
Fair Work Commission: 4 yearly Review of modern awards

SUBMISSIONS

**4 YEARLY REVIEW OF MODERN AWARDS
AM2016/3 - PROPOSED HELICOPTER AIRCREW AWARD**

**NORTHERN NSW RESCUE HELICOPTER SERVICE LIMITED
AUSTRALIAN BUSINESS INDUSTRIAL
- and -
THE NSW BUSINESS CHAMBER LTD**

24 DECEMBER 2018

1. BACKGROUND

- 1.1 These submissions are made in accordance with the Directions issued on 10 December 2018 by the Fair Work Commission (**Commission**) in respect of the proposed Helicopter Aircrew Award (**Draft Award**) on behalf of:
- (a) the Northern NSW Rescue Helicopter Service Limited (**Westpac Rescue Service**);
 - (b) Australian Business Industrial (**ABI**); and
 - (c) the New South Wales Business Chamber Ltd (**NSWBC**).
- 1.2 ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and has some 4,200 members. NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth) with more than 19,000 members.
- 1.3 The Westpac Rescue Service is a not-for-profit emergency helicopter service which operates four aero-medical helicopters between three bases in Newcastle, Lismore and Tamworth. The service employs air pilots, air crew persons, engineering and maintenance personnel, and other administrative, operations and management personnel. The Westpac Rescue Service is also a member of ABI and the NSWBC. Further, we note that the Westpac Rescue Service was named as a relevant employer during the course of these proceedings (see [164] of the AMWU Submission filed 20 August 2018).
- 1.4 The Westpac Rescue Service currently employs its staff under enterprise agreements. The instruments currently in force which cover employees who would be covered by the proposed Helicopter Aircrew Award are the *Hunter Region Rescue Helicopter Pilots and Crewpersons Enterprise Agreement No. 5* and the *Northern Region Life Saver Rescue Helicopter Enterprise Agreement No. 5*.
- 1.5 Notwithstanding the fact that the Westpac Rescue Service currently operates under enterprise agreements, if the application succeeds, they are an affected party to the application as any new award would become an applicable reference instrument for the purpose of the 'Better Off Overall Test'.

2. LEGISLATIVE FRAMEWORK OF THE FOUR YEARLY REVIEW

- 2.1 The legislative framework applicable to the 4 Yearly Review has been considered in detail in *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (**Preliminary Issues Decision**). The Preliminary Issues Decision addresses in detail the legislative framework applying to these proceedings.
- 2.2 The Preliminary Issues Decision confirms (at [23]) that the Commission remains at all times obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the modern awards objective.
- 2.3 This means that, when considering the creation of any new award, or any variation to an existing modern award, the Commission should be focused upon ensuring that any new version of the safety net is consistent with the modern awards objective.
- 2.4 The power to create new modern awards during the review is found at section 156(2)(b), which operates subject to section 163(2) and section 134. Section 163(2) provides that the Commission must not make a modern award covering certain employers or employees unless it has considered whether it should, instead, make a determination varying an existing modern award to cover them.
- 2.5 Turning to section 134, it is not the section in the Act that vests discretion, but is however the section that conditions the exercise of modern award powers which include (for instance) the discretion vested by section 139.
- 2.6 The purpose of section 134 of the Act is the creation of a 'fair and relevant minimum safety net of terms and conditions' that is constituted by the NES and modern awards. It should be uncontroversial that what section 134 is setting is the terms and conditions of employment that no employee in a given circumstance should fall below; such is clear from the words "minimum safety net".
- 2.7 In arriving at this fair and relevant minimum safety net, the Commission is to "take into account" those matters set out in section 134(1)(a)-(h) inclusive. This said, the ultimate outcome is the creation of a "fair and relevant minimum safety net" having taken into account and weighed up the matters set out in section 134 (1) (a)-(h).
- 2.8 The Commission's discretion to make determinations varying or creating modern awards is expressed in general terms. However, the need for a 'stable' modern award system suggests that parties seeking to create a modern award must advance a merit argument in support of

any proposed variation.¹ It logically follows that this same requirement exists in respect of the creation of a new modern award. In our submission, a merit based argument would no doubt be more persuasive if it was aligned with the matters outlined in subsections 134(1) and 163(2) of the Act.

2.9 For the reasons outlined below, there are a number of inclusions in the Draft Award which our clients do not consider are necessary to ensure it provides a “fair and relevant minimum safety net” of terms and conditions.

