied. So far as we are aware virtually all junior employment in junior rate classifications fits within one or more of the first three types listed in paragraph 6.2.1. Perhaps, some shift work may be available to juniors, if it is worked, and if the relevant award does not preclude it. None of the awards we have examined closely make a junior rate classification specific to a type of employment. Most awards speak generally when providing for the main types of employment provided for under the conditions of the award.

6.2.5 The utility of junior rates and the utility of any type of employment are each substantially dependent upon the type of industry and its employment needs. The availability of juniors and their need for particular kinds of work during school to work transition and thereafter also affects the use of junior rates and different types of employment.

6.2.6 The type of employment in which junior rates are predominantly used is casual work for less than full-time hours. Most awards define "part-time" as a type of employment that is not "casual" employment. Part-time conditions of employment in

that sense correspond to the proportion that the regular hours worked bear to the standard ordinary hours of employment for full-time, or weekly hire employees. As we have noted at paragraph 5.2.5 above, statistical surveys do not use the term "part-time" as a reference to that type of employment strictly so-called. Over one third of employment at junior rates, about 21 per cent of total junior employment in Australia, is provided by three companies and their respective related companies, franchisees and subsidiaries: Coles Myer Limited, Woolworths Limited and McDonald's. In November 1998, Woolworths employed 50,694 employees aged between 15 and 20 years of age, 91 per cent of whom were casual and part-time employees[8]. Coles Myer did not provide a detailed breakdown of the type of employment of the 60,000 employees it categorised as juniors. An estimate that 40 per cent of total employment are juniors working part-time or casual suggests that almost all junior employment by Coles Myer is of that type[9]. McDonald's 660 stores account for about 44,000 employees under 21 years of age. From the information supplied, it appears that no more than about four per cent of those employees would be weekly or regular part-time employees, the remainder being casual employees[10]. The average working hours and patterns for casual/part-time employees were not supplied in any detail. However, there is a reasonably reliable basis for estimating average employment periods for the more regular casuals at about 10 hours to 12 hours per week[11].

6.2.7 The scale of the employment by those major retailers imprints that pattern of use of junior rates on the figures for junior employment generally. But even without the dominance of the major retail employers, the use of junior rates shows a polarisation around part-time casual employment and away from full-time employment. In a December 1998 paper, Wooden[12] analysed the changing pattern of the use of the main types of employment in the Australian employment market. That study added fixed term contract employment, and the use of non-employed contractors to the usual list of types of employment. It points to a national growth in casual employment for less than full-time hours, from 5.5 per cent in 1971 to 18 per cent in 1997.

6.2.8 The growth of that type of employment, and the high concentration of its use for junior employment in the retail and service industries, is influenced by a number of factors. We have already commented on the work and use of labour force scheduling techniques and regulation or cost avoidance techniques. We have no reliable data about the extent to which such techniques are applied. Our knowledge of industry and observation of particular cases makes us think that such human resource management practices are endemic. We consider them to be among the more important direct influences on the growth of casual employment. But the point of view expressed by

Wooden confirms the pattern and reasons for the dispersal of casual part-time employment as the main type of employment of juniors:

> *"... If two different types of labour - casual labour and permanent labour, which are substitutes - are allowed for, it follows that in choosing between the two different types of labour, it is the relative cost that matters.*
>
> *The very basis for the distinction between casual and permanent labour, however, is that they are not perfect substitutes. Permanent workers, for example, have longer average tenure which will have positive consequences for training and human capital accumulation (relative to casuals). This longer average tenure is reinforced by legislative protections which make it both difficult and costly for firms to dismiss permanent workers. Moreover, as a result of conditions specified in some awards, employers are often constrained to employing permanent workers on a regular basis over a limited range of working hours, with only limited ability to adjust these arrangements. Casual workers, on the other hand, and as observed earlier, may be required to work different hours, both in terms of length and timing, and employment can generally be terminated without notice.*
>
> *The relative productivity of casual labour will thus vary across firms and industries. Some factors which are likely to influence these differences include the importance of skills and training, the importance of labour flexibility in responding to changes in output demand, and the way in which work is organised. These factors, in turn, impact on the relative demand for casual workers. In jobs which require high skill levels (i.e. skills that are acquired only after substantial investments in formal education and training, or through long periods of on-the-job learning), casual labour should be relatively unattractive to employers. On the other hand, in firms facing market characteristics which involve a high degree of variability in demand over the course of a day or a week (such as in retail trade or restaurants), or even a year (such as in agriculture), casual labour may be highly sought after by employers. Use of permanent labour in such situations, for example, is likely to involve hoarding labour, at considerable cost, during periods of low demand. In contrast, casual labour can be hired to work only during the times of peak demand."*[13]

6.2.9 The converse effect of those reasons for choosing casual employment is that full-time employment increasingly has become a less prevalent type of employment for juniors. That type of employment, as the passage quoted demonstrates, is seen by employers to be best reserved for classes of work and employees associated with high, or at least not low, skill levels. In the presentations to us, the Joint Governments advanced that reason to explain the near total decline in the use of junior employment in public services. A similar absence of junior employment from industries in which work is predominantly structured around full-time types of employment may be attributed to similar causes. The use of fixed term contract employment and labour hire practices, is increasing[14]. Those measures will militate further against juniors being employed in full-time work. In essence, such measures are predicated upon what have been described as *just-in-time* staffing principles: supplying optimally skilled labour on demand in a competitively tendered situation, but otherwise keeping the cost of maintaining it off inventory. We note that development as a consideration to which

some weight should be given in the assessment of the introduction, or review of trainee classifications, as urged in the AFMEPKIU's proposal. It is also a consideration to be weighed in analysing what scope there may be for using junior rates in industries where such rates have fallen into disuse, or are not available. Our own experience, independent of this Inquiry, suggests that industries with high levels of full-time employment have thus far shown the highest propensity to use fixed term contract and labour hire practices.

6.2.10 It has been suggested that there is no justification for the conclusion that junior rates have no practical utility in areas of full-time employment where they were once widely utilised such as public administration and railways. In our view, that response simply dismisses a reasoned and inescapable inference from facts and employer conduct that are not disputable. The evidence that junior rate classifications are of little use in securing direct entry to full-time employment is that they are not being used, and there is virtually no junior employment by Commonwealth departments, by State Rail authorities and like institutions where full-time employment of juniors was once extensive. We do not expect that position to change for jobs that may arise in the future. No rational basis exists for thinking that the causes that have brought about the current position will cease to operate: junior employees are not needed for the relevant full-time labour force inventory because of application of human resource management techniques of the kind we have described. Those techniques are zealously promoted. Nothing has been raised with us to counter a view that has been consolidated over the course of the Inquiry. The employment of juniors has virtually vanished from the areas of public sector employment, rail transport, and financial services. The only realistic means for such employment to resume is through traineeships and apprenticeships directed to developing the skills of the kind that are said to be now essential for the work performed by the dwindling core workforces retained for such employment.

6.2.11 The emphasis that is given to cost and productivity considerations, in the use of casual and part-time employment as the predominant type of employment for juniors, points to another aspect of the choices made: the concentration of the employment in relatively low skill occupations and work. Some studies have analysed the skill requirements and average training demands for casual employment. That work is fragmented and far from being conclusive. It affords some basis for questioning how far "maturation skills" are a fundamental concern when selecting and training employees for much of the work done by casual employees[15], and the extent to which such employment is a bridge to more secure employment:

"With respect to training the fragmentary evidence points towards less access to training for casuals as compared to permanent employees (Campbell, 1998). ... The ABS NSW survey (Catalogue 6247.1) revealed that only 38 per cent of casuals received any formal training from their employer while only 28 per cent had access to a career path or progression.

...

It is difficult to conclusively answer the bridge or trap question in Australia for a number of reasons. First, there is heterogeneity across casual employment with respect to motivation, conditions and duration. ... longitudinal and preference data with respect to casual employment in Australia is very fragmentary, any analysis can only be largely speculative, however, it is possible to connect the available fragmentary data. For example, the youth longitudinal survey (NBEET, 1992) demonstrated a strong connection between unemployment and casual employment, and suggested that those in casual employment were more likely than those in permanent employment to be unemployed or still in casual employment 12 months later. Indeed, a subsequent NBEET report suggested that the bulk of casual jobs were unlikely to constitute a stepping stone, but rather acted as a dead-end (NBEET, 1992, 67).

... This suggests, in accordance with the static workforce estimates, that casual employment constitutes an important ***destination*** *for flows into employment and that at any one time the majority of vacancies are likely to be casual. The inflow into casual employment is even more important for the unemployed. It seems that there is some dualism in employment destination, flows into permanent jobs are likely to be accounted for by those already with permanent jobs or by those finishing graduating from educational courses. Other categories of job seekers, the unemployed in particular, are more likely to be funnelled into casual employment. The ABS SEUPDATE longitudinal survey indicates that over two thirds of job seekers who obtain work end up in casual jobs (ABS, 1997)."*[16]

6.3 Utility of Junior Rates for Industries:

6.3.1 We do not have the resources to undertake a detailed examination of the utility of junior rates in all industries. Instead we look at industries which we have followed in some detail in earlier chapters: construction and metals. We outline the situation where either by submission or observation junior rates have no role and we look at a serious attempt to resolve the tension between equality of opportunity and equal remuneration. We do not analyse the retail industry in this chapter. The utility of junior rates for that industry and, by association, the hospitality and accommodation industries has been well established in earlier parts of this report.

6.3.2 The reasons that help form an employer's choice about type of employment, or about using a junior rate option for it, influence also the use of junior rates by particular industries. Availability of junior rate classifications applicable to employment in an industry, and the use and the mix of the variable constituent elements of the applicable classifications, varies between industries. The major retailers established through their submissions the utility of junior rates for the retail and

wholesale trade industries. Wage cost differentials, suitability for low skill entry level work, and availability of juniors to meet the flexibility demands of peak service utilisation are the main criteria. The hospitality industry also established the utility of junior rates on the same basis. The railway industry, on the submissions of ARTBIU, now has an employment structure in which junior rates have no practical utility. Junior rates do not appear in the more recently made rail industry awards. The junior rate classifications that survive have no application in the workplace. For the public services, and for the Australian Public Service in particular, much the same conclusion seems to be open. The relevant awards in the Australian Public Service provide for junior rates at entry levels. However, as the Joint Governments pointed out in their response to the Issues Paper, recruitment to entry level work in the Australian Public Service clerical stream dropped from 83 per cent of all appointments in 1989 to 6.8 per cent in 1998:

> *"... This reflects changing work requirements and practices in the APS that have reduced demand for staff with fewer qualifications and for staff in clerical support roles. Since most APS employees under 20 are recruited to the base level, this trend has produced a marked decline in junior employment in the APS."*[17]

We believe that the decline in the use of junior employees in clerical support roles is typical of all other occupational groups in the public sector where juniors once may have been employed.

6.3.3 Finally, we note that submissions by the Transport Workers' Union of Australia (the TWU) were not countered in any material respect. In the transport industry generally, junior rates are not much used. Age linked qualifications apply to some types of driving licences, characteristically used by drivers in the industry. Generally, higher levels of insurance premiums apply to drivers under age 25. Those considerations are cogent reasons for accepting that junior rates are not likely to be of much practical use in the functional operations of that industry.

6.3.4 We observed at paragraph 5.4.4 that full-time work opportunities are melting away, affecting most seriously those teenagers who are not in full-time education. A teenager unable to find employment as a trainee or as an apprentice faces serious difficulties in obtaining either full-time work or adequate remuneration. One concrete proposal directly relevant to an aspect of that predicament was made in submissions by the Master Builders Association (the MBA) supported by the Housing Industry Association (the HIA). Those bodies contended that the absence of junior rates had contributed to a lower level of employment of youth in the building and

construction industry than would otherwise occur[18]. We note there are several ways in which entry level junior labour may be employed in those industries. The first option, employment of new entrant employees at the standard award rate, is historically well established for the reasons shown in paragraphs 2.2.37 and 2.2.38. Another option is employment at a junior rate in sales and clerical services. Employment under apprenticeship and traineeship provisions generally in construction, fabrication or building is the third main option. The remaining option is grouped as employment in an *Unapprenticed Junior* classification on apprenticeship rates in South Australia on work of a kind for which there is no trade apprenticeship, or in a *Junior Worker* or an *Improver* classification on roof tile fixing in Western Australia[19].

6.3.5 The HIA in its submission contended that the provision in Appendix S of the NBCI Award for new entrant CW1 classification has been implemented only to a minor extent. That classification is provisional upon agreement or arbitral determination to implement it. As noted at paragraph 3.5.1.2, it provides for new entrants to be paid at 85 per cent of the trade rate rising to 90 per cent after 12 months, and to 92.4 per cent "upon fulfilling the substantive requirements of Construction Worker Grade 1". The HIA claimed that the CFMEU through certified agreements had promoted the Construction Worker Level 3 trades labourer rate at 92 per cent of the trade rate as the minimum new entrant rate. Consequently, it was suggested, the standard award classification of Level 4 Builder/Labourer at 90 per cent had become almost completely disused. Only the relevance of that point, not its accuracy, was disputed. As we have noted at paragraph 3.5.1.2 above, the Construction Workers Grade 1(d) rate in Appendix S of the NBCI Award assumes progression to the 92.4 per cent relativity, subject to assessment or completion of structured training for 16 modules.

6.3.6 As we understand the award provisions and current effective rates for both the main construction and metals awards, the new entrant levels that would apply to a Year 11 or 17 year old at the respective adult, trainee and junior weekly rates, are:

Figure 6.1[20]

	Appendix S CW1 $	Effective Minimum Adult Entry Level $	Apprentice $	NTW Trainee $	Unapprenticed Junior $	Junior Worker Roof Tiling $	Civil Operations Trainee $
Construction Industry	438.70	474.70 [(a)] (444.95)	243.80 [(c)]	371.10 [(d)]	243.80 [(f)]	276.00 [(g)]	356.80
Metals Industry	-	373.40 [(b)]	199.56 [(c)]	193.00 [(e)]	225.48	-	-

(a) CFMEU Policy L3 or CW1(d) full award rates including industry and special allowances. The figure in brackets is the base rate Builders Labourer classification L4 under the NBCI Award with the same allowances.
(b) C14 and National minimum wage rate, applicable for first three months.
(c) First year apprentice with proportionate tool allowance. (South Australian rates.)
(d) Construction industry single rate applies throughout traineeship regardless of school year entry level Skill Level B: the most generally used rate.
(e) NTWA rate for a Year 11 student. The exit rate in the Metal Industry for the trainee at Skill Level A after two years is $381.45, and $362.95 for Skill Level B.
(f) Applies only in South Australia: age 17 rate assumes first year of service rate, as for Apprentice.
(g) Applies only in Western Australia.

6.3.7 The MBA and particularly the HIA submissions criticised the level of some of those rates but did not analyse them comparatively or in any detail:

> *"Thus new entrants into the industry are paid a minimum of 92% of a trades wage. Where a young person is unable to obtain an apprenticeship or traineeship they are competing for labourers' jobs against other experienced workers, and only where these are in short supply will a new entrant be taken on. ... The building industry needs to be included in any new arrangements which the Commission may recommend covering competency based rates for young people and school to work transition. ... The decision to treat the building and construction industry as a special case when framing the National Training Wage Award 1994 was the major cause of its failure to assist the industry."*[21]

The CFMEU responded that the enterprise agreement or overaward entry rate to employment in the industry is properly a matter for the negotiating parties and not directly our concern for this report. We accept that point. Moreover, Appendix S itself is dependent upon implementation by agreement. It provides that if the CW1 criteria are met, the rate should be at that level. However we reproduce the comparison in Figure 6.1 because it reinforces the important place of the training contract classifications in the overall pattern. If a junior is unable to gain entry to the construction industry on the long established basis of being accepted as capable of "fully productive" performance, the classifications shown in the remaining columns in the first row of the Figure are the only other means of gaining entry. The apparently near defunct Unapprenticed Junior classifications are an alternative of a kind to

apprenticeships and perhaps traineeships. NTW traineeships are now available for the building and construction industry for entry level builders' labourer work at around minimum wage level. However, it would seem that at least the Metal E & AI Award junior rate classification is potentially diminished in scope by the extension of the occupational pursuits for which apprenticeships are now being made available, including, perhaps, non-trade "traineeships" on NTW terms. As we have seen at paragraph 2.2.36, State legislation in South Australia may have had a similar limiting effect on the *de facto* scope of the NBCI Award Unapprenticed Junior classification.

6.3.8 A relatively high proportion of juniors are engaged at adult rates in the construction industry. Total non-farm employment of persons aged under 21 in the ANZSIC classification of the construction industry was established to be 38,500, of whom an estimated 18,018 were apprentices, 17,748, (or 46.1 per cent), were paid at adult rates, and 2,772 or 7.2 per cent were paid at junior rates[22]. The CFMEU and the MBA both made submissions, and later responded to the Issues Paper. However, no further detail has been forthcoming about the breakdown of junior employment in the available classifications in the construction industry[23]. Probably that employment on junior rate classifications in the ANZSIC classification for the construction industry, is mainly in shop assistant classifications and retail outlets[24]. We have explained the limited application of junior rate classifications to building and construction operations. It appears that little use is made of the junior rate classifications for actual building and construction work. No evidence or statistical detail of such use was provided by MBA in response to our request for it. By custom and practice, those juniors who are engaged for entry level unskilled construction and building work receive the adult rate. Otherwise apprenticeships are the general means of introducing juniors to the industry. It would appear that traineeships are also becoming an accepted extension of that practice.

6.3.9 We note that between November 1984 and November 1995, the total number of employees in the construction industry grew by 36 per cent, whereas the total Australian labour force expanded by 27 per cent[25]. However, over the period May 1986 to May 1998, the total number of teenage youth employed in construction fell from 34,866 to 31,995 a fall of some nine per cent[26]. The figures for teenage youth are a different measure from that for employees aged 21 but the difference does not detract from that relative decline. Demographic factors may account for part of that decline, which is lower than the decline shown for industries now most reliant on a full-time but presumably more skilled core workforce. But we think it likely other considerations have also been important.

6.3.10 Reliance on apprenticeships and traineeships as the entry point to employment in all traditional apprenticeship trades and related areas of employment was reinforced by a custom and practice of excluding other forms of non-trade employment. It was, and is, also reinforced by the design of the Unapprenticed Junior classifications in juxtaposition with other classifications in any related industry or occupation. Policies developed by unions, often in collaboration with employer bodies, have fostered training and competency based approaches to career paths in those industries. Both the CFMEU and the AFMEPKIU in their respective submissions about the construction and metals industries placed emphasis on the priority that should be given to training in the promotion of junior entry level employment in association with competency based classification of work and payments. Both unions have done much to foster the use of apprenticeships and training arrangements. Especially they have done so in response to the relative collapse of the apprenticeship system that occurred from 1990-1991.

6.3.11 In that year, commencements of apprenticeships dropped 28 per cent from the level achieved in the previous year, or 21 per cent below the previous five year average. Commencements have not since regained those levels[27]. Compounding the effect of a relative abandonment of the apprenticeship system by industry employers has been a sustained growth in the number of persons aged 21 and above undertaking apprenticeship and traineeship employment. For all occupational categories across industry generally, 55.8 per cent of those commencing a contract of training in 1997-1998 were aged 21 or older[28]; at 30 September 1998 of all persons in training under a contract of training 55 per cent were aged 21 or more[29]. Those global figures are skewed toward the older age group by the pattern of commencements in intermediate clerical, sales and service workers, and in the labourers and related workers occupational groupings[30]. NCVER statistical collections using an occupational classification, (ASCO), and the literature disclose an apparently consistent trend toward age 21 and older take up of training opportunities[31]. That trend is to be expected. The traineeship system in particular was designed to admit long term unemployed, including adults.

6.3.12 Figure 6.2 is reproduced from NCVER Australian Apprentice and Trainee Statistics. It shows absolute numbers and a relative decline over the decade in apprenticeships in what were the main trades and apprenticeship creating industrial occupations. In contrast, there has been rapid growth in the past three years in the Labourers and Related Workers' occupation group.

Figure 6.2 Total number in training at 30 June 1988 to 1998 by occupation group (ASCO)

Occupation Group		Training at 30 June (.000's)[1]										
		1988[2]	1989	1990	1991	1992	1993	1994	1995[3]	1996	1997	1998
41	Metal Fitting and Machining	15.2	15.5	16.2	15.1	14.4	12.4	11.2	10.4	11.3	11.7	20.89
42	Other Metal	11.6	12.2	13.4	12.3	11.6	9.8	9.5	9.3	9.9	9.7	
43	Electrical	20.9	21.9	23.3	22.4	20.9	17.8	16.5	15.9	16.7	16.8	17.3
44	Building	27.7	30.3	32.7	30.6	28.8	23.8	25.5	26.4	25.9	24.3	24.26
7	Plant & Machine Operators & Drivers	0.4	0.9	0.6	0.5	0.5	0.6	0.5	0.6	1.4	2.2	3.5
8	Labourers & Related Workers	0.9	2.5	0.9	0.6	0.6	0.9	0.7	1.5	5.3	12.9	14.91
	Australia	**156.3**	**163.9**	**172.8**	**160.2**	**151.9**	**137.5**	**131.1**	**135.8**	**158.0**	**175.4**	**195.47**

(1) The number of trainees in training have been estimated between 1985 and 1993.

(2) From 1988 onwards changes were made to occupational groupings. These include: the splitting of Metal into two trade groups - "Metal Fitting and Machining" and "Other Metal", the removal of Horticulture from the "Miscellaneous" trade group category as a separate grouping, and the transfer of the trade Vehicle Mechanic from the "Metal" trade group category to the "Vehicle" trade.

(3) From 1995 onwards farming vocations were transferred from the "Miscellaneous" trade group to "Managers and Administrators".

6.3.13 In the early 1990s, unions and peak employer bodies promoted group employment schemes for new apprenticeships and associated measures as responses to the relative collapse of apprenticeship numbers. For reasons which we elaborate upon when discussing the school to work transition, Australian teenagers are faced with steadily increasing competition for entry to training contract opportunities. In our view, the greater the reliance that the industrial parties place on the existence of 'non-discriminatory" traineeship or apprenticeship classifications to justify the non-use or abandonment of relatively defunct Unapprenticed Junior classifications, the greater is the need to demonstrate that training contract employment will allow teenage Australians adequate access to entry level employment in the relevant industry. The rate of growth of apprenticeships in both the construction and metals industries broadly defined is not spectacular. The total number has declined since 1996 to a level that is lower than all years over the past decade other than 1993. Moreover, the degree of "capture" of, or competition for, training positions by adults justifies concern for those juniors who must rely on such opportunities to gain entry to work that will offer some prospect of stable employment. Those circumstances justify some of the views expressed that more use could be made of Unapprenticed Junior classification options.

Even in their present form, the classifications are capable of being of real utility to junior employees and employers in those industries.

6.3.14 The building and construction industry does not yet structure employment around daily and weekly customer peak periods in the same way as the retail and hospitality sectors. Of course some seasonality and use of daily hire or fixed term arrangements is characteristic of the industry. Instances include the limitation of engagements to the time taken to complete a construction contract. Most employment in the industry, including fixed term contract employment is on a full-time basis. We accept the CFMEU's comment that the use of daily hire employment means that the full-time characteristic must be qualified. Employment can be structured around weekly or monthly peak periods of demand. As at May 1998, 92% of employed teenagers in the industry were employed on a full-time basis[32]. However, the definition of full-time for that purpose covers any employee who in the reference week worked 35 hours or more in all jobs. An expanded application of junior rates in the building and construction industry could result in expanded opportunities for youth employment, perhaps at the expense of some adult employment. However we think it likely that the days of "nippers" of the kind acknowledged in paragraph 2.2.37 have long since passed. A substantial proportion of such positions could be expected to be full-time in the restricted sense we have used. A critical area of youth labour market concern is the absence of full-time work particularly for young people who most need it, the potentially marginalised school-leavers. The history of industry recognition of physically mature juniors as equivalent in work value terms to adults, and entitled to be paid as such, is well established, and an important consideration. It causes the debate about Unapprenticed Junior classifications for the building and construction industry to be very much about why, how, and to what extent there should be a retreat from that position. The rate adopted in the NTW classification, used for some traineeships and apparently apprenticeships, is another aspect of the historical linkage to that valuation of the work of some junior employees. The extent to which the need for experience and acquisition of competency should cause any of the classification options for entry level work to be displaced or modified will involve a closer examination of the function and inter-relation of each of them. Primarily that task, or the exploration of alternative options, must be a matter for the industrial parties to awards and agreements. We have had regard to that consideration, to the nature of the work, and to the effective removal of age discriminatory provisions from the award classification structures generally. Our assessment is that the low `utility of the Unapprenticed Junior classification in the building and construction industry should be acknowledged. The classification is isolated in coverage and almost defunct in practical operation. In our assessment,

instead of reviving it, but before replacing it, identified problems of maintaining a reasonable youth share of available employment through the training contract classifications should be considered and addressed in relationship to other options for entry level employment of juniors suited to the work.

6.3.15 The "metals" and some manufacturing industries are grouped broadly around the standards set by the Metals E & AI Award and may be taken for our purposes as one industry group. The utilisation of junior rates for that section of industry has several features that parallel features of the construction and building industry. But there are several significant differences. The coverage of the Unapprenticed Junior classification in the Metals E & AI Award, albeit restricted in operation to occupational fields that are not able to be covered by a new apprenticeship, is coextensive with the Award's coverage[33]. Moreover, the relationship between full rate entry level employment, junior rates, apprenticeship, NTW and trainee exit rates in the Metals E & AI Award has been the subject of relatively close consideration in the *Junior Rates Test Case* and subsequent decisions, for the most part by consent[34]. In contrast to the criticism directed by construction industry employers about the interfaces of the corresponding entry level classifications and rates in that industry, no substantive criticism appears to be directed against the respective levels set and applied in the metals and manufacturing industry. Indeed, the furnishing trade awards excepted, we have no reason to disagree with the substance of an observation that, at this stage, the only industry that has come to terms with the industrial relations infra-structure that will be necessary to support the New Apprenticeships arising from training packages is the metals industry.

6.3.16 We are not able, on the data available to us, to draw any conclusions about the effective utilisation of junior rates among the respective options that are available for junior employee entry to the metals and manufacturing industry. On the pay arrangement figures derived from the May 1996 ABS survey, there are about 20,515 juniors employed at junior rates in the manufacturing industry, marginally more than the number of apprentices and trainees. It would appear that there is a relatively small, and still declining, use of the Unapprenticed Junior classification under the Metals E & AI Award[35]. Employment in manufacturing production and mechanical engineering is preponderantly full-time. However, labour resource inventory control techniques are likely to have stunted new recruitment of entry level employees, especially of juniors. Our knowledge of patterns of employment in manufacturing enterprises confirms that likelihood.

6.3.17 The metals and manufacturing industry and the construction industry both appear to perform disproportionately well in the commencement of apprenticeships and traineeships relative to their respective shares of employment, and projected employment[36]. The relatively low use of the existing junior rate classification in those industries may be offset by the higher relative share of new commencements on training contracts. However, the metals industry has always been characterised by relatively high proportions of trade based apprenticeships. Since 1988, the metals industry has been in the vanguard in developing competency based training and wage classification. Very recently, metals industry employers have expressed concern about the effective take up of competency based training. That concern, and the reason for it, was outlined in a closing submission to the Inquiry on behalf of the AIG:

> *"... given the level of dissatisfaction amongst employers with competency standards, the low incidence of competency standards implementation, (despite bi-partisan support at the industry level), does not represent a very stable platform in the metal and engineering industry upon which to base a transition from junior rates to a competency based system of assessing wages and career progression for young people in the industry."*[37]

That point is made more compelling when it is appreciated that the competency standards that are the foundation of the existing competency based classifications in the Metals E & AI Award have not been developed or applied to work performed in the entry level C14 and C13 classifications[38].

6.3.18 There is now much more competition from adults for apprenticeships in the metals and manufacturing industries. The non-discriminatory form of trainee classifications may compound that competition. On a balance of considerations, our assessment is that the Unapprenticed Junior classification is being used, and may yet be developed further to promote entry level employment of juniors to the metals and manufacturing industries.

6.3.19 The submissions and material put to us also dealt with several other industries in sufficient detail to permit some assessment to be made of the utility of junior rate classifications in them. The submission put by the Pharmacy Guild of New South Wales advocated persuasively the utility of a junior rate classification available to that subsection of the retail industry under a New South Wales State Award. We do not set out the detail of that submission. The elements of the relevant classification are detailed in Table A1 and Note D at **Appendix A**. The submission drew our attention to two important points. The first is the real service that a Pharmacy, as one kind of a small business, can perform in the school to work transition, especially in regional and rural Australia where entry level job opportunities for teenagers are rare. We refer to

other instances of similar small business potential in paragraphs 6.4.18 and 6.4.19 below. The second point is the utility of the particular junior rate Pharmacy Assistant classification in clause 14(ii) of the Pharmacy (State) Award. It is a hybrid in one sense. It incorporates with age progression, automatic progression after six months' service and some allowance for advancement within the wage scale by reference to performance. We have not attempted to evaluate the equity of the progression. However, the elements around which the Pharmacy Assistant classification is constructed are fundamental in character. They reflect an attempt to resolve the tension between using an age based discount to promote equal opportunity and the need that later arises to ensure that pay scales accord equal treatment to employees performing work of equal value.

6.4 For School to Work Transition:

6.4.1 Subparagraph 120B(2)(c)(iii) of the Act requires that our report include an assessment of the utility of junior rates in the school to work transition. The required assessment concerns the particular uses and attributes of junior rates as they operate in that transition. That part of our task did not attract much direct comment in the submissions to us. Concern about the effective outcomes of that transition is a common theme in many submissions. Relatively few submissions made direct comment on the stages or processes of the transition. It is appropriate therefore to commence by drawing together observations from several sources about the character of the school to work transition and the environment in which it operates.

6.4.2 If the transition from school to work was ever a simple matter, it is no longer so. The transition is a process of adjustment. It formally may start at any time from the end of compulsory education at age 15. It may extend to such time as work is attained on a continuing basis, or until any link with education expires. The transition process parallels the movement of a young person to adult status, or from parental dependence to self-dependence:

> *"Young people face several hurdles in their efforts to gain adult status. They have to find work, complete their initial education, leave the parental home, set up new living arrangements and form stable personal relationships outside their family. Finding stable employment markedly affects the chances of youth achieving the other transitions to adulthood. A successful move for young people from full-time education to full-time work is a crucial step in their efforts to become independent adults."*[39]

6.4.3 Negotiating that "crucial step" has become increasingly difficult, complex and contingency ridden over the past decade:

"...Today the transition to full-time working is much more gradual and drawn out. Most young people will not find full-time employment until they are well into their 20s, will have a post school qualification, and will have been exposed to the workforce through part-time employment while studying. This is reflected in labour force data which reveals that the minimum age at which more than 50 percent of young people are in full-time employment and not in full-time education has risen from 18 years in 1981 to 22 years today, (and in any employment rather than full-time employment from 18 years to 21 years).

Education and work are no longer alternatives, but complement each other as young people make the necessary adjustments in preparation for a future in the workforce."[40]

6.4.4 Just over 250,000 young people left school at the end of 1997. Based on ABS 1996 data, some 45 per cent went on to further full-time study and the remaining 137,500, (55 per cent), went mostly into the labour market. Among school leavers who enter the labour market, currently around half have completed Year 12. A significant group, around a third, have completed only Year 10. It is convenient to focus on the age cohort 15 to 19. Figures for that statistical group are more readily available. As a proportion of the working age population, that group has undergone a relative decline from 12 per cent of the 15 to 64 age population in 1990 to 10.5 per cent in 1996[41]. On May 1996 survey figures, there were 1,127,800 in the 15 to 19 age cohort of the population. Figure 6.3 sets out details of the proportionate participation of that group in educational or work activity:

Figure 6.3[42]: Labour market and education participation* of 15 to 19-year-olds 1996, number and proportion of population†

	In the labour force						Not in the labour force		Total	
	Employed full-time		Employed part-time		Unemployed					
	%	No.	%	No.	%	No.	%	No.	%	No.
In education	6	75,700	23	293,300	6	74,100	38	485,300	73	928,400
Not in education	12	155,700	5	67,800	6	78,200	3	41,700	27	343,400
Total	18	231,400	28	361,100	12	152,200	41	527,100	100	1,127,800

* Education participation refers to participation in either full-time or part-time study leading to a recognised educational qualification under the Australian Bureau of Statistics Classification of Qualifications (ABSCQ).
† Estimates have been rounded to nearest hundred. Percentages have been rounded to whole percentages.
Source: Australian Bureau of Statistics, Labour force survey (unpublished data), May 1996.

6.4.5 On the basis of that data, McClelland and others estimate that in 1996 there were 187,700 15 to 19 year olds, (or 15 per cent of the total age cohort), who were either employed part-time and not in education, unemployed and not in education; or neither in the labour force nor in education. This group comprises young people in *marginal* activities. It includes an indeterminate number on junior rates in part-time

work but not in education. For this marginal activities group particularly, but also generally for school leavers, access to entry level employment is preponderantly through jobs on junior rates or apprenticeships and trainee arrangements. The estimate in the Joint Governments' Submission of 56 per cent and 13 per cent respectively of the proportion of employed persons under age 21 on junior rates and apprenticeships is an adequate approximation. The proportions for the age 15 to 19 subset of that group may be understated because it is likely that persons aged 20 will more frequently be on adult rates.

6.4.6 The estimated 187,700 15 to 19 year olds who in 1996 were counted as those in marginal activities are a significant group. They constitute the class of employees for whom any debate about the utility of junior rates in the school to work transition is most critical. The class grew from 12 per cent of the total age cohort in 1990 to 15 per cent in 1996[43]. The membership of this marginalised class is characterised by:

- its close association with the relative decline in the school retention rate over that period;
- its relatively higher concentration in country and regional Australia where unemployment rates of teenagers of over 30 per cent are disclosed for some centres[44];
- a marginally higher concentration of females and a relatively high concentration of young people from disadvantaged socio-economic backgrounds, particularly indigenous Australians[45].

6.4.7 When discussing the utility of junior rates in particular industries, we touched upon aspects of the use of apprenticeships and traineeships. Junior rate classifications, competency based or standard classifications, and training contract classifications are effectively the comprehensive threshold to entry level employment. Several points of some importance to an assessment of the utility of junior rates in the school to work transition may therefore be derived from the relatively voluminous literature about recent experience with vocational education and training.

6.4.8 Figure 6.4, for the period 1988 - 1998, is a reproduction of the total numbers of contracts of training. It shows also the division between apprenticeships and traineeships, a distinction abolished from January 1998. Since 1995, there has been a strong growth in the number of traineeships and a relative stagnation in the number of apprenticeships at a level well below peaks set at the start of the 1990s.

Figure 6.4 Contracts of Training 1988 - 1998[46]

30 June	Number in training ('000)		
	Apprentices	Trainees (1)	Total (2)
1988	147.1	9.2	156.3
1989	151.7	12.2	163.9
1990	161.0	11.8	172.8
1991	151.0	9.2	160.2
1992	142.9	9.0	151.9
1993	122.7	14.9	137.5
1994	123.3	7.8	131.1
1995	122.9	12.0	135.8
1996	124.4	29.7	158.0
1997	123.1	47.8	175.4
1998 (3)	-	-	195.47

(1) The number of trainees in training have been estimated between 1985 and 1993.

(2) From 1994/95 to 1997/98 some contracts of training cannot be identified as apprentices or trainees, these are included in the totals only.

(3) From 1 January 1998 the distinction between apprenticeship and training was removed by the New Apprenticeship Schemes: the figure used is an estimate.

6.4.9 Figure 6.5 is derived from NCVER statistics for 1997-1998. It shows commencements of contracts of training for 1997-1998 by age. Only the totals are extracted, the shares by gender, and by age category 21 years or more. The percentage column brings into relief the proportions of the adult take up of those opportunities in the occupational pursuits most relevant to the industries we have most discussed in this Chapter.

Figure 6.5[47] Commencements by Age 1997/1998 Annual Statistics - Australia (000)

Code	ASCO Description	21 or more	Total	%	Males	Females
1	Managers & Administrators	0.79	1.94	-	1.34	0.60
2	Professionals	1.39	1.64	-	0.63	1.01
3	Associate Professionals	4.57	6.75	-	4.10	2.66
		(0.57)	(3.17)	17.98	-	-
41	**Mechanical & Fabrication Eng**	**1.05**	**5.58**	**18.80**	**5.51**	**0.08**
42	Automotive	1.38	6.42	21.50	6.28	0.15
43	Electrical and Electronic	1.20	5.13	23.30	5.05	0.08
		(1.21)	(6.56)	18.44	-	-
44	**Construction**	**1.75**	**8.78**	**19.90**	**8.68**	**0.10**
45	Food	1.72	6.08	-	4.50	1.58
46	Skilled Agricult & Horticult Wkrs	0.29	1.03	-	0.91	0.12
49	Other Trades & Related Wkrs	1.63	6.78	24.00	2.97	3.81
4931	Hairdressers	0.66	3.53	-	0.36	3.17
4900	Other	0.97	3.25		2.60	0.65
5	Advanced Clerical and Serv Wkrs	0.24	0.37	-	0.13	0.24
6	**Intermed Clerical, Sales & Serv Wkrs**	**20.36**	**37.22**	**54.70**	**11.04**	**26.19**
7	Intermed Prodn &Transport Wkrs	2.56	3.87	-	3.48	0.38
8	**Element Clerical, Sales & Serv Wkrs**	**5.46**	**12.21**	**44.70**	**5.44**	**6.77**
		(7.56)	**(12.59)**			
9	**Labourers and Related Wkrs**	**10.02**	**16.00**	**62.60**	**12.91**	**3.09**
	TOTAL	**54.39**	**119.81**	**45.40**	**72.97**	**46.84**
	Male	**29.96**	**72.97**	**41.10**		
	Female	**24.43**	**46.84**	**52.20**		

Note: The figures in brackets are the counterpart estimates for 1996/1997.

