DECISION

Fair Work Act 2009
s.158 - Application to vary or revoke a modern award

Mr David Truss
(AM2012/354)

SECURITY SERVICES INDUSTRY AWARD 2010
(ODN AM2008/11) [MA000016]

Security services

COMMISSIONER LEWIN MELBOURNE, 29 JULY 2013

Application to vary a modern award- standing to make application- modern awards objective- variation must be necessary to meet objective- applicable principles- construction of existing award provisions- need for satisfaction - no significant changes identified since Award made- insufficient basis for variations.

Introduction

[1] This Decision concerns an Application made to vary the *Security Services Industry Award 2010* [MA000016] (the Award). The Application has been made by Mr David Truss. FBIS International Protective Services (Aust) Pty Ltd (FBIS) is an employer covered by the Award which employs security guards. Mr Truss is an employee of FBIS.

[2] The Award was made by a Full Bench of Fair Work Australia by Decision on 19 December 2008[1], taking effect from 1 January 2010. In accordance with the provisions of Division 3 of Part 2-3 of Chapter 2 of the *Fair Work Act 2009* (the Act), the Award provides minimum wages and terms and conditions of employment applicable to the employees of national systems employers in the security industry and operates accordingly throughout the Commonwealth of Australia. Additionally, the Award applies to non national systems employers in those states which have referred industrial relations powers to the Commonwealth, namely New South Wales, Victoria, Queensland, South Australia and Tasmania.

[3] Mr Truss seeks to vary the Award through the insertion of clauses concerning 'Allowances', 'Superannuation', 'Ordinary hours of work and rostering', 'Penalty rates', and 'Annual leave.' The variations sought are outlined further below.

[4] Directions were posted on the Fair Work Australia Award Modernisation website and all interested parties were notified of those Directions. Interested parties were Directed to file full written Submissions and the Applicant was Directed to file with Fair Work Australia any Submissions in reply. Submissions were made by two interested parties and submissions in reply were filed by Mr Truss.

[5] The Australian Security Industry Association Limited (the ASIAL) as did the South Australian Chamber of Commerce and Industry trading a Business SA (Business SA) filed submissions in opposition to the Application.

[6] All submissions were posted on the Fair Work Commission Award Modernisation Website.

Statutory Provisions

Section 157 of the Act provides the Commission with the ability to vary a modern award as follows:

> **157 FWA may vary etc. modern awards if necessary to achieve modern awards objective**
>
> (1) FWA may:
>
> (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages; or
>
> (b) make a modern award; or
>
> (c) make a determination revoking a modern award;
>
> if FWA is satisfied that making the determination or modern award outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.
>
> Note 1: FWA must be constituted by a Full Bench to make a modern award (see subsection 616(1)).
>
> Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).
>
> Note 3: If FWA is setting modern award minimum wages, the minimum wages objective also applies (see section 284).
>
> (2) FWA may make a determination varying modern award minimum wages if FWA is satisfied that:
>
> (a) the variation of modern award minimum wages is justified by work value reasons; and

(b) making the determination outside the system of annual wage reviews and the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

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

(3) FWA may make a determination or modern award under this section:

(a) on its own initiative; or

(b) on application under section 158.

[7] Section 158 of the Act prescribes conditions applicable to the making of applications to vary a modern award.

158 Applications to vary, revoke or make modern award

(1) The following table sets out who may apply for the making of a determination varying or revoking a modern award, or for the making of a modern award, under section 157:

Item	COLUMN 1 THIS KIND OF APPLICATION …	Column 2 may be made by …
1	an application to vary, omit or include terms (other than outworker terms or coverage terms) in a modern award	(a) an employer, employee or organisation that is covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award.
2	an application to vary, omit or include outworker terms in a modern award	(a) an employer, employee or outworker entity that is or would be covered by the outworker terms; or (b) an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate or would relate.

Item	COLUMN 1 THIS KIND OF APPLICATION …	Column 2 may be made by …
3	an application to vary or include coverage terms in a modern award to increase the range of employers, employees or organisations that are covered by the award	(a) an employer, employee or organisation that would become covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that would become covered by the modern award.
4	an application to vary or include coverage terms in a modern award to increase the range of outworker entities that are covered by outworker terms	(a) an outworker entity that would become covered by the outworker terms; or (b) an organisation that is entitled to represent the industrial interests of one or more outworkers who would become outworkers to whom the outworker terms relate.
5	an application to vary or omit coverage terms in a modern award to reduce the range of employers, employees or organisations that are covered by the award	(a) an employer, employee or organisation that would stop being covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that would stop being covered by the modern award.
6	an application to vary or omit coverage terms in a modern award to reduce the range of outworker entities that are covered by outworker terms	(a) an outworker entity that would stop being covered by the outworker terms; or (b) an organisation that is entitled to represent the industrial interests of one or more outworkers who would stop being outworkers to whom the outworker terms relate.

