



Fair Work Commission

4 yearly review of modern awards 2014

AM2017/50

Submission

Hair and Beauty Industry Award 2010

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1. The Shop Distributive and Allied Employees' Association (SDA) makes this submission in accordance with the Directions issued by the Full Bench on 21 February 2018.
2. The SDA makes these submissions in support of the consent draft determination filed by the Ai Group, on behalf of the Hair and Beauty Association (HABA) and the SDA on 22 February 2018.
3. The variations proposed in the consent draft determination reflect the consent positions reached by the parties following extensive discussions, including a conference facilitated by the FWC.

Context of the Review

3. The FWC considered the conduct of the Four Yearly Review and on 17 March 2014 issued a statement¹ (The Preliminary Jurisdictional decision) outlining some observations including various considerations of the relevant legislation.
4. As part of the statement a useful summary of considerations on the conduct of the Review was included:

Summary

[60] On the basis of the foregoing we would make the following general observations about the Review:

1. *Section 156 sets out the requirement to conduct 4 yearly reviews of modern awards and what may be done in such reviews. The discretion in s.156 (2) to make determinations varying modern awards and to make or revoke modern awards in a Review, is expressed in general terms. The scope of the discretion in s.156 (2) is limited by other provisions of the FW Act. In exercising its powers in a Review the Commission is exercising 'modern award powers' (s.134 (2)(a)) and this has important implications for the matters which the Commission must take into account and for any determination arising from a Review. **In particular, the modern awards objective in s.134 applies to the Review.***

¹ [2014] FWCFB 1788

2. *The Commission must be constituted by a Full Bench to conduct a Review and to make determinations and modern awards in a Review. Section 582 provides that the President may give directions about the conduct of a Review. The general provisions relating to the performance of the Commission's functions apply to the Review. Sections 577 and 578 are particularly relevant in this regard. In conducting the Review, the Commission is able to exercise its usual procedural powers, contained in Division 3 of Part 5-1 of the FW Act. Importantly, the Commission may inform itself in relation to the Review in such manner as it considers appropriate (s.590).*

3. *The Review is broader in scope than the Transitional Review of modern awards completed in 2013. **The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking** into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party **seeking to vary** a modern award in the context of the Review must **advance a merit argument** in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self-evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation. In conducting the Review, the Commission will also have regard to the historical context applicable to each modern award and will 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. The Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.*

4. ***The modern awards objective applies to the Review. The objective is very broadly expressed and is directed at ensuring that modern awards, together***

with the NES, provide a 'fair and relevant minimum safety net of terms and conditions'.

5. *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 (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations.*

(emphasis added)

5. In conducting the 4-yearly review of modern awards pursuant to s.156 of the Fair Work Act 2009 (the **Act**), the Commission must review each modern award² against the modern awards objective so as to ensure that modern awards, together with the National Employment Standards (**NES**), “provide a fair and relevant minimum safety net of terms and conditions”, taking into account the considerations set out in s 134(1)(a)-(h) of the Act.

6. Section 134 (1) of the Act states:

(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
 - (iii) employees working on weekends or public holidays; or*

² Section 156(5) of the Act.

- (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**.*

7. These criteria are “broad considerations which the Commission must take into account in *considering whether a modern award meets the objective set by s 134(1)*”.³ 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.⁵ To the extent there is any tension between some of 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.*”⁶

General approach

8. The Preliminary Jurisdictional decision provided detailed guidance about the conduct of the 4-yearly review and related jurisdictional issues. At [23] the Full Bench stated (emphasis added):⁴

The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the

³ *National Retailers Association v Fair Work Commission* (2014) 225 FCR 154, [109] (Collier, Bromberg, Katzman JJ).

⁵ *Four Yearly Review of Modern Awards – Annual Leave* [2015] FWCFB 3406, [19], [20] (the **Annual Leave decision**).

⁴ [2014] FWCFB 1788 at [23], [24], [27], footnotes omitted

proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self-evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

9. The proposed variations to the Hair and Beauty Industry Award sought in the consent draft determination filed on 22 February 2018 are supported by a cogent merit argument.

The proposed consent variations and considerations

38-hour week rosters (averaging)

10. The consent draft determination seeks to remove an ambiguity in the Award by inserting the following provision which regulates the averaging of hours for a full-time employee over a roster cycle:

Clause 28.4 A full-time employee will be rostered for an average of 38 ordinary hours per week, worked in any of the following forms:

- (a) 38 hours in one week;*
- (b) 76 hours in two consecutive weeks;*
- (c) 114 hours in three consecutive weeks;*
- (d) 152 hours in four consecutive weeks.*

Clause 28.5 Notwithstanding clause 28.4, a full-time employee may be rostered to work an average of 38 ordinary hours per week in accordance with an arrangement implemented prior to [insert date of effect of Commission's determination].