6.4.10 The statistics set out demonstrate several points of some weight in our assessment:

- the serious decline of around 30 per cent in traditional apprenticeships through the 1990s;

- the current growth in what usually will be shorter term traineeship courses;

- the dimension of what has been said to be a "capture" of traineeships by adults. The apparent degree and significance of that change may be offset by demographic factors[48]; the dimension and the trend of it illustrate the reality of competition for entry level training positions. (However the rationale for the NTW traineeships allowed adult access to the discounted rate in them. The total number of young people in traineeships has increased since the inception of the NTW system.)

- the imbalance in the overall training contract commencements for females (39 per cent of total commencements).

6.4.11 Against the background of those particular considerations, and the general considerations we have discussed in preceding sections, we are satisfied that the role and usefulness of junior rates is best demonstrated in the school to work transition, and in school and work interfaces. However, we have not found it easy to extract a simple strand of analysis of the role of junior rates in that transition from the plethora of data and opinion to which we have been exposed. The most obvious theme is a reliance by some employers and some employees on the evidence of abundant use of junior rates by the majority of juniors who remain in post-compulsory education. The substantial discount against adult wage rates that is characteristic of junior rates is attractive to employers. The discount is accepted as a simple compensation for perceived supervisory and maturation skill deficits. The discounted rate can be deployed in the flexible patterns of working time that juniors are often singularly able to make use of.

6.4.12 Thus, as we have seen, the biggest employers in the retail sector Coles Myer, Woolworths and McDonald's use a sizeable proportion of youth in their employment. With the aid of junior rates, a greater number of youth than adults can be employed in a part-time/casual capacity. Most of those employed are students. Consequently, these "big" youth employers are contributing to work experience availability and correspondingly to the school-to-work transition. The contribution made by McDonald's in particular to the induction of young employees through the maturation process to an employment friendly work ethic is widely recognised. Indeed, such work experience is generally accepted as a credential for engagement by other employers. One commentator has gone so far as to identify McDonald's as a prime agent for bringing about a global work and employment model based on a cultural homogeneity adapted to a global market economy[49].

6.4.13 The scale of the contribution made by casual part-time work in service industries to an effective transition from education to work through the use of junior rates makes it a dominant factor in the overall assessment of the utility of junior rates.

6.4.14 However, that dominance may be associated most closely with employers, students and sectors of the junior labour force best positioned to make use of the employment options offered. The dominance should not mask other features of the use of junior rates in the school to work transition. Junior rates are used, and are of some

benefit to those in the marginalised class we have described in paragraph 6.4.5. But, substantial qualifications must be made about the degree of that benefit:

> *"... The full implications of the diversity in approaches, priorities and experiences of young people are illustrated by early school leavers. These young people, the research indicates, are likely to have left school because of dissatisfaction with school and to have placed a priority on direct entry to the labour market in order to sustain a livelihood (see Wyn & Lamb 1996 for a discussion of early school leavers). However, this group is marginalised, because the labour market they enter is not one which sustains a real living wage. More importantly, the reality for this group of young people is that their access to further education is blocked. Re-entry into secondary school is notoriously difficult, and school completers are now displacing early leavers in the Technical and Further Education (TAFE) system (Holden 1992).*
>
> *Post-compulsory education and training policies and programs have been designed to meet the assumed needs of a restructuring economy. They are framed in a way which makes false assumptions about the nature of growing up, the achievement of an adequate livelihood, and the reality of young people's perspectives and experiences of growing up. Furthermore, the categorical notions of youth implicit in the policies marginalise a significant minority of young people from education, training and from full-time employment."*[50]

6.4.15 The dilemma faced by early school leavers is made more complete by the shift that appears to be occurring in the pattern of commencements of training contracts. We are not aware of any data that would show the pay arrangements applying to the contracts of training analysed in the NCVER statistics drawn upon earlier in this section. However, the growth in adult and late or post teenage entry to new apprenticeships is a sufficient basis to pose the question of whether the facially non-discriminatory form of new apprenticeships and NTW classifications may operate to the disadvantage of the sub-21 age group generally and of early school leavers in particular. It appears that the youngest people in the marginalised class must now compete for available traineeships against older candidates. Apprenticeship rates are formulated on an entry level rate and year of experience progression. The NTW rate is not uniform but it would appear to permit the remuneration of an adult at the $346 maximum rate . That rate applies generally to a school leaver five years out from Year 10, or three years out from Year 12. A consequential question that follows from that possible effect of the use of the non-discriminatory form of traineeship provision is whether the existing degree of effect on the competitiveness of school leavers is intended. The NTW classification and the associated training packages were designed for access by many who are not juniors. However since the purpose of discounted pay rates for trainees is the promotion of equality of opportunity to gain an entry level training contract, it is at least arguable that age entry and progression may be a preferable means for building an element of affirmative action into the classification system.

6.4.16 The recognition of the need for juniors to develop maturation skills in a work environment is implicit in junior rates. That implication adds to the utility of them as an aid in transitional employment. The effectiveness of junior rates for that purpose is increasingly dependent upon the staffing resource techniques of employers in the localities where juniors are available. In regional and country Australia, employment opportunities on low skill work are already meagre. Unemployment of juniors in those areas already reaches levels that are catastrophic for school to work transition. To a lesser but important extent, the utility of junior rates in transitional employment may also be a function of the machinery that is developed at community level. A more effective and less socially corrosive movement from compulsory education to self sufficient employment is not merely a wage classification design problem. The system in existence currently results in 15 per cent of the age cohort being "marginalised". Employers generally, including governmental employers represented at the local level, have an essential role in the development of school to work transitions. Communal acceptance of that fact of industrial life was given a much lower profile in the submissions to us than it gets in the literature, and than it deserves.

6.4.17 In different ways, and with different emphasis, the submissions of the New South Wales Pharmacy Guild, of McDonald's and of the Queensland Government each stressed the importance of that role. A junior rate, an adult wage, or a training contract classification, may be the classification applied to a school leaver on entry to work. The effectiveness of the use of any of those classifications in underwriting optimal transitions from education to paid employment would be greatly enhanced by greater reciprocal understanding between employers, secondary schools or vocational education and training institutions, and students seeking work. We are left with a strong impression that a much more effective use could be made of available options if there were better reciprocal understandings of how work, the award classification applicable to it, and training, each play their part in the transition. That understanding could be advanced if all participants in the transitional process could be confronted with the evidence of a vitally important consideration for young people. It is that the longitudinal studies of youth employment establish that those who do not find employment early have great difficulty in getting a start at all. As we have seen, the studies show that those who dwell too long on low pay, are later represented disproportionately in the numbers of those who have no pay.

6.4.18 The literature shows that difficulty is most acute for juniors in the marginalised group, for juniors in regional and country Australia, and for women and indigenous Australians. For young people who contemplate leaving school, the

dilemma about whether and when to embark on the transition from school to work, is made no easier by the reality and difficulty of obstacles that need to be negotiated at whatever point the start is made. An employer may be found at local level who is sympathetic to creating an entry level employment opportunity. But employers of that kind are each faced with his or her own obstacles and difficulties:

> *"... I have been associated with retailing for over 30 years and for the last 15 years have run my own retail hardware businesses. Experience has shown me that the employment of junior staff although, sometimes attractive on the basis of lower wages, is not always the best alternative. Young staff require significant supervision and training to bring them to the level of confidence and expertise required to ensure the success of a retail business and frequently we have chosen to employ qualified retail staff rather than go down the route of employing juniors. The juniors we have chosen to employ have progressed well because we could afford to put the time and effort into training them.*
>
> *One of the reasons we have chosen to employ Juniors is that we feel an obligation to the youth of our community to give some of them an opportunity. The recognition of the need to train and supervise juniors in setting the applicable youth awards has enabled us to offer juniors employment opportunities. To remove age as a basis for discrimination will further exacerbate the high level of youth unemployment in our society. The key need we, as a society have, is to give our young people a start in employment. Youth wages give an incentive to consider taking on young people and to remove them jeopardises the career start opportunities for our young."*[51]

6.4.19 A more pungent version of the barriers to employing juniors is illustrated by another submission, a civil engineering contractor, and employer of 65 employees, only one of whom is under 20 years of age. His submission strayed from our terms of reference but put a point of view succinctly and comprehensively:

> *"The company does not generally employ unskilled school leavers because the wage levels in our award are too high in this age group for the company to profit from their employ. Wage levels for a 17 year old should be at around 40% of an adult wage of $160.00 - $180.00 per week subject to the suggestion mentioned further in the letter.*
>
> *It is interesting to note that all our 20 - 29 age group employees had part time junior employment such as Coles, McDonalds etc. whilst at school or university or both.*
>
> *We believe that we would probably employ three young people aged 17 - 18 if the wage level was appropriate to their skills, which are negligible unless they have had experience in the industry through family members. Such a wage should be similar to an apprentice tradesman - first year. ...*
>
> *Young people's self esteem is bolstered by having a job, not by their wage levels.*
>
> *We believe that the Commission could recommend to government some basic changes to the system of remunerating young people such as outlined below. Such a system would ensure many more young people in the workforce with all the resultant benefits to the community.*
>
> *1. Set youth wages to similar rates for trade apprentices.*
>
> *2. Ask the Commonwealth to forego PAYE tax on such employees.*

3. *Ask the State to forego PAYROLL tax on such employees.*
4. *Ask the States to cover those employees for Workers Compensation.*
5. *Ask the Commonwealth to exempt such employees from compulsory super contributions.*
6. *The young wage runs for a similar time as an apprenticeship.*

The PAYE and PAYROLL tax foregone could be compensated for by reduced dole payments and juvenile crime prevention. The Super contribution on low wages is eaten up by fund charges at almost no benefit to the employee.

The points about removing taxes and super etc. is that the administrative burden, for very small employers, of employing the young is removed. It is difficult to make money from inexperienced labor. The carpenter who might consider an apprentice doesn't want the burden of paperwork for Super, Workers Compensation or PAYE tax."[52]

6.4.20 Observations of that kind do not always fully address questions that come to mind as to why better use could not be made of available training contract options. However, such observations bring into sharper contrast the grave difficulties of marginalised junior employees and their particular need for more opportunities for full-time work as they try to move toward self-sufficiency. In such a perspective, the design of a junior rate classification, with or without training contract obligations, and the recognition and adequacy of its function as a special measure for promoting better school to work transition may be critical. The available and potential uses of junior rates in school to work transitions, particularly those needed for "marginalised" juniors are significant. The presence and need for a discount in labour cost under a junior rate, and the simplicity of it as an effective across the board "personal" classification of a junior employee, are important factors ensuring that utilisation of junior rate classifications. Together they justify well designed junior rates being recognised as a special measure for creating or protecting employment opportunity for young employees in a type of employment. The fact that the protection may have elements of being a "moral hazard"[53] benefitting some employers and disadvantaging particular employees is not a barrier to this recognition. Rather, it is a reason to examine the detail of junior rates with a view to the classification being structured in ways that may reduce such hazard.

Endnotes

[1] 1997 figures original data: ABS *Transition from employment to work* Cat. No. 6227.0: Joint Governments' Submission 38 at p. 17.
[2] Wooden, M. & VandenHeuvel, A., *"The labour market for young adults"* in *Australia Young Adults: The Depending Divide*, Dusseldorp Skills Forum 1999 at pp. 40-45.
[3] Joint Governments' Submission 38 at p. 17.
[4] Spierings, J., *"A crucial point in life: learning, work and young adults"* in Dusseldorp Skills Forum 1999 at p. 8.
[5] For example, the definitions used by the ABS in Labour Force statistics included forms of economic activity that are not employment in a legal sense; and see also the definitions used by Wooden M., *The changing nature of employment arrangements: Paper for the transformation of Australian industrial relations project* - Discussion Paper Series No. 5, National Institute of Labour Studies - CEDA December 1998.
[6] Print P7500 at p. 15.
[7] Print R2700 at pp. 19-22.
[8] Woolworths Submission 28 at p. 2.
[9] Coles Myer Submission 27 at pp. 4 and 9.
[10] McDonald's Submission 21 at p. 1 and following; McDonald's South Australia Award 1995, Print F0374, clause 4 defines "casual" to mean any employee other than a "weekly employee".
[11] Ibid, McDonald's Transcript at p. 314; ABS Cat No. 6306.0 May 1996 at p. 33.
[12] Wooden, M., *The changing nature of employment relationship: Paper for the transformation of Australian industrial relations project* - Discussion Paper Series No. 5, National Institute of Labour Studies - CEDA December 1998.
[13] Ibid at p. 14.
[14] Wooden, M., ibid *The changing nature of employment arrangements* at p. 37.
[15] Ibid at p. 13; Burgess and Campbell, *Casual employment in Australia: growth characteristics - a bridge or a Trap?* Economic and Labour Relations Review June 1998 at pp. 31-54.
[16] Ibid *Casual employment in Australia* at pp. 44-46.
[17] Joint Governments' Response to Issues Paper, at p. 17.
[18] Master Builders Association Inc Submission 30; Housing Industry Association Submission 19.
[19] National Building and Construction Industry Award: clause 46 Part I and Part V subclauses (16), (17) and (18). As to apprenticeship see clause 46 Part II. As to civil operations traineeship see clause 51; and relationship to NTW clause 9D which add industry allowance and special allowance of $25.10 to the NTW Skill Level B and Skill Level A rates. The Unapprenticed Junior classification apparently came into the NBCI Award through the former National Building Trades Construction Award 1975, which provided a pay scale for South Australia only, and an Improver's rate. Neither of the main AWU nor Builders Labourers Federation Awards appear to have included any junior rate. See generally paragraph 2.2.23 and following.
[20] See Appendix B for basis of calculation of NBCI Award Rates.
[21] HIA Submission 19 at p. 3.
[22] Figure 5.5.
[23] At transcript p. 104 Mr Grinsell-Jones stated the MBA associations in South Australia and Western Australia had no figures or indications of what the extent of junior employment in those States may be.
[24] HIA Submission 19 at p. 1.
[25] Labour Force Australia 1978-95 ABS Cat 6204.0 Table 11.
[26] Figure 8 of the Issues Paper.
[27] NCVER *Australian apprentice and trainee statistics at a glance 1985 - 1987* Australian National Training Authority 1998 at p. 3.

[28] NCVER, ibid: Annual Statistics Vol 4 No. 4 1997-30 June 1998 at p. 12; although that figure may be skewed by an increase in the traineeships for which adult commencements are relatively higher.
[29] NCVER ibid Vol 4 No. 5 at p. 11.
[30] NCVER 1998 Excel spreadsheet: *Commencements by Age.*
[31] See Figure 6 within, derived from NCVER Preliminary Reported Figures as at December 1998 for 1997-1998 *Commencements by Age*, and 1996-1997 Australian Training Statistics Vol 3 p. 47.
[32] Figure 8 of the Issues Paper.
[33] The Unapprenticed Junior classification has characteristically been linked with a proportions clause or restriction on the work for which it may be used. Thus, for example Dethridge CJ in the *Commercial Printing Award Case* (1934) 33 CAR 581 at 583 noted *"high rates for juniors are frequently claimed by unions to promote the employment of adults"*. But added that the same objective could best be achieved by the award prescription of the proportion of juniors to be employed. In the simplified Metal Engineering and Associated Industries Award in March 1998, Marsh SDP allowed clause 4.2.6(a) excluding the employment of unapprenticed juniors in a trade or occupation declared or recognised by an Apprenticeship Authority [Print P9311 at pp. 22-25]. Other award proportions clauses have since been excised as not allowable award matters in the *Section 109 Review Decision* Print R2700.
[34] *Re Furnishing Trades Award October 1994* Print L5963; *Re Metal Industry Award: Junior Rates May 1997* Print P1371; see paragraphs 2.2.28 and 2.2.52 above.
[35] Submission by AIG; transcript at p. 422.
[36] Robinson, C. & Ball, K., *Young people's participation in and outcomes from vocational education in Australia's youth reality and risk*; in Dusseldorp Skills Forum ibid at p. 79 Table 15.
[37] Transcript at p. 419.
[38] Transcript at pp. 416-7: "*the parties judged that because of the relatively low levels of skills possessed by employees at those levels it would be difficult to measure competency at those levels: C14 ... the entry level for non-trade adults with progression to C13 if they have completed up to 3 months structured training."*
[39] Sweet R., "*Youth: the rhetoric and reality of the 1990's*" in Dusseldorp Skills Forum ibid at p. 6.
[40] Wooden, M., *The labour market for young Australian* in Dusseldorp Skills Forum ibid at pp. 35 and 49.
[41] Robinson, C. & Ball, K., ibid at p. 74.
[42] McClelland, A. & others, *Young people and labour market disadvantage; the situation of young people not in education or full time work* in Dusseldorp Skills Forum ibid at p. 107.
[43] McClelland, A. & others, ibid at p. 108..
[44] McClelland, A. & others, ibid at p. 108; Supplementary Submission by Western Australian Government: *Western Australia's young people 1996*, ABS National Youth Affairs Research Scheme Catalogue No. 4123.5.
[45] ABS Catalogue No. 4123.5 at p. 15.
[46] NCVER, *Australian Apprenticeship and Trainee Statistics, Apprentice and Trainees in Australia 1985 - 1997*: Summary.
[47] NCVER Excel Spreadsheet of Preliminary Reported Figures in Vol 4 *Australian Training and Apprenticeship Statistics 1997-1998*.
[48] See generally Robinson C: ibid at pp. 67-68 and 74-75.
[49] Elliott, L. & Atkinson, D., *Age of Insecurity* ibid at p. 19.
[50] Wyn, J., *Young people and the transition from school to work: new agenda's in post-compulsory education and training* in *Against the Odds* ibid 111 at pp. 114-115.
[51] Submission 63: Myrtleford Victoria.
[52] C.B. Construction Pty Ltd Submission 8 at p. 2.
[53] Elliott, L. & Atkinson, D., "*The Age of Insec*urity" at p. 94: *"... a second, closely linked, virtue claimed for the market system was the elimination of 'moral hazard', and this is a*

concept easier to recognize than to describe. Put simply, an arrangement is at moral hazard when it means the good are subsidizing or otherwise supporting the bad. For example, a motor-insurance system that charged one premium for all drivers, regardless of their conduct on the road, age, experience and so forth, would generate moral hazard. Moral hazard can be broadened to include any situation in which one group is unfairly subventing another. ...";, Richardson A. & Harding, S., in "*Poor Workers?*" ibid discuss the related question of the function of low wages as a disincentive to work: "*The greater the concern about disincentives, the greater the implied disutility of work and the more the minimum wage needs to exceed the gift of income available to the non-employed, to be both fair and efficient. (Fair to compensate for the disadvantages of working, and efficient to induce labour supply)."* at p. 41.

7. THE FEASIBILITY OF REPLACING JUNIOR RATES WITH NON-DISCRIMINATORY ALTERNATIVES:

7.1 If *feasible* is taken to mean capable of being done, it is feasible to replace junior rates with non-discriminatory alternatives. The complete abolition of junior rates can be done. However the phrasing of the requirement for our report indicates to us that considerations of practicality cannot be dismissed. We are of the view that to be *a feasible* alternative, a replacement classification would need to not significantly compromise those characteristics of an existing junior rate classification that ensure its functional effectiveness and operational utility. That view is consistent with all of the secondary assessments we have made[1]. Feasibility is to be assessed having regard to the nature of the particular junior rate classification to be replaced, as if being dealt with on a case by case basis, having regard to the circumstances of junior employment in the industry or enterprise to which the junior rate classification applies.

7.2 The considerations by reference to which we establish the feasibility of replacing a junior rate classification with a non-discriminatory alternative classification are that the classification:

(A) is, within the meaning we have settled upon[2], a non-discriminatory alternative, in whole or part, to the classification to be replaced;

(B) is simple to administer;

(C) does not remove a significant differential cost effect of an existing level of a discounted pay rate in the subject classification to be replaced, unless any such removal demonstrably will not disadvantage the competitive position of the classes of junior employees now in receipt, or likely to be in receipt of junior rates, or to be in receipt of the substituted rates under the classifications on entry level work; or otherwise does not have significant detrimental effect on youth employment under the subject classification; and

(D) is reasonably capable of being implemented as an award classification by or soon after 22 June 2000, taking account of the process prescribed by the Act.

7.3 Several alternatives put forward have been discussed in **Chapter 3**. The most specific classification proposals were those advanced by the CFMEU, the SDAEA and the ACTU. Overall, each classification suffers from one defect or another when measured against the considerations we use to establish its feasibility as a replacement for particular junior rate classifications. However we shall discuss the detail of each of the specific proposals before passing to a more general assessment.

7.4 The CFMEU proposal, set out in **Appendix D** and discussed in **Subchapter 3.5.1**:

(A) is for a non-discriminatory alternative classification, but our acceptance of it as such is qualified. We hold serious reservations about the factors that demonstrate junior rate replaceability[3]. Those reservations go to whether the class of juniors to be covered would perform work of a kind that corresponds with the work to which the existing *Unapprenticed Junior* classification operatively applies under the relevant awards in South Australia[4];

(B) is, in the custom and practice of the industry, sufficiently simple to administer when compared with the age based progression of the existing Unapprenticed Junior classification. The proposal is for a competency-based classification rate to be applied using a length of "*service within the industry*" progression to an "*after 12 months*" pay rate;

(C) removes a significant differential cost between full rate and the existing apprenticeship pay rate used for the Unapprenticed Junior classifications. It may be the case that there is no relevant employment under the replaced classification, or no employment of juniors who are not "*immediately productive*" in the duties as described for CW1 at the level expected of CW1(a)[5]. If that be the case, we would accept that the removal of the differential cost effect may not destroy the competitive advantage of the class of employees. That acceptance is based on the assumption that full work value equivalence of the class of employees is established. That assumption would also displace the reservation we hold about the status of the proposal as a non-discriminatory alternative having regard to the replaceability criteria. However, we are unable to make that assumption. Because of that view, we do not need to address for this purpose any other possibility of detrimental effect on youth employment under the replaceable classification; and

(D) depends at present upon agreement for implementation. It is however reasonably capable of being implemented within the declared time period.

For these reasons, on balance of all considerations, we do not consider the proposal to be a feasible alternative.

7.5 The SDAEA proposal, set out in **Appendix D** and discussed in **Subchapter 3.5.2**:

(A) is a non-discriminatory alternative for juniors age 18 and above, subject to the reservations expressed in paragraph 3.5.2.4. It appears to be directly discriminatory for juniors aged 15 to 17 years. We have noted the SDAEA's contention that work valuation removes even direct age discrimination. The problematic character of any finding to that effect is noted under our comments about work value status and replacement factors at paragraph 3.5.2.3;

(B) is relatively complex, because of the need to conduct work value assessment for age 15 to 17 employees, a potentially ongoing problem;

(C) removes a clearly established wage cost differential effect for the age 18 and above pay rate levels. We discuss that more concrete and assessable cost differential effect at paragraph 5.8.3. We note also at that paragraph an assertion that implementation of the entire original SDAEA proposal would cost Woolworths in the vicinity of 11 per cent of its total current labour cost. That estimate would overstate the cost impact of the modified SDAEA proposal. However, increases approximating to those sizes for employees above age 18, not qualified by any conditions, would in our view disadvantage the competitive position of junior employees in receipt of junior rates, or who might be in receipt of junior rates under existing classifications for Retail Workers. An increase of the magnitude involved would have significant disemployment effects on the many juniors likely to be affected; and

(D) is not likely to be reasonably capable of being implemented within the declared time period, because of the need for work valuation processes to be applied at ages 15 to 17. Moreover, junior employment under retail awards is predominantly subject to State award coverage. The effect of continuing exemptions of junior rates, and the contingent factors discussed at paragraph 5.7.4, preclude us from accepting that the process of replacement of existing

junior rate Retail Worker classifications would be other than complex and protracted.

For these reasons, on balance of all considerations, we do not consider the proposal to be a feasible alternative.

7.6 The ACTU proposal, set out in **Appendix D** and discussed at **Subchapter 3.5.3**:

(A) is for a generic non-discriminatory alternative. For purposes of identifying the considerations most relevant to the feasibility of implementing it, we shall assume it is to replace the retail, or the metal and manufacturing, or the hospitality industries junior rate classifications[6]. Our conclusion that the proposal is for a non-discriminatory alternative is based on the reasoning set out in paragraph 3.5.3.3. Some points of that reasoning are problematic. The reservations we have expressed about the work value status of the SDAEA's similar proposal for the removal of discounted rates for age 18 to 20 year olds is a qualification applied also to the ACTU proposal;

(B) is simple to administer for classification pay rates for ages 18 and above. The "*at school*" and "*out of school beyond Year 10*" conditions below age 18 are in our view more complex than existing age condition progression. The degree of complexity is not great; the condition extends only to a maximum of two years out of school, terminating generally by movement to the standard rate at about age 18;

(C) removes wage cost differentials that are established most particularly for the age 18 and above pay rate levels of the *Retail Worker Grade 1* junior rates. The differential cost effect removed would be significantly less, if applied to the *Unapprenticed Junior* classification of the Metal E & AI Award, or the Hospitality Industry Award *Juniors* classifications. Those classifications, (summarised at Table A1 of **Appendix A**) have significantly greater compression of the age 20 relativity. In the case of the Hospitality Award, age 20 is the junior rate exit age. However, the ACTU proposal incorporates an effective change to the level of the comparator rate. For both of those awards, the movement proposed would be from a comparator at 84 per cent of the trade equivalent to a comparator at 92 per cent. If implemented, that change produces an increase of about 13 per cent above the current level of the age 20 discounted

rate for Unapprenticed Junior under the Metal E & AI Award. We accept that some exceptions about assessment of cost differential effect might need to be made to cover particular junior rate classifications with non-standard age exit conditions. However, as a general proposition, we consider that the ACTU proposal would involve increases to junior pay rates at age 18 and above levels of a magnitude similar to those we have assessed in relation to the SDAEA proposal. Consequently, we consider that there would be likely to be significant disemploying effects at ages 18 and 19 generally, and in some instances at age 20 classification rates; and

(D) envisages a process whereby award restructuring principles would be applied to remaining junior rate classifications. We do not consider that a process of that kind, if implemented, need be of the same degree of complexity as a case by case work valuation of existing junior rate classifications envisaged in the SDAEA proposal. For instance, agreements might develop about the scale of progression to be applied to rates for ages 15 to 17. There might also be agreement about a standard comparator other than the 92 per cent relativity point to the trades rate. Possibilities of that kind increase the likelihood that the principles advanced by the ACTU are reasonably capable of being determined upon to produce non-discriminatory alternative classifications for some awards by June 2000. However, the processes of the Inquiry give us no encouragement to believe that agreements of that kind are likely. It follows that for similar reasons to those we have given in relation to the SDAEA proposal we doubt that the proposal is reasonably capable of being implemented within the declared time period.

For these reasons, on balance of all considerations, we do not consider the proposal to be a feasible alternative.

7.7 Other more general classifications proposed as non-discriminatory alternatives did not meet the criteria we developed in **Subchapter 3.4** to establish that status. None of them would exhibit all the test characteristics specified in paragraph 7.2. Nor, in our understanding, do any of the "resultant" classifications that might be based upon application of the principles sponsored by the proponents of the alternatives identified in **Chapter 3**.

7.8 In the circumstances, and subject to the reservations we have expressed in paragraphs 7.4, 7.5 and 7.6, we conclude that none of the proposed alternatives there

analysed are feasible replacements of junior rate classifications in any sense that is adequately comprehensive of the classification as a whole. That assessment is based on the considerations set out in paragraph 7.2 but draws upon the criteria we stated in paragraph 3.4.4 and contingently applied in **Subchapter 3.5**.

7.9 We acknowledge that the proposals there discussed do not exhaust the limits of possible alternatives. Inevitably, the notion of replacing or removing junior rate classifications reduces to a process prescribed by the Act, or by the legislation relevant to the particular award or agreement provision. Permutations of classification form or content may arise in the course of such a process. The mix of form and content in the specific classification proposals advanced and analysed in **Subchapter 3.5** do not satisfy the criteria and considerations we have developed for the purposes of this report. We have not considered it to be our function to design one that does. A classification that in form and content might satisfy those criteria and considerations in an abstract sense could perhaps be formulated. Developed in isolation from a consensus of, or determination between, the industrial parties affected, it would serve no useful purpose here as a feasible alternative.

7.10 The assessment we have given in paragraphs 7.7 and 7.8 would be too far fetched if we denied the scope that may exist for particular outcomes from the proposals we have analysed to be accepted as non-discriminatory alternatives to parts, or even the entirety, of an existing junior rate classification. Any likely process for replacing or removing a junior rate classification will admit for evaluation considerations of discriminatory effect, cost, fair valuation of work performed, and youth employment effects. Such considerations would be assessed in the particular case, balanced, and made the basis of a determination of whether the relevant minimum wage rate should continue to be differentiated for reasons of age. Some of those considerations will also be factors in award variation processes. For the purposes of our assessment of the feasibility of replacing junior rates with non-discriminatory alternatives, we do not expect those speculative outcomes of a process to be sufficiently general, or sufficiently expedient to establish adequately the feasibility of that means of replacing junior rates with non-discriminatory alternatives.

7.11 We qualify the observation we have made in paragraph 7.10 in relation to two potential outcomes of the process that might be applied. One class of potential outcomes could arise from the ACOSS proposal. We discussed and excluded it as a formal non-discriminatory alternative for reasons set out at **Subchapter 3.5.4**. We note in passing that implementation of the principles proposed by ACOSS would result in

four classification rates below existing standard award minimum rate entry levels. A classification of that kind might reasonably be said to produce a more simple system of entry level rates. The resultant identification of a rate with particular school and subsequent experience credentials could suffice as a simple measure if allied with a non-prescriptive, "*opinion and belief of the employer*" basis for adopting the rate payable on commencement in any employment. However, as we indicated at paragraphs 3.5.4.2 and 5.8.7, the cost consequences of the proposal are not straight-forward. Some lower costs for proposed Level 1 to 3 employment must be offset against higher costs for proposed Level 4 and Full rate employment. The removal of differential cost effect for Full rate employment would entail relative cost increases similar to, but somewhat lower than, those that might eventuate from implementing the ACTU proposal. None the less, the degree of loss of the cost differential effect removed for the age 18 and 19 junior rates generally would appear to be sufficient to create unacceptable disemploying effects. A notable and important aspect of the proposal is that under it, *marginalised juniors* might better compete for entry level placements. Each of the proposed levels is either facially or indirectly discriminatory. The potential for the classification to be accepted as related to the inherent requirements of junior employment, or "reasonable", is assisted by the limitation of its operation to employees under age 21. That consideration would make whatever contribution to equal opportunity is reflected in the discounted rates less susceptible to capture by non-juniors. That function of the classification might be reinforced by designing other conditions engineered for the class of employment intended to be covered, including perhaps: term of employment; the region to which the classification is to apply; or, assessment of training or work performance.

7.12 Another more specific potential class of non-discriminatory alternatives is also excluded from our negative assessment in paragraphs 7.7 to 7.10 of the feasibility of replacing junior rate classifications. There are industries where replacement of junior rates with a non-discriminatory alternative has already effectively occurred. For the most part it appears to be a characteristic of those industries that there has not been a high or even significant level of junior employment in recent times. In our view, it is feasible to replace junior rates with non-discriminatory alternatives where juniors are demonstrably not needed, or where juniors are recognised or credentialled to perform work at a standard recognised as warranting equal remuneration to that accorded to all similar work under the classification. No significant effect on the employment of youth would result. The industries we discussed at paragraphs 6.3.2 and 6.3.3 provide instances of that potential class of non-discriminatory alternatives.

7.13 Otherwise and in general, the feasibility of replacing junior rates is conditioned to a significant degree by the process within which it is to occur. In **Subchapter 3.1**, we commented on the statutory basis of that function before mentioning in paragraph 3.1.7 the possible desirability of the anti-discrimination provisions of the Act being revisited and revised to remedy difficulties created by their form and piecemeal nature.

7.14 Under the Act in its present form the Commission has an obligation to review awards for compliance with the anti-discrimination requirements of the Act. It would seem appropriate that any such review of a particular junior rate classification should take into account:

- the avoidance of discrimination on grounds of age that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;

- maturation skills and related personal attributes in the employment or in performance of particular work required under the classification;

- the need for protective measures for young workers in the industry or employment covered by an award classification;

- the desirability of maintaining a junior rate having regard to the availability and use of structured training under New Apprenticeships in the relevant industry, award or agreement; and

- the likely effect of the junior rate classification in securing a reasonable balance of entry of young employees to employment in the relevant industry.

BY THE COMMISSION:

JUSTICE P.R. MUNRO DEPUTY PRESIDENT D.A. DUNCAN COMMISSIONER F. RAFFAELLI

Endnotes

[1] See paragraph 5.7.3.
[2] See paragraphs 3.1.10 and 3.2.8 as applied at paragraph 3.4.4.
[3] See paragraph 3.5.1.3.
[4] See Table A1 of Appendix A. Note E to that Table sets out the details of the *Junior Worker* classification operative for roof tiling in Western Australia. The *Unapprenticed Junior* classification operative in South Australia differs from the Western Australia classification because it is not based on age progression but on years of experience. Otherwise the effective difference between the two NBCI Award junior classifications is in relation to the percentage of the trade rate applicable at are age 16 and 17, or the first two years of service as an apprentice or as *Unapprenticed Junior* respectively. Each classification is based upon the same percentages as the respective apprentice rate for the State.
[5] See paragraphs 3.5.1.2 and 3.5.1.3.
[6] A short form comparison of those classifications may be found at Table A1 of Appendix A.