Item	COLUMN 1 THIS KIND OF APPLICATION …	Column 2 may be made by …
7	an application for the making of a modern award	(a) an employee or employer that would be covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that would be covered by the modern award.
8	an application to revoke a modern award	(a) an employer, employee or organisation that is covered by the modern award; or (b) an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award.

Note: The FWC may dismiss an application to vary, revoke or make a modern award in certain circumstances (see section 587).

(2) Subject to the requirements of the table about who can make what kind of application, an applicant may make applications for 2 or more related things at the same time.

Note: For example, an applicant may apply for the making of a modern award and for the related revocation of an existing modern award.

[8] The provisions of s.158 of the Act impose limits upon who may apply to vary a modern award in this manner. Mr Truss has standing to make the Application as he is an employee who is covered by the Award and the Application seeks to vary the terms of the Award, as provided for by ss158(1) Item 1(a) of the Act.

The Application and variations sought

[9] The Application seeks the insertion of a number of clauses in the terms of the Award as follows:

> "Need to insert into Clause 15.1(a) "**Maritime allowance Payable per week."**
>
> Need to insert in as Clause 15.12 "**An maritime allowance is payable to an employee who is required to hold a MSIC [maritime security identification card] and is required to pay for the cost of the MSIC."**

Need to insert in as Clause 15.12 (a) "**If the employee has paid for the MSIC and has changed employer [even if an employer had paid for the MSIC and deducted the amount from the employees pay] the allowance will still be awarded to the employee by the new employer, if the new employer requires the employee to hold a MSIC."**

Need to insert in as Clause 15.12 (b) **"This allowance will be calculated by the dollar amount divided by years, divided by 52 weeks = weekly allowance**."

Need to insert Clause 20.1 (c) **"Superannuation is calculated on the average ordinary hours worked as stated in clause 21.1(a)"**

Need to insert Clause 22.2 (a) **"4 shifts on 4 shift off Permanent night shift means when a employee is engaged on a 4 shifts on and 4 shifts off roster," and the work is performed during a night span over the whole period of a roster cycle in which more than two thirds of the employee's ordinary hours is between 1800 hrs and 0600 hrs.**

Need to insert Clause 21.2 [ii] (a), **"For a full-time employee who is rostered to do 4 shifts on and 4 shifts off – a minimum of 10.86 hours and a maximum of 12 hours."**

Need to insert Clause 21.1 [v] "**all roster cycles start day will commence on Monday"**

Need to insert in as **Clause24.1 (a) "Annual leave is to be calculated on the average ordinary hours worked as stated in clause 21.1(a)"**

Jurisdiction to vary a Modern Award

[10] The Fair Work Commission has jurisdiction to vary a modern award in the manner sought by the Application. However, that jurisdiction and the exercise of power to vary a modern award is subject to specific statutory considerations. Modern awards are the subject of Part 2-3 of Chapter 2 "Terms and Conditions of Employment" of the *Fair Work Act 2009* (the Act).

[11] Division 2 of Part 2-3 of Chapter 2 of the Act sets out the modern awards objective as follows:

134 The modern awards objective

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(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

(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.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's modern award powers, which are:

(a) The FWC's functions or powers under this Part; and

(b) The FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).

[12] The Act provides that four yearly reviews of modern awards are to be conducted by the Fair Work Commission. The four yearly reviews are to be conducted as provided for by Division 4 of Part 2-3 of Chapter 2 of the Act.

[13] It is appropriate to observe that the power to vary the Award outside the four yearly review provisions of the Act applicable to modern awards is contingent upon there being a circumstance or circumstances which gives rise to satisfaction on the part of Fair Work Australia that there is a necessity to vary a modern award to meet the modern awards objective.[2] Such satisfaction must be arrived at on a proper basis and in accordance with a procedure which affords natural justice to persons whose interests may be affected by a determination to vary a modern award.

[14] Whether or not the Commission can be satisfied that it is necessary to vary the award to achieve the modern awards objective will depend upon the extent to which a variation which is sought addresses the statutory direction provided in s. 134 of the Act. When considering if this is so it will be necessary to have regard to the evidence, if any, and material submitted in support of any Application to vary a modern award and likewise any opposition thereto. An Applicant for a variation to a modern award will bear the onus of establishing the need to vary the Award to meet the modern awards objective. It will also be necessary to have regard to the nature of the relevant modern award, its scope and coverage and the likely effects upon employers and employees covered by the Award caused by the proposed variation to the terms of the award, taking into account the provisions of s. 134 of the Act.

Approach to the Application

[15] The relevant principles which guide my consideration of the Application are set out in the *"Statement"*[3] by a Full Bench of Fair Work Australia on 26 June 2009 in relation to the variation of modern awards. Relevantly, the Full Bench stated as follows:

> **"[3]** Applications to vary the substantive terms of modern awards will be considered on their merits. It should be noted, however, that the Commission would be unlikely to alter substantive award terms so recently made after a comprehensive review of the relevant facts and circumstances including award and NAPSA provisions applying across the Commonwealth. Normally a significant change in circumstances would be required before the Commission would embark on a reconsideration."

[16] It is now appropriate to set out the grounds upon which the Application is made.

