

FAIR WORK COMMISSION

Matter No: AM2016/32

Four Yearly Review of Modern Awards – Transport Industry Awards

Road Transport and Distribution Award 2010

OUTLINE OF SUBMISSIONS OF THE SHOP, DISTRIBUTIVE AND ALLIED EMPLOYEES ASSOCIATION

Introduction

1. By its written submissions dated 18 January 2017 the Transport Workers Union (the **TWU**) seeks a number of variations to the *Road Transport and Distribution Award 2010* (the **Award**). Those variations are sought as part of the four yearly review of the Award conducted under s 156 of the *Fair Work Act 2009* (Cth) (the **FW Act**).
2. The variations sought by the TWU include the insertion of a new definition of driver within the Award. The Shop, Distributive and Allied Employees Association (the **SDA**) oppose that variation. These submissions address that variation only. In summary, that variation is opposed for the following reasons.
 - (a) The proposed variation does nothing to ensure that the Award is simple and easy to understand. To the contrary the proposed variation adds ambiguity and uncertainty.
 - (b) The proposed variation creates, rather than avoids, unnecessary overlap of modern awards.
 - (c) The proposed variation is an inappropriate attempt to revisit issues determined by the Full Court of the Federal Court of Australia in *Transport Workers' Union of Australia v Coles Supermarkets Australia Pty Ltd* [2014] FCAFC 148; (2014) 245 IR 449 and by the Fair Work Commission in *Transport Workers Union v Coles Supermarkets* [2015] FWC 1591.

The proper approach to the application

3. Section 156 of the FW Act provides that the Fair Work Commission (the **Commission**) must conduct a 4 yearly review of modern awards (the **Review**). Subsection 156(2) deals

with what must be done in the Review and provides that the Commission must review all modern awards and may, among other things, make determinations varying modern awards.

4. In the *4 yearly review of moderns awards – Penalty Rates* decision (the **Penalty Rates Decision**) the Full Bench said:

The Commission's task in the Review is to decide whether a particular modern award achieves the modern awards objective. If it does not then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138).¹

5. The Commission has broad discretion as to the conduct of the Review, but each modern award must be reviewed in its own right.² The Commission must ensure that the modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions, taking into account the modern awards objective set out in s 134(1) of the FW Act.

6. At paragraph [102] of the Penalty Rates Decision the Full Bench stated:

The requirement in s 156(5) to review each modern award 'in its own right', is intended to ensure that the Review is conducted 'by reference to the particular terms and the particular operation of each particular award rather than by a global assessment based upon generally applicable considerations. However, while the review of each modern award must focus on the particular terms and operation of the particular award, this does not mean that the review of a modern award is to be confined to a single holistic assessment of all of its terms.'³

7. In *Re Four Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788, (2014) 241 IR 189 (the **Jurisdictional Issues Decision**) the Full Bench identified that in addition to s 156 a range of other provisions in the Act are relevant to the review. Those provisions include the objects of the Act (s 3), the interaction with the NES (s 55) and those provisions providing for the performance of functions and exercise of powers by the Commission (ss 577 and 578).

¹ *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [36], see also [141].

² *Fair Work Act* s 156(5).

³ *4 yearly review of modern awards – penalty rates* [2017] FWCFB 1001 at [102]

8. Section 577 relevantly provides, amongst other matters, that the Commission must perform its functions and exercise its powers in a manner that is fair, just, open and transparent. Section 578 relevantly provides that in performing functions or exercising powers, in relation to a matter (including a review), the Commission must take into account: the objects of the Act; equity, good conscience and the merits of the matter.
9. In the Jurisdictional Issues Decision the Commission considered the scope of the Review. It identified the following relevant propositions which were adopted by the Commission in the Penalty Rates Decision:⁴
- (a) In conducting the Review the Commission will have regard to the historical context applicable to each modern award;
 - (b) The Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time it was made; and
 - (c) Variations to modern awards should be founded on merit based arguments. The extent of the argument and material required will depend on the circumstances.
10. In conducting a review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.⁵

The modern awards objective – discretion and necessity

11. The modern awards objective is set out in s 134(1) of the Act and provides:
- (1) *The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:*
 - (a) *relative living standards and the needs of the low paid; and*
 - (b) *the need to encourage collective bargaining; and*
 - (c) *the need to promote social inclusion through increased workforce participation; and*
 - (d) *the need to promote flexible modern work practices and the efficient and productive performance of work; and*
 - (da) *the need to provide additional remuneration for:*
 - (i) *employees working overtime; or*
 - (ii) *employees working unsocial, irregular or unpredictable hours; or*

⁴ at [111].

⁵ *Jurisdictional Issues Decision*, [27].