SCHEDULE A

List of persons and organisations who assisted the Inquiry

SUBMISSIONS

Name	Submission No.
Australian Chamber of Commerce and Industry (ACCI)	49
Australian Council of Social Services (ACOSS)	35
Australian Council of Trade Unions (ACTU)	51
ACTU Queensland Branch	20
Anti Discrimination Board of New South Wales	34
Australian Catholic Commission for Industrial Relations	61
Australian Democrats	46
Australian Industry Group (AIG)	59
Australian Liquor, Hospitality and Misc. Workers Union	50
Australian Manufacturing Workers' Union	48
Australian Manufacturing Workers' Union Vehicle Division	44
Australian Rail, Tram and Bus Industry Union (ARTBIU)	12
Australian Retail Association (ARA)	23
Australian Services Union	57
Australian Young Christian Workers	53
Australian Youth Policy & Action Coalition Inc (AYPAC)	32
C B Constructions Pty Limited	8
Construction, Forestry, Mining and Energy Union (CFMEU)	37
Coles Myers Limited	27
Community and Public Sector Union (CPSU)	40
CPSU/ State Public Services Federation Group	18
Daveys Mitre 10	66
Gibson, C. Ms	2
Hammond, R. Mr	9
Home Australia Pty Limited	31
Housing Industry Association	19
Industrial Relations and Legal Affairs Committee – NSW Young Labor	14
Job Watch	29

Name	Submission No.
Jones, R. A. Mr	4
Labor Council of New South Wales	36
MANN Wodonga	67
Master Builders' Australia Inc (MBA)	30
Master Builders' Association of Western Australian	22
Master Plumbers and Mechanical Services Assoc. of Australian	39
McDonald's Australia Limited	21
Minister for Industry, Science and Technology, Victorian Government	62
Motor Traders' Association	26
Motor Traders' Association of New South Wales	13
Murray, J. Ms	24
National Children's & Youth Law Centre	16
National Farmers' Federation	11
National Union of Students	56
New South Wales Government	52
Ovens Mitre 10	63
Pearce, J. Mr	3
Queensland Government	33
Restaurant & Catering Industry Assoc. of New South Wales	15
Restaurant & Catering Industry Association of Australia	47
Schaap's Hardware Pty Limited	65
Shop, Distributive & Allied Employees' Association (SDAEA)	54
Stanfield, D. Mr	5
The Joint Governments: The Commonwealth, The State of South Australia, The State of Victoria, The State of Western Australia, The Australian Capital Territory and The Northern Territory	38
Taylor, G. Mr	7
The Master Grocers' Assoc. of Victoria Inc.	60
The NSW Pharmacy Guild	10
The Pharmacy Guild of Australia	17
Thorpe, G. Mr	1
Timber Trade Industrial Association	6
Transport Workers' Union of Australia	41
Victorian Automobile Chamber of Commerce	55
Victorian Employers' Chamber of Commerce and Industry	43
Victorian Trades Hall Council	45
Weight's Mitre 10	64

Name	Submission No.
Woolworths Limited	28
Youth Affairs Council of South Australia	42
Youth Advisory Council New South Wales	58
Youth Affairs Network Queensland	25

RESPONSES TO ISSUES PAPER:

Parties	Response No.
Australian Chamber of Commerce and Industry (ACCI)	17
Australian Council of Social Services (ACOSS)	11
Australian Council of Trade Unions (ACTU)	14
Australian Industry Group (AIG)	4
Australian Liquor, Hospitality and Miscellaneous Workers Union	13
Australian Manufacturing Workers' Union	19
Australian Rail, Tram and Bus Union (ARTBU)	2
Australian Retailers Association (ARA)	5
Australian Youth Policy & Action Coalition Inc. (AYPAC)	21
Coles Myer Limited	10
Construction, Forestry, Mining, Energy Union (CFMEU)	15
Labor Council of New South Wales	20
Master Builders Australia Inc (MBA)	3
McDonald's Australia Limited	6
National Farmers' Federation	8
New South Wales Government	18
Queensland Government	7
Restaurant & Catering Industry Association of Australia	16
Shop, Distributive and Allied Employees' Association (SDAEA)	12
The Joint Governments: The Commonwealth, The State of South Australia, The State of Victoria, The State of Western Australia, The Australian Capital Territory and The Northern Territory	1
Woolworths Limited	9

PARTICIPANTS AND APPEARANCES AT THE HEARINGS RELATING TO THE ISSUES PAPER:

15-17 and 22-24 February 1999

Australian Chamber of Commerce and Industry	Mr R. Hamilton
Australian Council of Social Services	Mr D. Thompson Ms R. Kusuma
Australian Council of Trade Unions	Mr G. Belchamber Ms M. Gaynor
Australian Industry Group	Mr R. Boland Ms S. Cullen
Australian Liquor Hospitality & Miscellaneous Workers Union	Ms J. Schofield
Australian Manufacturing Workers' Union	Mr T. Ayres
Australian Rail Tram & Bus Industry Union	Ms L. Carruthers
Australian Retailers Association	Mr P. Naylor Mr M. Diserio
Coles Myer Limited	Mr B. Dunstone Mr R. West
Construction, Forestry, Mining and Energy Union (Construction and General Division)	Mr S. Maxwell
Labour Council of New South Wales	Mr M. Gadiel
Master Builders Association Inc.	Mr A. Grinsell-Jones
McDonald's Australia Limited	Ms J. Owen
National Farmers' Federation	Mr R. Calver
New South Wales Government	Mr S. Benson, of Counsel Dr S. Bridgeford Mr J. Walsh
Queensland Government	Mr A. Crack
Restaurant & Catering Industry Association of Australia	Ms J. Lambert
Shop, Distributive & Allied Employees' Association	Ms S. Burnley

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Woolworths Limited	Mr J. Degabriele

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Australian Council of Trade Unions	Mr G. Belchamber Ms S. Burnley Mr T. Ayres
New South Wales Government	Mr S. Benson, of Counsel Dr S. Bridgeford Mr J. Walsh
Queensland Government	Mr A. Crack
The Joint Governments: The Commonwealth, The State of South Australia, The State of Victoria, The State of Western Australia, The Australian Capital Territory and The Northern Territory	Mr J. Stewart Mr P. Drever

SCHEDULE B

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SCHEDULE C

Abbreviations and Glossary

1983 BLMR Study:	Bureau of Labour and Market Research in 1983
ABS:	Australian Bureau of Statistics
ACC Traineeship:	Advanced Crew Course Traineeship
ACCI:	Australian Chamber of Commerce and Industry
ACIRRT:	Australian Centre for Industrial Relations Research and Training
ACOSS:	Australian Council of Social Services
Act, the:	Workplace Relations Act 1996
ACTU:	Australian Council of Trade Unions
AFMEPKIU:	Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union
AIG:	Australian Industry Group
AIRC:	Australian Industrial Relations Commission
AMWU:	Australian Manufacturing Workers' Union
ANZSIC:	Australian and New Zealand Standard Industrial Classification
AQF:	Australian Qualifications Framework
ARA:	Australian Retailers Association
ARTBIU:	Australian Rail, Tram and Bus Industry Union
ASCO:	Australian Standard Classification of Occupations
ASU:	Australian Municipal, Administrative, Clerical and Services Union
AVTS:	Australian Vocational Training System
AWE:	Average weekly earnings
AYPAC:	Australian Youth Policy and Action Coalition
CAI:	Confederation of Australian Industry

CBAOA Case:	Commonwealth Bank of Australia Officers Association Case P7400
CFMEU:	Construction, Forestry, Mining and Energy Union
Coles Myer:	Coles Myer Limited
Commission:	Australian Industrial Relations Commission
CPSU:	Community and Public Service Union
CW1:	Construction Worker Level 1
EEH Survey:	ABS Survey of Employee Earnings and Hours
HIA:	Housing Industry Association
Hospitality Award:	Hospitality Industry - Accommodation, Hotels, Resort and Gaming Award, 1998
HREOC Act:	Human Rights and Equal Opportunity Act 1986
HREOC:	Human Rights and Equal Opportunity Commission
HRSCEET:	House of Representatives Standing Committee on Employment, Education and Training, September 1997
ILO:	International Labour Organisation
Inquiry:	Junior Rates Inquiry conducted by the Full Bench established by the President of the Commission
JGS:	Joint Government Submission
Joint Governments:	The Commonwealth, The State of South Australia, The State of Victoria, The State of Western Australia, The Australian Capital Territory and The Northern Territory
Junior rates:	Junior rates of pay
KFC Agreement:	Kentucky Fried Chicken National Enterprise Agreement
MBA:	Master Builders' Association of Australia
MBAWA:	Master Builders' Association of Western Australia
McDonald's:	McDonald's Australia Limited
MEAA:	Media Entertainment and Arts Alliance
Metals E & A I Award:	Metal Engineering & Associated Industries Award, 1998
"Mayer" competencies:	The Mayer Committee, *Employment Related Key Competencies: A Proposal for Consultation.*

Minister:	Minister for Employment, Workplace Relations and Small Business
MW:	Minimum Wages
NBCI Award:	National Building and Construction Industry Award 1990
NCVER:	National Centre for Vocational Education Research Limited
NCYLC:	National Children's & Youth Law Centre
NFF:	National Farmers' Federation
NMW:	National Minimum Wage
NTW:	National Training Wage
OECD:	Organisation for Economic Cooperation and Development
R&CIA:	Restaurant and Catering Industry Association of NSW
Re Furnishing Trades:	The *Junior Rates Case*
RIA Branch:	Research, Information and Advice Branch Australian Industrial Registry
SDAEA:	Shop, Distributive and Allied Employees Association
SNR decision:	Safety Net Review - Wages Decision
STA:	State Training Authority
TAFE:	Technical and Further Education
TWU:	Transport Workers' Union of Australia
UKLPC:	United Kingdom Low Pay Commission
WAT:	Work Area Team
Woolworths:	Woolworths Limited
WROLA Act:	Workplace Relations and Other Legislation Amendment Act 1996
YACSA:	Youth Affairs Council of South Australia

APPENDIX A

Table A1 - Junior Rates: Weekly Award Wages in Selected Awards for 38 hour week after April 1998 Safety Net Adjustment

	Metal Engineering And Associated Industries Award 1998 (A)			Hospitality Industry Accommodation, Hotels, Resorts and Gaming Award 1998 (B)			Pastoral Industry Award 1998 (C)			Pharmacy (State) Award (D)			National Building and Construction Industry Award 1990 (E)			Graphic Arts – General – Interim Award 1995 (F)		
Age	($)	(per cent)	hourly rate	($)	(per cent)	hourly rate	($)	(per cent)	Hourly rate	($)	(per cent)	hourly rate	($)	(per cent)	hourly rate	($)	(per cent)	Hourly rate
Under 16	$143.57	36.8	$3.79	-	-		$168.03	45	$4.42	$168.84	40	$4.44	-	-		$117.03	30	$3.08
16	$184.52	47.3	$4.86	-	-		$186.70	50	$4.91	$211.05	50	$5.55	$209.00*	42	$5.50	$156.04	40	$4.11
17	$225.48	57.8	$5.93	$273.07	70	$7.20	$205.37	55	$5.40	$253.26	60	$6.66	$279.30*	55	$7.35	$195.05	50	$5.13
18	$266.44	68.3	$7.01	$312.08	80	$8.21	$242.71	65	$6.39	$295.47	70	$7.78	$381.20*	75	$10.03	$234.06	60	$6.16
19	$321.83	82.5	$8.47	$351.09	90	$9.24	$280.05	75	$7.37	$337.68	80	$8.89	$443.50*	88	$11.67	$292.58	75	$7.70
20	$381.13	97.7	$10.03	$390.10	100	$10.27	$336.06	90	$8.84	$379.89	90	$10.00	Trade rate	100		$351.09	90	$9.24
Adult	$390.10	100	$10.27	$390.10	100	$10.27	$373.40	100	$9.83	$422.10		$11.12	*(minimum rates)			$390.10	100	$10.27

Note A: Clause 5.5.1: Unapprenticed Juniors: **Comparator Classification:** C13 – Engineering/ Production employee who has completed up to three months structured training. (Schedule D:Part 1: 1.2). Note that the C13 classification is one level above the C14 classification used as the Federal Minimum Wage equivalent $373.40 per week as per: [Print Q6779; P1371 and Q1998]. Principle 9.3 the Federal Minimum Wage Principles requires the percentage for the junior wage rates clause to be applied to that amount to calculate a minimum wage rate. *Casual loading* is 20% (Clause 4.2.3).

Note B: Clause 15.5.1 : Junior Employees (other than Office Juniors): **Comparator Classification**: The comparator is to whatever is the "appropriate adult" classification for the work. In the example above the Level 1 Food and Beverage Attendant Grade 1 is used as the comparator; duties include picking up glasses, emptying ashtrays, general assistance with food and beverages; cleaning and tidying areas. (Clause 3.1.1) *Casual loading* is 25% Mon - Fri, 50% Sat, 75% Sun, 175% Pub Holiday (Clause 15.2). For the Office Junior classification the percentage range is from 50% - 100% for ages 15 to 20; the comparator is a Clerical Grade 1 - $415.20.

Note C: Clause 38.3 – Juniors: **Comparator Classification**: Station Hand Grade 1 – a person with less than 12 months experience. (Clause 37.2). Ordinary hours to not exceed 160 hours in any consecutive period of 4 weeks (Clause 39.1). *Casual loading* is 17.5% (Clause 38.1(c)).

Note D: Clause 14(ii) – Junior Pharmacy Assistants: **Comparator Classification**: There are 4 grades of Pharmacy Assistants. Pharmacy Assistant Grade 1(First six months) receives $422.10 per week. After six months there is automatic progression to Grade 2 at $432.40. Grades 1-4 range from $422.10 - $463.10 (Table 1). Grade 1 employee is conditioned upon six months training under supervision (Clause 2).

Note E: Clause 46, Part V (18)(a) – Junior Worker - Roof Tile Fixing Western Australia: **Comparator Classification**: The aggregate of the tradespersons minimum weekly rate prescribed in Clause 9(a) and the special allowance prescribed in Clause 9.3; the actual minimum rate. Juniors also receive a percentage of the allowances adults receive, such as the industry allowance ranging from 40% - 100% if aged between 16 and 19 and a percentage of the tool allowance. (Clause. 46 Part V (18)(b)). **N.B.** Junior rate does not apply generally and is confined specifically to juniors who are roof tilers. Note that this rate includes the industry allowance of $17.40 (Clause 10(1)) which is calculated as a percentage dependent on age, as discussed earlier (Clause 46,Part V (18)(b)). *Casual loading* is 20% (Clause 8.1(c)).

Note F: Clause 16B – Table B4 – Junior (other than a junior artist and/or designer or a junior keyboard operator/assembler) not being an apprentice who works in the Grade level 2 area – i.e. An attendant/assistant mechanic, caster, copy holder, railway ticket printer, assistant on the printing machine etc. (Clause 16B): **Comparator Classification** : A Level 2 employee must have completed the structured training at Level 1 and have taken training in a wider range of duties and classifications (Clause 16D) [Table B4 refers to the comparator group level 2A which no longer exists]. *Casual loading* is 20% (Clause 4.1.5)(e)).

Table A1 (continued)

	Travel Industry – Agencies – General Award 1998 (G)			Federal Meat Industry [Processing] Award 1996 (H)			Vehicle Industry Repair Services and Retail Award 1983 (I)			Insurance Industry Award 1998 (J)			Queensland Local Government Officers' Award 1998 (K)			Clerical and Administrative Employees (Victorian) Award 1995 (L)		
Age	($)	(per cent)	Hourly rate	($)	(per cent)	hourly rate	($)	(per cent)	Hourl y rate	($)	(per cent)	hourly rate	($)	(per cent)	hourly rate	($)	(per cent)	hourly rate
Under 16	$266.83	64	$7.41	-	-		$205.91	47.5	$5.42	-	-		$243.59	55	$6.41	$199.15	45	$5.24
16	$266.83	64	$7.41	$197.00	50	$5.18	$205.91	47.5	$5.42	$215.84	50	$5.68	$243.59	55	$6.41	$221.30	50	$5.82
17	$266.83	64	$7.41	$236.40	60	$6.22	$216.75	50	$5.70	$259.00	60	$6.82	$265.73	60	$6.99	$265.55	60	$7.00
18	$308.53	74	$8.12	$295.50	75	$7.78	$270.94	62.5	$7.13	$302.18	70	$7.95	$310.02	70	$8.16	$309.80	70	$8.15
19	$362.73	87	$9.55	$334.90	85	$8.81	$325.13	75	$8.56	$345.34	80	$9.09	$354.30	80	$9.32	$354.10	80	$9.32
20	-	-		$394.00	100	$10.37	$379.31	87.5	$9.98	$388.51	90	$10.22	$398.59	90	$10.49	$398.35	90	$10.48
Adult	$416.93		$10.97	$394.00		$10.37	$433.50		$11.41	$431.67		$11.36	$442.88*		$11.65	$422.10		$11.11

Note G:. Juniors – (Clause 13.3) **Comparator Classification:** The percentages generally apply to "*the appropriate classification*". The comparator used in the table is the Travel Support employee. This employee is an adult employee who performs the work of a messenger, receptionist, typist or clerical support staff: (Clause 4.8). The wage rate is determined by an employee, in their first year of employment and working a large city. *Casual loading* is 20% (Clause 10.2.2).

Note H: Junior Grade in Abattoir – **Comparator Classification:** Grade 2 – employees whose tasks could be one of the following: move cattle and sheep up the race; clean tripes by machine; separate/handle offal; remove head meat or bag lambs: (Part 5: Clause 24.1 Division A and Division E). *Casual loading* is 20% (Clause 11(c)(i)).

Note I: This is the minimum percentage rate for Juniors employed as an assembler – accessories, assembler – body shop, automotive parts salesperson, automotive serviceperson and/or checker, bodymaker – second class etc (Clause 13(a)). Each of the listed occupations come under a level between 1 – 6 with a different wage rate corresponding with each level. **Comparator Classification:** The occupation used in the table is an assembler – accessories, who is a Level 3 employee whose minimum adult rate is $412.60. The Level 3 employee would normally have completed 8 modules of a nationally accredited RS&R Certificate or equivalent training (Clause 8(a)). *Casual loading* is 20% (Clause 6(f).

Note J: Junior employees can be employed in Grades 1-3 (Clause 14.5). Grade 1 is used in the Table. **Comparator Classification:** Grade 1 employee duties are: mail; sort and file documentation; computer work; complete standard forms/letters according to rules; despatch/process cheques/payments etc. (Appendix B) *Casual loading* is 25% (Clause 11.1)

Note K: Juniors – (Clause 7) **Comparator Classification:** First Increment of Level 1 – Technical Services stream: Requires basic knowledge of construction, maintenance, horticulture and council administration (Clause 7.1, Schedule A). *The rate is calculated as the weekly rate of $23 037 (divided by 52.016). *Casual loading* is 19% Mon - Fri, 25% otherwise (Clause 19.4)

Note L: Juniors employed as clerical assistants. **Comparator Classification:** Grade 1 and 2 Clerical Assistant with first six months experience – the employee must perform clerical and office tasks directed within the skill levels set out, namely, operate telephones, use all technical aids, receive and sort mail etc (Clause 3(a) and 3(h)).

Table A1 (continued)

	Clothing Trades Award 1982 (M)			SDAEA Victorian Shops Interim Award 1994 (N)			Shop Employees (State) Award – (NSW) Per hour (O)			Westpac Banking Corporation Enterprise Development Agreement 1998 (P)			National Australia Bank Enterprise Agreement 1997 (Q)		
	($)	(per cent)	Hourly rate	($)	(per cent)	hourly rate	($)	(per cent)	Hourly rate	($)	(per cent)	hourly rate	($)	(per cent)	hourly rate
Under 16	$206.30	50	$5.43	$216.20	50	$5.69	$172.72	40	$4.55	$236.85		$6.23	$324.40		$8.54
16	$206.30	50	$5.43	$216.20	50	$5.69	$215.90	50	$5.54	$236.85		$6.23	$324.40		$8.54
17	$247.56	60	$6.51	$237.80	55	$6.26	$259.08	60	$6.82	$284.15		$7.48	$324.40		$8.54
18	$284.70	69	$7.49	$291.90	67.5	$7.68	$302.26	70	$7.95	$331.50		$8.72	$417.15		$10.98
19	$309.45	75	$8.14	$345.90	80	$9.10	$345.44	80	$9.09	$378.90		$9.97	$417.15		$10.98
20	$350.70	85	$9.23	$389.20	90	$10..24	$388.62	90	$10.23	$426.25		$11.22	$472.75		$12.44
Adult (21+)	$412.60		$10.85	$432.40		$11.38	$431.80		$11.36						

Note M: Junior rate is for an "improver". There is no definition of an improver in the Award, though the section dealing with this classification also deals with apprentices (Clause 8(b)). **Comparator Classification:** Skill level 2 – employees are required to have attained the skills of Level 1 and to instruct other employees, to identify and rectify minor equipment/machine faults. There are four levels. An employee who has a trade certificate holds the fourth level position (Clause 7A(b)(ii)). *Casual loading* is 33.3% (Clause 21(c)).

Note N: Juniors: **Comparator Classification**: Retail Worker Grade 1 means a shop assistant, a sales person, an assembler, a demonstrator, a ticket writer, a window dresser, a merchandiser and all others. (Clause 4). *Casual loading* is 25% ordinary times, 45% night shift (Clauses 14(c) and 9(f)).

Note O: Taken from Submission 23: Australian Retailers Association – Appendix E at 73. Juniors, the wage rate and comparator classification are referred to in Part B – Monetary Rates -Table 1 of the award, supplied by the Retail Traders' Association of New South Wales. These rates are identical in the Retail and Wholesale Industry – Shop Employees – ACT Award 1996.

Note P: The junior rates clause and the wage rates are the same for the Westpac Banking Corporation (Telephone Banking) Enterprise Development Agreement 1998 and also the Westpac Corporation (WFS) Enterprise Development Agreement 1998.

Note Q:: Juniors – (Clause 16). Note that the clause seeks to phase out junior rates.

Table A2 - Apprentice Juniors: Weekly Award Wages in Selected Awards for 38 hour week after 1998 Safety Net increase

	Metal Engineering And Associated Industries Award 1998 (V)			Hospitality Industry Accommodation, Hotels, Resorts and Gaming Award 1998 (W)			Vehicle Industry, Repair Services and Retail Award 1983. (X)			Aerospace Industry (Hawker de Havilland) Award 1998 (Y)			National Building and Construction Industry Award 1990 (Z)			Graphic Arts Award 1977 (AA)		
Year of Apprenticeship	($)	(per cent)	Hourly rate	($)	(per cent)	hourly rate	($)	(per cent)	Hourly rate	($)	(per cent)	hourly rate	($)	(per cent)	hourly rate	($)	(per cent)	Hourly rate
1	$195.40	42	$5.14	$255.86	55	$6.73	$195.40	42	$5.14	$232.40	42	$6.11	$235.00	42	$6.18	$198.20	47.5	$5.22
2	$255.90	55	$6.73	$302.38	65	$7.96	$255.90	55	$6.73	$304.35	55	$8.00	$296.50	55	$7.80	$250.30	60	$6.59
3	$348.90	75	$9.18	$372.16	80	$9.79	$348.90	75	$9.18	$414.55	75	$10.90	$391.10	75	$10.29	$302.50	72.5	$7.96
4	$409.40	88	$10.77	$441.94	95	$11.63	$409.40	88	$10.77	$487.00	88	$12.81	$452.50	88	$11.91	$365.05	87.5	$9.61
Tradesperson	$465.20		$12.24	$465.20		$12.24	$465.20* (* minimum weekly rate)		$12.24	$553.40* (* rates apply at Milperra site NSW only)		$14.55	$525.16		$13.82	$417.20		$10.98

Note V: Year 1 of the Apprenticeship - National Training Wage Award (ODN: 22543 of 1998) Traineeship Skill Level "B" exit rate
Year 2 – C14 – Engineering/Production Employee – Level 1 – has undertaken up to 38 hours induction training.
Year 3 – C13 - Engineering/Production Employee – Level 2 – has completed up to 3 months structured training.
Year 4- C12 – Engineering/Production Employee – Level 3 – has completed an Engineering Production Certificate I – (Part I: Schedule D: 1.2)
Note W: This rate applies to Victoria only. NSW apprentices come under the State awards.
The comparator in this instance is a Cook (tradesperson) Grade 3 – a 'commi chef' who completed an apprenticeship or who has passed the appropriate trade test and who is engaged to perform cooking, butchering and baking or pastry cooking duties. (Clauses 3 and 18)
Note X: Body Maker 1st Class – means a tradesperson engaged on the building, rebuilding, altering (without the aid of jigs), repairing or customising of passenger and/or commercial vehicle bodies, trailers and other vehicle bodies or chassis in wood/metal and other substitute material (Clause 44(h)(i)). **[Note that in Clause 14(b)(i) is the minimum rate to be paid for an apprentice or probationer and thus the employer shall covenant to pay wages of not less than the above rate].**
Note Y: Aerospace Base Tradesperson – an employee who holds a Trade Certificate or Tradesperson Rights Certificate in one of the following engineering streams: electrical/electronics, mechanical or fabrication (Schedule B – Employees at 361 Milperra Rd, Bankstown, NSW, Clause 1.6 – Definitions and Clause 1.2 Rates of Pay). There is provision for adult apprentices to keep their adult wage as apprentices. (Schedule A: Clause 1.4).
Note Z: The above rates are for an apprentice in the following trades in Western Australia: carpentry and joinery, painting, glazing, bricklaying, stonemasonry, plastering and/or tilelaying and fixing. The minimum rates for all trades other than signwriters are set out in Clause 46: Part VI (14)(a) which range from $198.70 in the first year to $416.20 in the fourth year. This rate is calculated to include the Industry Allowance - $17.40 (Clause 10(1)) and the Tool Allowance for a stonemason - $18.90 (Clause 11).
Note AA: Compared to a skilled employee working at the rate prescribed for group Level 5 (Clause 16B). An employee at this level will have achieved the comparable knowledge and standards as ratified by the National Training Board or have completed an apprenticeship. (Clause 16D(b)).

Table A3 - Comparison between junior rates and apprenticeship rates: selected awards

Junior Rates: Weekly Award Wages in Selected Awards for 38 hour week after April 1998 Safety Net increase.

	Metal Engineering And Associated Industries Award 1998 (Note 1)			Hospitality Industry Accommodation, Hotels, Resorts and Gaming Award 1998 (Note 2)			SDAEA Victorian Shops Interim Award 1994 (Note 3)			National Building and Construction Industry Award 1990 (Note 4)			Graphic Arts Award 1977 (Note 5)		
Age	($)	(per cent)	Hourly rate	($)	(per cent)	hourly rate	($)	(per cent)	Hourly rate	($)	(per cent)	hourly rate	($)	(per cent)	hourly rate
Under 16	$143.57	36.8	$3.79	-	-		$216.20	50	$5.69	-	-		$117.03	30	$3.08
16	$184.52	47.3	$4.86	-	-		$216.20	50	$5.69	$209.00*	42	$5.50	$156.04	40	$4.11
17	$225.48	57.8	$5.93	$273.07	70	$7.20	$237.80	55	$6.26	$279.30*	55	$7.35	$195.05	50	$5.13
18	$266.44	68.3	$7.01	$312.08	80	$8.21	$291.90	67.5	$7.68	$381.20*	75	$10.03	$234.06	60	$6.16
19	$321.83	82.5	$8.47	$351.09	90	$9.24	$345.90	80	$9.10	$443.50*	88	$11.67	$292.58	75	$7.70
20	$381.13	97.7	$10.03	$390.10	100	$10.27	$389.20	90	$10.24	Trade rate	100		$351.09	90	$9.24
Adult	$390.10	100	$10.27	$390.10	100	$10.27	$432.40		$11.38	*(minimum rates)			$390.10	100	$10.27

Apprentice Juniors: Weekly Award Wages in Selected Awards for 38 hour week after 1998 Safety Net increase

	Metal Engineering And Associated Industries Award 1998 (Note 6)			Hospitality Industry Accommodation, Hotels, Resorts and Gaming Award 1998 (Note 7)			SDAEA Victorian Shops Interim Award 1994 (Note 8)			National Building and Construction Industry Award 1990 (Note 9)			Graphic Arts – General – Interim Award 1995 (Note 10)		
Year of Apprenticeship	($)	(per cent)	Hourly rate	($)	(per cent)	hourly rate	($)	(per cent)	Hourly rate	($)	(per cent)	Hourly rate	($)	(per cent)	Hourly rate
							$194.60	45	$5.12*						
1	$195.40	42	$5.14	$255.86	55	$6.73	$237.80	55	$6.26	$235.00	42	$6.18	$198.20	47.5	$5.22
2	$255.90	55	$6.73	$302.38	65	$7.96	$335.10	77.5	$8.82	$296.50	55	$7.80	$250.30	60	$6.59
3	$348.90	75	$9.18	$372.16	80	$9.79	$389.20	90	$10.24	$391.10	75	$10.29	$302.50	72.5	$7.96
4	$409.40	88	$10.77	$441.94	95	$11.63	$432.44	100	$11.38	$452.50	88	$11.91	$365.05	87.5	$9.61
Tradesperson	$465.20		$12.24	$465.20		$12.24	$432.44	100	$11.38	$525.16		$13.82	$417.20		$10.98

*This row of figures refer to Pre Apprenticeship rate in the SDAEA – Victorian Shops Interim Award 1994

Note 1: Clause 5.5.1: Unapprenticed Juniors: **Comparator Classification:** C13 – Engineering/ Production employee who has completed up to three months structured training. (Schedule D: Part 1: 1.2). Note that the C13 classification is one level above the C14 classification used as the Federal Minimum Wage equivalent as per $373.40 per week. [Print Q6779; P1371 and Q1998]. Principle 9.3 the Federal Minimum Wage Principle requires the percentage for the junior wage rates clause to be applied to that amount to calculate a minimum wage rate.
Note 2: Clause 15.5.1 : Junior employees (other than office juniors). Note that junior office employees percentage range is greater, from 50% - 100% from 15 to 20 years, the comparator is a Clerical grade 1 - $415.20: **Comparator Classification**: The comparator is to whatever is the "appropriate adult" classification for the work. In the example above the Level 1 Food and Beverage Attendant Grade 1 is used as the comparator. Their duties include picking up glasses, emptying ashtrays, general assistance with food and beverages; cleaning and tidying areas. (Clause 3.1.1)
Note 3: Juniors: **Comparator Classification**: Retail Worker Grade 1 means a shop assistant, a sales person, an assembler, a demonstrator, a ticket writer, a window dresser, a merchandiser and all others. (Clause 4). *Casual loading* is 25% ordinary times, 45% night shift (Clauses 14(c) and 9(f)).
Note 4: Clause 46, Part V (18)(a) – Junior Worker - Roof Tile Fixing Western Australia: **Comparator Classification**: The aggregate of the tradespersons minimum weekly rate prescribed in Clause 9(a) and the special allowance prescribed in Clause 9.3, the actual minimum rate. Juniors also receive a percentage of the allowances adults receive, such as the industry allowance ranging from 40% - 100% if aged between 16 and 19. (Clause. 46 Part V (18)(b)). **N.B.** Junior rate does not apply generally and is confined specifically to juniors who are roof tilers. Note that this rate includes the industry allowance of $17.40 and the tool allowance of $9.90 (Clause 10(1)) which is calculated as a percentage dependent on age (Clause 46: Part V (18)(b)). *Casual loading* is 20% (Clause 8.1(c)).
Note 5: Clause 16B – Table B4 – Junior (other than a junior artist and/or designer or a junior keyboard operator/assembler) not being an apprentice who works in the Grade level 2 area – i.e. An attendant/assistant mechanic, caster, copy holder, railway ticket printer, assistant on the printing machine etc. (Cl 16B): **Comparator Classification** : A Level 2 employee must have completed the structured training at Level 1 and have taken training in a wider range of duties and classifications. (Clause 16D) [note that Table B4 refers to the comparator group level 2A which no longer exists]
Note 6: Year 1 of the Apprenticeship - National Training Wage Award (ODN: 22543 of 1998) Traineeship Skill Level "B" exit rate.
Year 2 – C14 – Engineering/Production Employee – Level 1 – has undertaken up to 38 hours induction training.
Year 3 – C13 - Engineering/Production Employee – Level 2 – has completed up to 3 months structured training.
Year 4- C12 – Engineering/Production Employee – Level 3 – has completed an Engineering Production Certificate I – (Part I: Schedule D: 1.2)
Note 7 :This rate applies to Victoria only. NSW apprentices come under the State awards.
The comparator in this instance is a Cook (tradesperson) grade 3 – a 'commi chef' who completed an apprenticeship or who has passed the appropriate trade test and who is engaged to perform cooking, butchering and baking or pastry cooking duties. (Clauses 3 and 18)
Note 8: Floristry is the only trade offered. Comparator – Retail Worker Grade 1 (Clause 4A). Retail Worker Grade 1 as defined in Note 3 above.
Note 9: The above rates are for an apprentice in the following trades in Western Australia: carpentry and joinery, painting, glazing, bricklaying, stonemasonry, plastering and/or tilelaying and fixing. The minimum rates for all trades other than signwriters are set out in Clause 46: Part VI (14)(a) which range from $198.70 in the first year to $416.20 in the fourth year. This rate is calculated to include the Industry Allowance - $17.40 (Clause 10(1)) and the Tool Allowance - $18.90 (Clause 11).
Note 10: Compared to a skilled employee working at the rate prescribed for group Level 5. (Clause 16B) An employee at this level will have achieved the comparable knowledge and standards as ratified by the National Training Board or have completed an apprenticeship. (Clause 16D(b)).

Table A4 - Comparison between junior rate, apprenticeship rate and traineeship rate: selected awards

National Building and Construction Industry Award 1990

Junior rate (Note 1)				**Apprenticeship rate** (Note 2)				**Traineeship rate** (Note 3)			
Age				**Year of Apprenticeship**	($)	(per cent)	Hourly Rate		($)	(per cent)	Hourly rate
Under 16	-	-		**1**	$235.00	42	$6.18	Stage 1	$356.35		$9.38
16	$209.00*	42	$5.50	**2**	$296.50	55	$7.80	Stage 2	$398.15		$10.48
17	$279.30*	55	$7.35	**3**	$391.10	75	$10.29	Stage 3	$448.25		$11.80
18	$381.20*	75	$10.03	**4**	$452.50	88	$11.91				
19	$443.50*	88	$11.67	**Trade rate**	$525.16		$13.82				
20	Trade rate	100									

Note 1: Clause 46, Part V (18)(a) – Junior Worker - Roof Tile Fixing Western Australia: **Comparator Classification**: The aggregate of the tradespersons minimum weekly rate prescribed in Clause 9(a) and the special allowance prescribed in Clause 9.3, the actual minimum rate. Juniors also receive a percentage of the allowances adults receive, such as the industry allowance ranging from 40% - 100% if aged between 16 and 19. (Clause. 46 Part V (18)(b)). **N.B.** Junior rate does not apply generally and is confined specifically to juniors who are roof tilers. Note that this rate includes the industry allowance of $17.40 and the tool allowance of $9.90 (Clause 10(1)) which are calculated as a percentage dependent on age (Clause 46,Part V (18)(b)). *Casual loading* is 20% (Clause 8.1(c)).

Note 2:. The above rates are for an apprentice in the following trades in Western Australia: carpentry and joinery, painting, glazing, bricklaying, stonemasonry, plastering and/or tilelaying and fixing. The minimum rates for all trades other than signwriters are set out in Clause 46: Part VI (14)(a) which range from $198.70 in the first year to $416.20 in the fourth year. This rate is calculated to include the Industry Allowance - $17.40 (Clause 10(1)) and the Tool Allowance - $18.90 (Clause 11).

Note 3: Civil Operations Traineeship definition – a system of structured on-the-job training with an employer and off-the-job training with an approved training provider.

The three stages of training result in a qualification at CW3 level (equivalent to AVC level 3). Progression through each stage will be dependent on the Trainee passing the required competency based assessment. It does not say how long the stage takes. **In the response to the Issues Paper the CFMEU suggested that it would be more appropriate for the purpose of the comparison to use the general traineeship rate which is based on the National Training Wage Award 1994 (see below)**

Junior rate				**Apprenticeship rate**				**Traineeship rate – Skill Level B ****							
								Left school	**Year 10**		**Year 11**		**Year 12**		
Age	($)	(per cent)	Hourly Rate	**Year of Apprenticeship**	($)	(per cent)	Hourly Rate		$	Hourly rate	$	Hourly rate	$	Hourly rate	
16	-	-						School leaver	$371.10	$9.77	$371.10	$9.77	$371.10	$9.77	
17	$209.00*	42	$5.50	1	$235.00	42	$6.18	1 year out	$371.10	$9.77	$371.10	$9.77	$371.10	$9.77	
18	$279.30*	55	$7.35	2	$296.50	55	$7.80	2 years	$371.10	$9.77	$371.10	$9.77	$371.10	$9.77	
19	$381.20*	75	$10.03	3	$391.10	75	$10.29	3 years	$371.10	$9.77	$371.10	$9.77	$371.10	$9.77	
20	$443.50*	88	$11.67	4	$452.50	88	$11.91	4 years	$371.10	$9.77	$371.10	$9.77	$371.10	$9.77	
Adult	Trade rate	100		Tradesperson	$525.16		$13.82	5 years or more	$371.10	$9.77	$371.10	$9.77	$371.10	$9.77	

*Minimum rates.

Note ** The rates are calculated as per Clause 9D. The rates are the same as the National Training Wage Award but include the Industry Allowance of $17.40 and the Special Allowance of $7.70. **Skill Level B is used, though the award specifies the Skill Level A rate as well.**

Table A4 continued

SDAEA – Victorian Shops Interim Award 1994

Junior rate (Note 1)				**Apprenticeship rate (Note 2)**				**Traineeship rate (Note 3)**							
								Left school	**Year 10**		**Year 11**		**Year 12**	
Age	($)	(per cent)	Hourly Rate	**Year of Apprenticeship**	($)	(per cent)	Hourly Rate		$	Hourly rate	$	Hourly rate	$	Hourly rate
Under 16	$216.20	50	$5.69											
16	$216.20	50	$5.69	**Pre Apprenticeship**	$194.60	45	$5.12	School leaver	$161.00*	$4.24	$171.00*	$4.50	$225.00	$5.92
17	$237.80	55	$6.26	**1**	$237.80	55	$6.26	1 year out	$193.00	$5.08	$225.00	$5.92	$259.00	$6.82
18	$291.90	67.5	$7.68	**2**	$335.10	77.5	$8.82	2 years	$225.00	$5.92	$259.00	$6.82	$304.00	$8.00
19	$345.90	80	$9.10	**3**	$389.20	90	$10.24	3 years	$259.00	$6.82	$304.00	$8.00	$346.00	$9.11
20	$389.20	90	$10..24	**4**	$432.44	100	$11.38	4 years	$304.00	$8.00	$346.00	$9.11		
Adult	$432.40	100	$11.38	**Trade rate**	$432.44	100	$11.38	5 years or more	$346.00	$9.10				

Note 1: Juniors: **Comparator Classification**: Retail Worker Grade 1 means a shop assistant, a sales person, an assembler, a demonstrator, a ticket writer, a window dresser, a merchandiser and all others. (Clause 4).
Note 2: Floristry is the only trade offered. Comparator – Retail Worker Grade 1 (Clause 4A). Retail Worker Grade 1 as defined in Note 1 above.
Note 3: Deems the National Training Wage Award 1994 to apply (Clause 14(d)). Trainee rate – (National Training Wage Award 1994 at Clause 10). The rate differs depending on the highest year of schooling completed and the skill level depending on the accredited training level. In the above table the highest year of schooling completed was Year 10, if it had been Year 11 the trainee would have started on a higher level but progressed proportionally at the same trainee as the trainee in the example. Retail worker - **Skill level B.** (Information provided by the Retail Traders' Association of New South Wales). *This rate applies to trainees who spend 33% of their time in approved training.

Traineeship rate Retail Industry (State) Training Wage Award (NSW) (Note 1)				**Traineeship rate** Retail Industry (State) Training Award (QLD) (Note 2)			
	($)	(Per Hour)	(Approx. Age)		($)	(Per hour)	(Approx. Age)
Left year 12				**Left year 12**			
School leaver	$225.00	$5.92	18	School leaver	$225.00	$5.92	17
1 year out	$259.00	$6.82	19	1 year out	$259.00	$6.82	18
2 years	$304.00	$8.00	20	2 years	$304.00	$8.00	19
3 years	$346.00	$9.11	21	3 years	$364.00	$9.11	20

Table A4 continued

Hospitality Industry, Accommodation, Hotels, Resorts and Gaming Award 1998

Junior rate (Note 1) (Note 1)				**Apprenticeship rate (Note 2)**				**Traineeship rate (Note 3)**							
								Left school	**Year 10**		**Year 11**		**Year 12**		
Age	($)	(per cent)	Hourly Rate	**Year of Apprenticeship**	($)	(per cent)	Hourly Rate		$	Hourly rate	$	Hourly rate	$	Hourly rate	
Under 16	-	-													
16	-	-		**Pre Apprenticeship**	-	-		School leaver	$161.00*	$4.24	$171.00*	$4.50	$225.00	$5.92	
17	$273.07	70	$7.20	**1**	$255.86	55	$6.73	1 year out	$193.00	$5.08	$225.00	$5.92	$259.00	$6.82	
18	$312.08	80	$8.21	**2**	$302.38	65	$7.96	2 years	$225.00	$5.92	$259.00	$6.82	$304.00	$8.00	
19	$351.09	90	$9.24	**3**	$372.16	80	$9.79	3 years	$259.00	$6.82	$304.00	$8.00	$346.00	$9.11	
20	$390.10	100	$10.27	**4**	$441.94	95	$11.63	4 years	$304.00	$8.00	$346.00	$9.11			
Adult	$390.10	100	$10.27	**Trade rate**	$465.20	100	$12..24	5 years or more	$346.00	$9.10					

Note 1: Clause 15.5.1 : Junior employees (other than office juniors). Note that junior office employees percentage range is greater, from 50% - 100% from 15 to 20 years, the comparator is a Clerical grade 1 - $415.20: **Comparator Classification**: The comparator is to whatever is the "appropriate adult" classification for the work. In the example above the Level 1 Food and Beverage Attendant Grade 1 is used as the comparator. Their duties include picking up glasses, emptying ashtrays, general assistance with food and beverages; cleaning and tidying areas. (Clause 3.1.1)
Note 2: This rate applies to Victoria only. NSW apprentices come under the State awards. The comparator in this instance is a Cook (tradesperson) Grade 3 – a 'commi chef' who completed an apprenticeship or who has passed the appropriate trade test and who is engaged to perform general or specialised cooking, butchering, baking or pastry cooking duties and/or who supervises other cooks and employees. (Clauses 3 and 18).
Note 3: Clause 36 refers traineeships to the National Training Wage Award 1994. In Schedule C to that Award, Hospitality CST – Accommodation, Hospitality CST – Food and Beverage and Hospitality CST – Kitchen Attending/Food Production are classified as Skill Level B and the corresponding rates are provided in the table.