4. Grounds:

Clause15.1 a

Employees who work as a maritime security officer in a MSZ [maritime security zone] are required to have a MSIC [maritime security identification card] [at this date it is $480 for four years,] in most cases the employer pays for the MSIC but some employers are putting the financial cost onto the employee for the MSIC without any allowance to cover the cost.

There is the understanding of the burden of the MSIC to the employer as some employees leave the employer after a short time and the employer then has to pay for another MSIC which becomes costly.

The client also has the burden of the cost of the MSIC for their own employees and is paying for their employees MSIC so the client would most likely expect the cost of the MSIC to be passed on in the price of the service but would not expect to pay more than one per position

To even out the disadvantage of these MSIC, on the employee's side an allowance could be granted to the employee to cover the financial cost of the MSIC and for the

employer's side the allowance would be paid only as long as the employee is employed by that employer

So to stop any poaching by one employer from another employer if the employee has paid for the MSIC and has changed employer [even if an employer had paid for the MSIC and has deducted the amount from the employees pay] the allowance will still be awarded to the employee by the new employer if the new employer requires the employee to hold a MSIC.

Clause 20.1 Superannuation legislation
Under legislation the superannuation is calculated with a maxim of 38 hours per week being the ordinary hours worked by a full time employee but the superannuation legislation has not taken into account that a 10.86 hour shifts x 4 shifts on and 4shifts off, these shift employees will work half of the weeks doing 32.58 ordinary hours for those weeks and the other half of the weeks worked 43.44 hours per week of ordinary hours but the superannuation legislation allows the employer to cap the 43.44 hours at 38 hours and the weeks where 32.58 ordinary hours are worked will be calculated at a pro rata of 32.58 hours per week. So to remove any disadvantage, clause 20.1 (c) needs to be added.

Clause 22.2
The award has not taken in to account the 12 hour shifts x 4 on, 4shifts off, so the award has disadvantaged the employee who is working a 12 hour night shift x 4on, 4shifts off, as 50% of their shift is before midnight.

Clause 21.2 [ii]
This would disadvantage the permanent employee who is rostered to do 4 x 12 hour shift on, 4 shifts off; as a permanent employee who is rostered to do 4 shift x 12 hour on, 4 shifts off would average 3.5 shifts per week and if the minimum hours per shift is 7.6 hours than 7.6 hours multiply by 3.5 shift would only give the employee an average of 26.6 hours per week which is below the permanent employee's minimum hours of 38 hours per week as stated in clause 21.1(a) of the award.

Clause 21.1 so that no employer or employee could disadvantage the other there is a need to have a definition on the day[Monday?] these cycles start, so there is no misunderstanding and one side can't move the start day up or down to gain the advantage.

Clause24.1 To ensure there is no confusion with the 4 on 4 off shift. Annual leave is calculated on the average ordinary hours worked as stated in clause 21.1(a).

[17] These grounds were the substance of what was put in support of the Application. No evidence was called in support of the Application and no further written submissions were made, other than those made by Mr Truss in reply to others, which will both be referred to below.

[18] In response to the Application and the grounds in support of the Application, submissions were received from the Australian Security Industry Association Ltd and Business SA. It is convenient to set out those submissions in full.

[19] The submissions of Australian Security Industry Association Ltd are as follows:

FAIR WORK AUSTRALIA
Fair Work Act 1996

Submission by the Australian Security Industry Association Limited

in reply to
an application to vary
MA000016 the Security Services Industry Award 2010 made by Mr. David Truss
under s.157 - 160

2 January 2013
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Introduction

1. This submission is made on behalf the Australian Security Industry Association Limited (ASIAL) in reply to an application by Mr. David Truss to vary MA000016 Security Services Industry Award 2010.

2. ASIAL is a registered organization of employers under the Fair Work Act 2009. ASIAL represents over 3000 members throughout Australia predominantly involved in the Security Industry.

3. ASIAL is therefore an organisation that is entitled to represent the industrial interests of one or more employers that are covered by the Security Services Industry Award 2010 (the Award) and affected by the variations being sought.

4. ASIAL notes the observations of the Award Modernisation Full Bench that:

"Applications to vary the substantive terms of modern awards will be considered on their merits. It should be noted, however, that the Commission would be unlikely to alter substantive award terms so recently made after a comprehensive review of the relevant facts and circumstances including award and NAPSA provisions

applying across the Commonwealth. Normally a significant change in circumstances would be required before the Commission would embark on a reconsideration".[1]

5. ASIAL submits that the variations sought by Mr. Truss do not pass this "significant hurdle" and there is no significant change in circumstances that would give the Commission reason to vary the Award.

6. Section 138 deals with the terms to be included in modern awards. In discussing the application of s.138 The Full Bench in Decision [2012] FWAFB 56000 agrees with the observations of Tracey J in *Shop Distributive and Allied Employees Association v National Retail Association No.2) [2012] FCA 480 that:*

"..a distinction must be drawn between what is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action."