- (iii) employees working on weekends or public holidays; or
- (iv) employees working shifts; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the **modern awards objective**.

12. The s 134(1)(a) to (h) factors in the modern awards objective are “broad considerations which the Commission must take into account in considering whether a modern award meets the objective set by s 134(1)”.⁶ The criteria “do not set any standard against which a modern award could be evaluated”, and many of them are properly described as “broad social objectives.”⁷
13. The obligation to take into account the matters set out in paragraphs 134(1)(a) to (h) means that each of the matters set out must be treated as a matter of significance in the decision making process.⁸
14. In circumstances where the nature of the modern awards objectives are broadly expressed, and there are a range of considerations which the Commission must take into account, there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.⁹
15. No particular weight should be attached to any one consideration over another; and not all of the matters identified in s 134(1) will necessarily be relevant to a particular proposal to vary a modern award.¹⁰ To the extent there is any tension between some of

⁶ *National Retailers Association v Fair Work Commission* (2014) 225 FCR 154, [109] (Collier, Bromberg, Katzman JJ).

⁷ *Ibid.*

⁸ *Jurisdictional Issues Decision*, [31] citing *Friends of Hinchinbrook Society Inc v Minister for Environment (No 3)* (1997) 77 FCR 153 and *Australian Competition and Consumer Commission v Leelee Pty Ltd* [2000] ATPR 41-742 and *Edwards v Giudice* (1999) 94 FCR 561.

⁹ *Jurisdictional Issues Decision*, [34].

¹⁰ *Four Yearly Review of Modern Awards – Annual Leave* [2015] FWCFC 3406, [19], [20] (*Annual Leave Decision*).

the considerations in section 134(1), “the Commission’s task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.”¹¹

16. Section 138 of the FW Act relevantly provides:

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

The effect of s 138 is that the terms of a modern award must be “necessary to achieve the modern awards objective”. What is “necessary” in a particular case is a value judgment based on an assessment of the considerations in s.134(1), having regard to the submissions and the evidence directed to those considerations.¹²

17. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective. The Commission should recognise a distinction between that which is “necessary” and that which is “merely desirable”.¹³
18. The task in the Review is to make a finding as to whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are ‘necessary to achieve the modern awards objective’. In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission’s consideration is upon the terms of the modern award, as varied.¹⁴

The proposed amended definition of driver

19. The Award (at clause 4.1) describes itself as covering ‘employers throughout Australia in the Road Transport and Distribution Industry and their employees in the

¹¹ *Annual Leave Decision*, [20].

¹² *Jurisdictional Issues Decision*, [36].

¹³ *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] 205 FCR 227; 219 IR 382.

¹⁴ *4 yearly review of modern awards – penalty rates* [2017] FWCFB 1001 at [141]

classifications listed in clause 15 – Classifications and Minimum Wage Rates to the exclusion of any other modern award.’

20. Clause 15 of the Award identifies that the classifications under the Award are set out in Schedule B – Classification Definitions for Distribution Facility Employees and Schedule C – Classification Structure for Minimum Rates of Pay.
21. Schedule C of the Award identifies a number of drivers by reference to the vehicle driven by them. For example, a Transport Worker Grade 4 includes a “driver of a fork-lift with a lifting capacity in excess of 5 tons and up to and including 10 tons”; a Transport Worker Grade 7 includes a “driver of a double articulated vehicle up to and including 53.4 tons GCM – including B-doubles”; and a Transport Worker Grade 9 includes a “driver of a mobile crane with a lifting capacity in excess of 50 tons”.
22. Presumably because there is little or no ambiguity over the term ‘driver’, that term is not otherwise defined in the Award (including within clause 3.1 the definitions and interpretation clause of the Award).
23. The TWU now seeks to insert a definition of “driver” in clause 3.1 of the Award. The proposed definition is as follows:

***Driver** means an employee who is engaged to drive a rigid vehicle, a rigid vehicle with trailer combinations, an articulated vehicle, a double articulated vehicle and/or multi-axle platform trailing equipment. A Driver may also undertake non-driving duties or other tasks in connection with driving the vehicles described in this definition including loading and unloading of vehicles; consolidating goods, wares, merchandise or other materials for loading; refueling of vehicle; operation of onboard computer equipment; routine vehicle instruction; washing or cleaning of vehicles; basic vehicle maintenance tasks; and log book maintenance and other paperwork associated with the driving task.*

24. It is apparent from the proposed definition that the qualifying requirement of a “driver” is that the employee must drive a particular vehicle. Thereafter, the proposed definition seeks to add a list of other tasks that may be “included” as “non-driving duties” or “other tasks” “in connection with driving.” The ambiguity and uncertainty created by these terms is dealt with below.
25. As explained above, by reference to the *4 yearly review of modern awards – penalty rates* decision, the question before the Commission is here whether the terms of the

Award, as varied by the proposed words, are necessary to achieve the modern awards objective.