Metal, Engineering and Associated Industries Award 1998

Junior rate (Note 1) (Note 1)				**Apprenticeship rate (Note 2)**				**Traineeship rate (Note 3)**							
								Left school	**Year 10**		**Year 11**		**Year 12**		
Age	($)	(per cent)	Hourly Rate	**Year of Apprenticeship**	($)	(per cent)	Hourly Rate		$	Hourly rate	$	Hourly rate	$	Hourly rate	
Under 16	$143.57	36.8	$3.79												
16	$184.52	47.3	$4.86	**Pre Apprenticeship**	-	-		School leaver	$161.00*	$4.24	$171.00*	$4.50	$225.00	$5.92	
17	$225.48	57.8	$5.93	**1**	$195.40	42	$5.14	1 year out	$193.00	$5.08	$225.00	$5.92	$259.00	$6.82	
18	$266.44	68.3	$7.01	**2**	$255.90	55	$6.73	2 years	$225.00	$5.92	$259.00	$6.82	$304.00	$8.00	
19	$321.83	82.5	$8.47	**3**	$348.90	75	$9.18	3 years	$259.00	$6.82	$304.00	$8.00	$346.00	$9.11	
20	$381.13	97.7	$10.03	**4**	$409.40	88	$10.77	4 years	$304.00	$8.00	$346.00	$9.11			
Adult	$390.10	100	$10.27	**Trade rate**	$465.20	100	$12.24	5 years or more	$346.00	$9.10					

Table A4 – continued.

Metal, Engineering and Associated Industries Award 1998 – Exit from Traineeship rates

	Skill Level A (Note 4)			Skill Level B			Skill Level C		
School leaver	Year 10 $	Year 11 $	Year 12 $	Year 10 $	Year 11 $	Year 12 $	Year 10 $	Year 11	Year 12
Plus 1 year out of school	230.70	282.25	328.65	241.65	269.95	310.00	241.95	252.30	284.65
Plus 2 years	282.25	328.65	381.45	269.95	310.00	362.95	252.30	284.65	318.30
Plus 3 years	328.65	381.45	Note *	310.00	362.95	Note*	284.65	318.30	Note*
Plus 4 years	381.45	Note *		362.95	Note*		318.30	Note*	
Plus 5 years or more	Note *			Note*			Note*		

Note 1: Clause 5.5.1: Unapprenticed Juniors: **Comparator Classification:** C13 – Engineering/ Production employee who has completed up to three months structured training. (Schedule D: Part 1: 1.2). Note that the C13 classification is one level above the C14 classification used as the Federal Minimum Wage equivalent as per $373.40 per week. [Print Q6779; P1371 and Q1998]. Principle 9.3 the Federal Minimum Wage Principle requires the percentage for the junior wage rates clause to be applied to that amount to calculate a minimum wage rate.
Note 2: Year 1 of the Apprenticeship - National Training Wage Award (ODN: 22543 of 1998) Traineeship Skill Level "B" exit rate, Year 2 – C14 – Engineering/Production Employee – Level 1 – has undertaken up to 38 hours induction training. Year 3 – C13 - Engineering/Production Employee – Level 2 – has completed up to 3 months structured training. Year 4- C12 – Engineering/Production Employee – Level 3 – has completed an Engineering Production Certificate I – (Part I: Schedule D: 1.2).
Note 3: National Training Wage Award 1994 – Skill Level B – including classifications such as the following: Advanced Engineering Traineeship Level 1 (AQF2), Advanced Engineering Traineeship Level 2, Engineering, Electronics Equipment. (Schedule C)
Note 4: Employees complete a traineeship under the terms of the National Training Wage Interim Award 1994. These rates apply after that period. (Clause 5.6)
Note *: Insert appropriate classification rate as specified in clause 5.1

Graphic Arts – General – Interim Award 1995

Junior rate (Note 1)				**Apprenticeship rate (Note 2)**				**Traineeship rate (Note 3)**						
								Left school	**Year 10**		**Year 11**		**Year 12**	
Age	($)	(per cent)	Hourly Rate	**Year of Apprenticeship**	($)	(per cent)	Hourly Rate		$	Hourly rate	$	Hourly rate	$	Hourly rate
Under 16	$117.03	30	$3.08											
16	$156.04	40	$4.11	**Pre Apprenticeship**				School leaver	$161.00*	$4.24	$171.00*	$4.50	$225.00	$5.92
17	$195.05	50	$5.13	**1**	$198.20	47.5	$5.22	1 year out	$193.00	$5.08	$225.00	$5.92	$259.00	$6.82
18	$234.06	60	$6.16	**2**	$250.30	60	$6.59	2 years	$225.00	$5.92	$259.00	$6.82	$304.00	$8.00
19	$292.58	75	$7.70	**3**	$302.50	72.5	$7.96	3 years	$259.00	$6.82	$304.00	$8.00	$346.00	$9.11
20	$351.09	90	$9.24	**4**	$365.05	87.5	$9.61	4 years	$304.00	$8.00	$346.00	$9.11		
Adult	$390.10	100	$10.27	**Trade rate**	$417.20	100	$10.98	5 years or more	$346.00	$9.10				

Note 1: Clause 16B – Table B4 – Junior (other than a junior artist and/or designer or a junior keyboard operator/assembler) not being an apprentice who works in the Grade Level 2 area – i.e. an attendant/assistant mechanic, caster, copy holder, railway ticket printer, assistant on the printing machine etc. (Cl 16B): **Comparator Classification** : A Level 2 employee must have completed the structured training at Level 1 and have taken training in a wider range of duties and classifications. (Clause 16D) [note that Table B4 refers to the comparator group level 2A which no longer exists].
Note 2: Compared to a skilled employee working at the rate prescribed for group Level 5. (Clause 16B) An employee at this level will have achieved the comparable knowledge and standards as ratified by the National Training Board or have completed an apprenticeship. (Clause 16D(b)).
Note 3: Rates – National Training Wage Award 1994. Traineeship agreements – Skill Level B - Small Offset Printing Traineeship; Printing Production Support Traineeship; Print Design Traineeship; Graphic Arts Merchants Traineeship. (Clause 9.3 – Graphic Arts- General – Interim Award 1995).

Table A5 – Junior Rates: Selected Certified Agreements in the Retail Trade industry for 38 hour week
The respective note to each agreement indicates the date upon which the rate quoted is effective from.

	Woolworths Distribution Centres WA Agreement 1998 (Note 1)			Woolworths Supermarkets – NSW/ACT Agreement 1998 (Note 2)			Greenstore Trading Pty Ltd Enterprise Agreement 1997 (Note 3)			Jewel NSW and ACT Enterprise Agreement 1997 (Note 4)			Sunbury Plaster Products Certified Agreement – with Employees 1998 (Note 5)			Video Ezy (Morayfield and Bribie Island) Certified Agreement 1998 (Note 6)		
Age	($)	(per cent)	Hourly rate	($)	(per cent)	hourly rate	($)	(per cent)	Hourly rate	($)	(per cent)	Hourly rate	($)	(per cent)	Hourly rate	($)	(per cent)	Hourly rate
Under 16	374.71	70	9.86	175.76	40	4.63	213.18	50	5.61	227.60	50	5.98	192.28	55	5.06	213.75	45	5.63
16	374.71	70	9.86	219.70	50	5.78	213.18	50	5.61	227.60	50	5.98	192.28	55	5.06	237.50	50	6.25
17	374.71	70	9.86	263.64	60	6.94	232.56	54.5	6.12	250.30	55	6.59	192.28	55	5.06	261.25	55	6.88
18	401.48	75	10.57	307.58	70	8.09	288.04	67.5	7.58	307.20	67.5	8.08	235.98	67.5	6.21	308.75	65	8.13
19	428.24	80	11.27	351.52	80	9.25	339.34	79.5	8.93	364.10	80	9.58	279.68	80	7.36	356.25	75	9.38
20	481.77	90	12.68	395.46	90	10.41	353.78	83	9.31	409.60	90	10.78	314.64	90	8.28	403.75	85	10.63
Adult	535.30		14.09	439.40	100	11.56	426.36	100	11.22	455.10	100	11.98	349.60	100	9.20	475.00	100	12.50

Note 1: (Agreement 15) Junior – under 21 years (Clause 7), wages effective from 1 October 1998. **Comparator Classification** – Storeworker Grade 1 – First 3 Months. After 3 Months the employee earns $540.50 per week and after 12 months $546.00 (Clause 13.1). Junior rates (Clause 13.4). Proportion of Juniors – the number of juniors shall not exceed the proportion of one to one for the first five adults and thereafter one junior to every two adults or fraction thereof (Clause 9) and the proportion is limited with overtime work (Clause 26.10). Clause 21.5 Eligibility for Superannuation – implies that junior casual employees are excluded. Clause 24.9 states that a junior employee, who is under eighteen years, will not be required to work afternoon or night shift without his/her consent. National Training Wage Award applies (Clause 46).
Note 2: (Agreement 28) Juniors – Wages effective from August 1998 – January 1999 (Clause 11.2) **Comparator Classification**: Grade 1. National Training Wage Award 1994 applies (Clause 6). Apprenticeships (Clause 7). If a junior has a certificate of some kind, they will receive a percentage of the adult allowance given for that qualification (Clause 12). Junior employees, under 18 years, are eligible for superannuation if they work at least 30 hours per week (Clause 37).
Note 3: (Agreement 24) Juniors – Wage rates effective from 31 July 1998 (Clause 8). **Comparator classification** – Retail Employee Grade 2. Junior employees not required to work overtime unless she/he desires (Clause 21(c)).
Note 4: (Agreement 6) Juniors – Schedule 1 – Wage rates, effective from 1 July 1998. **Comparator classification** – Shop Assistant. National Traineeship Award applies – Clause 38. Juniors are eligible for superannuation if work at least 30 hours per week – Clause19A. Note: an employee, including a junior, who performs the work of a store manager for one week or more shall be paid the appropriate manager's rate. (Clause 7(f)).
Note 5 (Agreement 23) Juniors – Wages, effective in 1998 (Clause 10.2) **Comparator Classification**: Level 1 – Introductory Level – These employees have no previous experience or training with the employer. Duties include performing work under direct supervision, limited customer service duties and providing assistance to employees of a higher level (Clause 10). Junior office employees (Clause 10). Apprentices (Clause 10.4). Traineeships (Clause 10.6). required to work for a maximum of 6 months at this level. The rate for a trainee shall be based upon Level 1 of the relevant Level at a percentage of 70% if school year completed Year 10, 80% post-Year 11, 90% post-Year 12 (Clause10.6). The rate for a Plastering Apprentice shall be based upon the prescribed rate for a qualified Tradesperson: First year – 55%, Second year – 65%, Third year – 80%, Fourth year – 95% (Clause 10.4).
Note 6: (Agreement 45) Juniors – Clause 3.3(c), effective from 1 December 1998. **Comparator Classification** – Video Ezy Employee – engaged in the reception, cleanliness of the store, presentation, sale or delivery by hand of any goods for sale. For a junior to be eligible for superannuation they must work 30 hours per week (Clause 3.4). The same rate and conditions applies for the following agreements: Video Ezy Bundaberg Certified Agreement 1998, Video Ezy Albany Creek Certified Agreement and Video Ezy Mount Isa Certified Agreement.

Table A5 - continued

Age	Angus Park Group Employees Enterprise Agreement 1998 (Note7)			BBC Hardware Limited Retail Agreement 1998 (Note 8)			QII Certified Agreement (Note9)			Suregroup Pty Ltd 1998 Agreement (Note 10)			Plyboard Distributors Pty Ltd Agreement 1998 (Note 11)			WP Crowhurst Pty Ltd Enterprise Agreement 1998 (Note 12)		
	($)	(per cent)	Hourly rate	($)	(per cent)	Hourly rate	($)	(per cent)	Hourly rate	($)	(per cent)	Hourly rate	($)	(per cent)	Hourly rate	($)	(per cent)	Hourly rate
Under 16	-	-	-	228.60	50	6.00	196.00	40	5.16	261.47	60	6.88	216.20	50	5.68	239.90	50	6.31
16	227.95	50	6.00	228.60	50	6.00	245.00	50	6.45	261.47	60	6.88	216.20	50	5.68	239.90	50	6.31
17	273.54	60	7.20	251.40	55	6.60	294.00	60	7.74	305.05	70	8.03	237.82	55	6.26	287.88	60	7.58
18	319.13	70	8.40	308.50	67.5	8.10	343.00	70	9.03	348.62	80	9.17	291.87	67.5	7.68	335.86	70	8.84
19	364.72	80	9.60	365.70	80	9.60	392.00	80	10.32	392.20	90	10.32	345.92	80	9.10	383.84	80	10.10
20	410.30	90	10.80	411.40	90	10.80	441.00	90	11.61	435.78	100	11.33	389.16	90	10.24	431.82	90	11.36
	455.90	100	12.00	457.10	100	12.00	490.00	100	12.89	435.78	100	11.33	432.40	100	11.38	479.80	100	12.63

Note 7: (Agreement 10) Juniors – Wages effective from 1 April 1998 – 7 April 1999 (Clause 6I(a)) **Comparator Classification**: Promotion Centre Assistant – an employee who provides customer service, packs and maintains stock lines (Clause 6II). Note that junior employees employed in agricultural, viticultural and horticultural activities for 3 consecutive years will be reclassified to an adult rate (Clause 7(a)). No child under the age of 15 years shall be employed in any capacity by the Employer except with the consent of the Union or of its local representative nearest to the worksite where the child is to be employed (Clause 7(c)). If there are proportionally more juniors than adults in fruit picking, then the juniors will receive adult wages (Clause 7(d)).

Note 8: (Agreement 3) Juniors – Wages effective from 19 July 1998 - 19 January 1999 (Clause 7.3). **Comparator Classification** – Grade 1 elected as the example for the table. The junior rate is calculated as a percentage of the Grade that the junior is classified as. As per the statutory declaration there are 710 employees under the age of 21 years covered by this agreement. A junior will be eligible for superannuation if he/she works at least 30 hours per week (Clause 7.5.4). Casual employees are paid a loading of 22%. In addition to the casual loading, casual employees are paid between 6pm – 10pm Saturday – 25%, between 8am – 6pm Sunday – 50% and Public Holidays (midnight to midnight) – 150%.

Note 9: (Agreement 29) Juniors – Wages effective from 14 October 1998 (Clause 3.3) **Comparator Classification**: Qii Customer Service Employee.

Note 10: (Agreement 16) Juniors – Clause 16. **Comparator Classification -** Year 1 Permanent Sales Assistant (Excluding South Australia). In the second year the weekly rate only increases by $10.69. The casual sales assistant in the first year earns $13.56 per hour.

Note 11: (Agreement 17) Juniors – Wages effective from 4 August 1998 and are adjusted in accordance with Safety Review Decisions after 12 months of the Agreement's commencement (Clause 18.1.1(c)) **Comparator Classification** – Sales assistant. Apprentices who have completed a pre-apprenticeship course– 1st year – 45%, 2nd year – 55%, 3rd year – 75%, 4th year – 90%. A trainee is defined as a person who is a full-time employee in his or her first three months of employment or a casual employee in his or her first 6 months of employment (Clause 42).

Note 12: (Agreement 1) Juniors – Wages effective from 4 August 1998 - 14 February 1999. (Clause 12). **Comparator Classification** – Full-time (weekly) employee. Junior casual employees who work after 4pm shall be entitled to a minimum period of engagement of 2 hours as distinct from the 3 hours for adult employees (Clause 13.3). A junior under 18 years will only be entitled to superannuation if he/she works more than 18 hours per week (Clause 37). There are trainee rates specified in the agreement (Clause 12).

Table A5 - continued

Age	SDA – Coventrys Certified Agreement 1998 (Note13)			Newmart Pty Ltd Agreement 1998 (Note14)			Franklins Limited – SDA-Victorian Agreement 1998 (Note15)			Woolworths Distribution Centre Certified Agreement 1996 (Note 16)			Kmart Australia Ltd Agreement 1998 (Note 17)			Lone Star Steakhouse and Saloon South Australia – Certified Agreement 1998 (Note 18)		
	($)	(per cent)	Hourly rate	($)	(per cent)	Hourly rate	($)	(per cent)	Hourly rate	($)	(per cent)	Hourly rate	($)	(per cent)	hourly rate	($)	(per cent)	Hourly rate
Under 16	182.76	40	4.81	201.74	45	5.31	-	-	-	307.78	55	8.10	-	-	-	196.84*	50	5.18
16	228.45	50	6.01	224.15	50	5.90	235.50	50	6.20	363.74	65	9.57	223.75	50	5.89	196.84*	50	5.18
17	274.14	60	7.21	246.57	55	6.49	259.10	55	6.82	439.29	78.5	11.56	246.13	55	6.48	236.21*	60	6.22
18	319.83	70	8.42	302.60	67.5	7.96	317.90	67.5	8.37	520.43	93	13.70	302.06	67.5	7.95	275.58*	70	7.25
19	365.52	80	9.62	358.64	80	9.44	376.80	80	9.92	559.60	100	14.73	358.00	80	9.42	334.62*	85	8.81
20	411.21	90	10.82	403.47	90	10.62	424.00	90	11.16	559.60	100	14.73	402.75	90	10.60	354.31*	90	9.32
Adult	456.90	100	12.02	448.30	100	11.80	471.90	100	12.42	559.60	100	14.73	447.50	100	11.78	393.68*	100 (*Base rate)	10.36*

Note 13: (Agreement 7) Juniors – Wages, effective from 1 March 1998 – 1 January 1999 (Clause 26, Part I and II). **Comparator Classification** - Sales Assistant, Storeperson. Note that this rate also applies to a Packer, Picker or Despatch Hand but that may include an extra allowance (Clause 26 Part III). The Company is to keep a copy of the Time and Wages Record (Clause 20) and juniors may be required to furnish the Company with a copy of their birth certificate (Clause 24). Juniors who are full-time, part-time or casual receive the additional Late Night Trading Loading of $2.55 per hour (Clause 26 Part I (c) and (d)). The National Training Wage Award applies (Clause 43).

Note 14: (Agreement 9) Juniors – Wages, effective from 1 July 1998 to 1 January 1999 (Clause 5.1.3). **Comparator Classification**: Service Assistant - who works in Extended Trading Hour Stores. (Clause 5.1.1). If there is a suspected breach of security the Company may only question juniors in the presence of their parent or guardian. (Clause 4.8) Apprenticeship rates (Clause 5.1.4) National Training Wage Award 1994 applies (Clause 9.1)

Note 15: (Agreement 21) Juniors – Wages effective from 23 February 1998 – 15 February 1999 (Clause 29(h)). **Comparator Classification**: Shop Assistant. Apprentices (Clause 20). National Training Wage Award 1994 applies (Clause 21). Where a junior employee is directed to perform a higher duty he/she will receive an allowance equal to the difference between his/her weekly pay as at Clause 29 and the weekly pay for the age group one year older than the employee so directed (Clause 32). For a junior employee to be eligible for superannuation he/she must be over 18 years and earn more than $450.00 per calendar month (Clause 37(f)(i)).

Note 16: (Agreement 2) Juniors – Wages, effective from 25 November 1998 (Clause 5.1.1(c)). **Comparator Classification** – Order Selector/Stacker/Dispatch (Non Forklift).

Note 17: (Agreement 13) Juniors – Wages effective from 1 May 1998 - 1 May 1999 (Clause 7.2). **Comparator Classification** – Level 1 Retail Assistant – this employee performs sales and replenishment related duties and foodservice duties. (Clause 7.3). National Training Wage Award 1994 applies (Clause 35).

Note 18: (Agreement 18) Juniors – Wages, effective from 6 August 1998 - 1 April 1999 (Clause 9.6). **Comparator Classification** – Lone Star Induction Level – an employee who has no previous experience in the hospitality industry. This rate shall apply for first 3 months. The casual rate for this classification is $13.47 per hour. Traineeship structure complies with the South Australian Department of Education, Training and Employment and is detailed in Appendix 2.

APPENDIX B

By AIRC industry panel, and presence of index of selected award junior rates : Apprenticeship/Trainee Classification

[Referred to at Paragraph 2.3.2]

As at 27 November 1998

Table B1.

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
A0003	ACTORS ETC. (TELEVISION) AWARD 1998	Entertainment and Broadcasting Industry	Y	10.2, 10.3	No	No
A0272	AUSTRALIAN PUBLIC SERVICE SENIOR EXECUTIVE ADMINISTRATIVE AND CLERICAL AWARD 1984	Commonwealth Employment	N		No	No
A0497	AUSTRALIAN DEFENCE INDUSTRIES (PAID RATES EMPLOYEES) AWARD 1989	Defence Support	Y	8.1.1	9	40
A0510	AUSTRALIAN SUBMARINE CORPORATION PTY LTD PRODUCTION AWARD 1989	Shipbuilding Industry	N		13.6	No
A1132	AUSTRALIAN SUBMARINE CORPORATION PTY. LIMITED (TECHNICAL AND SUPERVISORY EMPLOYEES) AWARD 1994	Shipbuilding Industry	N		No	No
A1693	AUSCHAR OPERATIONS PTY LTD - FLUIDISED BED COAL DRYING PLANT INDUSTRIAL AWARD 1998	Chemical Industry	N		No	No

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
A1818	AUSTRALIAN SUBMARINE CORPORATION, PROFESSIONAL ENGINEERS & SCIENTISTS AWARD 1996	Shipbuilding Industry	N		No	No
A2865	AEROSPACE INDUSTRY (HAWKER DE HAVILLAND) AWARD 1998	Aerospace Industry	N		4.2.6	4.2.7
B0001	BANK OFFICIALS' (FEDERAL) (1963) AWARD	Banking Industry	Y	6	No	28
B0008	BRASS, COPPER AND NON-FERROUS METALS INDUSTRY AWARD 1998	Brass, Copper and Non-Ferrous Metals Industry	Y	5.5	4.2.6	4.2.7
B0018	BUSINESS EQUIPMENT INDUSTRY (TECHNICAL SERVICE) AWARD, 1978	Business Equipment Industry	Y	6	No	5A
B0149	BHP STEEL PRODUCTS - WESTERN PORT TRADESPERSONS AWARD 1998	Metal Industry	N		No	No
B0151	BHP STEEL PRODUCTS SERVICE CENTRE AWARD, 1998	Metal Industry	N		No	No
B0152	BHP STEEL PRODUCTS DIVISION WESTERN PORT AWARD 1998	Metal Industry	N		No	No
B0165	BULK LOADING - HAY POINT SERVICES PTY LTD AWARD 1998	Port and Harbour Services	N		No	No
B0166	BULK HANDLING AND GENERAL SERVICES PTY LTD BULK HANDLING AWARD 1998.	Port and Harbour Services	N		No	No
B0168	BHP STEEL PRODUCTS BUILDING FRAMES AWARD 1998	Metal Industry	N		No	No

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
B0169	BULK TERMINAL SERVICES BULK HANDLING AWARD 1998	Port and Harbour Services	N		No	No
B0171	THE BUILDING AND CONSTRUCTION INDUSTRY (ACT) AWARD, 1991	Building, metal and civil construction industries	N		10	No
B0363	BI-LO PTY. LTD. RETAIL AWARD 1994	Wholesale and retail trade	Y	7 (d)	No	37
B0500	BHP STEEL PRODUCTS - TECHNICAL EMPLOYEES (WESTERN PORT) AWARD 1998	Metal Industry	N		No	No
B0598	BEKAERT - BHP STEEL CORD AWARD, 1998	Metal Industry	N		No	No
B0694	BBC HARDWARE LIMITED RETAIL AGREEMENT 1995	Wholesale and retail industry	Y	7.3	No	NT WA 43
B0878	BHP REINFORCING AWARD 1998	Metal Industry	Y	14.3	14.4	No
C0019	CLERICAL AND SALARIED STAFFS (WOOL, RURAL AND ASSOCIATED INDUSTRIES) AWARD 1993	Wool Industry	Y	8 (k)	No	No
C0037	CLOTHING TRADES AWARD 1982	Clothing Industry	Y	6(b)(i)	8	7A
C0091	CLERKS (FINANCE COMPANIES) CONSOLIDATED AWARD 1985	Finance and Investment Services	Y	7	No	No
C0131	COMMERCIAL TRAVELLERS (A.C.T.) CONSOLIDATED AWARD, 1994	Wholesale and retail trade	N		No	No
C0173	CHILD CARE INDUSTRY (AUSTRALIAN CAPITAL TERRITORY) AWARD, 1998	Health and Welfare Services	Y	Schedule A (c)	No	No

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
C0191	COMMUNITY SERVICES (HOME CARE SERVICE OF NEW SOUTH WALES) FIELD STAFF AWARD 1992	Health and Welfare Services	N		No	No
C0257	COLES MYER LTD (NEW WORLD SUPERMARKET, COLES FOSSEY AND K-MART) (TASMANIA) AWARD 1988	Wholesale and retail industry	N		No	No
C0370	COLES SUPERMARKETS AUSTRALIA PTY. LTD. RETAIL AWARD 1993	Wholesale and retail trade	Y	7.3	No	NTWA 37
C0716	COMMERCIAL SALES (VICTORIA) AWARD 1996	Wholesale and retail trade	Y	21.3	No	No
C0777	CATERING - VICTORIA AWARD 1998	Catering Industry	Y	12.5.1	12.4	No
C1487	CLEANING SERVICES - SPOTLESS SERVICES AUSTRALIA/ALHMWU - OUTDOOR FACILITIES - CONSENT AWARD 1998	Cleaning Services	N		19.5	No
C1758	CLEANING (BUILDING AND PROPERTY SERVICES) (ACT) AWARD 1998	Cleaning Services	N		No	No
C1943	CAPRAL ALUMINIUM LIMITED AWARD 1998	Aluminium industry	Y	18.1.1	13	No
C2236	COLLINS FINANCE AND MANAGEMENT (SIZZLER RESTAURANT)EMPLOYEES AWARD 1998	Liquor and accommodation industry	Y	10.5	No	No

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
C3256	CATERING INDUSTRY - NATIONWIDE FACILITIES MANAGEMENT - GOULBURN POLICE ACADEMY - CONSENT AWARD 1998	Catering Industry	N		17.9	No
C3258	CHEMICAL INDUSTRY (HUNSTMAN/MONSANTO/AWU) AWARD 1998	Chemical Industry	N		No	No
C3262	CHEMICAL INDUSTRY - SCIENTIFIC AND TECHNICAL OFFICERS AWARD, 1998	Chemical Industry	Y	5.3	No	4.2.6
C3607	COMMONWEALTH AUTHORITIES AND AUSTRALIAN CAPITAL TERRITORY PUBLIC SECTOR EMPLOYMENT - GENERAL CONDITIONS OF SERVICE AWARD 1998	Commonwealth Employment	N		No	No
D0018	DREDGING INDUSTRY (AWU) AWARD 1998	Maritime Industry	N		No	No
D0102	DRAUGHTING, PRODUCTION PLANNERS AND TECHNICAL WORKERS AWARD 1998	Metal Industry	Y	5.4	No	4.2.6
D0498	DENTAL (PRIVATE SECTOR VICTORIA) AWARD 1998	Health and Welfare Services	Y	17.2	No	No
E0010	ENGINE DRIVERS AND FIREMEN - GENERAL - AWARD 1998	Engine Drivers and Firemen	Y	15.4.1	No	No
E0327	ENTERTAINMENT AND BROADCASTING INDUSTRY - LIVE THEATRE AND CONCERT - AWARD 1998	Entertainment and Broadcasting Industry	N		No	3.8

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
E0468	ENTERTAINMENT AND BROADCASTING INDUSTRY - DANCE COMPANY - AWARD 1998	Entertainment and Broadcasting Industry	Y	3.10	No	No
E0471	ENTERTAINMENT AND BROADCASTING INDUSTRY - ACTORS - (THEATRICAL) AWARD 1998	Entertainment and Broadcasting Industry	Y	16.11	No	No
E0480	ENTERTAINMENT AND BROADCASTING INDUSTRY - CINEMA AWARD - 1998	Entertainment and Broadcasting Industry	Y	16.2	No	No
E0688	ENTERTAINMENT AND BROADCASTING INDUSTRY - THEATRE MANAGERS - CINEMA - AWARD 1998	Entertainment and Broadcasting Industry	N		No	No
E0689	ENTERTAINMENT AND BROADCASTING INDUSTRY - THEATRE MANAGERS - LIVE THEATRE - AWARD 1998	Entertainment and Broadcasting Industry	N		No	No
E0691	ENTERTAINMENT AND BROADCASTING INDUSTRY - MOTION PICTURE PRODUCTION AWARD 1998	Entertainment and Broadcasting Industry	N		No	No
F0002	FEDERAL MEAT INDUSTRY AWARD 1981	Meat Industry	Y	I:12 (e) (ii)	12	10E
F0015	FOOD PRESERVERS' INTERIM AWARD 1986	Food	Y	5	No	No
F0029	FURNISHING TRADES - GENERAL - VICTORIA, SOUTH AUSTRALIA AND TASMANIA AWARD 1998	Furnishing Industry	Y	22.2.1(a)(i)	16.5	22.3

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
F0063	THE FOOTWEAR - MANUFACTURING AND COMPONENT - INDUSTRIES AWARD, 1979	Clothing Industry	Y	14 (c)(i)	11	8B
F0252	FRANKLINS BIG FRESH SDA VICTORIA CONSENT AWARD 1994	Wholesale and retail trade	Y	Schedule 1	41	40
F0327	FURNITURE & FURNISHING TRADES (NEW SOUTH WALES) AWARD 1998	Furnishing Industry	Y	20.1	16.5	16.5
F0402	FOOD AND BEVERAGE INDUSTRY - SILVIO'S DIAL-A-PIZZA AND DOMINO'S PIZZA CONSENT AWARD 1995	Wholesale and retail trade	Y	4.3.2	No	No
F0403	FOOD AND BEVERAGE INDUSTRY - SILVIO'S DIAL-A-PIZZA AND DOMINO'S PIZZA (TASMANIA) INTERIM AWARD 1996	Wholesale and retail trade	Y	4.3.2	No	No
F0578	FOOD, BEVERAGES AND TOBACCO INDUSTRY - AERATED WATERS - GENERAL AWARD 1998	Wholesale and retail trade	Y	19.8	No	5.19.3
F0707	FORD MOTOR COMPANY (VEHICLE INDUSTRY) - CONSOLIDATED AWARD 1998	Vehicle Industry	N			
G0003	GLASS INDUSTRY - GLASS MERCHANTS AND GLAZING CONTRACTORS - TASMANIA - AWARD 1996	Glass Industry	Y	35.2.2	27.5	34.3.1

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
G0005	GLASS INDUSTRY - GLASS MERCHANTS AND GLAZING CONTRACTORS, GENERAL, SOUTH AUSTRALIA AWARD 1998	Glass Industry	Y	22.2.3	16.5	21.3
G0014	GRAPHIC ARTS AWARD, 1977	Graphic Arts	Y	TABLE B4	42B	42C
G0029	THE GLASS WORKERS' CONSOLIDATED AWARD 1985	Glass Industry	Y	5	No	cl 39 Div 1
G0034	GLASS INDUSTRY - GLASS MERCHANTS AND GLAZING CONTRACTORS - VICTORIA - CONSOLIDATED AWARD 1996	Glass Industry	Y	35.2.2	27.5	34.3.1
G0072	GENERAL MOTORS HOLDEN'S AUTOMOTIVE LIMITED (PART 1) GENERAL AWARD 1988	Vehicle Industry	N		No	No
G0073	GENERAL MOTORS HOLDEN'S AUTOMOTIVE LIMITED (PART 2 - DRAUGHTING, PRODUCTION PLANNING AND TECHNICAL GRADES) GENERAL AWARD 1988	Vehicle Industry	N		No	No
G0074	GENERAL MOTORS HOLDEN'S AUTOMOTIVE LIMITED (PART 3 - SUPERVISORS) GENERAL AWARD 1988	Vehicle Industry	N		No	No
G0075	GENERAL MOTORS HOLDEN'S AUTOMOTIVE LIMITED (PART 4 - CLERKS) GENERAL AWARD 1988	Vehicle Industry	Y	7 (d)	No	No

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
G0076	GENERAL MOTORS HOLDEN'S AUTOMOTIVE LIMITED (PART 5 - PROFESSIONAL ENGINEERS AND PROFESSIONAL SCIENTISTS) GENERAL AWARD 1988	Vehicle Industry	N		No	No
G0118	GLADSTONE SHIP BUNKERING OPERATION AWARD, 1992	Maritime Industry	N		No	No
G0146	GLASS INDUSTRY AWARD (QLD) 1998	Glass Industry	Y	13.2	8.4	No
G0439	GRAPHICS ARTS - GENERAL - INTERIM AWARD 1995	Graphic arts	Y		No	5.3.2
G0542	GLASS INDUSTRY - BOTTLE MERCHANTS - GENERAL AWARD 1996	Glass Industry	Y	33.3.1	No	No
H0008	HOSPITALITY INDUSTRY - ACCOMODATION, HOTELS, RESORTS AND GAMING AWARD 1998	Liquor and Accommodation Industry	Y	15.5.1	15.4	No
H0049	HOLDEN'S ENGINE COMPANY (PART 1) AWARD 1993	Vehicle Industry	N		No	No
H0050	HOLDEN'S ENGINE COMPANY (PART 2) AWARD 1993	Vehicle Industry	Y	10	No	10
H0051	HOLDEN'S ENGINE COMPANY (PART 3) AWARD 1993	Vehicle Industry	N		No	No
H0052	HOLDEN'S ENGINE COMPANY (PART 4) AWARD 1993	Vehicle Industry	Y	4 (d)	No	No
H0053	HOLDEN'S ENGINE COMPANY (PART 5) AWARD 1993	Vehicle Industry	N		No	No

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
H0184	HARRIS SCARFE LIMITED EMPLOYEES AWARD, 1994	Wholesale and retail industry	Y	Schedule A	No	Sched C
H0488	HEALTH AND ALLIED SERVICES - PRIVATE SECTOR - VICTORIA CONSOLIDATED AWARD 1998	Health and Welfare Services	Y	19.5.1	19.5	No
H0564	HEALTH AND ALLIED SERVICES - PUBLIC SECTOR - VICTORIA CONSOLIDATED AWARD 1998	Health and Welfare Services	Y	17.4.1	No	App B
I0002	INSURANCE INDUSTRY AWARD 1998	Insurance Industry	Y	14.5	No	No
I0152	INDEPENDENT EDUCATION (VICTORIA) INTERIM AWARD 1994	Educational Services	Y	Appendix 1: Pt 2 :3	No	No
J0069	JOURNALISTS (TELEVISION) AWARD 1998	Entertainment and Broadcasting Industry	Y	14.7	No	No
K0068	KMART AUSTRALIA LTD AWARD 1994	Wholesale and retail trade	Y	7.2	No	NTWA 35
K0095	KFC NATIONAL ENTERPRISE AWARD 1995	Wholesale and retail trade	N		No	NTWA 39
L0012	LIQUOR INDUSTRIES - RACECOURSES SHOWGROUNDS ETC. - CASUALS AWARD 1998	Liquor and Accommodation Industry	Y	13.9	No	No
L0021	LIQUOR AND ALLIED INDUSTRIES, HOTELS, HOSTELS, CLUBS AND BOARDING ESTABLISHMENTS ETC. (A.C.T.) AWARD, 1992	Liquor and Accommodation Industry	Y	2:7(e)	9	14

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
L0138	LAND SURVEYORS GENERAL - AWARD 1998	Metal Industry	Y	5.2.4	No	5.1.1
L0289	LIQUOR AND ACCOMMODATION INDUSTRY - RESTAURANTS - VICTORIA - AWARD 1998	Liquor and Accommodation Industry	Y	17.12.1	17.11	No
L0442	LIQUOR AND ACCOMMODATION INDUSTRY - CIDER MANUFACTURING AND BOTTLING - BULMER AUSTRALIA LIMITED - AWARD 1998	Liquor and Accommodation Industry	Y	13.3.1	No	No
M0042	METAL, ENGINEERING AND ASSOCIATED INDUSTRIES (PROFESSIONAL ENGINEERS AND SCIENTISTS) AWARD 1998	Metal Industry	N		No	No
M0055	MOTELS, ACCOMMODATION AND RESORTS AWARD 1998	Liquor and Accommodation Industry	Y	13.5.1	13.4	No
M0141	MARITIME INDUSTRY DREDGING AWARD 1988	Maritime Industry	N		No	No
M0142	MOBILE CRANE HIRING AWARD 1996	Building, metal and civil construction industries	N		No	14.1.4
M0197	MARINE ENGINEERS (NON PROPELLED) DREDGE AWARD 1988	Maritime Industry	N		No	No
M0200	MITSUBISHI MOTORS AUSTRALIA LIMITED (VEHICLE INDUSTRY) AWARD 1980	Vehicle industry	Y	10	11	No
M0205	MITSUBISHI MOTORS AUSTRALIA LIMITED (CLERKS) AWARD 1980	Vehicle Industry	Y	8(c)	No	No