7. ASIAL submits that the application made under s.157 is not meet the criteria of "necessary".

8. Mr. Truss did not attend and made no submissions during the making of the Modern Award.

9. Mr. Truss is seeking to introduce a new allowance (Maritime Allowance) not previously included in any pre modern security award of any state or territory or the Security Services Industry Award 2010.

10. Variations of this nature fall into the category of "work value and can only be determined by Fair Work Australia after proper consideration having regard to s156.

11. The application seeks to vary operation of 12 hour shifts, particularly in relation to rosters requiring employees to work "4 days on and 4 days off" configurations. There are many more variations using combinations of hours and days and roster cycles, which are adequately controlled by current award provisions. ASIAL submits that the variations sought will create confusion and ambiguity and is entirely unnecessary.

12. ASIAL submits that in an industry that operates 24 hours per day 7 days per week, it is operationally restrictive, and an unnecessary imposition on employers to have a fixed day for the commencement of a roster. The Award deals adequately with changes to rostered times at Clause 21.12.

13. In our opinion Mr. Truss's submissions regarding the application of the Superannuation Guarantee Administration Act are without foundation.

14. It is ASIAL's submission that application of the Superannuation Guarantee Administration Act, the Award and various applicable Australian Tax Office Rulings provide adequate advise and instruction on the calculation of ordinary time

earnings and ordinary hours of work. It is therefore unnecessary to vary the Award as sought by Mr. Truss.

15. The application seeks to vary the calculation of annual leave. ASIAL submits that the NES and the Award ensure that 7 day shift workers are paid in accordance with their roster for ordinary hours during a period of leave or at ordinary rates plus a 17.5% loading whichever is the greater. The award provision are unambiguous and fair in their application and continue pre modern award conditions for employees. There is no necessity to for this variation to be considered.

16. It is ASIAL's submission that the variation(s) in the terms sought by Mr. Truss, and the grounds in support of the application are neither necessary nor desirable and will not assist to overcome an error or ambiguity.

17. ASIAL submits that the application should be dismissed in their entirety.

[1] [2009] AIRCFB 645, at para 3.

[20] The submissions of Business SA are as follows:

"**1. Introduction**

1.1 Business SA is the State's leading business organisation and represents thousands of businesses through direct membership and affiliated industry and association groups.

1.2 Business SA is a registered association of employers under the South Australian *Fair Work Act 1994* and recognised under that and other legislation as the State's peak business and employer group.

1.3 Business SA is also a transitionally recognised association under the *Fair Work (Registered Organisations) Act 2009.*

1.4 Through membership of the Australian Chamber of Commerce and Industry (ACCI), Business SA is able, on behalf of the South Australian business community, to play an active role in national issues that impact on the local business community.

1.5 We have an interest in the Security Services Industry with members engaged in the provision of Security services. As such, Business SA made submissions in relation to the industry during the Award Modernisation Process.

1.6 Business SA welcomes the opportunity to make submissions to the Fair Work Commission in response to the application by Mr David Truss (AM2012/354) to vary the Security Services Industry Award 2010.

2. Relevant provisions of the Fair Work Act 2009

2.1 Chapter 2, Part 2-3, Division 5 of the *Fair Work Act 2009* sets out the provisions under which Modern Awards can be varied outside the four yearly reviews. This includes varying Modern Award under section 157 to achieve the Modern Awards objective and to remove an ambiguity or uncertainty or to correct an error under section 160.

2.2 The Modern Awards objective in turn is set out in section 134(1) as follows:

FWA 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

(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.

2.3 In relation to the terms to be included in Modern Awards, section 138 states that:

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.

2.4 In discussing the application of section 138, the Full The Full Bench in Decision [2012] FWAFB 56000 agrees with the observations by Tracey J in Shop, Distributive and Allied Employees Association v National Retail Association (NO 2) [2012] FCA 480 that:

a distinction must be drawn between what is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action."

2.5 In this context, in order for an application made under section 157 to be successful, the commission would need be satisfied that the variation that the variation is necessary and not merely desirable.

3. Submission in opposition to the application

Business SA makes this submission opposing the application AM2012/354 by David Truss to vary the Security Services Industry Award 2010 to introduce a new allowance, to vary the hours and related clauses to attempt to correct perceived inequities regarding 12 hour shifts and insert new provisions relating to superannuation and annual leave.

3.1 New subclauses 15.12 (a) and (b) – Maritime Allowance

3.1.1 The application proposes a maritime allowance payable to an employee who is required to hold a MSIC (maritime security identification card) and is required to pay for the cost of the MSIC. It is proposed that this be a weekly allowance.

3.1.2 Business SA submits that in this part it is unclear on what the basis the application is made and what, if any, evidence the applicant has that the Modern Award in its current form does not achieve the Modern Awards objective. It is further submitted that the variation is not necessary, but would in fact undermine the Modern Award achieving the Modern Awards objective, in particular taking into account:

134(1)(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.

3.1.3 This is because the variation would require the payment of a maritime allowance, equivalent to the cost of obtaining a MSIC, whereas today no such allowance is payable. In addition, the allowance would be payable even where the employee has already been reimbursed for this expense by a previous employer.