26. For the reasons set out below the variation should not be made.

The proposed variation creates ambiguity and uncertainty

27. The proposed definition of “driver” is set out at paragraph 23 above.
28. The first sentence of the proposed definition contains the necessary requirement for the definition. That is the employee must be engaged to drive one of the particular vehicles there set out.
29. Thereafter, the proposed definition provides “a driver may also undertake non-driving duties or other tasks in connection with driving the vehicles described in this definition including...”
30. There is no explanation as to the distinction between the “non-driving duties” and the “other tasks” “in connection with driving”. It is not clear whether the list that follows is a list of ‘non-driving duties’ *and* a list of ‘other tasks’ in connection with driving. It is also not clear whether the phrase ‘in connection with driving’ is to apply to both those ‘non-driving duties’ *and* the ‘other tasks’.
31. The list of additional duties (that are either non-driving duties or other tasks ‘in connection with driving’) does nothing to clarify the definition.
32. The result is nothing more than a definition that stipulates:
- (a) that the employee be a driver;
 - (b) and that if the employee is a driver he or she may carry out ‘non-driving duties’ or ‘other duties’ where one or both of those duties are ‘in connection with driving’.
33. There is no basis to contend that such a definition creates a more “simple, easy to understand, stable” modern award system as identified by s 134(1)(g) of the FW Act. To the contrary, the additional duties and/or tasks included in the new definition may suggest that some or all of those duties and/or tasks are necessary duties and/or tasks to

fulfill the definition of driver. The duties and/or tasks are prone to create uncertainty and ambiguity.

The proposed definition creates unnecessary overlap of modern awards

34. In the submissions in support of its application for variation the TWU submits that the proposed variation “will ensure that the ... Award is simple and easy to understand and that the standard provision dealing with the interaction between modern awards is capable of appropriate application”.
35. In fact, the proposed change tends to create an overlap in modern awards where none exists at present. As described in more detail below, the proposed definition more closely aligns the definition of driver with the role of a Customer Service Agent (**CSA**) under the *General Retail Industry Award (GRIA)*.
36. In doing so the variation is directly at odds with the modern award’s objective contained in s 134(1)(g). That objective provides for “the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia *that avoids unnecessary overlap of modern awards*”.
37. The proposed variation ignores the finding of the Federal Circuit Court, the Full Court of the Federal Court and the Fair Work Commission (described in more detail below) and increases the overlap of the two modern awards. It cannot be said that the variation will lead to an award with varied terms such that it only includes terms that are ‘necessary to achieve the modern awards objective’.
38. Moreover, the variation will achieve no more than the creation of uncertainty in respect of the settled operation of the Award. The TWU submissions expressly acknowledge this at [19] where the following is stated:

The TWU does not suggest that the insertion of a definition properly reflecting duties undertaken by a driver will necessarily produce a different outcome to the assessment of which classification is the “most appropriate” having regard to the work undertaken by any given class of employees.

In other words the variation may, but will not necessarily change, the current position arising from the Full Federal Court decision. How this could be said to achieve anything other than the promotion of uncertainty is left unexplained.

An inappropriate attempt to revisit determined issues

39. The striking aspect of the TWU application for variation is that there is no relevant evidence whatsoever presented to suggest that there is any difficulty in the operation of the Award in its current form. Tellingly, the only explanation provided by the TWU is the history of its attempts to assert that the classifications in the Award are most appropriate for the work of CSAs employed by Coles Supermarkets. That history is dealt with below.

TWU v Coles Supermarkets [2014] FCAFC 148; (2014) 245 IR 449

40. In *Transport Workers Union of Australia v Coles Supermarkets Australia Pty Ltd* the TWU claimed that Coles had underpaid those of its employees working as CSAs by failing to comply with the Award. Coles contended that the Award did not apply to the CSAs but rather those employees were covered by the GRIA.
41. The TWU's application was first heard by the Federal Circuit Court ([2014] FCCA 4; (2014) 284 FLR 238). The Federal Circuit Court concluded that the Award did not apply to the CSAs. It went on to conclude that, if the Award had covered the employment of the CSAs, the more appropriate classification was Retail Employee Level 1 under the GRIA and not Transport Worker Grade 2 under the Award. The TWU appealed the decision to the Full Court of the Federal Court.
42. The Full Court relevantly concluded the following.
- (a) The test that should be applied to discern if an award applied was to ascertain the objective meaning of the words used, bearing in mind the context in which they appeared and the purpose they were intended to serve. Applying that test the employment of CSAs fell comfortably within the Road Transport and Distribution Industry as defined in the Award and therefore within its coverage.
 - (b) However, because the work of CSAs started and finished at a retail establishment, they were based at a retail establishment and they made deliveries from a retail establishment, their employment was also covered by the GRIA.
 - (c) Given that the GRIA appeared to be a more comprehensive match with the work of CSAs, that was the award that applied to those employees.