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
M0295	MITSUBISHI MOTORS AUSTRALIA LTD (SUPERVISORY AND TECHNICAL EMPLOYEES) AWARD 1987	Vehicle Industry	Y	9	No	9
M0321	MUSICIANS (OPERA AND BALLET) ORCHESTRAL AWARD 1998	Entertainment and Broadcasting Industry	N		No	No
M0327	MEAT PRESERVATIONS ETC. AWARD 1990	Meat Industry	Y	5(c)	No	No
M0424	MITSUBISHI MOTORS AUSTRALIA LIMITED (P AND A WAREHOUSE, NEW SOUTH WALES) AWARD 1993	Vehicle Industry	Y	13.2.2	No	No
M0602	MOBIL OIL CLERICAL EMPLOYEES AWARD 1994	Oil and Gas Industry	Y	12(1)	No	No
M0613	MYER/GRACE BROS STORES AWARD 1994	Wholesale and Retail Trade	Y	9.6	No	33
M1239	MARITIME INDUSTRY - SYDNEY SEA PILOTS PTY LTD – LAUNCH CREWS – INTERIM AWARD 1996	Maritime Industry	N		No	No
M1913	METAL ENGINEERING AND ASSOCIATED INDUSTRIES AWARD, 1998	Metal Industry	Y	5.5.1	4.2.6	4.2.7
N0038	NISSAN AUSTRALIA VEHICLE INDUSTRY AWARD (PART 4, PARTS AND VEHICLE DISTRIBUTION OPERATIONS) 1983	Vehicle Industry	N		App B, Part 4	No
N0101	NURSES (ANFSOUTH AUSTRALIAN PRIVATE SECTOR) AWARD 1989	Health and Welfare Services	N		3*	

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
N0122	NATIONAL BUILDING AND CONSTRUCTION INDUSTRY AWARD 1990	Building Industry	Y	46 (18) (a)	13	51
N0173	NATIONAL WAREHOUSING AND DISTRIBUTION (NUW) INTERIM AWARD 1993	Storage Services	Y	6	No	No
N0183	NATIONAL JOINERY AND BUILDING TRADES PRODUCTS AWARD 1993	Building, Metal and Civil Construction Industries	Y	44	9.3	9
N0270	NSW/ACT WOOLWORTHS SUPERMARKET AWARD 1994	Wholesale and retail trade	Y	35	6	5
N0795	NATIONAL ELECTRICAL, ELECTRONIC AND COMMUNICATIONS CONTRACTING INDUSTRY AWARD 1998	Chemical Industry	N		17.7	No
O0030	OPTICAL SHOP ASSOCIATED (EDB HOLDINGS INC.) AWARD 1989	Wholesale and retail trade	Y	33	No	No
O0054	OVERSEAS AIRLINES AWARD 1994	Airline Operations	Y	7	No	No
O0061	OPTICAL SHOP ASSOCIATES (VISION EXPRESS) AWARD 1993	Wholesale and retail trade	Y	36	No	No
O0073	OFFICEWORKS SUPERSTORES PTY. LTD. AWARD 1994	Wholesale and retail trade	Y	9.3	No	21
O0289	OIL AGENTS/CONTRACTORS - STOREWORKERS AWARD 1998	Oil and gas industry	Y	12.4.1	No	No

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
P0030	PULP AND PAPER INDUSTRY (PRODUCTION) AWARD, 1973	Pulp and Paper Industry	Y	8 (a)	No	Appendix B
P0090	PLUMBING INDUSTRY (QLD AND W A) AWARD 1979	Plumbing Industry	N		44	No
P0143	PASTORAL INDUSTRY AWARD 1998	Agricultural Industry	Y	38.3	No	No
P0247	PORT SERVICES AWARD 1998	Port and Harbour Services	N		No	No
P0324	PILKINGTON (AUSTRALIA) OPERATIONS LIMITED - AUTOMOTIVE DIVISION, PRODUCTION AND WAREHOUSING AWARD 1993	Glass Industry	Y	Div C:14 (f) (i) (1)	No	No
P0437	PHILIP MORRIS LIMITED AWARD 1998	Food, Beverages and Tobacco Industry	N		No	No
P0518	PROFESSIONAL ENGINEERS (VEHICLE INDUSTRY - MITSUBISHI) AWARD 1998	Vehicle Industry	N		No	No
P1168	POWER AND ENERGY INDUSTRY ELECTRICAL, ELECTRONIC & ENGINEERING EMPLOYEES AWARD 1998	Electrical Power Industry	Y	10.1	No	10.1
Q0022	QUEENSLAND LOCAL GOVERNMENT OFFICERS' AWARD 1998	Local Government Administration	Y	7.1	No	NTW award

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
Q0093	THE QUEENSLAND COLES/WOOLWORTHS SUPERMARKET MEAT EMPLOYEES' AWARD 1995	Wholesale and retail trade	Y	7.2	Part 4.1.2; 1.3 Part 7.1	Appendix B,C, D
R0007	RUBBER, PLASTIC AND CABLE MAKING INDUSTRY - GENERAL - AWARD 1996	Rubber, Plastic and Cablemaking Industry	Y	23.4.7(a)	No	17.5
R0009	RAILWAYS METAL TRADES GRADES AWARD 1953	Railways	Y	6	4C & 6	Pt 11.4
R0017	RETAIL AND WHOLESALE SHOP EMPLOYEES (ACT) AWARD 1983	Retail and Wholesale Industry	Y	18.3.1	15.3	37
R0071	RESEARCH & SUPPLY VESSEL (AURORA AUSTRALIS) AWARD 1998	Maritime Industry	N		No	No
R0292	RETAIL AND WHOLESALE INDUSTRY - BOTTLE SHOP RETAIL - SHOP DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION - LIQUORLAND (AUSTRALIA) PTY LTD CONSENT AWARD 1995	Wholesale and retail trade	Y	Pt 5 Cl 1.3	No	NT WA Pt 5 Cl 2.4; Part 9 cl 2
R0319	RETAIL AND WHOLESALE INDUSTRY - RETAIL DISTRIBUTION CENTRES - SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' AWARD 1995	Wholesale and Retail Trade	N		No	No

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
R0343	RETAIL AND WHOLESALE INDUSTRY - SDAEA WHOLESALE GROCERS(DAVIDS-DISTRIBUTION VICTORIA) INTERIM AWARD 1995	Wholesale and retail trade	Y	1B(a)	No	No
R0527	RETAIL WHOLESALE INDUSTRY - SDAEA - CASUAL GUY PTY LTD - CONSENT AWARD 1996	Wholesale and retail trade	Y	Part D Cl 13.5	No	NT WA 11
R0591	RETAIL AND WHOLESALE INDUSTRY - FAST FOOD EMPLOYEES - SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION - DOMINO'S DIAL-A-PIZZA - INTERIM AWARD 1996	Wholesale and retail trade	Y	21	No	No
R0622	RETAIL TRADE INDUSTRY SECTOR - MINIMUM WAGE ORDER- VICTORIA 1997	Wholesale and retail trade	Y	5.4	5.5	5.7
S0073	STORAGE SERVICES AUSTRALIAN CAPITAL TERRITORY - NATIONAL UNION OF WORKERS - AWARD 1998	Storage Services	Y	17.4	No	No
S0157	SECURITY EMPLOYEES (A.C.T.) AWARD, 1998	Security Services	N			
S0283	STEVEDORING INDUSTRY AWARD 1991	Port and Harbour Services	Y	Sched 5:2 Subclause 25 (b)	41	No

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
S0481	SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION (HOUSEHOLD APPLIANCE AND HARDWARE STORES) PUBLIC HOLIDAYS INTERIM AWARD 1993	Wholesale and Retail Trade	N		No	No
S0485	SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION (CLOTHING, FOOTWEAR, FABRICS AND HANDBAGS STORES) PUBLIC HOLIDAYS INTERIM AWARD 1993	Wholesale and Retail Trade	N		No	No
S0486	SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION (BOOKSELLERS AND STATIONERS) PUBLIC HOLIDAYS INTERIM AWARD 1993	Wholesale and Retail Trade	N		No	No
S0488	SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION (J. BLACKWOOD AND SON PTY. LIMITED) PUBLIC HOLIDAYS INTERIM AWARD 1993	Wholesale and Retail Trade	N		No	No
S0490	SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION (FOOD AND LIQUOR STORES) INTERIM AWARD 1994	Wholesale and retail trade	Y	4	No	NTWA - 13(d)

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
S0491	SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION (BOOKSELLERS AND STATIONERS) INTERIM AWARD 1994	Wholesale and retail trade	Y	4	No	NTWA 14
S0492	SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION - VICTORIAN SHOPS INTERIM AWARD 1994	Wholesale and retail trade	Y	4	4A	No
S0498	SAFEWAY SUPERMARKETS (VICTORIA)(ENTERPRISE AGREEMENT) AWARD 1995	Wholesale and retail trade	Y	5(b)	5(b) & 39	39
S0504	SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION (FOOD SHOPS) INTERIM AWARD 1994	Wholesale and retail trade	Y	4	No	13(d)
S0524	SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION/TOYS R US (NSW) INTERIM AWARD 1994	Wholesale and retail trade	Y	Pt B:35(3)	No	4
S0525	SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION/TOYS R US (VICTORIA) INTERIM AWARD 1994	Wholesale and retail trade	Y	4	No	14(d)
S0665	SDA/SAN REMO LA PASTA INTERIM AWARD 1994	Wholesale and retail trade	Y	Sched 1 C	Schedule 1 D	No
S0761	SDAEA - TOYS R US (SOUTH AUSTRALIA) INTERIM AWARD 1994	Wholesale and retail trade	Y	Sched A	No	No

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
S0762	THE SHOP DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION TOYS R US WESTERN AUSTRALIA INTERIM AWARD 1994	Wholesale and retail trade	Y	26 Pt 2	No	NTWA 40
S0952	SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION - COUNTRY ROAD CLOTHING PTY. LTD. WHOLESALE/RETAIL WAREHOUSE AND DISTRIBUTION CENTRE AWARD 1995-1997	Wholesale and retail trade	Y	4:16	No	No
S0992	SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION - COLES SUPERMARKETS AUSTRALIA PTY LTD, WHOLESALE/RETAIL NATIONAL CONSOLIDATION CENTRE AWARD 1996	Wholesale and Retail Trade	N		No	No
S1072	SDA - CAMPBELLS CASH & CARRY PTY LTD - VICTORIA - AWARD 1996	Wholesale and retail trade	Y	15.2.3	No	No
S1274	SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION - COUNTRY ROAD AUSTRALIA RETAIL AWARD 1996 - 1999, THE	Wholesale and Retail Trade	N		No	No
S1894	SCIENTIFIC SERVICES PROFESSIONAL SCIENTISTS AWARD 1998	Scientific Services	N		No	No

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
S1903	SWAN HILL PIONEER SETTLEMENT PADDLE STEAMER AWARD 1998	Maritime Industry	N		No	No
T0007	TEXTILE INDUSTRY AWARD 1981	Textile Industry	Y	11 (a)	12B	10
T0029	TRANSPORT WORKERS (AIRLINES) AWARD 1988	Transport Industry	Y	8	No	7
T0118	TOBACCO INDUSTRY (ROTHMANS & WILLS) AWARD 1998	Food, Beverages and Tobacco Industry	Y	12.3	No	Annex A Item 1
T0140	TRANSPORT WORKERS AWARD, 1983	Transport Industry	Y	11(b)(ii)	No	No
T0150	TRANSPORT WORKERS (MIXED INDUSTRIES) AWARD 1984	Transport Industry	Y	14 (a)	No	No
T0220	TOYOTA AUSTRALIA VEHICLE INDUSTRY AWARD 1988	Vehicle Industry	Y	Sched A:C	Schedule E	No
T0232	TRAVEL INDUSTRY - AGENCIES - GENERAL AWARD - 1998	Travel Industry	Y	13.3.1	No	No
T0275	TOYOTA AUSTRALIA (PROFESSIONAL ENGINEERS AND SCIENTISTS) CONSENT AWARD 1992	Vehicle Industry	N		No	No
T0503	TARGET AUSTRALIA PTY LTD AWARD 1994	Wholesale and retail trade	Y	Appx A	No	19
T1321	TECHNICAL SERVICES - MINING AND MANUFACTURING - PROFESSIONAL ENGINEERS AND SCIENTISTS - BHP - AWARD 1998	Technical Services	N		No	No
T1450	TECHNICAL SERVICES PROFESSIONAL ENGINEERS (GENERAL INDUSTRIES) AWARD 1998	Technical Services	N		No	No

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
T1451	TECHNICAL SERVICES PROFESSIONAL ENGINEERS (CONSULTING ENGINEERS) AWARD 1998	Technical Services	N		No	No
V0005	VEHICLE INDUSTRY AWARD 1982	Vehicle Industry	Y	13 (b) (i)	56	No
V0010	VEHICLE INDUSTRY (AUSTRAL PACIFIC GROUP LIMITED) CONSOLIDATED AWARD 1995	Vehicle Industry	Y	7D (b)	10	No
V0019	THE VEHICLE INDUSTRY - REPAIR, SERVICES AND RETAIL AWARD 1983	Vehicle Industry	Y	13	14 & 15	52
V0162	VICTORIAN CATHOLIC SCHOOLS AND CATHOLIC EDUCATION OFFICES AWARD 1998	Educational Services	N		No	No
V0195	VEHICLE PARTS MANUFACTURE - NISSAN CASTING AUSTRALIA PTY LTD - AWARD 1995	Vehicle Industry	N		10.4	No
V0253	VIDEO INDUSTRY (SOUTH AUSTRALIA) AWARD 1996	Wholesale and retail trade	Y	9(d)	No	No
V0348	VEHICLE INDUSTRY - KENWORTH TRUCKS - AWARD 1998	Vehicle Industry	Y	5.1.7	4.3	No
V0350	VICTORIAN ELECTRICITY INDUSTRY (MINING & ENERGY WORKERS) AWARD 1998	Electrical Power Industry	Y	10.1	No	10.1

			Junior Rates		App' ships	Trainee
Award Code	**Award Name**	**Industry**	**Y/N**	**If Yes then Principal Clause Number for Junior rates**	**Y/N**	**Y/N**
V0352	VICTORIAN PORT AND HARBOUR SERVICES CONSOLIDATED OPERATION AWARD 1998	Port and Harbour Services	Y	5.15	No	15.2.2
W0161	WORLD 4 KIDS ENTERPRISE AWARD 1994	Wholesale and retail trade	Y	7(b)	No	No
W0187	WOOLWORTHS (SA) CLERKS (NON-STORE) AWARD 1994	Wholesale and retail trade	Y	Sched 1	No	No
W0193	WOOLWORTHS SUPERMARKETS (WA) AWARD 1994	Wholesale and retail trade	Y	8.4	No	26
W0214	WOOLWORTHS (SOUTH AUSTRALIA AND NORTHERN TERRITORY) AWARD, 1994	Wholesale and retail trade	Y	59.7	Part 1.10,59,60	54 & Appx A
W0215	WOOLWORTHS DISTRIBUTION CENTRE AWARD, 1993, THE	Wholesale and Retail Trade	N		No	No
W0334	WOOLWORTHS LIMITED CANBERRA D.C. AWARD, 1995	Wholesale and Retail Trade	N		No	No
W0519	THE WHOLESALE AND RETAIL TRADE - SHOP DISTRIBUTIVE AND ALLIED EMPLOYEES' ASSOCIATION - DAIMARU AUSTRALIA PTY LTD RETAIL AND WHOLESALE AWARD - 1996 - 1999	Wholesale and retail trade	Y	14.2.3	Part 2,2-5,7&8;14.2.4.2	NTWA 10.5
W0613	WHOLESALE AND RETAIL TRADE - THE DISNEY STORE AWARD 1996	Wholesale and Retail Trade	Y	16.4	No	NTWA 10.5

Table B2.

List of Awards examined and not containing a "Junior Rates" Clause
[Referred to in Paragraphs 2.3.2 and 2.7.1]

A0272	Australian Public Service Senior Executive Administrative and Clerical Award 1984	Commonwealth Employment
A0272	Australian Public Service Senior Executive Administrative and Clerical Award 1984	Commonwealth Employment
A1132	Australian Submarine Corporation Pty. Limited (Technical and Supervisory Employees) Award 1994	Shipbuilding Industry
A1693	Auschar Operations Pty Ltd - Fluidised Bed Coal Drying Plant Industrial Award 1998	Chemical Industry
A1818	Australian Submarine Corporation, Professional Engineers & Scientists Award 1996	Shipbuilding Industry
B0149	BHP Steel Products - Western Port Tradespersons Award 1998	Metal Industry
B0151	BHP Steel Products Service Centre Award, 1998	Metal Industry
B0152	BHP Steel Products Division Western Port Award 1998	Metal Industry
B0165	Bulk Loading - Hay Point Services Pty Ltd Award 1998	Port and Harbour Services
B0166	Bulk Handling and General Services Pty Ltd Bulk Handling Award 1998.	Port and Harbour Services
B0168	BHP Steel Products Building Frames Award 1998	Metal Industry
B0169	Bulk Terminal Services Bulk Handling Award 1998	Port and Harbour Services
B0500	BHP Steel Products - Technical Employees (Western Port) Award 1998	Metal Industry
B0598	Bekaert - BHP Steel Cord Award, 1998	Metal Industry
C0131	Commercial Travellers (A.C.T.) Consolidated Award, 1994	Wholesale and Retail Trade
C0191	Community Services (Home Care Service Of New South Wales) Field Staff Award 1992	Health and Welfare Services
C0191	Community Services (Home Care Service Of New South Wales) Field Staff Award 1992	Health and Welfare Services
C0257	Coles Myer Ltd (New World Supermarket, Coles Fossey and K-Mart) (Tasmania) Award 1988	Wholesale and Retail Trade
C1487	Cleaning Services - Spotless Services Australia/Alhmwu - Outdoor Facilities - Consent Award 1998	Cleaning Services
C1758	Cleaning (Building and Property Services) (Act) Award 1998	Cleaning Services
C3256	Catering Industry - Nationwide Facilities Management - Goulburn Police Academy - Consent Award 1998	Catering Industry
C3258	Chemical Industry (Hunstman/Monsanto/AWU) Award 1998	Chemical Industry
D0018	Dredging Industry (AWU) Award 1998	Maritime Industry
E0327	Entertainment and Broadcasting Industry - Live Theatre and Concert - Award 1998	Entertainment and Broadcasting Industry

E0688	Entertainment and Broadcasting Industry - Theatre Managers - Cinema - Award 1998	Entertainment and Broadcasting Industry
E0689	Entertainment and Broadcasting Industry - Theatre Managers - Live Theatre - Award 1998	Entertainment and Broadcasting Industry
E0691	Entertainment and Broadcasting Industry - Motion Picture Production Award 1998	Entertainment and Broadcasting Industry
F0707	Ford Motor Company (Vehicle Industry) - Consolidated Award 1998	Vehicle Industry
G0072	General Motors Holden's Automotive Limited (Part 1) General Award 1988	Vehicle Industry
G0073	General Motors Holden's Automotive Limited (Part 2 - Draughting, Production Planning and Technical Grades) General Award 1988	Vehicle Industry
G0074	General Motors Holden's Automotive Limited (Part 3 - Supervisors) General Award 1988	Vehicle Industry
G0075	General Motors Holden's Automotive Limited (Part 4 - Clerks) General Award 1988	Vehicle Industry
G0076	General Motors Holden's Automotive Limited (Part 5 - Professional Engineers and Professional Scientists) General Award 1988	Vehicle Industry
G0118	Gladstone Ship Bunkering Operation Award, 1992	Maritime Industry
H0049	Holden's Engine Company (Part 1) Award 1993	Vehicle Industry
H0051	Holden's Engine Company (Part 3) Award 1993	Vehicle Industry
H0053	Holden's Engine Company (Part 5) Award 1993	Vehicle Industry
I0002	Insurance Industry Award 1998	Insurance Industry
K0095	Kfc National Enterprise Award 1995	Wholesale and Retail Trade
M0042	Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998	Metal Industry
M0141	Maritime Industry Dredging Award 1988	Maritime Industry
M0197	Marine Engineers (Non Propelled) Dredge Award 1988	Maritime Industry
M0321	Musicians (Opera and Ballet) Orchestral Award 1998	Entertainment and Broadcasting Industry
M1239	Maritime Industry - Sydney Sea Pilots Pty Ltd – Launch Crews – Interim Award 1996	Maritime Industry
N0101	Nurses (Anfsouth Australian Private Sector) Award 1989	Health and Welfare Services
N0101	Nurses (Anfsouth Australian Private Sector) Award 1989	Health and Welfare Services

N0183	National Joinery and Building Trades Products Award 1993	Building, Metal and Civil Construction Industries
N0183	National Joinery and Building Trades Products Award 1993	Building, Metal and Civil Construction Industries
P0090	Plumbing Industry (Qld and W A) Award 1979	Plumbing Industry
P0090	Plumbing Industry (Qld and W A) Award 1979	Plumbing Industry
P0247	Port Services Award 1998	Port and Harbour Services
P0437	Philip Morris Limited Award 1998	Food, Beverages and Tobacco Industry
P0518	Professional Engineers (Vehicle Industry - Mitsubishi) Award 1998	Vehicle Industry
R0071	Research & Supply Vessel (Aurora Australis) Award 1998	Maritime Industry
R0319	Retail and Wholesale Industry - Retail Distribution Centres - Shop, Distributive and Allied Employees' Award 1995	Wholesale and Retail Trade
S0157	Security Employees (A.C.T.) Award, 1998	Security Services
S0481	Shop, Distributive and Allied Employees Association (Household Appliance and Hardware Stores) Public Holidays Interim Award 1993	Wholesale and Retail Trade
S0485	Shop, Distributive and Allied Employees Association (Clothing, Footwear, Fabrics and Handbags Stores) Public Holidays Interim Award 1993	Wholesale and Retail Trade
S0486	Shop, Distributive and Allied Employees Association (Booksellers and Stationers) Public Holidays Interim Award 1993	Wholesale and Retail Trade
S0488	Shop, Distributive and Allied Employees Association (J. Blackwood and Son Pty. Limited) Public Holidays Interim Award 1993	Wholesale and Retail Trade
S0992	Shop, Distributive and Allied Employees' Association - Coles Supermarkets Australia Pty Ltd, Wholesale/Retail National Consolidation Centre Award 1996	Wholesale and Retail Trade
S1274	Shop, Distributive and Allied Employees' Association - Country Road Australia Retail Award 1996 - 1999, The	Wholesale and Retail Trade
S1894	Scientific Services Professional Scientists Award 1998	Scientific Services
S1903	Swan Hill Pioneer Settlement Paddle Steamer Award 1998	Maritime Industry
T0275	Toyota Australia (Professional Engineers and Scientists) Consent Award 1992	Vehicle Industry

T1321	Technical Services - Mining and Manufacturing - Professional Engineers and Scientists - BHP - Award 1998	Technical Services
T1450	Technical Services Professional Engineers (General Industries) Award 1998	Technical Services
T1451	Technical Services Professional Engineers (Consulting Engineers) Award 1998	Technical Services
V0162	Victorian Catholic Schools and Catholic Education Offices Award 1998	Educational Services
W0215	Woolworths Distribution Centre Award, 1993, The	Wholesale and Retail Trade
W0334	Woolworths Limited Canberra D.C. Award, 1995	Wholesale and Retail Trade

Table B3.

**Awards with 'Junior Rate' provisions not included in adult age summary*
[Referred to in Paragraphs 2.3.2, 2.4.11 and 2.7.5]**

	Award Name	Industry	Reason for omission
B0878	BHP REINFORCING AWARD 1998	Metal industry : [58]	Competency based pay: Appendix A: Skills Model: new operator to pass competency test within 3 months of commencement, or deemed failed probation.
D0498	DENTAL (PRIVATE SECTOR VICTORIA) AWARD 1998	Health and welfare services: [50]	Experienced based pay: for Dental Assistants and Clerks less than age 21; (Cl.17.2)
H0488	HEALTH AND ALLIED SERVICES - PRIVATE SECTOR - VICTORIA CONSOLIDATED AWARD 1998	Health and welfare services: [54]	(Cl. 17): progression by year of experience to full rate at age 19 or 20
H0564	HEALTH AND ALLIED SERVICES - PUBLIC SECTOR - VICTORIA CONSOLIDATED AWARD 1998	Health and welfare services:[51]	(Cl. 19): progression by year of experience to full rate at age 19 or 20
L0012	LIQUOR INDUSTRIES - RACECOURSES SHOWGROUNDS ETC. - CASUALS AWARD 1998	Liquor and accommodation industry: [7]	Junior not defined but 80% adult rate applies to Juniors: (Cl.13.9).
M0602	MOBIL OIL CLERICAL EMPLOYEES AWARD 1994	Oil and gas industry: [16]	Absolute dollar amounts by age., Whether calculated as percentage, or the appropriate adult reference rate not clear.
N0183	NATIONAL JOINERY AND BUILDING TRADES PRODUCTS AWARD 1993	Building, Metal And Civil Construction Industries: [222]	Clause 44: Unapprenticed juniors under age 21 in S.A. joinery and mixed industry paid by year of experience as for apprentices with adult rate after 4th year.
P1168	POWER AND ENERGY INDUSTRY ELECTRICAL, ELECTRONIC & ENGINEERING EMPLOYEES AWARD 1998	Electrical power industry; [30]	Experienced based pay: apprentices and trainees only
R0009	RAILWAYS METAL TRADES GRADES AWARD 1953	Public transport industry: [140]	Refers to percentage scale in another Award; allows age 18 rate for non-dependent juniors.
T0118	TOBACCO INDUSTRY (ROTHMANS & WILLS) AWARD 1998	Food, beverages and tobacco industry: [33]	Clause 12.3 : Trainee rate based on percentage of award classification
V0350	VICTORIAN ELECTRICITY INDUSTRY (MINING & ENERGY WORKERS) AWARD 1998	Electrical power industry: [31]	Trainee rates only based on experience and percentage of award rate of Power Plant Operator
V0352	VICTORIAN PORT AND HARBOUR SERVICES CONSOLIDATED OPERATION AWARD 1998	Port and harbour services: [64]	Trainee rates only.

* The figure in brackets is the page reference to the conspectus of selected award extracts

APPENDIX C

Discrimination, indirect discrimination and "non-discriminatory alternatives"

Introduction:

1. The Inquiry's terms of reference require it to report upon aspects of "*non-discriminatory alternatives*" and the consequences of "*abolishing*" junior rates. The meaning to be given to those expressions is dependent upon the view taken about several points that arise as to the construction of the anti-discrimination provisions of the *Workplace Relations Act 1996* (the Act). The first is whether and to what extent indirect discrimination for reasons of age comes within the definition of discrimination in the relevant provisions of the Act. An associated question is whether either or both direct and indirect discrimination may be saved from the operation of the Act by one or other of the tests for whether discriminatory conduct is "reasonable". The third main question is whether the reference to "abolishing junior rates" in paragraph 120B(2)(b) is a reference to, or should be read in a way that takes account of the effect of the expiry of the exemption of junior rates from the anti-discrimination provisions of the Act; and, if it is, whether abolition of junior rates is mandated by that expiry. Finally, and dependent in part upon answers to the first two questions is the definition of the expression "non-discriminatory alternatives" used in section 120B. If the meaning given to that expression proceeds upon a misconception of what is, or is not discrimination for purpose of the Act, the assessments made in the Report may be misleading and fundamentally flawed. From the outset of the Inquiry, the more substantial submissions effectively raised questions or put divergent positions that depend upon one, or more or all of the points of construction we have posed. It is both necessary and appropriate to examine and construe the relevant provisions of the Act.

Discrimination: the origins and application of anti-discrimination processes in industrial dispute prevention and settlement machinery:

2. It is appropriate to start at the beginning. No direct reference to "*discrimination*" was made in the *Conciliation and Arbitration Act 1904*. Certain classes of "*discriminatory action*" on industrial grounds were prohibited[1]. Upon the passage of the *Industrial Relations Act 1988*, the Commission was required in the performance of its functions to take account of the principles embodied in the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984* in relation to *discrimination in employment*[2].

The *Disability Discrimination Act 1992* was added with effect from November 1992 to that list. However, the primary responsibility for discouraging discrimination in employment lay with several other agencies. Employment Discrimination Committees, under various names, had been established under the general oversight of the National Labour Consultative Committee from the mid 1970s. Those committees, and the placement of them within the industrial relations machinery, were a response to obligations Australia had accepted upon ratification of ILO Convention 111. In 1986, the administration of the Employment Discrimination Committees was taken over by the then newly established Human Rights and Equal Opportunity Commission (HREOC). The text of ILO C111 was set out in Schedule 1 of the *Human Rights and Equal Opportunity Commission Act 1986* (the HREOC Act). One of the functions of HREOC was to deal with complaints about discrimination in employment, but it lacked power to intervene in awards. With effect from January 1993 the Commission became obliged to remove discrimination from any award that it considered to be a *discriminatory award* referred to it by HREOC[3].

3. Australia ratified ILO Convention 111, Discrimination (Employment and Occupation) 1958, (ILO C111), on 15 June 1973. ILO C111 seeks to promote equality of opportunity and treatment in respect of employment and occupation with a view to eliminating any discrimination. Discrimination is defined by reference to seven prohibited grounds of discrimination, none of which are age:

> *"*Article 1
>
> *1. For the purpose of this Convention the term "discrimination" includes -*
>
> *(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;*
>
> *(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.*
>
> *2. Any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.*
>
> *3. For the purpose of this Convention the terms 'employment' and 'occupation' include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment."*

It is apparent that Article 1(b) authorises the Member State to add other specified prohibited grounds of discrimination after appropriate consultation. The defined term "discrimination" in Article 1 is supplemented in effect by Article 5.1 which, so far as relevant, reads:

> "Article 5
>
> *1. Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.*
>
> *2. Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination."*

4. Age discrimination in employment was prohibited for persons over the age of 40 years from 1967 under a United States federal statute[4]. Recommendations made by the Henderson Report into Poverty in Australia in 1975, and by the Coombs Royal Commission on Australian Government Administration in 1976, supported the inclusion of age as a prohibited ground of discrimination in employment[5]. In its 1982 - 1984 "Article 22 Report" to the ILO, Australia notified that its Employment Discrimination Committees now accepted complaints alleging discrimination on a further nine grounds (including age), additional to the grounds specified in ILO C111.

5. With effect commencing 1 January 1990, by HREOC Regulations, age, (along with other specified grounds), was declared to be a distinction, exclusion or preference which could constitute discrimination[6]:

> *"**Regulation 4 Other Distinctions, Exclusions or Preferences that constitute Discrimination***
>
> *4 For the purposes of subparagraph (b)(ii) of the definition of "discrimination" in subsection 3(1) of the Act, any distinction, exclusion or preference made:*
>
> *(a) on the ground of :*
>
> *(i) age; or*
>
> *(ii) medical record; or*
>
> *(iii) criminal record; or*
>
> *(iv) impairment; or*
>
> *(v) marital status; or*
>
> *(vi) mental, intellectual or psychiatric disability; or*

(vii) nationality; or

(viii) physical disability; or

(ix) sexual preference; or

(x) trade union activity; or

(xi) one or more of the grounds specified in subparagraphs (iii) to (x) (inclusive) which existed but which has ceased to exist; or

(b) on the basis of the imputation to a person of any ground specified in paragraph (a); is declared to constitute discrimination for the purposes of the Act."

The effect of that Regulation was to increase the ambit of "discrimination" in relation to the functions of HREOC. The declaration of the additional grounds for the purposes of the HREOC Act did not make discrimination on the declared ground unlawful. Moreover, the Explanatory Statement to the HREOC Regulations, (the 1990 HREOC Explanatory Statement), stated:

"Subparagraph 4(a)(i) provides that any distinction, exclusion or preference on the basis of a person's age constitutes discrimination for the purposes of the ***Act where it has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation****. It is envisaged that this ground will most commonly relate to matters such as maximum and minimum hiring ages and mandatory retiring ages.* ***However, where a particular age restriction is genuinely related to a person's capacity to perform a particular job, a distinction, exclusion or preference on that basis will not constitute discrimination due to the exception in section 3 of the Act for a distinction, exclusion or preference based on the inherent requirements of a job****."*[7] (emphasis supplied)

6. The reference in the sentence emphasised is to the definition of discrimination in section 3 of the HREOC Act which reads:

*" **'discrimination'** means:*

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

(b) any other distinction, exclusion or preference that:

(i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

(ii) has been declared by the regulations to constitute discrimination for the purposes of this Act;

but does not include any distinction, exclusion or preference:

(c) in respect of a particular job based on the inherent requirements of the job; or

(d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed;"

That definition corresponds closely to the definition of discrimination in Article 1.1 of ILO C111 set out in paragraph 3 above. So far as we are aware, in the four years of operation prior to the implementation of the *Industrial Relations Reform Act 1993*, Regulation 4 of the HREOC Act was not invoked against any discriminatory aspect of a junior rate, nor was any reference of a "discriminatory award" ever made to the AIRC for that reason.

7. In the hearings before us, a question was raised as to how it was that age could have been accepted to be an additional specified ground of prohibited discrimination under ILO C111. The Joint Governments' concluding submission dealt with an aspect of that issue. It noted that the 1990 HREOC Explanatory Statement made reference to HREOC's specified functions under Division 4 of Part II of its Act relating to equal opportunity in employment and identified the declaration of the additional grounds as support for ILO C111. Implied in the Explanatory Statement is an indication that HREOC, in accordance with its Act, had inquired into aspects of equal opportunity in employment and had reported to the Commonwealth Attorney-General on those matters. Australia reported (for the period 30 June 1988 to 30 June 1990) to the ILO on a range of matters relevant to ILO C111. It included an explanation of the HREOC Regulations and the identification of further grounds of discrimination such as age. Copies of that report were also forwarded to the Confederation of Australian Industry (the CAI) and to the ACTU. That explanation adds substance to what is already the conclusive acceptance by the High Court in the *Industrial Relations Reform Act Case* that a prohibition of discrimination on grounds of age could validly be made by that Act as a statute designed to implement ILO C111[8].

8. The *Industrial Relations Reform Act 1993* (the 1993 Act), with effect from 30 March 1994, introduced into Part VIA of the *Industrial Relations Act 1988*, provisions giving effect to what were described and defined as the "Anti-Discrimination Conventions"[9]. In outline the scheme of that legislation used several treaty instruments as the foundation for several new substantive heads for statutory powers conferred by the revised Act. The "Anti-Discrimination Conventions" were defined, and if not already published in the HREOC Act, were set out in schedules to the Act as amended

by the *Industrial Relations Reform Act 1993*. The Anti-Discrimination Conventions were invoked for purposes of a new power to make orders about equal remuneration for work of equal value[10]; and were foundational to a new object of the Act to eliminate discrimination[11]. That object was given concrete expression in the new termination of employment protections which prohibited termination of employment for reasons that included age[12]. Most relevant to our examination was a requirement for the Commission to refuse to certify enterprise bargaining agreements or enterprise flexibility agreements containing a provision that discriminates against an employee for reasons of age, not *based on the inherent requirements of the employment*[13].

9. The anti-discrimination measures, and the reference to age, sexual preference, physical or mental disability were not part of the Bill when first submitted. The latter were added as amendments during committee stages in the Senate. The Bill for the 1993 Act left the House of Representatives without any reference to anti-discrimination provisions in the proposed section 150A, and without reference to *"sexual preference, age, physical or mental disability"* in the proposed Object 3(g). A similar omission of those attributes is evident in subsection 170MD(5) as it appeared in that Bill[14]. Senator Spindler moved the inclusion of "*sexual preference, age, physical or mental disability*" [15] in proposed Object 3(g). Senator Bell later proposed the insertion of paragraph 150A(2)(ab)[16] which, renumbered, became paragraph 150A(2)(b) of the Act. For that reason, and because of the original wording of the *Industrial Relations Reform Bill*, we are able to assume that the legislation was first drafted in the belief that the substance of the comment we have quoted from the 1990 HREOC Explanatory Memorandum still applied. That commentary may be paraphrased to the effect that a particular age restriction genuinely related to a person's capacity to undertake an employment would not constitute discrimination, by nullifying or impairing equality of opportunity or by treatment in employment, because of the availability of the exception for a distinction based on the inherent requirements of that employment. The likelihood of that being the operative legislative assumption is increased by another factor. If there was no such belief, the failure to replicate the exemptions of youth wages from the prohibition against age discrimination that had been an element of State and New Zealand legislation since the inception of legislated prohibitions of age discrimination in those jurisdictions between 1990 through to 1993 was quite extraordinary[17].