3.1.4 It is also worth noting that holding a MSIC is not a new requirement for persons seeking to work in maritime security zone, but has been in place since the enactment of the *Maritime Transport Security Act 2003*.

3.1.5 While claims were made for a number of allowances to be included in the Security Services Industry Award 2010 during the Part 10A Award Modernisation Process, no party appear to have sought the inclusion a maritime allowance. This proposed allowance was not considered by the Full Bench in the making of this award and the relevant NSW pre-reform award, the award from which the rates in the exposure draft were drawn, does not provide such an allowance.

3.2 Subclause 20.1 - Legislative Superannuation

3.2.1 The application proposes that Superannuation be calculated on the average ordinary hours worked as stated in subclause 21.1(a).

3.2.2 This proposed change is unnecessary. The award, the *Superannuation Guarantee Administration Act 1992* and appropriate ATO rulings combined ensure that all employees are to be paid superannuation on all ordinary hours worked, in accordance with the definition of "ordinary time earnings.

3.2.3 The applicant has not demonstrated that the Modern Award in its current form fails to meet the Modern Awards objective or that existing provisions results in ambiguity or uncertainty.

3.3 Subclause 21.2(a)(ii) - Shift Duration

3.3.1 The application proposes that the following words would clarify ordinary hours for the purposes of fairness. "For a full-time employee who is rostered to do 4 shifts on and 4 shifts off - a minimum of 10.86 hours and a maximum of 12 hours."

3.3.2 This proposed amendment is unnecessary. In the event of a 12 hour shift being worked the employee will either be paid appropriate overtime at penalties or an agreement has been reached at the workplace level under clause 21.2(b) to ensure all elements of working a 12 hour shift at ordinary time are addressed.

3.4 New Clause 21.1(v) - Ordinary Hours and Roster Cycles

3.4.1 The application proposes that all roster cycles start day will commence on Monday.

3.4.2 The applicant requests this variation to 'avoid the employer (or employee) ''moving' the roster start day'. Business SA submits that the award provides a structure which would ensure the employee's entitlements in the event that an employer attempted to do this. Further any such changes made specifically to a 12 hour shift arrangement would need to be by agreement.

3.4.3 The variation therefore is unnecessary.

3.5 Clause 22.2(a) - Permanent Night Work

3.5.1 The application seeks to ensure that this subclause applies to 12 hour shift workers by inserting "4 shifts on 4 shift off Permanent night shift means when a employee is engaged on a 4 shifts on and 4 shifts off roster," and the work is performed during a night span over the whole period of a roster cycle in which more than two thirds of the employee's ordinary hours is between 1800 hrs and 0600 hrs.

3.5.2 Business SA submits that this application is unnecessary. The current clause provides for 12 hour shifts as permanent night shift is 'work performed during a night span over the whole period of a roster cycle in which more than *two thirds of the employee's ordinary shifts* include ordinary hours between 0000 hrs and 0600 hrs.'

3.6 Clause 24.1(a) - Annual Leave

3.6.1 3.6.1 It is proposed that "Annual leave is to be calculated on the average ordinary hours worked as stated in subclause 21.1(a)" to ensure fairness.

3.6.2 Business SA submits that this application is not necessary. The NES ensures that annual leave is calculated on all ordinary hours. In the event of a 12 hour shift including overtime an appropriate penalty is payable.

4. Conclusion

4.1 In conclusion it is Business SA's submission that the application in its entirety be dismissed. The application neither seeks to correct an error nor does it assist the Commission to achieve the Modern Awards Objective."

Consideration

[21] I shall address the variations sought by that Application in order. Before doing so however, I make the general observation that the information and submissions filed in support of the variations sought is limited and falls well short of what would usually be presented to the Commission in support of an Application of this kind. This is no criticism of Mr Truss but rather an observation that an individual employee making an Application of this kind may be unfamiliar with the nature and extent of a case necessary to persuade the Commission to exercise the relevant power to vary a modern award which applies throughout Australia to many employers and employees working in extremely diverse circumstances. Moreover, the content and structure of the submissions in support of the Application relate to highly particular circumstances affecting Mr Truss' employment that pose some puzzling implications, which I am unable to be sure I can fully comprehend, on what is before me. This aspect of the matter will be referred to further below.

The Maritime Security Identification Card Allowance

[22] It is a notorious fact that employees working in maritime ports and adjacent areas serving the maritime industry are required to obtain a security clearance and are required to hold a Maritime Security Identification Card (Card). There is a cost for obtaining the necessary accreditation. It will usually, if not invariably, be the case that an employer covered by the Award will require, as a condition of employment, that an employee working in such areas holds a Card.

[23] Prima facie there is an issue of fairness in relation to a requirement of an employer that an employee obtain or hold a particular document, such as a licence, wear specified clothing, provide certain tools or materials or otherwise incur a cost in order to be employed or carry out work as directed. Arguably, if the requirement is one imposed upon on an employee by an employer, consideration of the relevant cost and issues of reimbursement, as a fair condition of employment to be prescribed by an award of industrial tribunal, is something which engages with the subject of "a fair and relevant minimum safety net of terms and conditions of employment"[4] which is a critical object of the modern awards objective.