43. The Full Court, in agreeing that the GRIA was more appropriate than the Award, adopted the reasoning given by the Federal Circuit Court. That reasoning included findings that:
- (a) at [76] of the Federal Circuit Court judgment: “Although the delivery function is the primary purpose of the CSA role, it is important to identify personal shopping and other additional instore duties (both for the sake of completeness, and because it is relevant to the issue of which award applies, should it be necessary for the Court to determine that issue). These instore duties are an important part of the CSA role”;
 - (b) at [84] of the Federal Circuit Court judgment: “In addition to delivery duties and personal shopping duties, some CSAs ... also perform general duties in the stores. These duties may include stacking collapsible crates in the on-line room of the store; **consolidating orders** in the on-line room; loading dollies with bold consolidated orders in the on-line room of the store in preparation for the next delivery run; looking for missing items in the back store room; general cleaning in the storeroom or other duties of the store; preparing paperwork in advance of the next delivery run; **washing vans**; returning groceries back to store shelves; putting away shopped orders into various temperature controlled zones within the store; shelf restocking; and trolley collection (emphasis added); and
 - (c) at [231] of the Federal Circuit Court judgment: “In light of the scope of clause B.1.1 of the [GRIA], all tasks performed by CSAs described earlier, including delivery driving tasks and **van loading and unloading** fall within Retail Employee Level 1 classification. This is because the Retail Employee Level 1 classification encompasses both “delivery of goods” and “packing of goods for dispatch and dispatch of goods” (emphasis added).
44. It is apparent that the proposed variation is an attempt to revisit the issue determined by the Full Court of the Federal Court. The TWU Submission makes this plain at [16] to [19]. The inclusion of “consolidating orders” and “washing vans” and “van loading and unloading”, all referred to in the findings above, are directed at the proposition that CSAs are more appropriately covered by the Award. That is not an appropriate reason to vary the Award. The outcome is not aimed at ensuring or demonstrating that the

Award is not meeting the modern awards objective and ought be varied so that it only includes terms that are ‘necessary to achieve the modern awards objective’.

TWU v Coles Supermarkets [2015] FWC 1591

45. Despite the decisions of the Federal Circuit Court and Full Court of the Federal Court above, the TWU made further application with respect to the CSAs by its application for a scope order under s 238 of the FW Act.
46. Throughout 2014 the SDA, TWU and Coles (amongst others) were negotiating the proposed *Store Team Enterprise Agreement 2014* which was to cover employees including “drivers effecting delivery of goods ordered through the Coles on-line website. These drivers are presently referred to as Customer Service Agents.”
47. By its application for a scope order dated 10 September 2014 the TWU contended that it was not appropriate for the proposed *Store Team Enterprise Agreement 2014* to cover drivers employed to undertake the delivery of goods ordered through the Coles on-line website. Evidence was heard from:
- (a) a number of CSAs;
 - (b) a number of Coles employees including a store manager, on-line department manager, national training compliance manager and employee relations manager;
 - (c) the principal negotiating officers for the SDA, being Mr de Bruyn, the National President of the SDA and Mr Galbraith, National industrial Officer of the SDA.
48. The TWU’s application for a scope order was dismissed by Commissioner Roberts.
49. In dismissing the application Commissioner Roberts concluded:

In the end, little emerged that had not been considered by the Federal Circuit Court of Australia and the Full Court of the Federal Court. The TWU’s application for a scope order represents the grip that its attachment to the Transport Award has. Over time, this appears to have developed into an idée fixe, which not even the Federal Court can make it abandon. The factual situation is that CSAs as members of the on-line departments within Coles stores and overall as employees of Coles on-line, are an integrated and integral part of the retail operation. They are not transport workers despite the fact that some of them choose to describe themselves as ‘drivers’, as does the TWU. They are not organizationally distinct any more than instore meat department or bakery employees are.

50. The proposed variation of the Award is yet another attempt by the TWU to revisit the matters determined as to the duties of the CSAs. That is despite the findings of the Federal Circuit Court, Full Federal Court of Australia and Fair Work Commission. That is not an appropriate purpose of the modern award review. The outcome is not aimed at ensuring or demonstrating that the Award is not meeting the modern awards objective and ought be varied so that it only includes terms that are ‘necessary to achieve the modern awards objective’.

Disposition

51. In all of the circumstances set out above, the application for the variation to the modern award by the insertion of the proposed definition of “driver” should be dismissed.

Dated: 2 March 2017

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