3. THE DRAFT AWARD

3.1 This submission is advanced from what appears to be the generally accepted starting point that the *Miscellaneous Award 2010* is the modern award applicable to employees who perform work as helicopter aircrew. Helicopter aircrew are those employees who are not covered by the *Air Pilots Award 2010* (the **Pilots Award**) but who are part of the flight crew and perform operational duties relating to the flying of the aircraft.

3.2 A Full Bench of the Commission has previously indicated support for the creation of an industry award for rescue helicopter aircrew or an amendment to the scope of an existing award to provide a safety net for these employees.² Accordingly, while this submission deals with the Draft Award, our clients do not *prima facie* oppose an amendment to the coverage of the Pilots Award to include helicopter aircrew, should the Commission be minded to move this way.

3.3 In the following submissions we will deal in detail with specific aspects of the Draft Award, but make the following general comments:

- (a) the AMWU and Babcock Mission Critical Services Australasia Pty Ltd (**Babcock**) have been the parties most heavily involved in the proceedings to date;
- (b) the current proposed draft reflects a rescue helicopter operational model that is not standard across the industry;
- (c) there are other employers who do not perform rescue helicopter operations who would be caught by the new award - for example, private non-rescue operators that utilise an aircrewperson to perform ‘left front seat’ operations;
- (d) the focus on a particular operational model has influenced the development of the classification structure in the Draft Award; and

¹ *Preliminary Issues Decision* at [60].

² [2014] FWCFB 5092 at [6]-[7].

(e) should the Commission be minded to make the Draft Award or a new modern award in different terms, our clients would be supportive of a further consultation process whereby any proposed new award be subject to:

- (i) a short 'exposure draft' process prior to arriving at the final version of the award; or
- (ii) interested parties being given an opportunity to comment on the coverage clause of any proposed new award, if this is the preferred course of action.

3.4 In respect of paragraph 3.3(c) **above**, we note that the Full Bench posed this question to the AWMU during the hearing on 20 July 2018.³ It is not conceded by our clients that the Draft Award would not (or alternatively, should not) cover helicopter aircrew that are not engaged by rescue helicopter services.

3.5 We will turn now to submissions dealing with the terms of the Draft Award.

Clause 17 - Classifications

3.6 Firstly, it appears that the definition of "Helicopter Aircrew" would be more appropriately included in clause 3 - Definitions. This term is not utilised to denote an actual classification and its relevance lies in its utilisation in the award coverage provisions at clause 4.1.

3.7 Generally speaking, the classifications reflect the operational model of the instrument upon which the Draft Award is based, and the model utilised by Babcock. Unfortunately, there exist no widely-accepted qualifications or other external tool (such as roles denoted by the Civil Aviation Safety Authority) which might be used to underpin the classifications of the award.

3.8 The enterprise agreements under which the Westpac Rescue Service currently operates contains one classification for 'Crewperson', with allowances payable for additional responsibilities such as 'Training and Checking', 'Rescue Crewperson Qualification' and 'Winch Operator'. We are instructed this method of categorising employees is common across the industry. In part, this is due to the historical reliance on a classification and remuneration model which is determined by years of service (an "incremental model"), rather than skills and qualifications.

3.9 For the Westpac Rescue Service, the difficulty with the classification structure of the Draft Award will lie in linking the appropriate classifications in its enterprise agreement currently under negotiation to those in the award, for the purpose of the 'Better Off Overall Test'.

³ See, for example, PN420 - PN425 of the Transcript.

3.10 The classifications as currently drafted also potentially capture employees who are currently at a level of seniority within the Westpac Rescue Service such that they are not considered to be covered by any modern award. For example, the Westpac Rescue Service Chief Crewman is responsible for duties equivalent to the 'Check and Training Aircrewperson' and the 'Line Training Aircrewperson', but is also part of the organisation's senior management team.

Clause 18 - Minimum Wages

3.11 It is not apparent, nor do our clients agree it is appropriate, why the remuneration of any employee covered by the Draft Award should be linked to the *Manufacturing and Associated Industries and Occupations Award 2010* classifications. However, we note the comment in the Draft Award that a new table will be inserted, at which time our clients would appreciate the opportunity to further comment on the minimum wages for each classification.

3.12 The definitions contained at clauses 18.4 and 18.5 should, if required to be included, be located in clause 3 - Definitions. However, our clients' overall view is that the drafting of these provisions (and clauses 26 and 27, relating to payment for overtime) is unnecessarily complex and would benefit from review and refinement.