[24] The determination and award of allowances by industrial tribunals for such circumstances is, however, not straight forward but rather uneven. Reference may be made to the terms and conditions, of the *Road Transport (Long Distance Operations) Award 2010* and the *Road Transport and Distribution Award 2010,* which do not prescribe reimbursement or allowances for truck drivers who must hold licences of various kinds in order to perform the work covered by the Award, which licences are required by statutory regulation of the industry. On the other hand, allowances are payable in relation to the transportation of dangerous goods.

[25] On what is before me, I consider that there is insufficient evidence and material to satisfy me that the variation sought is appropriate. No doubt from the perspective of employees required to incur the necessary expense of the Card the variation would be desirable. However, the Commission must be satisfied that it is necessary to vary the Award in order to achieve the modern awards objective, which involves more than judging the desirability of a relevant condition of employment from an employee perspective.

[26] It is notable that the relevant obligation arises from statutory regulation of the security environment of the relevant areas into which access requires a person to hold the Card, by the Commonwealth of Australia, as matter of public policy, for reasons of national security. This is not a discretionary imposition upon employees determined unilaterally by their employer or employers. Moreover, the statutory requirements apply to persons other than security guards whose employment is covered by the Award. The more general implications of awarding as sought by the Application have not been addressed. Employees employed under the terms of other Awards may well be required to hold a Card.

[27] The imposition of the cost of the Card upon employers would be significant and I am unable to know from adequate information in the proceedings what the effects of doing so would be on employment costs or productivity[5], having regard to the bare nature of the Application and the supplementary material. Moreover, the issue of how any amount of reimbursement would be applied or recovered in relevant circumstances, in light of unknown levels of labour market turnover, seems fraught and may impose obligations upon employers much greater than the nominal cost quoted in the Application for each single employer of an employer at a particular point in time. The proposal in the Application and how it would apply in practice in my view is underdeveloped.

[28] Having regard to the matters which must be taken into account prescribed by s.134 of the Act, on what is before me, I am unable to reach the requisite satisfaction which would give rise to the discretionary power to vary the Award as sought. It may be that a more substantially grounded Application might be able to address the issues I consider have not been adequately addressed. However, given the gap between the alleged desirability of reimbursement by an allowance and the relevant considerations not dealt with by the Application, the Application must be dismissed.

Superannuation

[29] In my view, the uniform statutory regulation of employer contributions to employee superannuation accounts should not be readily and haphazardly varied by the Commission by imposing varying definitions of contribution levels throughout the Award system. I also agree with the submission of Business SA that the *Superannuation Guarantee Administration Act* 1992 and appropriate Australian Tax Office rulings adequately ensure that employer contributions are required in relation to all employees' ordinary time earnings and thus the variation sought is unnecessary to ensure such liability upon employers in the security industry.

Shift Duration

[30] The variation sought by the Applicant in Clause 22.2 should be considered having regard to the existing provision of the relevant Award provisions, which are set out below.

> **22.2 Permanent night work** means work performed during a night span over the whole period of a roster cycle in which more than two thirds of the employee's ordinary shifts include ordinary hours between 0000 hrs and 0600 hrs.

[31] The merits of the proposed variation and its consequences is not made out sufficiently, so as to be confidently entertained as a necessary variation to the Award to achieve the modern awards objective. On what has been put in support of the variation it would seem that Mr Truss is referring to a particular roster in his workplace. I consider the variations sought could have significant potential impacts in the security industry well beyond the operations of FBIS, which I am unable to accurately discern. In my view, to award in favour of the variation sought would be something of a leap in the dark having regard to the limited material before me.

[32] It seems that the essence of the submission is that the particular roster worked by Mr Truss should be paid for as a permanent night shift. This, if generalised by Award, could have significant effects upon employment costs and productivity that are not addressed in the proceedings.

[33] It is appropriate in relation to this aspect of the Application to refer to the principles set out and cited in the *"Statement"* of the Full Bench above. In my view, having regard to the matrix of provisions governing the ordinary hours, shift work and shift allowance of the Award, determined by the Full Bench when the award was made and no discernible change of circumstances having been made out, the case before me is insufficiently compelling to warrant what could and most probably would be a major change affecting the industry as a whole. The regulation of ordinary hours, shift work, rostering and penalty rates is a highly complex and interactive matrix of rights and duties and obligations prescribed by the Award. In my view, given the extremely limited basis upon which the Application is made and the absence of comprehensive evidence and analysis of the relevant issue, it would be capricious to exercise the jurisdiction to vary the Award in the manner sought in this respect.

[34] The ambiguity and uncertainty surrounding this aspect of the Application is illustrated by Mr Truss' submission in reply on this part of the Application as follows.