10. We can find nothing in the speeches during the relevant parliamentary debate, about the 1993 Bill, to displace what we consider to have been the operative legislative assumption based on the 1990 HREOC Explanatory Memorandum. The amendments were moved by Senator Spindler who spoke briefly to them, adding "age" "sexual

preference" and "physical or mental disability" to the list of attributes in Object 3(g). He spoke in terms that, it has been acknowledged, did not "provide a full outline of the intention of the age discrimination amendments":

> *"I wish to confine my comments tonight to particular areas of the bill where I will be moving amendments. Firstly, I will be moving to remove discrimination on the grounds of sexuality, age or disability in an employment situation and to prohibit these areas as grounds for dismissal. ... It is also time that our society paid some attention to the treatment that people receive on the basis of age. ...*
>
> *The other end of the scale youth also deserves some attention. The Australian Youth Policy and Action Coalition asserts that the sole use of age as a determinant of wages is the most serious form of discrimination in employment related to age. The coalition supports moves towards competency based wage fixing whereby experience, skill and overall employability are the determinants of rewards and not just the arbitrarily ascribed characteristic of an individual's age.*
>
> *For young Australians, access to employment can be extremely difficult. Any moves that seek to address the discrimination faced by young people when seeking employment would, I submit, be moves in the right direction. Of the 400,000 Australians who are the very long-term unemployed, that is, those who are out of the labour force for 12 months or more 40 per cent are between 16 and 25 years of age. We should note this figure and realise that we are mortgaging the future of today's young generation."*[18]

11. However, soon after the introduction of the anti-discrimination provisions of the 1993 Act, an amendment was made. A Commission decision may have been the first warning that junior rates were under immediate threat by the duty of the Commission to refuse to certify agreements containing a discriminatory provision. Simmonds C on 13 May 1994, without argument being addressed to him on the point, held that an agreement containing wage differentials based on age did not fall within the exemption from discrimination provided in subsection 170MD(6)[19]. He refused to certify the agreement until the clause was removed. However, in a move foreshadowed in a major policy statement on 4 May 1994 new subsections 170MD(5A) and 150A(4) provided, with effect from June 1994, that until 22 June 1997 the Commission was to disregard any provision "*relating to rates of wages that discriminates against an employee because the employee has not reached a particular age*". The parliamentary intention reflected in that amendment was to postpone whatever operative effect the anti-discrimination process under sections 170MC, 170ND and 150A might have on junior rate provisions. Moreover, that intention appears to have been founded on a belief that the effect of the amendments "required that junior rates be removed from all federal awards as they are progressively reviewed under the Act". At least that was how the Special Minister of State's Second Reading Speech in the House of Representatives on

9 June 1994 explained the intent of the Bill, and described the effect of the 1993 legislation:

> *"The Bill proposes amendments to the Industrial Relations Act 1988 which would suspend for three years the age discrimination provisions of that Act in relation to junior wage rates. This issue was foreshadowed in the government's Working Nation white paper 'Employment and Growth'. These provisions were included in the Industrial Relations Reform Act 1993 as a result of amendments in the Senate in December last year. Although the Senate amendments required that junior wage rates be removed from all federal awards as they are progressively reviewed under the act by the Australian Industrial Relations Commission, they do not allow for a transition period. These provisions are also creating difficulties for new agreements and awards, because some employers have not had sufficient time to adapt to the new requirement. ... The government considers that an orderly change to competency based wages can be achieved within three years and regards this as a reasonable transition period. The government is concerned that the existing requirements of the Act may create difficulties for the orderly transition, given that many parties appear to need more time to develop wage arrangements that pay workers on the basis of their skill and capacity rather than their age ...*
>
> *The Bill will modify the effect of the four provisions in the Act that prevent age discrimination…. In other words, this would result in the Commission only applying the age discrimination element of section 150A in the second and subsequent three-year cycles of award reviews. Similarly, agreements which contained wage rates that discriminated on the basis of age could not be approved or certified under the Act from 22 June 1997."*[20]

12. The June 1994 Amendments, in terms, did not address the meaning or constructive effect of the definition of *"discriminates"* as used in the then Act. Rather, the amendments were a stay of the operation of the age discrimination provisions, bringing about a more orderly transition to the scheme of competency based wages. The then government gave competency based wages a high policy priority in the "Working Nation" program, announced on 4 May 1994, and referred to at the outset of the Special Minister of State's Second Reading Speech:

> *"The Government is committed to comprehensive reform of Australia's system of entry level vocational education and training. As part of this process, the proposed Australian Vocational Certificate Training System (AVCTS) incorporates competency based wages. The Government supports the transition, over time, to competency based arrangements from the current system of age based wages for young people.* ***In the move to competency based rates, there will be no change from youth/age rates until a suitable skills and experience based replacement is available. This is critical to protect the youth labour market. The Government is examining ways to ensure that the age discrimination provisions that were inserted into the Reform Act by the Senate accommodate an orderly transition from junior rates in awards to competency based***

> ***arrangements.*** *The Government is pursuing the introduction of a training wage which will provide employers with the incentives to create additional employment and training opportunities for entry level trainees and unemployed people."*[21] (our emphasis)

13. With respect to those who would contend otherwise, neither the Second Reading Speech nor the amendments moved by it contain much to illuminate the construction that should be placed on the words of "*the four provisions in the Act that prevent age discrimination*" enacted six months beforehand. The amending legislation appears to have been framed on an assumption, or perhaps a belief that the four provisions referred to operated in a way that equated junior rates in awards and agreements with "*provisions that discriminate for reasons of age*". But there is no indication of any consideration having been given to what award provisions were within the meaning of "*discriminates*" in the ordinary or the technical senses apparently used in the Act. Moreover, the process to be applied to the review of awards for discriminatory provisions directed that the Commission, "*in order to remedy the deficiency, take the steps (if any) prescribed by the Regulations*"[22] . The steps prescribed gave the Commission a very wide discretion to consider whether any "deficiency" should be omitted from the award. It was open to the Commission to decide that, because an immediate remedy was not appropriate, the parties should be given an opportunity to remedy the deficiency in a manner agreed by them[23].

14. The relatively non-prescriptive nature of the Section 150A process, notwithstanding a belief that the age discrimination provisions of the Act would have the effect of removing junior rates, was a dynamic in the parliamentary consideration of the June 1994 amendments. A similar belief remained a dynamic in subsequent debates about the extension of the 1994 exemptions, and was a factor in 1996 in the insertion of Section 120B. An ill-founded belief influencing a parliamentary intention does not overcome the ordinary meaning being given to the provisions of an Act in accordance with the rules of statutory construction[24]. However, for our own purposes of applying section 120B of the Act, a parliamentary belief is a consideration of substantial weight. It seems to have been thought that junior rates were comprehensively offensive to the veto on age discrimination that had been inserted in the Act. In our construction of the statutory terms of reference through which the Parliament commissioned this Report, it is appropriate to give weight to that consideration.

15. Our conclusion in paragraph 3.1.8 of the Report is based on that consideration. It is implicit in the several relevant speeches, and to an extent in our conclusion expressed in paragraph 3.1.8, that *"discriminates"* in paragraph 143(1C)(f) and counterpart

provisions, does not admit any exemption for the facially discriminatory age requirement of a junior rate. However we have qualified that implication to acknowledge the formal effect of the *"inherent requirements"* exception in paragraph 143(1C)(f). It may be relevant to note a point that appears open from the Junior Rates Full Bench decision observations quoted at paragraph 33 of this Appendix.

16. That decision, delivered on 20 December 1995, endorsed the AVTS Guidelines. It appeared to accept that a classification progression focussed on competencies linked with schooling and life experience, rather than age, *even if they are discriminatory on their face*, will fall within *the test of reasonableness*. Presumably the Full Bench intended to cover only indirect discrimination in that remark. It is of some importance to note that the position of the Joint Working Party endorsed by that decision included the proposition that:

> *"Non-trainee wage structures below the base level in an award which use the same progression criteria as a National Training Wage (eg. highest year of schooling completed and time out of school) will meet the age discrimination reforms of the Federal Industrial Relations Act provided that the trainee and non-trainee wage arrangements in the award are being reformed in accordance with the AVTS Trainee Wage Guidelines and this approach."*[25]

The AVTS Guidelines so endorsed included the following propositions:

> ***"Wage arrangements***
>
> *5.1 The parties should develop trainee wage structures which appropriately reflect the competency-based AVTS training arrangements that are to be established. These should provide competency-based training classifications through which trainees advance to the relevant "mainstream" classifications. Points of entry and speed of advancement will reflect the underlying training arrangements and be based on competency.*
>
> *5.2 The parties should establish rates of pay for each point in the trainee classification structure expressed as a percentage of the relevant mainstream classification. The rates of pay should reflect the relative value of the competencies demonstrated by the trainee on the job over the period of the training arrangement. Trainee wage rates will therefore:*
>
> *(i) establish appropriate relativities which take account of work value, skill evaluation;*
>
> *(ii) reflect any need for young workers to mature in work orientation and experience in order to achieve full competency; and*
>
> *(iii) be equitable to trainees while ensuring they are competitive in the labour market by reflecting the cost/benefits to employers of providing training.*

> *5.3 The wage rates should take into account time spent in accredited training by reflecting any effects it has on the productive value of the trainee. Rates should therefore reflect:*
>
> *(i) the extent to which reduced time spent on the job in productive work decreases the value of the trainee; and*
>
> *(ii) the extent to which increased time spent in training enhances the rate at which the trainee requires competencies which increase the value of the trainee."*[26]

17. It follows that the common expectation, based on the implementation of the AVTS guidelines was for junior rates to be "*not move(d) away from"*. Rather, non-trainee rates were to be merged with the schooling and life experience criteria which had been agreed to be a proxy for the achievement of key working competencies. That clear understanding is not compatible with a position put to us by the Joint Governments about the parliamentary belief, and therefore intention, in respect of s.120B. There is no room for an inference that Ministerial understanding of competency based classifications and non-discriminatory alternatives could be contradictory of the understandings and relative inexactness of those expressions integral to the AVTS guidelines. Those guidelines and the associated MOLAC principles were central to, at all material times after June 1994, the changes being made to training and junior rates. On a fair reading of the passages we have quoted they are incompatible with the view that "competency based wage" should be given a narrow meaning, or that a formula of the kind reflected in the NTW progression could not qualify at all as a non-discriminatory alternative to junior rates. Indeed, the AVTS guidelines appear to suggest that the three expressions were virtually synonymous.

18. There are several differences between the wording of the provisions in the 1993 Act and the anti-discrimination provisions in the current Act. Aspects of those differences in their impact upon junior rates may be of some importance in the construction of the existing provisions. In the 1993 Act, two operative provisions established a specific duty on the Commission to help in the elimination of discrimination. The most immediately functional was subsection 170MD(5). It required the Commission to refuse to certify an agreement, if the Commission "*thinks that a provision of the agreement discriminates against an employee*". Subsection 170MD(6) said that subsection 170MD(5) did not apply in so far as a provision "*discriminates in respect of particular employment based on the inherent requirements of that employment*". That test is similar but broader than the "exception" relied upon in the definition of discrimination of the HREOC Act. Moreover, the wording of the exception in the 1993 Act is not relevantly distinguishable from the stipulations now made in subsections 143(1D) and 170LU(6) of the Act, and sub-item 54(1) of Schedule

5 of the WROLA Act to the effect that a provision is not discriminatory merely because it discriminates in that way.

19. The definition of discrimination in subsection 3(1) of the HREOC Act had explicit linkage to similar expressions in ILO C111[27]. The broad approach to discrimination in the 1993 Act had a less explicit but readily inferable linkage with the same Convention. We note that Article 1.3 of that Convention makes an implicit distinction between the word "*employment*" and the word "*job*" appearing in Article 1.2. A similar distinction appears to be associated with paragraphs (c) and (d) of the definition of "*discrimination*" in the HREOC Act, and may be read as having the same meaning as in ILO C111 because of the operation of subsection 3(8) of the HREOC Act. Distinctions of that kind in the wording of the expression "inherent requirements of the position" were treated as significant in the reasoning of some members of the High Court in *Qantas v Christie*[28] when construing subsection 170DF(1) of the 1993 Act, the counterpart of subsection 170CK(2) of the Act as it now stands.

20. It may be inferred that the choice of the expression subsequently used in subsection 170MD(6) of the 1993 Act, and repeated in the corresponding provisions of the current Act: "*particular employment, based on the inherent requirements of that employment"* was deliberate. The use of the word "*employment*" in that context has a broader connotation than the use of the word "*job*" in the corresponding provision of the HREOC Act, and the words "*the particular position*" in former subsection 170DF(2), and what is now subsection 170CK(3) of the Act in relation to unlawful termination for reasons of age. Moreover, that broader connotation is consistent with the broad meaning of "employment" given in Article 1.3 of ILO C111. We shall return to consider that meaning. It may have important work to do in how we should view junior employment, the inherent requirements of that employment, and special measures designed to meet the particular requirements of persons, who for reasons such as age, are generally recognised to require special protection or assistance.

21. The inception of the *Workplace Relations Act 1996* with effect from 31 December 1996 carried over the regulatory scheme for eliminating discrimination for reasons of age, but with significant changes, postponing the application of the anti-discriminatory regime to "*a junior rate of pay*" until 22 June 2000[29]. The anti-discrimination provisions of the Act now in force, in the main merely relocate the provisions about the same class of discriminatory activity that the object of it and the Act it replaced each seek to help prevent and eliminate.

The anti-discrimination provisions of the Act:

22. As we shall see, a number of the current provisions of the Act are modifications or re-enactments of provisions that have been part of the legislative scheme for some time. The current provisions may appropriately be construed against an understanding of that background. It is convenient to set out at this stage the provisions that are most relevant to the anti-discrimination regime of the Act.

23. The prevention and elimination of discrimination, on the basis of attributes that include age, is among the objects of the Act:

> *"**3. Principal object of this Act***
>
> *The principal object of this Act is to provide a framework **for cooperative workplace relations** which promotes the economic prosperity and welfare of the people of Australia by:*
>
> *...*
>
> *(j) **respecting and valuing the diversity of the work force** by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin; ..."*

That object differs from the object first inserted in the Act's predecessor by the 1993 Act in two particulars. The principal object is no longer to provide a framework for the prevention and settlement of industrial disputes, it is in the terms emphasised. The reference to *respecting and valuing the diversity of the workforce*, is integrated as part of the anti-discrimination object.

24. The Act retains in Section 4 a definition of "**Anti-Discrimination Conventions**" introduced by the former Act. Those Conventions include ILO C111. The Anti-Discrimination Conventions, as defined, are referred to substantively only in the objects of section 170BA and in section 170BC in connection with Division 2 of Part VIA of the Act. Those provisions concern minimum entitlements of employees and orders requiring equal remuneration as between men and women. As we shall see, there is a direct reference to ILO C111 in section 170CK of the Act. Neither of those invocations of ILO C111 is applicable to the regime created by the Act for preventing and eliminating discrimination against an employee in the provisions of awards and certified agreements.

25. Since the enactment of the *Industrial Relations Act 1988*, the Commission's functions have included a generally worded obligation to take account of the anti-

discrimination principles embodied in the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*. The *Disability Discrimination Act 1992* was added to that list in 1992. An obligation to have regard to the principles embodied in the Family Responsibilities Convention was added as section 93A by the 1993 Act. The current provisions are otherwise unamended since 1988:

> *"**93 Commission to take account of Racial Discrimination Act, Sex Discrimination Act and Disability Discrimination Act***
>
> *In the performance of its functions, the Commission shall take account of the principles embodied in the Racial Discrimination Act 1975, the Sex Discrimination Act 1984 and the Disability Discrimination Act 1992 relating to discrimination in relation to employment.*
>
> ***93A Commission to take account of Family Responsibilities Convention***
>
> *In performing its functions, the Commission must take account of the principles embodied in the Family Responsibilities Convention, in particular those relating to:*
>
> *(a) preventing discrimination against workers who have family responsibilities; or*
>
> *(b) helping workers to reconcile their employment and family responsibilities."*

It is appropriate to interpolate that while each of the three Acts referred to in section 93 have been amended on several occasions, they all are formulated around common structural elements. Those elements are: a definition of discrimination[30], and, of indirect discrimination[31], each of which is declared unlawful[32]; and prohibited as the basis for action or decision about specified matters[33]; subject to general or specified exceptions[34]. The attributes which are within the respective definitions of discrimination in those three Acts include eight that correspond to 10 of the 14 now listed in the Act: race, colour, descent or national or ethnic origin; sex, martial status, pregnancy or potential pregnancy, family responsibilities; disability as defined. The attributes that are different in kind to the attributes by reference to which the discrimination is prohibited by those three Acts are sexual preference, age, religion and political opinion. We have already noted that the first two of those four attributes were added to the 1993 Act by amendments in the Senate. The other two religion and political opinion, are both among the attributes mentioned as grounds in the definition of "discrimination" in employment in Article 1 of ILO C111.

26. Section 50A of the *Sex Discrimination Act 1984* provides for the Sex Discrimination Commissioner to refer a complaint about a discriminatory act under an award or certified agreement to the Australian Industrial Relations Commission (the

AIRC). Such an act may otherwise be exempted from the prohibition in the *Sex Discrimination Act 1984* because acts done in direct compliance with an award or order of the AIRC are exempted by subsection 40(1)(e) of that Act. As we have seen, the counterpart provision in the *Industrial Relations Act 1988* was inserted in 1992. It is unchanged in the Act now in force. It requires the AIRC to review allegedly "*discriminatory awards*" or agreements:

> *"**111A Hearings in relation to discriminatory awards***
>
> *(1) If an award or certified agreement is referred to the Commission under section 50A of the Sex Discrimination Act 1984, the Commission must convene a hearing to review the award or agreement.*
>
> *(2) In a review under this section:*
>
> *(a) in the case of an award—the parties to the proceeding in which the award was made are parties to the proceeding on the review, and are entitled to notice of the hearing; and (aa) in the case of a certified agreement—the persons bound by the agreement, and the employees whose employment is subject to the agreement, are parties to the proceeding on the review, and are entitled to notice of the hearing; and*
>
> *(b) the Sex Discrimination Commissioner is a party to the proceeding."*

27. That specific power to conduct a review of the award by reference from the Sex Discrimination Commissioner was complemented in the same series of amendments by an obligation to vary an award thought to be discriminatory to remove the discrimination. For that purpose, an act done in compliance with the award or agreement is excluded from any automatic deeming that the act is reasonable.

> *"**113 Power to set aside or vary awards***
>
> *...*
>
> *(2A) If:*
>
> *(a) an award or certified agreement has been referred to the Commission under section 50A of the Sex Discrimination Act 1984; and*
>
> *(b) the Commission considers that the award or agreement is a discriminatory award or agreement;*
>
> *the Commission must take the necessary action to remove the discrimination, by setting aside, setting aside the terms of, or varying, the award or agreement.*
>
> *(2C) Before taking action under subsection (2A) in relation to a certified agreement, the Commission must give the persons bound by the agreement and the employees whose employment is subject to the agreement an opportunity to amend the agreement so as to remove the discrimination.*
>
> *...*

(5) In this section:

***discriminatory award or agreement** means an award or certified agreement that:*

(a) has been referred to the Commission under section 50A of the Sex Discrimination Act 1984; and

(b) requires a person to do any act that would be unlawful under Part II of the Sex Discrimination Act 1984, except for the fact that the act would be done in direct compliance with the award or agreement.

For the purposes of this definition, the fact that an act is done in direct compliance with the award or agreement does not of itself mean that the act is reasonable."

It may be noted that the last sentence of subsection 113(5) connotes that an act that is reasonable may not be discriminatory. In the context, the words used carry an implication. The extension in the *Sex Discrimination Act 1984* of "*discrimination"* to "*indirect discrimination"*, and the "*reasonableness"* test for indirect discrimination in section 7B of that Act, may be applied by the Commission in testing for a *discriminatory award or agreement* under subsection 113(2A).

28. Passing over section 120B, the next set of anti-discrimination provisions are most central to our task. Apart from the provisions to which we have already referred, the duty imposed on the Commission to help in the elimination and prevention of discrimination has generally taken the form of an obligation to review awards with a view to removing discriminatory provisions, or to refuse certification of an agreement that contains a discriminatory provision. The Act in its current form introduced from 31 December 1996 an amended version of the provisions to that effect that had earlier been used in a different context. Subsection 143(1C) was novel. It was similar to the repealed section 150A of the *Industrial Relations Reform Act 1993* in that it imported what is in effect an anti-discrimination function of the Commission into Division 6 of Part VI of the Act. That Division is primarily devoted to matters of award form and effect, machinery provisions connected with awards in operation. However, subsections 143(1C) to (1E) now append to the machinery provisions a substantive function. That function is to ensure that decisions and determinations in the nature of awards and orders do not contain discriminatory provisions. The duty thereby imposed on the Commission intrudes upon the exercise of the award making power and into the Commission's function in determining a matter that comes before it:

*"**143 Making and publication of awards etc.***

(1) Where the Commission makes a decision or determination that, in the Commission's opinion, is an award or an order affecting an award, the Commission shall promptly:

(a) reduce the decision or determination to writing that:

…

(1C) The Commission must ensure that a decision or determination covered by subsection (1):

…

(f) does not contain provisions that discriminate against an employee because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

(1D) A decision or determination covered by subsection (1) does not discriminate against an employee for the purposes of paragraph (1C)(f) merely because:

(a) it provides for a junior rate of pay; or

(b) it discriminates, in respect of particular employment, on the basis of the inherent requirements of that employment; or

(c) it discriminates, in respect of employment as a member of the staff of an institution that is conducted in accordance with the teachings or beliefs of a particular religion or creed:

(i) on the basis of those teachings or beliefs; and (ii) in good faith.

(1E) Paragraph (1D)(a) does not apply to a decision or determination made by the Commission more than 3 years after 22 June 1997, except where the Commission decides, on a case-by-case basis, that the paragraph should apply. Decisions by the Commission as to whether the paragraph should apply must be made by the Commission in accordance with principles established by a Full Bench."

29. Subsections 143(1D) and (1E) also affect other parameters of our task. Paragraph 143(1D)(a) provides for the exemption of junior rates from the operation of the duty on the Commission imposed by paragraph 143(1C)(f). Subsection 143(1E) operates as a contingent termination of that exemption. The contingency is that the exemption may continue to apply on a case by case basis by a decision of the Commission in accordance with principles established by a Full Bench.

30. The substantive test set in the legislative formula to be applied to certified agreements is virtually identical to that established for awards in subsections 143(1C) to (1E). The only difference is that the test is to be applied in making a decision as to whether an agreement should be certified. The current provision of the Act had an antecedent in subsection 170MD(5) of the 1993 Act, with which it closely corresponds:

"170LU When Commission to refuse to certify an agreement

...

(5) Despite section 170LT, the Commission must refuse to certify an agreement if it thinks that a provision of the agreement discriminates against an employee, whose employment will be subject to the agreement, because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

(6) For the purposes of subsection (5), a provision of an agreement does not discriminate against an employee merely because:

(a) it provides for a junior rate of pay; or

(b) it discriminates, in respect of particular employment, on the basis of the inherent requirements of that employment; or

(c) it discriminates, in respect of employment as a member of the staff of an institution that is conducted in accordance with the teachings or beliefs of a particular religion or creed:

(i) on the basis of those teachings or beliefs; and

(ii) in good faith.

(7) Paragraph (6)(a) does not apply for the purposes of any application of subsection (5) by the Commission more than 3 years after 22 June 1997, except where the Commission decides, on a case-by-case basis, that the paragraph should apply. Decisions by the Commission as to whether the paragraph should apply must be made by the Commission in accordance with principles established by a Full Bench."

31. The duty on the Commission in subsection 143(1C) is expressed in terms that apply to decisions and determinations made prospectively from the date of the amendment. Existing award provisions are brought under review by two items prescribed in Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act 1996* (the WROLA Act). The items are in virtually identical terms. They apply respectively to the variation of awards during and after "the interim period". That period expired on 30 June 1998, 18 months from the date of commencement of section 89A of the Act, which restricts the award making power to "allowable award matters". The Commission is obliged to ally a review of an award to remove non-allowable matters with a review of it to remove discriminatory provisions. As we have seen, the latter form of review had an antecedent in the repealed section 150A of the *Industrial Relations Reform Act 1993*. That section required all awards in force to be reviewed to remedy deficiencies including one which arose where the Commission considers the "*award contains a provision which discriminates against an employee because of, or for reasons including ... age...*". In paragraphs 8-13 we have traced the history of parliamentary provenance of the language that identified such a provision. It is still

common to all currently operative provisions of the Act, and to the relevant items in Schedule 5 of the WROLA Act. Item 54 of that schedule effectively replicates the substance of subsections 143(1D) and 143(1E) in relation to item 49 or 51 review proceedings:

> *"**49 Variation of awards during the interim period***
>
> *(1) If one or more of the parties to an award apply to the Commission for a variation of the award under this item, the Commission may, during the interim period, vary the award so that it only deals with allowable award matters.*
>
> *...*
>
> *(8) The Commission must also review the award to determine whether or not it meets the following criteria:*
>
> *...*
>
> *(f) it does not contain provisions that discriminate against an employee because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.*
>
> *(9) If the Commission determines that the award does not meet the criteria set out in subitem (7) or (8), the Commission may take whatever steps it considers appropriate to facilitate the variation of the award so that it does meet those criteria.*
>
> ***51 Variation of awards after the end of the interim period***
>
> *(1) As soon as practicable after the end of the interim period, the Commission must review each award:*
>
> *(a) that is in force; and*
>
> *(b) that the Commission is satisfied has been affected by item 50. (... each award ceases to have ... effect to the extent that it provides for matters other than allowable award matters.)*
>
> *...*
>
> *(7) The Commission must also review the award to determine whether or not it meets the following criteria:*
>
> *...*
>
> *(e) where appropriate, it provides support to training arrangements through appropriate trainee wages and a supported wage system for people with disabilities;*
>
> *(f) it does not contain provisions that discriminate against an employee because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.*
>
> *(8) If the Commission determines that the award does not meet the criteria set out in subitem (6) or (7), the Commission may take whatever steps it*

considers appropriate to facilitate the variation of the award so that it does meet those criteria.

54 Certain provisions not discriminatory

(1) A provision of an award does not discriminate against an employee for the purposes of paragraph 49(8)(f) or 51(7)(f) merely because:

(a) it provides for a junior rate of pay; or

(b) it discriminates, in respect of particular employment, on the basis of the inherent requirements of that employment; or

(c) it discriminates, in respect of employment as a member of the staff of an institution that is conducted in accordance with the teachings or beliefs of a particular religion or creed:

(i) on the basis of those teachings or beliefs; and

(ii) in good faith.

(2) Paragraph (1)(a) does not apply to a decision or determination made by the Commission under this Part more than 3 years after 22 June 1997, except where the Commission decides, on a case-by-case basis, that the paragraph should apply. Decisions by the Commission as to whether the paragraph should apply must be made by the Commission in accordance with principles established by a Full Bench."

32. Finally in this context, we note section 170CK of the Act. That provision relevantly cites an additional object of the Act for purposes of the unlawful termination of employment. Significantly it makes direct reference to giving effect to ILO C111. That reference is a truncated version of a much fuller invocation of ILO C111 in the since repealed section 170CA of the 1993 Industrial Relations Reform Act. The work of subsection 170CK(2) is to make unlawful a termination of employment on certain grounds, one of which is age:

*"**170CK Employment not to be terminated on certain grounds***

(1) In addition to the principal object of this Division set out in section 170CA, the additional object of this section is to make provisions that are intended to assist in giving effect to:

(a) the Convention concerning Discrimination in respect of Employment and Occupation, a copy of the English text of which is set out in Schedule 1 to the Human Rights and Equal Opportunity Commission Act 1986; and

(b) the Family Responsibilities Convention.

(2) Except … reasons:

…

(f) race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;

...

(3) Subsection (2) does not prevent a matter referred to in paragraph (2)(f) from being a reason for terminating employment if the reason is based on the inherent requirements of the particular position concerned."

The concept of discrimination in Commission Principles:

33. In *Re Furnishing Trades*[35] (the *Junior Rates Case*), the Full Bench was asked to determine that the then proposed NTW approach met the discrimination requirements of the *Industrial Relations Act 1988* as amended by the 1993 Act. A Joint Working Party had proposed the NTW formula based on "*highest year of schooling completed and time out of school*". That formula is now the basis of the schedule of rates in the current NTW scheme. The Full Bench itself appears to have suggested that the then current anti-discrimination provision of the Act applicable to award provisions generally, paragraph 150A(2)(b), extended to indirect discrimination for reasons of age. A submission to the Full Bench by the Human Rights and Equal Opportunity Commission (HREOC) appears to have made a contention to that effect. HREOC supported its contention with a reference to a statement made by the ILO Committee of Experts about the meaning of discrimination for purposes of ILO C111[36]. Be that as it may, the Full Bench, in relation to the proposed NTW "guidelines" referred to and approved a statement about the meaning of discrimination. It appears the statement had first been made by the October 1995 *Third Safety Net Adjustment and Section 150A Review Full Bench*[37] in the form of what were entitled "Guidelines for Section 150A Reviews":

*"**Discrimination***

During the hearing, the Commission expressed some concern over the potential for the guidelines to lead to a breach of the discrimination provisions in the Act. While the Commission accepted that the guidelines were not directly discriminatory on the basis of age, we wished to ensure that we addressed the potential for the application of the progression criteria to lead to 'indirect discrimination'.

For the purposes of these proceedings, we are relying on the definition of 'indirect discrimination' contained in the document Section 150A Award Reviews Guide: Discrimination*. This is a "model clause", developed as a guide for section 150A reviews, which states:*

> *'Indirect discrimination occurs when apparently neutral policies and practices include requirements or conditions with which a higher proportion of one group of people than another in relation to a particular attribute, can comply, and the requirement or condition is unreasonable under the circumstances.'"*

34. In its submission to the *Junior Rates* Full Bench, the Commonwealth relied upon the leading High Court case of *Waters & Ors v Public Transport Corporation*[38] ("*Waters*"). The Bench noted :

> *"All the parties supported the Commonwealth's submission, although the Australian Chamber of Commerce and Industry made clear that it was not asking the Commission to rely on the model clause definition of 'indirect discrimination' in this case."*

After referring to the decision in *Waters* for the purpose of developing a principle about how a reasonableness test might be applied to indirect discrimination for reasons of age, the Full Bench gave a qualified endorsement of the putative NTW award provision:

> *"We have accepted the Commonwealth's submission on these issues, while noting some of the key points which we think should form the focus of the approach by the parties in relation to indirect discrimination and the progression criteria of the National Training Wage [Prints L5188 and L5189].*
>
> *In applying the* Waters *approach in the case before us, we have had regard to the objects of the Act and several other provisions. Subsection 3(g) requires the Commission to act in the settlement and prevention of industrial disputes in a way which promotes the economic prosperity and the welfare of Australia by, among other things, helping to prevent and eliminate discrimination of the basis of age. Section 90 requires us to take account of the public interest in the performance of our functions and section 88A requires us to ensure that awards are suited to the efficient performance of work according to the needs of particular industries and enterprises, taking into account employees' interests. The Commission must also have regard, in relation to making, reviewing or varying awards, to appropriate relativities based on skills, responsibility and the conditions under which work is performed, and on the need for skill based career paths.*
>
> ***While we are prepared to endorse the AVTS Trainee Wage Guidelines as we stated above, we would also make some cautionary observations in the context of discrimination. The endorsement is predicated on the fact that this approach and the progression criteria of the NTW follow a structured path and focus on competencies linked with schooling and life experience, rather than on age.***
>
> ***If the guidelines and progression criteria are properly framed we believe that, even if they are discriminatory on their face, they will fall within the test of* "reasonableness" *as discussed above. The guidelines are designed to promote skills and competence and enhance the opportunities for youth employment. Ultimately, the framework that is proposed, and the setting and operation of rates of pay within it, will be reviewed through the section 150A process.***
>
> *In this decision, we have dealt with general guidelines put to us by the parties. In the future, specific provisions will be considered."*[39] (Emphasis supplied)

35. That relatively tentative outline of discrimination principles appears not to have been taken any further in later cases. The Full Bench's statement was used as the background to an issue raised in the submissions to us as to whether the formula for progression in the NTW could properly be accepted as a non-discriminatory alternative[40]. The foundation for that issue was an opinion prepared by Dr C.M. Jessup QC[41]. Two main points were made in that opinion. The first was that a formula based upon a requirement related to years out from completion of Year 10 is indirectly discriminatory. The second was that, even if the concept of discrimination used in the Act may be qualified by notions of reasonableness, (which is doubted), the requirement may not satisfy a judicial challenge based on a proper application of a test of reasonableness. That issue leads to others, the most notable being whether and how "indirect discrimination" is to be defined if the word "*discriminates*" in paragraph 143(1C)(f) and counterparts is construed to include indirect discrimination. In the circumstances it is necessary to examine the foundations for the principle stated about the meaning of discrimination in the context of section 150A of the former Act.

36. In the reasons stated by it, the *Junior Rates* Full Bench adopted the approach to the "reasonableness" qualification of indirect discrimination stated in the decision of the High Court in *Waters* in application to a different statutory context. In that decision the Court was considering sections 17 and 29 of the *Equal Opportunity Act 1984* (Victoria). That Act has since been repealed and replaced by the *Equal Opportunity Act 1995*. The relevant section 17 dealt with the concept of discrimination. Direct discrimination on the ground of status and private life was dealt with by subsection 17(1). Subsection 17(5) covered discrimination based on the imposition of a requirement with which a substantially higher proportion of persons of a different status do or can comply. It appears that that Act did not make a distinction in terms between direct and indirect discrimination. As Mason CJ and Gaudron J observed, the notions of "indirect" or "adverse effect" discrimination are derived from the decision of the United States Supreme Court in *Griggs v Duke Power Company*[42].

37. The passages we have quoted from the *Junior Rates Case*, and the position generally adopted by the participants in the hearing before us, were each developed from an acceptance that a provision that resulted in indirect discrimination is no less objectionable than one that results in direct discrimination. However, it is not self evident that indirect discrimination should be read into the Act's embargo on "*provisions that discriminate against an employee because of, or for reasons including*" age and other grounds.

38. At paragraph 25 above, and in the associated endnotes, we set out the basis upon which the provisions of paragraph 143(1C)(f) and subitem 51(7) of the WROLA Act may be contrasted with the more developed *Sex Discrimination Act 1984,* the *Racial Discrimination Act 1975* and the *Disability Discrimination Act 1992*. The elements of the anti-discrimination regime in those provisions generally correspond with the structural elements of State anti-discrimination legislation. In some instances that legislation anticipated any federal enactment of a prohibition of discrimination for reasons of age[43].

39. The anti-discrimination regime established by paragraph 143(1C)(f) of the Act and subitem 51(7) of Schedule 5 of the WROLA Act does not conform with what Mason CJ and Gaudron J described as the "usual practice" in Australia when legislating against indirect or disparate impact discrimination:

> *"The notion of 'indirect discrimination' or 'adverse effect discrimination' derives from the decision of the Supreme Court of the United States in* Griggs v. Duke Power Co.*, which gave rise to the term 'disparate impact discrimination'. In that case a general anti-discrimination provision, much like that in s.17(1) of the Act, which was directed to the elimination of racial discrimination, was interpreted as prohibiting the use of a selection test which, although not overtly differentiating on the basis of race, had a disparate impact on persons from different racial backgrounds.*
>
> *Within the Australian legal system, it is usual for anti-discrimination legislation to ban discriminatory practices in terms which deal separately with treatment which differentiates by reason of some irrelevant or impermissible consideration and with practices which, although not overtly differentiating on that basis, have the same or substantially the same effect. That is the case with s.17(1) and s.17(5) of the Act. That form of proscription appears to have been based on that in the* Sex Discrimination Act 1975 *(U.K.).*
>
> *... In the United States and Canada anti-discrimination statutes expressed in general terms that do not draw any distinction between direct and indirect discrimination have been consistently construed as applying to both forms of discrimination. This Court has taken the same approach construing s.92 of the Constitution."*[44]

40. The point made in the last paragraph quoted has much to be said for it as a basis for aligning anti-discrimination provisions with the prevention or elimination of the discriminatory conduct, direct or indirect - with the substance and not merely the form of the discrimination - that it is their purpose to prevent. Several members of the Court have identified themselves with the development of that "*purposive*" analysis of anti-discrimination provisions. Since the publication of the first version of this Appendix, we have been encouraged to do likewise.

41. The Court's *purposive* analysis appears to have been formulated initially around a revision of the principles applied to the construction of section 92 of the Australian Constitution. That section broadly may be characterised as a prohibition on discrimination against freedom of interstate trade. But the analysis applied to section 92 has been developed to cover other prohibitions on discrimination. The substance of the approach is best crystallised in the observations by Mason CJ in *Street v Queensland Bar Association*[45] in relation to section 117 of the Constitution:

> *"Another difficulty with the existing interpretation of s.117 is that it appears to proceed according to a narrow view of what amounts to a disability or discrimination. The statement of Griffith CJ in* Davies v Jones *… suggests that, in order to bring the section into operation, the State law must make the fact of being a resident in another State the criterion of being the disability or discrimination. Again this seems to be an unduly limiting notion. In terms the section applies when a subject of the Queen, being an out-of State resident, is subject to a disability or discrimination under the State law. The section is not concerned with the form in which that law subjects the individual to the disability or discrimination. It is enough that the individual is subject to either of the two detriments, whatever the means by which this is brought about by State law. This approach to the interpretation of the section accords with the approach generally adopted in connexion with statutes proscribing particular kinds of discrimination. They are either expressed or construed as proscribing an act or a law the effect of which is relevantly discriminatory: see, eg.,* Birmingham City Council v Equal Opportunity Commission *[[1989] A.C. 115, at pp. 1194-1195] ... It would be surprising if it were otherwise, especially since such statutes are generally intended to provide relief from discrimination rather than to punish the discriminator. ... It would make little sense to deal with laws which have a discriminatory purpose and leave untouched laws which have a discriminatory effect."*

42. On that approach, paragraphs 143(1C)(f) and 143(1D)(b) might be conceived to be a form of proscription of any award of the Commission, (a law), being made that discriminates against an employee for reasons of or including any of the listed attributes, one of which is age. To establish whether or not a decision or determination of an award provision is discriminatory, it would be appropriate to look to the substance rather than to the form. In other words, considerations of the kind that are taken into account when applying some statutory tests for indirect discrimination could be assessed. On the other hand, as the next case we refer to illustrates, the "numerical count" aspects of some indirect discrimination tests might not be determinative. This is because such a test could be relevant to the form rather than to the substance of the discrimination sought to be proscribed.