11. The Award refers to a full-time employee working an average of 38 hours per week in clause 11 and clause 28.2(a) but does not specify anywhere in the Award how the averaging of hours should work:

Clause 11. A full-time employee is an employee who is engaged to work an average of 38 hours per week.

Clause 28.2(a) Ordinary hours must not exceed an average of 38 per week and may be worked within the following spread of hours:

12. The Award, at Clause 30.1 also, relevantly, restricts a roster period to 4 weeks:

A roster period cannot exceed 4 weeks.

13. The SDA submits that inserting a provision which regulates how a full-time employee can be rostered for an average of 38 hours per week is necessary to meet the modern awards objective by providing a fair and relevant minimum safety net.
14. The provision will remove ambiguity pertaining to the operation of average hours for full-time employees and is consistent with other awards which contain similar averaging provisions.
15. The SDA submits that when considering Section 134(1) of the Fair Work Act 2009, consideration is neutral for all except section 134(1)(a) and 134(1)(g).
16. The insertion of the clause will have a positive impact on the relative living standards and the needs of the low paid as this provision will ensure that averaging of the 38-hour week for relatively low paid employees will be done over a determined period of time to ensure employees are being paid all entitlements under the award in a timely manner, such as the calculation of the payment for overtime, which refers to an average of 38 hours.
17. The insertion of the clause will also have a positive impact on section 134(1)(g) as it will ensure a greater understanding for both employers and employees about how averaging for full-time employees should work over a roster period.
18. The proposed clause 28.5 has been included to mitigate any issues that may arise for the operation of businesses who may have existing alternative averaging arrangements in place with employees not included in clause 28.4. Therefore, the insertion of the clause will not upset existing arrangements, therefore should not have any negative impact on current employment practices in the industry and will provide greater certainty around averaging of full-time hours going forward.

Notification of rosters

19. The consent draft determination also seeks to make two variations to the notification of rosters clause; Clause 29.
20. The first variation is to require the employer to provide permanent employees with a written roster (which may be by electronic means).
21. The current clause 29.1 states:

29.1 The employer will notify staff of:

- (a) the number of ordinary hours to be worked each week;
- (b) the days of the week on which work is to be performed; and
- (c) the commencing and ceasing time of work for each day of the week.

22. The proposed variation (with changes in red) is as follows:

29.1 The employer will ~~notify staff of~~ provide permanent employees with a written roster (which may be by electronic means) that identifies:

- (d) *the number of ordinary hours to be worked each week;*
- (e) *the days of the week on which work is to be performed; and*
- (f) *the commencing and ceasing time of work for each day of the week.*

23. Clause 12 of the award already requires that a part-time employee must have a written agreement regarding the regular pattern of work, which constitutes a roster, and that any variation of the regular pattern of work be in writing.

24. The variation sought in clause 29.1 extends the obligation to provide a written roster to full-time employees.

25. The SDA submits that this variation meets the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. This variation will provide greater certainty for the provision of rosters which will help in promoting the modern awards objectives in section 134(1)(a) and 134(1)(g) of the Act.

26. The clause has also been constructed to reflect contemporary circumstances by including the ability for written notice to be by electronic means. Contemporary circumstances have been a consideration in other matters before the Commission in the review of modern awards (see for example, Re Horticulture Award [2017] FWCFB 6037 at [36] per Catanzariti VP, Sams DP, Saunders C).

27. The second variation sought by the Ai Group, on behalf of the HABA, seeks to delete the current clause 29.2 and replace it with a new clause 29.3 which will allow an employee's roster for a particular day to be changed on a one-off basis, with the provision of 48 hours' notice if this is due to an unexpected change in operational requirements.

28. The SDA has consented to the variation with the inclusion of a note in the proposed new clause 29.3:

NOTE: Clause 29.3 is to be read in conjunction with clause 8.2 of this Award.

29. The purpose of the note is to ensure that the provision is read in conjunction with clause 8.2 of the Award. Clause 8.2 of the Award requires an employer to consult with the employee or employees affected and their representatives about a proposed change to an employee's regular roster or ordinary hours of work. The clause also requires the employer to invite the employee/s to give their views about the impact of the proposed change, including any impact in relation to their family or caring responsibilities and to consider those views.
30. This will provide a mechanism for employees who may not be able to change their roster at short notice to be consulted and consideration made for the reasons why they cannot change their roster, particularly if they have family or caring responsibilities.
31. The SDA is satisfied that with the inclusion of the note the proposed variation provided in the consent draft determination meets the modern awards objectives.