> In reference to the 10.86 hours shift there is some confusion as what is what. The Award only shows hours up to 10 hours, where is the information on 12 hours that is being worked. There has been no update to the Award on this.
>
> In reference to the 4 on 4 off, the confusion is that there are no clauses that deal with this roster. I'm only dealing with the 4 on 4 off as that is the shift I'm working on, all rosters must be look at to ensure that where a cycle is used, then that the average is used, but I'm willing to hear from other employees who have different roster's so we can insert more clauses to cover their needs. This will counteract any employers who may try to confuse their employees by the lack of information and clauses governing the rules in the Award.

In reference to night shift as it is showing that the Award has not been adjusted for the 12 hour shift it is still running on 8 hour shift. This is why there is a need to insert these clauses.

[35] Finally, I am unable to relate the content of this submission to a coherent case for a variation to the Award based on either a significant change of circumstances since the award was made.

Four days on Four Days off- Hours

[36] I cannot discern the merits of this variation on material before me.

[37] Clause 21.2 of the Award and the variations sought are set out below, sequentially, followed by the grounds in support of the variation.

Award Provisions

21.2 Shift duration

(a) Ordinary time shifts must be limited in duration to:

(i) for casual employees—a minimum of four and a maximum of 10 ordinary hours;

(ii) for full-time employees—a minimum of 7.6 and a maximum of 10 ordinary hours; and

(iii) for part-time employees—a minimum of one fifth of the employee's agreed weekly hours or four hours (whichever is the greater) and a maximum of 10 ordinary hours.

(b) Notwithstanding clause 21.2(a) by agreement between the employer and the majority of employees concerned in a particular establishment, ordinary working hours exceeding 10 but not exceeding 12 hours per shift may be introduced subject to:

(i) proper health monitoring procedures being introduced;

(ii) suitable roster arrangements being made;

(iii) proper supervision being provided;

(iv) adequate breaks being provided; and

(v) an adequate trial or review process being implemented where 12 hour shifts are being introduced for the first time.

> **(c)** Employees are entitled to be represented for the purposes of negotiating such an agreement. Once agreement is reached it must be reduced to writing and kept as a time and wages record.
>
> **(d)** Clause 21.2(b) is not intended to prevent an employer implementing 12 hour rosters through the use of regular rostered overtime (subject to the requirements in s.62 of the Act in relation to the right of an employer to require reasonable overtime) or individual flexibility agreements made pursuant to clause 7.

Variations sought

> Need to insert Clause 21.2 [ii] (a), **"For a full-time employee who is rostered to do 4 shifts on and 4 shifts off – a minimum of 10.86 hours and a maximum of 12 hours."**

Grounds in support

> **Clause 21.2 [ii]**
> This would disadvantage the permanent employee who is rostered to do 4 x 12 hour shift on, 4 shifts off; as a permanent employee who is rostered to do 4 shift x 12 hour on, 4 shifts off would average 3.5 shifts per week and if the minimum hours per shift is 7.6 hours than 7.6 hours multiply by 3.5 shift would only give the employee an average of 26.6 hours per week which is below the permanent employee's minimum hours of 38 hours per week as stated in clause 21.1(a) of the award.

[38] Mr Truss' submissions in reply on this aspect of the Application are bound up with those made likewise in relation to the variation sought to Clause 22.2. In my view, there is a complex consideration embedded in Mr Truss' submission, arising from the particular factual matrix of his employment which is not made readily or entirely apparent from the text of the submissions. Moreover, I have difficulty in following the disadvantage said to arise having regard to my construction of the proper application of the existing terms of the Award. I may be mistaken, however, my best endeavours to construe the submission lead me to conclude that the grounds state that the circumstances of employees employed on a four on four off 12 hour roster do not result in a "permanent employee" working an average of 38 hours per week.

[39] The Award provides for three types of employment, fulltime, part-time and casual. A full time employee is defined at Clause 10.3 of the Award as follows:

> **10.3 Full-time employees**
>
> A full-time employee is an employee who is employed in a classification in Schedule C - Classifications and engaged to work 38 ordinary hours per week, or, where the employee is employed on a roster, an average of 38 hours per week over the roster cycle.

[40] As Mr Truss refers to a permanent employee working 38 hours per week I take it that this is a reference to a full-time employee and that he is a full-time employee.

[41] It may be however, considering the potential implications of the roster pattern that is referred to, that Mr Truss is a part-time employee, I do not know. In any event what follows applies, *pro-rata* to part-time employees by operation of Clause 10.4 of the Award. The provisions of the Award set out above are unambiguous. A full-time employee is required to work and is entitled to payment for 38 hours per week. If the employer chooses to roster a full-time employee over a full-time employment roster cycle provided for by the Agreement, for less than 38 hours per week, that does not remove the employee's entitlement to payment for the ordinary hours of a full-time employee.

[42] If I correctly identify the content of the submission and the mischief sought to be remedied by the proposed variation correctly, I find it unnecessary to further consider the variation as sought.