43. Gaudron J in *Street* adopted a broadly similar view to Mason CJ but delivered independent reasons. Those reasons have since been approved in other contexts. Thus, in *Castlemaine Tooheys Ltd v South Australia*[46], McHugh and Gaudron JJ, in a joint judgment applying section 92 of the Constitution stated:

> *"In* Street v Queensland Bar Association *Gaudron J made reference to the general considerations which,* ***statute aside****, result in particular treatment being identified as discriminatory. By reference to those considerations it is possible to identify the general features of a discriminatory law. A law is discriminatory if it operates by reference to a distinction which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant to the object to be attained; a law is discriminatory if, although it operates by reference to a relevant distinction, the different treatment thereby assigned is not appropriate and adapted to the difference or differences which support that distinction. A law is also discriminatory if, although there is a relevant difference, it proceeds as though there is no such difference, or, in other words, if it treats equally things that are unequal - unless, perhaps, there is no practical basis for differentiation.*
>
> *So far as concerns the present case, the legislative regime for beverage containers operates by reference to a distinction between refillable and non-refillable beer bottles. Although the arguments of the parties were structured somewhat differently from the way in which we have expressed the considerations which indicate that a law is discriminatory, in substance the defendant sought to justify that distinction as relevant to two objectives, namely, the conservation of energy resources and the amelioration of litter problems."* (emphasis supplied)

44. However, as the emphasis we have supplied to the passage quoted in above presages, the statute in which discriminatory conduct is proscribed cannot be left aside. We are not aware of any decision in which the broad approach outlined has yet been applied to any of the anti-discrimination statutory provisions of the kind commonly developed in Australia to give effect to one or other of the Anti-Discrimination Conventions ratified by Australia. Moreover, in construing the statute before the Court in *Waters*, a majority of the members of the Court adopted a view, confirmed in a number of other decisions, to the effect that where direct and indirect discrimination are provided for in a statute, they are mutually exclusive categories in the context of the legislation construed[47].

45. The Act does not directly import a distinction between direct and indirect discrimination. However section 93 imports "*the principles embodied*" in several other Acts that do provide for such a distinction for unlawful discrimination on grounds of race, sex, or disability and cognate grounds. Those principles apply to discrimination based on most, but not all, of the attributes in relation to which discrimination is proscribed by paragraph 143(1C)(f). Thus, the Commission is obliged by section 93 to

take account of principles embodied in three named Acts relating to discrimination in relation to employment for reasons of: race, colour, sex, physical disability, marital status, family responsibility, national extraction or social origin. By subsection 113(5), the "reasonable" qualification in indirect discrimination under the *Sex Discrimination Act 1984* is implied for the purposes of the Commission's function to set aside or vary discriminatory awards. The *Sex Discrimination Act 1984* also prohibits discrimination on grounds of family responsibilities[48]. However, perhaps out of more abundant caution, section 93A adds the principles embodied in the Family Responsibilities Convention to those that section 93 requires to be taken into account by the Commission. Most relevantly Article 3.2 of that Convention defines the term "discrimination" to mean discrimination in employment and occupation as defined in Articles 1 and 5 of ILO C111. Hence, the prevention of discrimination against workers who have family responsibilities may be understood as importing the width and qualification of the explication of "discrimination", "employment" and "special measures" available under ILO C111. No such expansive connotations or embodiments of principles can be identified for preventing discrimination against an employee for reasons of age.

46. It is therefore apparent that, on the face of the Act, the position as to discrimination for reasons of "age" in paragraph 143(1C)(f) may be distinguished from discrimination for reasons of race, colour, national extraction and social origin; from discrimination for reasons of sex, marital status, family responsibilities and pregnancy; and from discrimination for reasons of physical disability. We have observed that the principal legislation prohibiting each of those three classes of grounds covered includes a form of prohibition of indirect discrimination[49]. There are important differences between each of those enactments in the substantive characterisation of different kinds of discriminatory action, including whether and when it is unlawful *per se*, and in the definition of indirect discrimination. A common feature is the arrangement of the statute to prohibit direct discrimination, to include forms of indirect discrimination within the prohibited class of discrimination, and to exclude what would otherwise be indirect discrimination by a reasonableness test.

47. The treatment of sex discrimination in sections 5, 7B and 7D of the *Sex Discrimination Act 1984* illustrates the arrangement of the concepts of direct and indirect discrimination:

> *"**Sex discrimination***
>
> ***5. (1)*** *For the purposes of this Act, a person (in this subsection referred to as the **"discriminator"**) discriminates against another person (in this subsection*

*referred to as the **"aggrieved person"**) on the ground of the sex of the aggrieved person if, by reason of:*

(a) the sex of the aggrieved person;

(b) a characteristic that appertains generally to persons of the sex of the aggrieved person; or

(c) a characteristic that is generally imputed to persons of the sex of the aggrieved person:

the discriminator treats the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of the opposite sex.

***(2)** For the purposes of this Act, a person (the **"discriminator"**) discriminates against another person (the **"aggrieved person"**) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.*

***(3)** This section has effect subject to sections 7B and 7D.*

Indirect discrimination: reasonableness test

***7B. (1)** A person does not discriminate against another person by imposing, or proposing to impose, a condition, requirement or practice that has, or is likely to have, the disadvantaging effect mentioned in subsection 5(2), 6(2) or 7(2) if the condition, requirement or practice is reasonable in the circumstances.*

***(2)** The matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances include:*

(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and

(b) the feasibility of overcoming or mitigating the disadvantage; and

(c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposed to impose, the condition, requirement or practice.

Special measures intended to achieve equality

***7D. (1)** A person may take special measures for the purposes of achieving substantive equality between:*

(a) men and women, or

(b) people of different marital status; or

(c) women who are pregnant and people who are not pregnant; or

(d) women who are potentially pregnant and people who are not potentially pregnant.

***(2)** A person does not discriminate against another person under section 5, 6 or 7 by taking special measures authorised by subsection (1).*

***(3)** A measure is to be treated as being taken for a purpose referred to in subsection (1) if it is taken:*

(a) solely for that purpose; or

(b) for that purpose as well as other purposes, whether or not that purpose is the dominant or substantial one.

(4) *This section does not authorise the taking, or further taking, of special measures for a purpose referred to in subsection (1) that is achieved."*

48. It seems to have been accepted that subsection 5(1) is concerned with direct discrimination, and that subsection 5(2) is concerned with indirect discrimination. Further, it appears to have been established that the categories of direct and indirect discrimination are mutually exclusive in their operation[50]. That differentiation between direct and indirect discrimination is substantially dictated by the language of section 7B. It prescribes a reasonableness test "exception" to a condition, requirement, or practice that would otherwise constitute indirect discrimination under subsection 5(2). Similar, and sometimes more explicit differentiation of direct and indirect discrimination, the detailing of the characteristics of both, and the express provision of the reasonableness test are typical of the arrangement of Commonwealth and State legislation prescribing anti-discrimination processes intended to include indirect discrimination as well as direct discrimination[51].

49. No corresponding incorporation by a reference of principles or formulae for prohibiting indirect discrimination has ever been applicable under a Commonwealth statute to discrimination for reasons of age. Age was first included among impermissible grounds of discrimination under a federal statute, when by statutory rule it was added in 1990 to the list of attributes for the purposes of the discrimination defined by the HREOC Act. Unlike the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992*, the HREOC Act did not then, and still does not include either any express provision about indirect discrimination, or a "reasonableness test" of indirect discrimination. The relevant provisions did not extend the anti-discrimination measures to indirect discrimination on grounds of age. As we have seen, that position is in marked contrast with the scheme of the anti-discriminatory legislation applicable to race, national extraction, sex and disability. The context in which the words "*discriminates against an employee*" appears in paragraph 143(1C)(f), 143(D)(a) and (b); subsections 170LU(5) and (6) of the Act, and subitems 49(8)(f) and 51(7)(f) must be given some weight. It does not add to the likelihood of there being a legislative intention that avoidance of indirect discrimination should be added to the Commission's function in relation to any of the grounds not already associated with a statutory formula for dealing with indirect discrimination.

50. Sackville J in *Commonwealth v HREOC*[52] adopted views stated in earlier cases to the effect that the words "*by reason of*" in subsection 5(1) of the *Sex Discrimination Act*

1984 imply a relationship of cause and effect between the sex, or characteristic of the aggrieved person and the less favourable treatment by the discriminator. He adopted also the view that it was appropriate to analyse the administrative determination or ground upon which the administration acts for purposes of assessing whether a decision could be held to be discriminatory or essentially discriminatory. He then pointed out the importance of identifying the character of the distinctions and differentiations which amount to discrimination within the meaning of an anti-discrimination statute:

> *"... Not every distinction necessarily amounts to discrimination, in the sense used by the Sex Discrimination Act ... [1984]. As Mason CJ and Gaudron J said in* Waters v Public Transport Corporation *(at 363);*
>
> > *'The discrimination with which the Act is concerned ... is discrimination against, rather than discrimination between, persons with different characteristics.* ***The notion of 'discrimination against' involves differentiating by reason of an irrelevant or impermissible consideration. Anti-discrimination legislation operates on the basis that certain characteristics or conditions are declared to be irrelevant or impermissible …***
> >
> > ***The notion of 'discrimination between' involves differentiating on the basis of a genuine distinction, which in the context of anti-discrimination legislation, must be a characteristic that has not been declared an irrelevant or impermissible consideration.'***
>
> *These observations, while made in the context of the* Equal Opportunity Act *(Vic), apply to the* Sex Discrimination Act … [1984]*."*[53] (Emphasis supplied)

51. When applied to the context of paragraphs 143(1C)(f) and 143(1D), and their counterparts that reasoning justifies a literal reading of the notion of discrimination against an employee. Compounding with that consideration is an aspect of the principles used by the courts in applying the reasonableness exception as a qualification to the meaning of indirect discrimination. As we have pointed out in a different context, those principles are founded upon an acceptance that indirect discrimination is an exclusive category under the *Sex Discrimination Act 1984*. Davies J in *Commonwealth Bank of Australia v HREOC* reiterated an observation made by Brennan CJ and McHugh J in *I. W. v City of Perth*:

> *"Many persons think that anti-discrimination law has a long way to go. In the meantime, courts and tribunals must faithfully give effect to the text and structure of those statutes without any preconceptions as to their scope."*[54]

and Davies J later pointed out:

> *"The (HREOC) Commission's failure to adopt this approach led it to fail to take into account relevant factors, as Sackville J has shown. The Commission in effect followed the approach enunciated in* Albemarle Paper Co v Moody *(1975) 422 US 405 AT 425. In* Waters, *Mason CJ and Gaudron J would have adopted that view. However, the majority of their Honours were of a different view."*[55]

The approach of Mason CJ and Gaudron J that Davies J was there referring to, is the "*purposive*" approach evolved by the Court in relation to the notion of discrimination under sections 92 and 117 of the Constitution. It involves a two stage examination of a discriminatory requirement: ascertaining whether there is a difference that might justify different treatment and if so, whether the different treatment in issue is reasonably capable of being seen as appropriate and adapted to that difference[56].

52. Those considerations and observations weigh against the words of paragraph 143(1C)(f) being read in a way that would extend their ordinary meaning. There is nothing in the ordinary meaning of the words *discriminate against an employee because of age* that would justify their extension to cover indirect discrimination by the imposition of requirements that have adverse impact on persons of a particular age. Nor is there a basis in the words of paragraph 143(1C)(f) to import a reasonableness test corresponding to one or other of the forms expressly provided for in other statutory contexts prohibiting discrimination on grounds of race, sex or disability. Moreover, differences exist between definitions of indirect discrimination in the principles embodied in the anti-discrimination legislation about 10 of the 14 attributes specified in the Act.

53. It follows that as a matter of construction of paragraph 143(1C)(f) and subsection 143(1D), it requires a logical leap to accept that some form of indirect discrimination on grounds of age can be divined as the meaning of the words used, unencumbered by any antecedent embodied principle in a federal statute. Perhaps the optimal leap would be in the direction of adopting the "*purposive*" analysis of the anti-discrimination regime. That would construe paragraph 143(1C)(f) as an intended prohibition on awards or agreements containing discriminatory provisions, broadly defined, that have the effect of impairing equality of opportunity or treatment. However, the dry observation of Davies J about the non-adoption of Mason CJ and Gaudron J's advocacy of a similar approach underlines the barriers to making such a leap without more than modest support in the language of the Act.

54. The first version of this Appendix was chided for omitting some *additional words* that followed the two sentences we have quoted from the decision of Brennan CJ and

McHugh J. We will mend that omission by including the additional words. However we include also the introduction to the passage. We do so because, although lengthy, the detail may be instructive. The full passage also contrasts the reference to "ambiguities" in the "additional words" with several substantive points about the scope, purpose and effects of the sometimes artificial definitions and restrictions found in anti-discrimination legislation:

> *"Otton LJ also said* ([1997] 2 WLR 824 at 840; [1997] 1 All ER 289 at 304) *that, like Templeman LJ in* Savjani*:* ([1981] QB 458 at 466-7) *he would "be slow to find that the effect of something which is humiliatingly discriminatory in racial matters falls outside the ambit of the Act". With respect, while we think that* Farah *was rightly decided, that is not the correct approach in determining questions under the Equal Opportunity Act 1984 (WA). In a case like* Farah*, the first question is whether the activity which the person refused to provide is capable of being regarded as a service which that person or his or her employer provides to other citizens. If it is, and a holding to that effect would promote the objects of the Act, then the court or tribunal should hold that it is a service within the meaning of the Act.* ***But, given the artificial definitions of discrimination in the Act and the restricted scope of the applications, the court or tribunal should not approach the task of construction with any presumption that conduct which is discriminatory in its ordinary meaning is prohibited by the Act.*** *The Act is not a comprehensive anti-discrimination or equal opportunity statute. The legislature of Western Australia, like other legislatures in Australia and the United Kingdom, has avoided use of general definitions of discrimination such as the one that Gaudron and McHugh JJ gave in* Castlemaine Tooheys Ltd v South Australia *and to which McHugh J referred to in* Waters v Public Transport Corp:
>
> > *'A law is discriminatory if it operates by reference to a distinction which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant to the object to be attained; a law is discriminatory if, although it operates by reference to a relevant distinction, the different treatment thereby assigned is not appropriate and adapted to the difference or differences which support that distinction. A law is also discriminatory if, although there is a relevant difference, it proceeds as though there is no such difference, or, in other words, if it treats equally things that are unequal – unless, perhaps, there is no practical basis for differentiation.'*
>
> *Those legislatures have also deliberately confined the application of anti-discriminatory legislation to particular fields and particular activities within those fields.*
>
> *No doubt most anti-discrimination statutes are legislative compromises, resulting from attempts to accommodate the interests of various groups such as traders, employers, religious denominations and others to the needs of the victims of discrimination. As the evils of discrimination in our society have become better understood, legislatures have extended the scope of the original anti-discrimination statutes.* ***Many persons think that anti-discrimination law has a long way to go. In the meantime, courts and tribunals must faithfully give effect to the text and structure of these statutes without any preconceptions as to their scope. But when ambiguities arise, they should not hesitate to give the legislation a construction and application that promotes its objects. Because of the restricted terms of a particular statute, however, even a purposive and beneficial construction of its provisions will not always be capable of applying to acts that most people would regard as discriminatory.[57]"*** (our emphasis)

55. We hope that it may be understood that a substantive point is broached by the analysis we have presented. That point goes to the construction of the Act's provisions. The anti-discrimination object of the Act manifests no overt concern with the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. That concern is part of the definition of discrimination in ILO C111. The concern is also integral to the principles embodied for the Commission to apply under sections 93 and 93A. But, that concern is not so readily found in the Act for the purposes of discrimination related to age, mental disability or sexual preference. It may be discovered in ILO C111 for the attributes political opinion and religion, but it is not explicit in the Act for them either. The notion of indirect discrimination for all of those attributes is at large. Having regard to the structure of the Act, and to the reasoning of Brennan CJ and McHugh J in the passage quoted, it would seem courageous to treat those questions as matters of mere ambiguity. We were provided with an opinion given by Mr Anthony Cavanough QC that displays such courage. He suggested we should apply a principle of statutory construction to the effect that what cannot be done directly, cannot be done indirectly[58]. With respect, the authorities he relies upon do not appear to address either the reasoning of the cases we have cited, or any of the terms of the statute to which we must apply that reasoning.

The explication of what constitutes discrimination in subsections 143(1C) and 143(1D):

56. The exemption of junior rates, now provided for in paragraph 143(1D)(a) and in its counterparts in subsection 170LU(6) and subitem 54(1), is framed as either an exception from what would be discrimination, or perhaps more properly, as part of the explication of what is discrimination for purposes of paragraph 143(1C)(f)[59]. Paragraph 143(1D)(a) allows that *a decision or determination* does not discriminate merely because it provides for a junior rate. However, paragraph (b) of that subsection also frees a *decision or determination* from being discriminatory merely because it *"discriminates, in respect of particular employment, on the basis of the inherent requirements of that employment*". We note that the two subsections operate on decisions and determinations *in futuro*, not on existing award provisions. Primarily subitems 49(8) and 51(7) of the WROLA Act vest the Commission with an independent power that operates on discrimination in an existing provision of an award. It does so by requiring the review of an award to determine that it meets the criterion that:

> *"it does not contain provisions that discriminate against an employee because, or for reasons that include, ... age ..."*

For that purpose, paragraph 54(1)(b) makes the same qualification to exclude from the meaning of "*discriminate"* a provision that discriminates *in respect of particular employment on the basis of the inherent requirements of that employment*.

57. However, subsection 113(2A) obliges the Commission to remove discrimination from what it "*considers to be a discriminatory award or agreement*" referred to it by the Sex Discrimination Commissioner. Under section 50A of the *Sex Discrimination Act 1984*, a complaint may be lodged that a person has done a discriminatory act under an award or agreement. If it appears to that Commissioner that the act is discrimination it must be referred to the AIRC. Since the 1993 Act, for the AIRC a *discriminatory award or agreement* is defined to be an award so referred that requires a person to do any act that would be unlawful under Part II of the *Sex Discrimination Act 1984*, except for the fact that the act would be done in direct compliance with the award or agreement. So far as we are aware, and again we have searched, no award or agreement has ever been referred under section 50A of the *Sex Discrimination Act 1984* in respect of a junior rate provision, or age discrimination. However, for the reasons given at paragraph 30 above, subsection 113(2A) implicitly invokes the full array of tests for indirect discrimination, reasonableness, and other criteria and exemptions of discriminatory conduct available under the *Sex Discrimination Act 1984* .

58. Subitem 54(1) of the WROLA Act repeats the exception from discrimination of provisions that discriminate in respect of particular employment on the basis of the inherent requirements of that employment. Despite a minor difference in wording, the same explication of what is discrimination would apparently apply to the Commission's exercise of its power to review the award as applies for the purposes of paragraph 143(1C)(f). For present purposes, it is not necessary to refer to subsections 170LU(5), (6) and (7). Those subsections effectively repeat the terms of subsection 143(1C) in relation to a Commission decision to certify or to refuse to certify a Part VIA enterprise agreement.

59. Thus for purposes of a decision under paragraph 143(1C)(f) or a review under subitem 51(7), a junior rate provision may be presumed to be a provision that discriminates on the ground of age. However, that characterisation is subject to the Commission's decision about whether paragraph 143(1D)(b) or subitem 54(1)(b) operates to rebut that presumption because, in respect of particular employment, the discrimination is made "*on the basis of the inherent requirements of that employment*". In other words, the Commission itself may be the instrument of reversing a *prima facie*

assumption that a junior rate does discriminate in the sense in which that term is used in the Act.

60. Moreover that construction of the Act is reinforced by subsection 143(1E) and subitem 54(2). Those provisions "sunset" the exemption of decisions and determinations saved by paragraph 143(1D)(a) and subitem 54(1)(a). The saving does not apply to decisions made more than three years after 22 June 1997, *"except where the Commission decides on a case-by-case basis that the paragraph should apply"*.

61. It follows that the Act as it currently operates may be construed to give the Commission a discretion to determine on review of an award that a decision to retain or include a junior rate is merited on the basis of the inherent requirements of the employment. Thereupon, the junior rate provision will be free from any operation of the Act's anti-discrimination obligations on it. A similar discretion applies to a decision or determination about making an award, and presumably, on certifying an agreement.

62. It may be thought that paragraph 143(1D)(b) and its counterparts would need to be read too widely for it to accommodate acceptance of a junior rate as a discrimination in respect of a particular employment based on the inherent requirements of that employment. However, we note some support for a broad reading of that provision. The first is consistency between the use of the words "*that employment*" and the expanded meaning of "employment" in Article 1.3 of the ILO C111 in the legislative history context we have described. The extracted statement from the Explanatory Memorandum about the intended effect of the more narrowly expressed exception in paragraph (c) of the definition of discrimination in the HREOC Act also supports that construction.

63. Some limited support is available from several cases, in which similar but narrower expressions have been construed. In *Qantas Airways Ltd v Christie*[60] Brennan CJ, who agreed generally with Gaudron J, made observations about a termination of employment for the prohibited reason - age. As we have noted, age as a reason for termination is not unlawful "*if the reason is based on the inherent requirements of the particular position*" concerned, under former subsection 170DF(2) of the Act (re-enacted as subsection 170CK(2) of the current Act). Brennan CJ stated:

> *"The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis*

> *which impermissibly discriminates against the employee, by reference to that organisation."*[61]

Gaudron J's decision explained the relevant test in the following passage:

> *"[35] Much of the argument in this Court was directed to the question whether the expression 'inherent requirements' in s 170DF(2) should be construed broadly or narrowly. It was put on behalf of Mr Christie that it should be construed narrowly because it is an exception to or exemption from the prohibition on termination on discriminatory grounds and a broad construction would be contrary to the evident purpose of s 170DF, namely, to prevent discriminatory conduct. I doubt whether s 170DF(2) is an exception or exemption of the kind which the argument assumes.* ***Rather, I think the better view is that sub-s (2) is, in truth, part of the explication of what is and what is not discrimination for the purposes of s 170DF of the Act.*** *However, that issue need not be explored for there is nothing to suggest that the expression 'inherent requirements' in s 170DF(2) is used other than in its natural and ordinary meaning.* ***And that meaning directs attention to the essential features or defining characteristics of the position in question.***
>
> *[36] A practical method of determining whether or not a requirement is an inherent requirement, in the ordinary sense of that expression, is to ask whether the position would be essentially the same if that requirement were dispensed with. Clearly, Mr Christie's position would not be essentially the same if it did not involve flying B747-400 aircraft or if it did not involve flying on Qantas' international routes. However, that does not answer the question raised by this case. The question is whether the position would be essentially the same if it involved flying B747-400 aircraft but only on those routes which remain available by reason of the enforcement of the Rule of 60."*[62] (emphasis supplied)

64. Those passages create a basis for a general range of considerations to be taken into account in examining the essential requirements of a particular position. However, we do not wish to understate the care with which the construction of similar expressions in anti-discrimination legislation must be approached. In *Commonwealth v HREOC* Wilcox CJ had to construe and apply the expression *"based on the inherent requirements of the particular job"*. As we have seen that expression is part of the definition of discrimination in subsection 3(1) of the HREOC Act, and is similar in several respects to the wording of paragraph 143(1C)(f). Wilcox CJ's decision stressed the need for a close linkage between the discriminatory distinction and the inherent requirements of the particular job:

> *"... If the words 'based on' are so interpreted that it is sufficient to find a link between the restriction and the stereotype, as distinct from the individual, the legislation will have the effect of perpetuating the very process it was designed to bring to an end. So it is not appropriate to reason that, because extreme fitness is an inherent requirement of the job of an SSO pilot, and younger pilots tend to be*

> *more fit than older pilots, therefore the requirement that SSO pilots be under 28 years of age on appointment is 'based on' the requirement of fitness. Unless there is an extremely close correlation between the selected age and the fitness requirement, so that the age may logically be treated as a proxy for the fitness requirement, the legislation will have the effect of damning individuals over 28 years by reference to a stereotypical characteristic (less physical fitness) of their age group."*[63]

That passage may illustrate some of the likely issues that would arise in testing discriminatory provisions affecting particular employment of juniors against the inherent requirements of that employment should the need arise.

65. In *Commonwealth v Carter*[64], Cooper J dealt with a review of a HREOC decision based on a provision of the Defence Act which precluded discrimination in respect of disability, but excluded from the discrimination the circumstance that:

> *"the person because of his or her disability:*
>
> *(a) would be unable to carry out the inherent requirements of the particular employment."*[65]

In relation to that provision Cooper J stated:

> *"Having regard to the objects of the Act and Division 1 of Part 2 as a whole, it would require clear words to allow an employer to implement a policy of discrimination against persons with one or other specified disabilities on the ground that such discrimination was a necessary requirement of the particular employment (an example of such an express provision is to be found in s 15(1) of the Canadian Human Rights Act 1985).*
>
> *Accordingly, the work required to be done in any particular employment will depend upon the duties and tasks actually fixed by the employer, including the manner in which and mode by which those duties and tasks are to be carried out. Where these matters are not fixed by the employer, then the general nature of the work itself will indicate what, in a functional sense, has to be done to do the work. The performance of the work must also be in the context of the common law duty of care owed by a worker to co-workers and others in a relationship of proximity to the worker when the work is performed. The Act does not seek to abrogate the common law duty of care. Thus, in the context of s 15(4) of the Act, ability or capacity to carry out the inherent requirements of the particular employment means ability or capacity consistent with the discharge of the common law duty of care to avoid risk of loss or harm to others having regard to the person's past training, qualifications and experience relevant to the particular employment, the person's performance as an employee and all other relevant factors that it is reasonable to take into account.*
>
> *Although it may be correct to say, as the applicant did, that the inherent requirements of a particular employment are not confined to the requirements related to the physical abilities or physical capabilities of an employee to execute*

the tasks or skills of the particular employment, non-physical requirements must not operate as unlawful discrimination under the Act.

The inherent requirements of a particular employment are the necessary tasks required to be performed and the personal characteristics or qualifications, if any, required by the employer, divorced of any requirement or condition the enforcement of which would constitute discrimination against a person on the ground of a disability. So understood, the inherent requirements of the particular employment will have functional requirements and requirements as to the satisfaction of any externally imposed personal characteristics or qualifications. *To take as an example the position of a factory machinist who is required to be a non-smoker. The inherent requirements of such a position are that the employee is capable of operating the machine and does not smoke. The non-smoking requirement discriminates against applicants who smoke. However, it is not discrimination unlawful under the Act. For the purposes of s 15(4) of the Act, one of the inherent requirements of the particular employment would be that the applicant or employee did not smoke. ...*

In order to obtain the benefit of the exception contained in s 15(4) of the Act, the employer bears the onus of establishing the inherent requirements of the particular employment and that the person would be unable to carry out those inherent requirements because of his or her disability. The employer must show that the employee or applicant for employment cannot (with or without accommodation: s 15(4)(a) and s 15(4)(b)), because of his or her disability, perform the requirements of the particular employment which are truly necessary to ensure the adequate performance of the employment. Although the Commission is not bound by the rules of evidence (s 98(1)(a)), such matters are to be established on the balance of probabilities based on relevant and credible evidence, taking into account the circumstances specified in s 15(4), and according to the dictates of common sense, as matters of objective fact and not as matters of mere speculation or impression."[66] (Emphasis supplied)

66. It is apparent from the decisions we have referred to, and from several Federal Full Court and first instance decisions, that the various statutory prohibitions of discrimination have been productive of differences of opinion[67]. Differences appear to have arisen about how to word and to apply tests for the reasonableness of indirect discrimination, and about tests for whether a requirement that would otherwise be discriminatory is based on the inherent requirements of a particular job, position or employment. We have not attempted to explore those differences or to reconcile them for the purposes of this analysis. It is sufficient to observe that the reasoning of the cases and the principles we have referred to, confirm that paragraph 143(1D)(b) of the Act should be read as part of the explication of what is discrimination for purposes of the Act. Moreover, but less confidently, in applying paragraph 143(1D)(b), it would seem to be appropriate to look to the essential features or defining characteristics of the particular employment in question. However, that formulation is based upon Gaudron J's reasoning which was a minority view in *Christie,* and may need to be qualified in the

different context of the Act. Perhaps, as suggested by Mr Cavanough QC in the opinion to which we have referred, the better view may be that: *there are policy reasons for requiring a tight correlation between the inherent requirements of the (employment) and the relevant distinction or preference,* to paraphrase Wilcox J. [68]

67. Even if that be so, it may be proper for the Commission to apply for the purpose the broad notion of "employment" associated with that expression in Article 1.3 of ILO C111. A wide range of considerations could perhaps be relevant to justifying an age discriminatory requirement of a junior rate as based on the *inherent requirements of that employment*. The Commission's performance of its functions under subsections 143(1C) and (1E) and subitem 51(7) in relation to junior rate provisions would in the ordinary course depend upon an application of paragraph 143(1D)(b), and subitem 54(1)(b) respectively.

Endnotes

[1] Thus Section 132A provided for offences in relation to independent contractors and defined "discriminatory action" in terms of refusal to supply or make use of services. Sections 5 and 188 of that Act were relatively longstanding prohibitions of discrimination against employers or employees for reasons related to freedom of association, but the term "discrimination" is not used in the Act at the time of its repeal.

[2] Section 93 *Industrial Relations Act 1988*.

[3] Subsection 113(2A) inserted Act No. 179 of 1992.

[4] *The Age Discrimination in Employment Act*, 29 USC S 621-634.

[5] Royal Commission on Australian Government Administration Report Volume 1 at p. 191.

[6] The Human Rights and Equal Opportunity Commission Regulations: Commonwealth Statutory Rule 1989 No. 407 of 21 December 1989, Regulation 4(a)(i).

[7] Quoted in Joint Governments' Concluding Submission at Appendix B3.

[8] *Victoria v The Commonwealth* (the *Industrial Relations Act Case*) (1996) 187 CLR 416 especially at 504-510, and 529-532.

[9] The *Industrial Relations Reform Act 1993*: subsection 4(1): definition of "Anti-Discrimination Conventions"; Section 93A: Commission to take account of Family Responsibilities Convention in performing functions; subsection 3(g), section 170BA, paras 170CA(2)(a) and 170DF(1)(f): prohibition on termination of employment for reasons that include age; subsections 170MD(5) and (6): certifications of agreement to be refused if provision discriminates against employee for reasons of age, not based on inherent requirements of employment; subsection 170ND(10): in respect of enterprise flexibility agreements; subsection 150A(4): review of awards to remove discriminatory provisions; regulation 26A: prescribed award review procedure.

[10] Section 170BA.

[11] Subsection 3(g).

[12] Subsection 170CA(2) and paragraph 170DF(1)(f).
[13] Subsections 170MD(5) and (6); 170ND(10).
[14] Catalogue No. 934549.7
[15] Hansard Reports: Senate 8 December 1993 at 4200
[16] Ibid at 4327
[17] For details see endnote to paragraph 48 within.
[18] Hansard Reports: Senate ibid p. 4200
[19] Print L3357.
[20] Hansard: House of Representatives Debates: 9 June 1994 p.1780.
[21] "Working Nation": Policies and Programs at p. 34.
[22] Subsections 150A (3) and (4).
[23] Regulation 26A commenced 4 July 1994.
[24] Construction of a statute is to be guided by the terms of the statute, not the terms of the parliamentary debate: *Australian Federation of Construction Contractors; Ex parte Billing* (1986) 68 ALR 416 at 420; *Liggins v Comptroller-General of Customs* (1991) 32 FLR 112; *Leask v The Commonwealth* (1996) 140 ALR 1 at 41. If passages of a debate are mistaken, they could not be an aid to legal construction: *Re Bolton: Ex parte Beane* (1987) 162 CLR 514 at 517; *Mills v Meeking* (1990) 169 CLR 214 at 233-234, 236-237; *Brennan v Comcare* (1994) 122 ALR 615 at 636.
[25] Print M7824 at page 3.
[26] Ibid Print M7824 at pp. 9-10.
[27] HREOC Act subsection 3(8).
[28] *Qantas Airways Ltd v Christie* (1998) 152 ALR 365 at 383 per McHugh J, at 392 per Gummow J, at 404 per Kirby J.
[29] Subsection 3(j),.paragraphs 88B(3)(e), 143(1C)(f), 143(1D)(a), subsections 143(1E), 170LU(5), (6) and (7); *Workplace Relations and Other Legislation Amendment Act 1996* Schedule 5: items 49(8)(f), 51(7)(f) and 54(1) and (2).
[30] *Racial Discrimination Act 1975* subsection 9(1); *Sex Discrimination Act 1984* sections 5, 6, 7, 7A; *Disability Discrimination Act 1992* sections 5, 7, 8, 9.
[31] *Racial Discrimination Act 1975* subsection 9(1A); *Sex Discrimination Act 1984* subsections 5(2) and (3), 6(2) and (3), 7(2) and (3), paragraph 7A(b)(ii) and (iii), and section 7B; *Disability Discrimination Act 1992* section 6.
[32] *Racial Discrimination Act 1975* subsection 9(1), sections 11, 12, 13, 14, 15, 16 and 17; *Sex Discrimination Act 1984* subsections 14(1), (2) and (3A), sections 15, 16, 17, 18, 19, 20 and Division 2; *Disability Discrimination Act 1992* Part 2: Divisions 1 and 2.
[33] *Racial Discrimination Act 1975* subsection 9(1), sections, 11, 12, 13, 14, 15, 16 and 17; *Sex Discrimination Act 1984* sections 14 - 20 in Part II Divisions 1 and 2; *Disability Discrimination Act 1992* Part 2.
[34] *Racial Discrimination Act 1975* section 8; *Sex Discrimination Act 1984* Division 4; *Disability Discrimination Act 1992*: exceptions are integrated with the respective prohibitions of discrimination in particular matters. Thus "work" is subject to exceptions stated in subsections 15(3) and (4).
[35] Print M7824.
[36] *"Report on Review of Awards - Direct Discrimination"* the Human Rights and Equal Opportunity Commission December 1994 at pp. 2-3 citing ILO General Survey of the Committee of Experts on the Implication of Conventions and Recommendations, ILO Geneva 1998 at p. 23.
[37] Print M5600 at 16, 20.
[38] (1991) 173 CLR 349.
[39] Print M7824 at page 6.
[40] Australian Retailers Association Submission 23 at pp. 23-25.
[41] Appendix F Submission 23 at pp. 13-19.
[42] (1971) 401 US 424.
[43] See paragraph 40 within and endnotes.

[44] *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 357-358.
[45] (1989) 168 CLR 461 at 487-488.
[46] (1989-1990) 169 CLR 436 at 478-479.
[47] *Waters* ibid per Dawson and Toohey JJ at 392; McHugh J at 400-403 who each appear to have decided that the direct discrimination and indirect discrimination provisions were mutually exclusive; see also *Australian Iron and Steel Pty Ltd v Banrovic* (1989) 168 CLR 165 at 175 per Deane and Gaudron JJ; *Australian Medical Council v Wilson* (1996) 137 ALR 653 at 679-680 per Sackville J in relation to the *Racial Discrimination Act 1975*; *Commonwealth Bank of Australia v HREOC* CLS 1997 FED 956 per Davies, Beaumont and Sackville JJ in relation to the *Sex Discrimination Act 1984*.
[48] Ibid section 7A, subsection 14(3A).
[49] *Racial Discrimination Act 1975* subsection 9(1) and (1A): making unlawful distinction based on race, colour, descent or national or ethnic origin including indirect requirement to comply; *Sex Discrimination Act 1984* sections 5, 6, 7, 7A and 7B in relation to sex, marital status, pregnancy and family responsibilities with indirect discrimination subject to the "reasonableness test" prescribed by section 7B; *Disability Discrimination Act 1992*: section 5 disability discrimination, Part 2 sections 15-29 prohibition on discrimination making it unlawful to discriminate in certain arrangements and conditions.
[50] *Commonwealth of Australia v Human Rights and Equal Opportunity Commission* [1997] 664 FCA (18 July 1997) per Sackville J at p. 17; *Waters* ibid at 392-393 per Dawson and Toohey JJ, at 420 per McHugh J; *Australia Medical Council v Wilson* (1996) 68 FCR 46 at 55 per Heerey J (with whom Black CJ agreed), at 74 per Sackville J; *Commonwealth Bank of Australia v HREOC* [1997] 1311 FCA (28 November 1997) Davies, Beaumont and Sackville JJ; per Sackville J at 20; Davies J at 11 and Beaumont J at 12 and 13 appear to have analysed subsection 5(2) of the *Sex Discrimination Act 1984* to similar effect.
[51] *Anti-discrimination Act 1977* (New South Wales): section 49ZYA, inserted 1993 but commenced 1 July 1994, covers direct and indirect discrimination on grounds of age, Part 4G Division 2: discrimination in work on the ground of age unlawful for certain purposes, with expressed exception relating to offering employment or terms and conditions for junior employees under 21 years of age (section 49ZYI); *Equal Opportunity Act 1995* (Victoria): commenced 1 January 1996, sections 6 and 7 establish meaning of discrimination on basis of an attribute, section 8 covers direct discrimination, section 9 incorporates a reasonableness test in the general definition of indirect discrimination, Part 3: When is discrimination prohibited?; exception for youth wages for employee under age 21; *Anti-discrimination Act 1991* (Queensland) (assented to 9 December 1991): prohibits discrimination on basis of certain attributes (sections 7 and 8), defines direct discrimination (sections 9 and 10) and indirect discrimination (section 11), and identifies areas of activity in which discrimination is prohibited (Part 4), but provides exemption for youth wages (section 33) among other; *Equal Opportunity Act 1984* (South Australia): Part 5 prohibition of discrimination on the ground of age assented to April 1990 commenced 1 June 1991: criteria for establishing discrimination on ground of age include direct (subsection 85(a)) and indirect discrimination (subsection 85(b)); prohibits discrimination in employment as unlawful, subject to exemption of offer of employment to only a young person, or payment to a young person at less than adult rate under award or agreement [paragraph 85f(4)(b)]; *Equal Opportunity Act 1984* (Western Australia): Part IVB discrimination on the ground of age, assented to December 1992; prohibits discrimination on grounds of age, defining indirect discrimination (subsection 66V(3)), in work and other specified areas of activity, but excepts measures to achieve equality of opportunity (section 66ZP), or acts done in compliance with award or agreement relating to payment of wages to employees under age 21 (section 66ZS). See generally also: CCH *Australian and New Zealand Equal Opportunity Law and Practice* P. 8-530 to 8-970.
[52] *Commonwealth of Australia & Anor v Human Rights & Equality Opportunity Commission & Ors* [1997] 664 FCA at 19 (18 July 1997).
[53] *Commonwealth of Australia & Anor v Human Rights & Equality Opportunity Commission & Ors* ibid at p. 21.