Clause 19 - Allowances

3.13 As discussed in relation to clause 17 - Classifications, there are a number of allowances paid by the Westpac Rescue Service (such as a 'Winch Operator' allowance) under its current enterprise agreements which are not contained in clause 19 of the Draft Award. Our clients submit that a flatter classification structure with the provision to pay allowances in respect of particular duties would better reflect the current operational reality across the industry.

Clause 19.5 - Mobile Intensive Care Ambulance allowance

3.14 With respect, this is an example of a clause which is included in the Draft Award because it is applicable to the Babcock operational model and the contractual arrangements pursuant to which it performs work. Our clients submit that it should not form part of the minimum safety net of terms and conditions to be applied across the industry generally.

Clause 19.6 - Other required additional skill certification allowance

3.15 Our clients strongly oppose the inclusion of clause 19.6. The allowance has no specified monetary amount and the clause merely requires that parties will attempt to reach agreement regarding same.

3.16 The AMWU assertion at [12] of its 27 April 2018 submission that there are other modern award terms which require employers and employees to "attempt to reach agreement" is

indeed correct, but such provisions relate to aspects of the employment relationship such as arrangements for when work is performed, not monetary entitlements. The potential for industrial disputation if agreement cannot be reached and the difficulties for employers attempting to exercise managerial prerogative to require employees to undertake particular duties, as well as to manage the changing requirements of the organisations with which they enter into contractual arrangements for the provision of services, is self-evident.

- 3.17 The AMWU also asserts at [9] of its 27 April 2018 submission that “it is necessary to include such a term in a modern award to respond to situations where an employer wishes to train employees and require them to exercise a new skill”. With respect, this submission is misguided. An employer can exercise its prerogative to require a modern award-covered employee to exercise a new skill as and when required, without the relevant award suddenly ceasing to provide a fair and relevant minimum safety net of terms and conditions. It may also be associated with movement of the employee within the classification structure, leading to an increase in remuneration.

Clause 19.7 - Fitness allowance

- 3.18 Our clients also strongly oppose the inclusion of clause 19.7 for the following reasons:
- (a) Aircrew are required to undertake a CASA Class 2 Medical, but this does not involve a fitness examination, meaning that the maintenance of a particular standard of fitness is not a prerequisite of employment;
 - (b) No required level of fitness is actually required to be exhibited by an employee in receipt of the allowance;
 - (c) The allowance is significant in quantum (\$1,521.50 per annum), but does not require any verification from the employee that he/she has actually incurred any expense or has spent the allowance on the matters outlined at clause 19.7(a)-(d); and
 - (d) There is no exemption provided for employers such as the Westpac Rescue Service which provide an on-site gym at its helicopter bases for use by employees.

Clauses 19.8, 19.9, 19.11 and 19.12 - expenses and travel

- 3.19 To the extent that the Westpac Rescue Service pays allowances relating to meals and travel, these are based on the ATO taxation determination amounts. Clause 19.9 - Overseas allowance and clause 19.15 - Transport allowance are already proposed to utilise the ATO standard rates. Our clients consider these to be the appropriate figures for these allowances, at least as a starting point in any new award.

Clause 19.20 - Permanent transfers

3.20 Our clients oppose the inclusion of clause 19.20. As currently drafted, the clause is not sufficiently clear that reimbursement for costs associated with moving will only be payable in circumstances where the employer has required the employee to relocate for operational reasons. Any costs incurred by an employee who elects to relocate should not be borne by the employer.

Clause 19.21 - Telephone

3.21 We note that clause 19.21 is not yet agreed between Babcock and the AMWU. Westpac Rescue Service has an arrangement in place with employees to reimburse costs associated with the use of a landline telephone at an employee's residence where it is required by the organisation (similar to the arrangements outlined in subclause (b)), but it is not agreed that reimbursement of costs associated with mobile telephones in the manner outlined in subclause (a) is appropriate.

Clause 19.23 - Protective clothing and uniforms

3.22 The preference of the Westpac Rescue Service is to provide protective clothing and uniforms to its employees, to ensure the items are of the required standard. This preference extends to the provision of footwear. As currently drafted, it is unclear whether an employee may unilaterally elect to purchase their own footwear and be reimbursed for the cost, or whether they are required to accept the provision of footwear by the employer instead. The interaction of subclauses (a) and (c) should be clarified accordingly.