[54] *IW v City of Perth* (1997) 71 ALJR 943 at 949.
[55] *Commonwealth of Australia & Anor v Human Rights & Equality Opportunity Commission & Ors* ibid at p. 11.
[56] *Waters* ibid at 364.
[57] I.W. v City of Perth (1997) 146 ALR 696 at 703-704.
[58] The authorities cited for that proposition were *Container Terminals Australia Ltd v Xeras* (1991) 23 NSWLR 215*, Sentry Life Assurance Ltd v Life Insurance Commission* (1983) 49 ALR 292 (at 308)*, Toohey v Gunther* (1928) 41 CLR 181 (at 195)*, Commonwealth v Queensland* (1921) 29 CLR 1 (at 15)*,* Bennion, Statutory Interpretation, 3rd edition, 1997, Part XXII (pp. 785-803 esp. section 322 at pp. 719-720)*.*
[59] *Qantas Airways Ltd v Christie* ibid at 375 per Gaudron J, with whom Brennan CJ generally agreed as to reasoning, except on a point of fact.
[60] *Qantas Airways Ltd v Christie* ibid*.*
[61] *Qantas Airways Ltd v Christie* ibid at p. 366.
[62] *Qantas Airways Ltd v Christie* ibid at p. 375. see also
[63] *Commonwealth v HREOC* (1998) 158 ALR 468 at 428 per Wilcox CJ.
[64] *Commonwealth v Carter* (1996) CLS FED 589.
[65] *Commonwealth v Carter* ibid.
[66] *Commonwealth v Carter* ibid.
[67] *Waters* and cases earlier cited illustrate the point but see also: *Commonwealth of Australia v HREOC* (1995) 63 FCR 74 Lockhart, Shepherd and Lindgren JJ; *Commonwealth of Australia v HREOC* (1997) 1311 FCA Davies, Beaumont and Sackville JJ; In *Commonwealth of Australia v HREOC* (1997) 664 FCA (18 July 1997) Sackville J at pages 18 to 21 reviews some of the authorities and differences of view; *Australian Medical Council v Wilson* (1996) 68 FCR 46 per Black CJ, Heerey and Sackville JJ, at 47 per Black CJ in relation to the meaning of indirect discrimination; at 54-55 per Heerey J and 73-74 per Sackville J.
[68] Citing Wilcox CJ in *Commonwealth v HREOC*.

APPENDIX D

Proposals as Non-discriminatory Alternatives

PROPOSAL 1 – The Construction, Forestry, Mining and Energy Union proposal

In the submission made as submission 37 in November 1998 to the Inquiry, the Construction, Forestry, Mining and Energy Union proposed that junior rates should be removed from existing awards in the building and construction industries, proposing the competency based classification structure in the industry should be applied. In particular it supplied the extracts from the National Building and Construction Industry Award 1990, Appendix S:

NATIONAL BUILDING AND CONSTRUCTION INDUSTRY AWARD 1990 [N0122]

APPENDIX S

CONTENTS

Section 1: Introduction - About this Appendix

1.1 The parties to the building and construction industry - employers, unions and governments - have for some time shared a belief that the industry needs to improve the way it goes about its work. This is in recognition of the fact that the potential of the industry, in both domestic and international terms, is not being fully realised.

1.2 This "Award Restructuring Appendix" is part of a broader effort to improve the building and construction industry in Australia. It addresses some of the key issues relating to the way work is organised and skills are acquired and rewarded. In addition, it also attempts to address the perennial concerns of construction

workers relating to job security and skills acquisition. This Appendix recognises that the cyclical and unstable nature of the industry calls for different solutions to some problems to that adopted in other industries. However, to the extent possible, consistency has been maintained with other restructured awards.

1.3 The approach underlying the Appendix is one of consultation and agreement. During its initial period of introduction, this Appendix is designed to be accessed site by site, or company by company, where agreement between an employer and his or her employees and their union has been reached. Following 12 months of the operation of this Appendix a review will be conducted by the Australian Industrial Relations Commission to determine whether it should apply to the full scope of the Award.

1.4 Central to this Appendix is a commitment of the parties to nationally approved competency standards and accredited, structured training. The parties also recognise and support the maintenance of structured trade training in the industry.

Section 2: What is "Award Restructuring?"

2.1 Award restructuring is a short-hand title for a wide ranging agenda for reform. In the building and construction industry the main elements of restructuring include:

- a new classification structure based on nationally recognised competency standards for skills and training;
- the creation of a career path for all employees;
- Certification (leave reserved);
- increased labour flexibility on site; and
- modernisation of the Award to make it easier to read and apply.

Section 3: Guidelines for Implementation

3.1 This Appendix can be introduced by an agreement in writing between the relevant union and a respondent employer or employer organisation specifying the scope of the agreement and its period of operation.

3.2 The Appendix shall operate and be available for introduction in the States of NSW, Victoria and the ACT for those streams defined in this Award except Civil Operating which shall operate nationally within the scope of the Award. Any respondent to the Award can make application to extend the operation of the Appendix to another State or States by agreement with the parties directly involved.

3.3 The Appendix shall operate in relation to a particular State from the date the Appendix is inserted into the Award for that State.

3.4 Where the new Appendix has been introduced the rates of pay prescribed in the Appendix shall be substituted for those appearing in subclause 9.1(a), 9.1(b), 9.1(c) and 9.1(d) of the Award. All other provisions of clause 9 of the Award shall continue to apply.

3.5 Parties shall implement this Appendix through appropriate consultative mechanisms. Wherever possible, consultative committees comprising equal numbers of employee

and employer representatives shall be established. Matters raised for consideration of the consultative committee shall be related to implementation of the new classification structure, the facilitative provisions contained in this Award and matters concerning training.

3.6 No existing employee's rate of pay shall be reduced as a result of the introduction of this Appendix.

Section 4: Definitions of Key Concepts and Terms

4.1 "Australian Vocational Training System" or "AVTS" refers to the new system of competency based training and certification being developed by the Employment and Skills Formation Council. The AVTS system has a strong industry focus and is designed to expand the amount of vocational training in secondary schools. This Appendix recognises the future role of AVTS qualifications in the industry.

4.2 "Certification" means the proposed system of skills recognition and accreditation outlined in section 5 of this Appendix. This certification system is not designed to replace the role of State and territory governments in this area.

4.3 "Civil Operations Stream" includes all related skills involved in earthmoving and associated activity and does not extend beyond the scope of this Award.

4.4 "Fields of Work" means a defined grouping of logically related skills based on an efficient organisation of work. The principal purpose of fields of work is to facilitate the development of training modules specifically tailored to encourage full practical utilisation of skills.

4.5 "Fitout/Finishing Stream" includes all fields of work principally concerned with fitout and finishing activities relating to newly constructed or existing buildings or structures, and does not extend beyond the scope of this Award.

4.6 "Industry accredited course" or "nationally accredited course" - is a course which has been constructed to reflect a group of standards which the CTA has endorsed as being appropriate combinations of skills to be available to the industry.

4.7 "Module": One module equates to 40 nominal training hours.

4.8 "CTA" means "Construction Training Australia". CTA shall be the recognised authority (for the purposes of this Appendix) responsible for developing competency standards for consideration and endorsement by the National Training Board/Australian National Training Authority and the provision of advice and assistance to State and Territory Training Authorities in respect of matters relating to training in the industry and callings covered by this Award, including but not being limited to:

- competency standards
- curriculum development
- training courses
- articulation and accreditation requirements both on and off the job
- on the job training guidelines, and
- assessment and certification arrangements.

In relation to the development of standards for this Award, the CTA may consult with other bodies or committees of a like nature to ensure that consistent standards are maintained across industries. CTA shall designate those fields of work that constitute the streams contained herein.

4.9 "New entrant" means an employee who has never previously worked within the scope of any of the following awards: National Building and Construction Industry Award 1990, Building and Construction Industry (ACT) Award 1991, Building and Construction Industry (Northern Territory) (Consolidated) Award 1982, the National Metal and Engineering (On-site) Construction Industry Award 1989, Australian Workers' Union Construction and Maintenance Award 1989, Plumbing Trades (Southern States) Construction Agreement 1979, Plumbing Industry (New South Wales) Award 1983, Plumbing Industry (Qld. and W.A.) Award 1979 Sprinkler Pipe Fitters' Award 1975 including any federal award which was superseded by the making of these awards, or any State counterpart award covering the same industries and/or callings as the federal awards cited. If there is any doubt as to the status of an employee in this regard, the following documentation may be regarded as prima facie evidence that an employee is not a new entrant:

(a) documentary evidence concerning registration with any of the construction industry portable long service leave schemes;

(b) documentary evidence concerning contributions into an approved industry superannuation fund (e.g. C+BUSS);

(c) documentary evidence concerning membership of a union party to any of the above Awards in the building and construction industry.

The new entrant classification does not apply to persons who were employed in the building and construction industry prior to the introduction of this Appendix. Existing employees are subject to the translation arrangements set out in Schedule A of the Appendix.

The purpose of introducing the new entrant level is not to displace existing employees, but to facilitate the introduction of a career path. Accordingly, an employer shall not purposely "turn over" employees within the new entrant classification as an alternative to engaging employees on an ongoing basis.

Provided that nothing contained in this clause shall prevent a party from submitting a dispute about the status of an employee in this regard to the Reclassification Disputes Board outlined in clause 5(d) of this Appendix.

4.10 "Recognition of Prior Learning" or "RPL" means the formal recognition of skill attained through on the job experience and/or training and may include formal qualifications (such as overseas qualifications), which have hitherto been unrecognised. In the building and construction industry, RPL principles are incorporated in both the competency standards and in the industry skills tests developed by CTA for the various levels of the career structure contained in this Appendix.

4.11 "Self-directed Work Area Team" or "WAT" means a group of employees who work as a team to plan and execute functions relevant to their employers business. Work Area Teams are generally autonomous of direct managerial supervision and perform their tasks in a way which maximises productivity and the utilisation of skills.

4.12 "Streams" or "Skill streams" means a broad grouping of skills related to a particular phase or aspect of production and does not extend beyond the scope of this Award.

4.13 "Structures stream" includes all fields of work principally concerned with the erection of new structures or buildings (including demolition and pre-construction) up until, but not including, the fitout and finishing stage of construction and does not extend beyond the scope of this Award.

4.14 "Supervision": This Appendix recognises two levels of supervision which are as follows:

4.14.1 "General Supervision" applies to a person who:

(i) receives general instructions, usually covering only the broader technical aspects of the work; and

(ii) may be subject to progress checks but such checks are usually confined to ensuring that, in broad terms, satisfactory progress is being made; and

(iii) has their assignments reviewed on completion; and

(iv) although technically competent and well experienced there may be occasions on which the person will receive more detailed instructions.

4.14.2 "Limited Supervision" applies to a person who:

(i) receives only limited instructions normally confined to a clear statement of objectives; and

(ii) has their work usually measured in terms of the achievement of stated objectives; and

(iii) is fully competent and very experienced in a technical sense and requires little guidance in the performance of work.

Section 5: Certification and Related Issues

(a) Certification

5.1 It is the intention of the industry parties that a system of certification shall come into existence as soon as practicable after the introduction of this Appendix. The system of certification shall be administered by CTA and will aim to record the skills, qualifications and experience of employees under this Appendix. The system of certification shall be complementary to the role of state and territory governments. For the purposes of this Appendix, and subject to sub-clause 5.2 below, the certification system shall be regarded as a "leave reserved" matter pending further consideration by the industry parties.

5.2 In order to facilitate progress on this issue the industry parties shall, no later than six months from the date of operation of this Appendix, report to the Commission as to the degree of progress on the following issues related to the proposed certification system:

(i) the method by which certificates shall be issued and the information contained on them recorded;

(ii) the means by which the certification system shall be funded;

(iii) the processes by which the parties will ensure that no employees will be disadvantaged.

(b) Engagement and Training - Preference

(Leave reserved).

(c) Allocation to skill streams contained within this Award

5.3 Workers from Level 2 to Level 8 inclusive shall be primarily employed in either the Structural, Fitout and Finish or the Civil Operations Stream.

5.4 The purpose of streams is not to create demarcations but to facilitate appropriate combinations of training within the industry.

5.5 Employees shall work across streams provided that the appropriate training, where required, has been provided.

(d) Classification Disputes

5.6 It is recognised that from time to time disputes may arise as to the proper classification of a position or job to be filled by an employee. In the event that a dispute as to the proper classification or reclassification of a position or job does arise the dispute settlement procedure as detailed hereunder shall apply:

(i) the employee shall submit his or her grievance to the site or company consultative committee;

(ii) the consultative committee may mediate and/or suggest a mutually agreeable solution to the dispute;

(iii) if the site consultative committee is unable to resolve the dispute, the matter may be referred by the employer or the employee and his or her union to the Reclassification Disputes Board;

(iv) the Reclassification Disputes Board shall be constituted in each state by one employer and one union representative and shall be chaired by a member of the Australian Industrial Relations Commission. The decision of the Board shall be final, pending any legal rights the parties may otherwise have;

(v) the proceedings of the Board shall be conducted in an informal manner and shall emphasise conciliation. An employee appealing to the Board may be represented by his or her union.

5.7 In any case, in determining the appropriate classification of a position or job to be filled by an employee, an employer will pay full regard to:

(a) the nature and skill requirements of the position to be filled;

(b) the skill level and certification of the employee;

(c) the experience and qualifications of the employee in:

(i) relevant indicative tasks nominated in this Appendix, and/or

(ii) fields of work against which an employee is accredited.

5.8 Agreed national procedures will be established for testing the validity of an employee's claim for reclassification. These procedures shall be included in the Implementation Manual which is to be published separately.

Section 6: The Skill Based Career Structure

6.1 Existing employees shall transfer to the new classification structure on the basis of existing Award rates of pay in accordance with the translation schedule marked "A". Upon translation existing employees shall be

regarded as satisfying the requirements of the new skill level to which they translate. However, in seeking upward reclassification an employee shall be required to demonstrate that he or she meets the full requirements of the higher skill level in accordance with the criteria outlined in this section.

6.2 The classification structure that follows is designed to facilitate the improvement of the level of skills of the workforce and to provide a career path for all employees. It is drafted to achieve the objectives of the 1989 National Wage Case Principles.

6.3 Accordingly, each classification level builds upon the previous level so that the value of an employee to the industry and his or her employer increases as the employee progresses through the structure. Skills are built up in a sequential manner through job learnt skills and structured training and the new industry training framework developed by CTA reflects this intent.

6.4 Under the new classification structure, an employee's building and construction industry skills are to be formally recognised, industry wide, at all levels from new entrant to Construction Worker 8 Level. Employees will move up the classification

structure as they acquire additional accredited skills. Payment will be on the basis of the level of skills required to perform the work of a particular position or job offered by an employer.

Construction Worker Level 1 (CW1)

	Relativity to tradesperson
CW1 (a):- (New Entrant): Upon commencement in the industry	85%
CW1 (b): After three months in the industry	88%
CW1 (c): After 12 months in the industry	90%
CW1 (d): Upon fulfilling the substantive requirements of Construction Worker 1, as detailed below	92.4%

A Construction Worker Level 1 (CW1) works under general supervision in one or more skill streams contained within this Award.

A employee at CW1(d) will:

(i) have successfully completed, in accordance with RPL principles, a Construction Skills test equivalent to 16 modules of structured training; or

(ii) have successfully completed a relevant structured training program equivalent to 16 modules (inclusive of AVTS training).

Skills and Duties

An employee at CW1 level performs work to the extent of their skills competence and training. Employees will acquire skills both formal and informal over time and with experience, and will undertake indicative tasks and duties within the scope of skills they possess.

An employee at this level may be part of a self-directed Work Area Team (WAT), and may be required to perform a range of duties across the three main skill streams contained within this Award.

An employee at this level:

- works from instructions and procedures;
- assists in the provision of on-the-job training to a limited degree;
- coordinates work in a team environment or works individually under general supervision;
- is responsible for assuring the quality of their own work;
- has a qualification in First Aid.

Indicative of the tasks which an employee at this level may perform include the following:

- uses precision measuring instruments;
- basic material handling functions;
- operate small plant and pneumatic machinery;
- inventory and store control;
- operate a range of hand tools and oxy welding equipment;
- has a knowledge of the construction process and understands the sequencing of construction functions;
- is able to provide First Aid assistance to other employees.

The CW1 classification incorporates the following broadbanded Award classifications:

- Builders' Labourer Group 4
- Plasterer, Terrazzo or Stonemason's Assistant
- Stonemason Assistant - Factory (Queensland and Tasmania)
- Trades Labourer
- Jackhammer Person
- Mixer Driver (concrete)
- Gantry Hand or Crane Hand
- Crane Chaser

- Cement Gun Operator (excluding Victoria)
- Drilling Machine Operator
- Concrete Gang, including concrete floater (as defined)
- Roof Layer (Malthoid or similar material)
- Dump Cart Operator
- Concrete Formwork Stripper.

An employee at this level may be undergoing training so as to qualify as a Construction Worker Level 1(d) or 2. Where possible, an employee at Levels 1(a), 1(b) and 1(c) shall be provided with access to accredited structured training approved by CTA in accordance with Clause 4.10 of this Appendix.

Section 7: Training

7.1 The parties to this Award recognise that in order to increase the productivity and efficiency of the industry a greater commitment to training and skill development is required.

Accordingly the parties commit themselves to:

- developing a more highly skilled and flexible workforce.
- providing employees with career opportunities through appropriate training to acquire additional skills.
- promoting the greatest possible use of all of the skills which an employee has acquired.

7.2 To facilitate the above objectives an employer shall, in co-operation with the consultative committee develop a training programme consistent with:

- the size, structure and scope of the activities of the employer;
- the need to develop vocational skills relevant to the enterprise and the building and construction industry generally through courses conducted by accredited educational institutions and providers;

7.3 Where, as a result of consultation in accordance with this clause it is agreed that additional training should be taken by the employee, that training may be taken either on or off the job. Provided that if the training is undertaken during normal working hours the employee concerned shall not suffer any loss of pay. The employer shall not unreasonably withhold such paid training leave.

7.4 Any costs associated with standard fees for prescribed course and prescribed textbooks (excluding those textbooks which are contained in the employer's technical library) incurred in connection with the undertaking of training pursuant to 7.2 shall be reimbursed by the employer upon the production of evidence of such expenditure. Provided that reimbursement shall be subject to the presentation of reports of satisfactory progress.

7.5 Travel costs incurred by an employee undertaking training in accordance with this clause pursuant to 7.2 which exceed those normally incurred travelling to and from work shall be reimbursed by the employer.

7.6 Any disputes arising from the operation of this clause shall be subject to the dispute settlement procedure contained in clause 47A and 47B of the Award.

Section 8: The Australian Vocational Certificate and Future Contracts of Training

8.1 The parties to this Appendix welcome the introduction of comprehensive training and certification reforms under the banner of the Australian Vocational Certificate. This Appendix is designed to incorporate and anticipate those reforms. It envisages a situation where future new entrants to the industry will be persons who have either completed appropriate AVC training or who are engaged in a structured, defined and enforceable contract of training.

8.2 As part of the process of accommodating the AVC reforms, the parties to this Appendix will consider the introduction of a regime of AVC traineeships for the building and construction industry once the Appendix is in place. The subject matter of negotiations will include the following:

- types and number of traineeships required by the industry;
- the training requirements and nature of the contract of training to apply;
- the relationship between traineeships and the existing apprenticeship system.

8.3 The parties recognise that a number of important training initiatives have recently been undertaken in the industry. These include the MBA- CFMEU "Build-a-Job" accelerated apprenticeship program, Building Industry Traineeships, and the recently

designed AVC pilot program for plant operator training. To the extent possible, the parties intend to incorporate these initiatives in the structure provided in this Appendix.

8.4 Until negotiations are completed, this matter shall be regarded as "leave reserved".

Section 9: Translation and Rates of Pay

(A) Translation:

9.1 Where agreement is reached to introduce this Appendix, all employees affected shall transfer from their current classification to the new classification structure on the basis of their existing Award classification rate in accordance with Schedule A attached.

9.2 No employee shall unreasonably refuse to undertake training provided by the employer in paid work time which would enable the employee to fulfil the substantive requirements of the skill level to which they have translated as a result of the introduction of this Appendix**.** In seeking upward reclassification an employee shall be required to demonstrate that he or she meets the full requirements of the higher skill level in accordance with the criteria outlined in this section.

(B) Rates of Pay:

9.3 This section details the rates of pay applicable under this Appendix. Payment is for skills used, and employees performing work in a job at their skills classification in that field of work shall be entitled to the minimum rates of pay contained herein by virtue of

- translation to the new structure as detailed in Schedule A - Translation; or
- by having fulfilled the criteria outlined in the skills classification definitions.

9.4 Schedule B shows the rate of pay applicable upon translation. Schedule B also shows the minimum rates applicable after six months and 12 months operation of this Appendix.

SCHEDULE A - TRANSLATION OF EXISTING CLASSIFICATIONS

[Appx S:Sched A substituted by V073; V094 ppc 15May97]

Old wage group	New wage group
Dogman CH (Vic)	CW7
Op. Gp. H-Crane Dvr NSW	CW7
Operator Grade 5	CW7
Operator Group G	CW6
Operator Group F	CW6
Trainee Dogman (Vic)	CW5
Operator Group E	CW5
Operator Group D	CW5
Operator Group C	CW5
Carver	CW5
Special Class Trades	CW5
Operator Grade 4	CW5
Marker/Setterout	CW4
Letter Cutter	CW4
Signwriter	CW4
Operator Group B	CW4
Operator Grade 3	CW4
Tradesperson	CW3
L1, Rigger/Dogman	CW3
Operator Group A	CW3
Operator Grade 2	CW3
Operator Grade 1	CW3
L2, Scaffolder Etc	CW2
L3, Trades Labourer	CW1(d)
Plasterer's Asst.	CW1(d)
Stonemason Ass Q	
L4, Builders Lab.	CW1(c)
Other	CW1(c)

SCHEDULE B - RATES OF PAY

Old Wage Group	New W Gro	New Relativ	Weekly Rate
Dogman CH (Vic)	C'	12	$548.70
Op.Gp.H - Crane Dvr NSW	C'	12	$548.70
Operator Grade 5	C'	12	$548.70
Operator Group G	C'	11	$527.90
Operator Group F	C'	11	$527.90
Trainee Dogman (Vic)	C'	11	$507.00
Operator Group E	C'	11	$507.00
Operator Group D	C'	11	$507.00
Operator Group C	C'	11	$507.00
Carver	C'	11	$507.00
Special Class Trades	C'	11	$507.00
Operator Grade 4	C'	11	$507.00
Marker/Setter out	C'	10	$486.20
Letter Cutter	C'	10	$486.20
Signwriter	C'	10	$486.20
Operator Group B	C'	10	$486.20
Operator Grade 3	C'	10	$486.20
Tradesperson	C'	10	$465.30
L1, Rigger/Dogman	C'	10	$465.30
Operator Group A	C'	10	$465.30
Operator Grade 2	C'	10	$465.30
Operator Grade 1	C'	10	$465.30
Machinist	C'	10	$465.30
L2, Scaffolder Hoist Dvr	C'	9	$448.60
L3, Trades Labourer	CW1	92.4	$435.20
Plasterer's Assistant	CW1	92.4	$435.20
Stonemason's Ass. .(inc. factory in NSW)	CW1	92.4	$435.20
Stonemason's Ass. (factory only QLD & TAS)	CW1	9	$409.60
L4, Bldrs Lab. other	CW1	9	$409.60

PROPOSAL 2 – The Shop, Distributive and Allied Employees Proposal.

The following is the system that the SDA would seek to have applied:

15 years	50 % of adult rate
16 years	60 % of adult rate
17 years	80% of adult rate
18 years	Adult rate

A revised proposition was put to the Inquiry in the response made to the Provisional Findings Paper, which is outlined as follows:

1. Adult rates at 18 years of age.
2. National Training Wage continues to apply.
3. For all those under 18 years of age a series of rates are applied according to the work value of the work being performed. It allows, where appropriate, those under 18 to receive a full rate.

PROPOSAL 3 – The ACTU proposal

The ACTU believes the objectives of SEP reform can be achieved for junior rates in four steps, subject to one over-riding rule.

Step 1: Rationalise the Inconsistency

The Retail (and related) industries account for the vast bulk of junior employment. Their share of total youth employment has increased over the past 15 years. The retail rates should be taken as benchmark to achieve consistency in rates of pay for junior employees.

Step 2: Accept that Adults Are Adults

Discounted rates for 18, 19 and 20 year olds are an historical anachronism and should be phased out.

Step 3: Reset the rates for 15 - 17 year olds

Establish a wage progression scale which makes sense.

Step 4: Replace 'age' with modified NTW schedule

	Year 10	Year 11	Year 12
at school	a	b	c
Plus 1	b	c	award
Plus 2	c	Award	award

[cf age 15 16 17
rate a b c]

Note that conceptually, step 4 precedes step 3.

PROPOSAL 4 - The ACOSS Proposal

ACOSS model for an alternative system

ACOSS proposes, as an interim measure until a full competency system can be developed and implemented, that the current age-based system be replaced by one that uses various criteria as 'proxies' for different degrees of competency. One set of criteria would apply to 15 to 17 year olds, with different arrangements for 18 to 20 year olds.

15 to 17 year olds

For 15 to 17 year olds, a more workable and practical alternative to a competency-based system and a fairer alternative to a purely age-based system, would be to pay graduated wage rates based on years of schooling and workforce experience. These graduations would act as basic proxies for levels of maturity, orientation to and understanding of workplace practices and cultures, and increasing levels of work skills and competency.

Under this proposal:

- a young person who had completed Year 9 would be paid at the base level;
- one with Year 10 (or Year 9 plus one year's full-time equivalent work experience) at the next level; and
- those with Year 11 (or Year 9 plus two year's full-time equivalent work experience or Year 10 plus one year's full-time equivalent work experience) at the next higher level.

These arrangements would apply to all young people until they had completed 12 years of schooling or turned 18.

The one exception would be young people who had entered into a formal structured training arrangement through a recognised traineeship or apprenticeship. These young people - and those who have reached the age of 18 or have completed 12 years of schooling - would receive the appropriate and agreed training wage, based on the National Training Wage.

18 to 20 year olds

Under the ACOSS proposal, young people aged 18-20 would be subject to the following arrangements:

- Those who have not completed 12 years of schooling, and who are not in a formal training arrangement, would only be entitled to the full rate of pay once they are 18 and have gained six months' full-time equivalent work experience. This six months could be built up cumulatively to take account of the part-time and casual work undertaken by many young people. The six months' experience, required of young people who have not completed high school before they can be paid full rates even after reaching 18, is intended to act as a proxy for the greater level of competence assumed of those who have completed 12 years of school.

- Young people who have not completed high school and without six months of full-time equivalent work experience would continue to be paid at a lower rate until they turn 21.

- Those over 18 who have completed high school, in the absence of any formal training arrangements where trainee wages would apply, would be entitled to the full rate of pay.

21 years and over

All people aged 21 and over would be paid at full rates, regardless of years of schooling, work experience or skill levels.

The Table below sets out the different criteria for wage levels that would apply under the ACOSS proposal. These wage levels would equate to the current age-based graduated junior rates of pay set out in individual awards.

Wage rate	**Criteria**
Level 1	Up to completion of Year 9
Level 2	**Completion of Year 10; *or*** **Year 9 plus one year's full-time equivalent work experience**
Level 3	Completion of Year 11; *or* Completion of Year 10 plus one year's full-time equivalent work experience; *or* Completion of Year 9 plus two years' full-time equivalent work experience
Level 4	Over 18; *and* Year 12 not completed; *and* Less than 6 months' full-time equivalent work experience
Training wage	In formal training arrangements as part of a recognised traineeship or apprenticeship (including over 18 years of age)
Full rate	Completed Year 12; *or* 18 years of age *and* Year 12 not completed *but* has 6 months' full-time equivalent work experience; *or* 21 years of age and over

PROPOSAL 5 - The Queensland Government Proposal

6. Preferred Option

Industry by industry implementation of competency-based progression and structured training

The preferred option for the Queensland Government is the industry by industry implementation of competency-based progression in conjunction with the introduction of structured vocational training through traineeships and apprenticeships.

The basic principles of the proposal and some initial modelling is outlined below:

6.1 Principles for the scheme

- Under this proposal there would be no move away from junior rates until a replacement competency-based system is available.
- Competency-based progression would be based around traineeship/apprenticeship systems and would be developed on an individual, industry by industry basis with the introduction of national training packages.
- Any changes would recognise the fragility of the youth employment market.
- Development of progression arrangements would involve industry participation and take account of the impact of any changes to junior rates in that particular industry and on broader socio-economic terms.
- The issue of traineeships for part-time employees would be addressed in cooperation with the industrial relation, education and training sectors. There is a need to provide encouragement through the principles of the Commission to enterprises and employees in accordance with objectives outlined in 6.2 below.

6.2 A system of competency-based progression

Key objectives are to:

- Bring equity and consistency to the treatment of young people whilst at the same time protecting their place in the labour market;
- Support the development of a broad skills base for all the entry level for different types of employment, industries and school to work transition; and
- Introduce competency-based training and wage arrangements on a case by case basis taking account of the particular circumstances of industries and enterprises (where appropriate) and the likely impact on youth and the local labour market.

Competency-based progression arrangements would be put in place with the introduction of National Training Packages. They would include apprenticeships and traineeships on a full-time, part-time and (school or tertiary) student basis. Guidelines for the implementation of training wage arrangements should provide that:

- The industrial parties will need to develop competency-based training arrangements tailored to the needs of their industry or enterprise with the implementation of the National Training Packages. Training wage structures appropriate to support these training arrangements will need to be developed.
- It will be necessary for the parties to ensure that the trainee and apprentice structures are consistent with the structure and integrity of other wage arrangements included in the award or agreement (as implemented through the Structural Efficiency Principle).
- Training wage rates should reflect the relative value of the competencies demonstrated by the trainee/apprentice to the employer, including decreased productivity due to time spent off-the-job, and increased productivity due to any increased competency resulting from the training.
- Appropriate relativities will be established which:
    1. Take account of work value (established through skill evaluation).
    2. Reflect the need in some cases for young workers to mature in work orientation and experience in order to achieve full competency;

3. By reflecting the costs/benefits to employers of providing training makes trainees and apprentices competitive in the labour market; and
4. Ensure that the overall value of youth labour to employers is retained.

The result will be competency-based classification structures through which trainees and apprentices advance to the classification applicable to the fully competent employee.

6.3 A system of traineeships/apprenticeships and school-to-work arrangements

Career Aspirants

Training wage arrangements for full-time career aspirants (i.e. individuals who are seeking permanent employment leading to a career within a particular industry) may be developed by taking as a starting point existing apprenticeship and traineeship arrangements where they already properly reflect the value of the trainee to the employer.

It would be necessary to convert the existing wage arrangement to one based on competency from a time-served or age basis. The conversion would be subject to the constraint that it should not change overall average trainee labour costs.

As a starting point, existing apprenticeship packages may be taken to adequately reflect key relativity points for the purpose of competency progression. Existing age bases on National/State Training wage(s) may be blended into the one wage stream where they coexist with apprenticeships.

The Queensland Government views this pathway as a significant mechanism for maximising the education and vocational potential of individual students and for meeting employers' future skill needs.

School Based Arrangements

School based apprenticeships and traineeships involve an education, training employment package of arrangements over years 11 and 12 that:

- Results in a senior school certificate and a vocational certificate (AQF2 or better) or progress toward completion of an apprenticeship (AQF3 or better);
- Has a Training Agreement between the student/trainee and the employer; and
- Is based on an employment relationship with pro-rata wages and conditions based on time in productive work.

This is a pathway for post compulsory (year 10) students making the transition from school to work. The mechanism of competency-based learning and assessment supported by competency-based progression is an effective skills development model.

Part-time Workers

It is estimated (using ABS *Labour Force Survey* data) that 32.2% of senior school students take part in part-time paid employment. Departmental statistics show that 49% of senior school students undertake at least one vocational education and training (VET) subject in Queensland schools. Recognition of the competencies gained through paid work would reinforce their VET in school outcomes.

The Queensland State Training Council policy on approved part-time training includes a minimum of 15 hours on average over one month. The Queensland Government has implemented a number of part-time school-based traineeships and apprenticeships which have demonstrated the efficacy of such an arrangement for entrants to the workforce to help overcome the low skill levels usually encountered.

The expanded traineeship/apprenticeship program has the potential to provide a significant pathway that addresses many of the concerns of employers requiring basic skills and maturity from new workers.

7. Conclusion

The Queensland Government would welcome the AIRC taking a lead role in introducing a system to replace junior rates by recommending a set of principles in line with the suggested model outlined above and consistent with the previously agreed MOLAC Principles and AVTS Guidelines. The principles should be predicated on the following objectives:

- A competency-based progression system will be introduced, based around a traineeship/apprenticeship systems to be implemented through state and federal industrial tribunals on an industry by industry basis.
- There will be no move away from junior rates until a replacement competency-based system is available (any changes will recognise the fragility of the youth employment market).
- Development of progression arrangements will involve industry participation and take account of the impact of any changes to junior rates in each particular industry and on the broader socio-economic terrain.
- Development of appropriate traineeship/apprenticeship schemes for full-time and part-time employees will be addressed in co-operation with the education and training sectors.

This model in its previous iterations under the MOLAC and AVTS principles has gained clear acceptance on a tripartite basis.

Subsequent to further development (as required), these principles should be introduced to awards with the support and active participation of all parties. State industrial tribunals should adopt the principles handed down by the AIRC consistent with the model outlined above but with any adaptation required to meet specific state needs.

With the support of the parties, Queensland is prepared to further support the development and piloting of a comprehensive scheme to replace junior rates of pay through the industry by industry implementation of competency-based progression and structured vocational education and training.

PROPOSAL 6 - The Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Proposal

There should be established a better link between wages and skill. Wages should not be age-based. As a matter of principle, junior rates should be removed and replaced with a genuine trainee rate. Juniors undergoing training should receive a "training wage". This training would need to be broad based and include key competencies and skills for creativity, new and changing job requirements. Such a "training wage" must be enforced by award provisions and legislative efforts must be made to ensure an appropriate award classification, no loss of income and a national qualification.

National Training Wage Award and Apprentices

There are two key award instruments which are based upon skill/competency, not age, for junior workers. They are apprentice award rates and a National Training Wage Award. In the establishment of the proposed new non-discriminatory structure where discounted rates for young people are solely associated with a training wage where the young person is either under contract of training (i.e. an apprenticeship or traineeship leading to national qualifications) or is a full-time student undertaking part-time or casual work (up to a maximum number of hours to be determined and specified) a review of the appropriate level and rates may be justified. This review would take into account:

- the effect of training packages
- appropriate rates for different qualification (AQF level) outcomes
- competency based progression
- mixes of work and training time and appropriate limits consistent with training needs
- the history of the current rates and relationship with the rate of competent and trained worker.

These matters have already been dealt with to a considerable extent in the simplification of apprenticeship provisions in the Metal, Engineering and Associated Industries Award

and in the introduction of part-time and school based arrangements in the National Training Wage Award.

PROPOSAL 7 – The Commission's Own Motion Proposal

In the submission made in November 1998 to the Inquiry the State of New South Wales stated:

> *"The position of the NSW Government is that reform to youth rates should not occur unless suitable wage models can be developed which protect youth employment. Therefore, conversion of age-based and training wage arrangements should be carefully managed within a time-table that allows industrial parties to develop suitable competency and experience-based replacements."*

That position has not been developed in a formal way. However, the Commission on its own motion is interested to have the participants explore a proposal founded upon the following points:

1. Neither the term "junior rates" nor "non-discriminatory alternatives" is expressly defined. That has led the Inquiry to a consideration of the proper construction of those terms.

2. The question whether any non-discriminatory alternatives are capable of being developed sufficiently to be a feasible substitute for existing rates is couched in terms of "absolutes". Instead, for the purposes of an award by award examination procedure there ought to be a rebuttable presumption that junior rates are not *per se* discriminatory (in the statutory sense as distinct from the *simpliciter* sense of only meaning to treat differently). In a particular case it ought to be open to a party to the industrial process to bring evidence to demonstrate that the junior employees covered by that award do not require "special protection or assistance" that might otherwise justify the differential rates applicable to juniors under that award.

3. If the presumption is in fact rebutted, the next step of the Inquiry ought to move to a work value assessment of the work carried out by juniors and by other relevant classifications covered by the award. The aim of this step would be to ensure the development of a classification structure that had differentiated classifications based

objectively on the skills required for each respective position; the responsibility undertaken by those employees; and the conditions under which the work was performed for each grouping.

4. The process of converting work performed in junior rate classifications to competency or work value based progression only ought progress on an industry specific or award by award basis. The process would involve mini work value cases. These would be confined to a comparison of the work value between work carried out by juniors in the specific industry or work area covered by the relevant award compared to a suitable base adult classification.

Recommended retail price $15.00

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