Clause 19.24 - Indemnity

3.23 Our clients are concerned that clause 19.24 may not be a matter that can lawfully be included in the Draft Award. While a similar clause is found in the Pilots Award and in enterprise agreements (including the Westpac Rescue Services' agreements, due to the fact these agreements cover both pilots and aircrew), our clients are not satisfied it is a matter which can validly be included in a modern award in accordance with section 139, 142 or Subdivision B of Division 3 of the Act.

3.24 In any event, even if the clause is permitted to be included in a modern award, it is not conceded that it is an entitlement which should form part of the minimum safety net and is more appropriately dealt with at an enterprise level, where due regard can be had to factors

such as the employer's insurance arrangements. To this end, we note that it was only included in the Pilots Award at the time of modernisation by agreement of the parties.⁴

3.25 While our clients oppose the inclusion of the clause in its entirety, subclause (b) - which would require an employer to pay fines on behalf of an employee levied by CASA - is strongly opposed as a matter of principle. Aviation is a safety-critical and highly-regulated area and all stakeholders (employers and employees alike) are required to comply with the applicable legislative and regulatory frameworks. Even if subclause (a) is included in the award, it is entirely inappropriate to include subclause (b).

Clause 19.25 and 19.26

3.26 We are instructed that the Westpac Rescue Service has its own arrangements in place with respect to insurances/schemes of the kind dealt with at clause 19.25 of the Draft Award. It is also not conceded that clause 19.26 (relating to income protection insurance) is a permitted clause in accordance with section 139, 142 or Subdivision B of Division 3 of the Act. These clauses should be deleted from the Draft Award and be a matter for negotiation at the enterprise level.

Clause 20 - Accident pay

3.27 A clause requiring payment of accident pay should not be included in the Draft Award. Unlike those other awards which still contain a clause (such as the *Black Coal Mining Award 2010* and the Pilots Award), our clients submit there does not exist an industry standard which would mean such a clause is necessary for the award to constitute a fair and *relevant* minimum safety net, nor is there a history of pre-reform entitlement which would suggest such an entitlement is appropriate.

Clause 21 - Payment of wages

3.28 Clause 21 only permits the payment of wages on a fortnightly basis. As the employees who would be covered by this award work alongside pilots covered by the Pilots Award, our clients support the same arrangements as provided for under clause 20.1 of the Pilots Award.

Clause 23 - Ordinary hours of work and rostering

3.29 Clause 23 has not been drafted in a manner which easily accommodates the operational reality of the industry. The Westpac Rescue Service operates a four on/four off 12 hour shift roster, which is commonplace across the sector. The clause should be expanded to include provisions allowing for shiftwork, and to reflect the fatigue management specifications which

⁴ *Award Modernisation Decision* [2009] AIRCFB 826 at [8].

influence rostering in the industry (similar to the arrangements found in clause 24 of the Pilots Award).

- 3.30 Our clients note that some of these elements are dealt with in clause 25 - Hours of duty and days free of duty. However, the interaction of these clauses requires further consideration.

Clause 27 - Overtime days worked

- 3.31 As indicated at paragraph 3.12, our clients are concerned about the lack of clarity in drafting between clauses 18.4 and 18.5, and clause 27. Until the intended operation of these clauses can be clarified, our clients reserve their position in respect of the concept of 'overtime days'.

- 3.32 If the Commission were minded to include payment for 'overtime days' as a feature of any new modern award, our clients oppose the calculation of all overtime for 'overtime days' being calculated at the rate of double time. As currently drafted, employees are also entitled to shift penalties on an overtime shift, which could result in payment at a rate of triple time. This kind of 'double dipping' should not be permissible under any new modern award.

Clause 28 - Overtime hours worked

- 3.33 The clause does not specify when 'overtime hours' become payable, other than a reference to clause 23, which merely provides for a permissible maximum number of hours averaged over a cycle. The clause also does not specify whether each day's overtime stands alone, which is the position our clients would support.

Clause 29 - Time off instead of payment for overtime

- 3.34 Our clients do not agree that a time off instead of payment for overtime clause is appropriate in this context. There is no similar clause in the Pilots Award and should be a matter for negotiation at an enterprise level.

4. CONCLUSION

- 4.1 Our clients thank the Commission for permitting the filing of this submission at this advanced stage of the proceedings.

4.2 Should you require any further information, please contact Kate Thomson on 02 4989 1003.

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On behalf of Australian Business Industrial, the New South Wales Business Chamber Ltd and the Northern NSW Rescue Helicopter Service Limited

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