[43] In my view, there is no ambiguity in Clause 21.1(a) of the Award as follows:

> **21.1 Ordinary hours and roster cycles**
>
> **(a)** The ordinary hours of work are 38 hours per week or, where the employer chooses to operate a roster, an average of 38 hours per week to be worked on one of the following bases at the discretion of the employer:
>
> **(i)** 76 hours within a roster cycle not exceeding two weeks;
>
> **(ii)** 114 hours within a roster cycle not exceeding three weeks;
>
> **(iii)** 152 hours within a roster cycle not exceeding four weeks; or
>
> **(iv)** 304 hours within a roster cycle not exceeding eight weeks.
>
> (emphasis added)

[44] If I am wrong and the object of the variation sought is different to ensuring payment to full-time employees of the rate of pay for 38 hours per week, on what is before me, I cannot then be sure of the merits of the variation or its consequences, having regard to the matters which must be taken into account in relation to achievement of the modern awards objective.

[45] Before departing this aspect of the Application, I should observe that on what is before me it would seem that the roster as referred to is predicated on the hours rostered on as ordinary hours. I am unable to reconcile such a roster with the requirement of the rostering provisions of the Award accordingly.

Roster cycles always to start on Monday

[46] On what is before me, in my view, the day(s) when roster cycles should commence is not appropriately determined by the Award. A provision allowing any day to be the commencing day of rostering of hours provided for by the Award was effectively included when the Award was made by the Full Bench. The Application does not identify any changed circumstances which can be said to make it necessary to vary the Award to meet the modern awards objective to require that all roster cycles commence on a Monday. More particularly, there is no other adequate ground for determining that the cycle should always and only commence on a Monday.

[47] It seems that the submission is based on a proposition that the day a roster cycle commences can be unilaterally changed by the employer. On what is before me, I am unable to understand how this can occur so as to cause quantifiable issues of fairness for determination. It is suggested this can be done "to gain the advantage" however explanation of how this occurs or the advantage which is gained is not before me.

[48] On what is before me, I cannot reach the satisfaction that it is necessary to vary the Award to meet the modern awards objective in accordance with the relevant Full Bench principles earlier stated in respect of this part of the Application.

Payment for Annual Leave

[49] The variation sought by this part of the Application may be misconceived. I am unable to be certain of the object of the variation sought, having regard to the existing provisions of the Award. In the grounds in support of the Application, Mr Truss says the following in relation to this aspect:

> **Clause24.1** To ensure there is no confusion with the 4 on 4 off shift. Annual leave is calculated on the average ordinary hours worked as stated in clause 21.1(a)

[50] The annual leave provisions of the Award are set out below:

> **24. Annual Leave**
>
> **24.1** Annual leave is provided for in the NES. Annual leave does not apply to casual employees. This clause supplements or deals with matters incidental to the NES provisions.
>
> **24.2 Definition of shiftworker**
>
> **(a)** For the purpose of the NES, a shiftworker is an employee:
>
> > **(i)** who works a roster and who, over the roster cycle, may be rostered to work ordinary shifts on any of the seven days of the week; and
> >
> > **(ii)** who is regularly rostered to work on Sundays and public holidays.
>
> **(b)** Where an employee with 12 months' continuous service is engaged for part of the 12 monthly period as a shiftworker, that employee must have their annual leave

increased by half a day for each month the employee is continuously engaged as a seven day shiftworker.

24.3 Taking annual leave

Annual leave is to be taken within two years of the entitlement accruing. For the purpose of ensuring accrued annual leave is taken within that period, or because of a temporary or seasonal slowdown in the employer's business, and in the absence of agreement as provided for in s.88 of the Act, an employer may require an employee to take a period of annual leave from a particular date provided the employee is given at least 28 days' notice.

24.4 Payment for annual leave

Before the start of the employee's annual leave the employer must pay the employee in respect of the period of such leave the greater of:

(a) the amount the employee would have earned during the period of leave for working their normal hours, exclusive of overtime, had they not been on leave; and

(b) the employee's ordinary time rate specified in clause 14.1, together with, where applicable, the leading hand allowance, relieving officer's allowance and first aid allowance prescribed in clause 15.1(a) respectively, plus a loading of 17.5%.

24.5 Leave allowed before due date

By agreement between an employer and an employee a period of annual leave may be taken in advance of the entitlement accruing. Provided that if leave is taken in advance and the employment terminates before the entitlement has accrued the employer may make a corresponding deduction from any money due to the employee on termination.

24.6 Annual close down

(a) Where an employer intends temporarily to close (or reduce to nucleus) the place of employment or a section of it for the purpose, amongst others, of allowing annual leave to the employees concerned or a majority of them, the employer must give those employees one month's notice in writing of an intention to apply the provisions of this clause. In the case of any employee engaged after notice has been given, notice must be given to that employee on the date of their engagement.

(b) Any employee who has accrued annual leave at the date of closing must:

(i) be given annual leave commencing from the date of closing; and

(ii) be paid 1/12th of their ordinary pay for any period of employment between accrual of the employee's right to the annual leave and the date of closing.

(c) Any employee who has no accrued annual leave at the date of closing must:

(i) be given leave without pay as from the date of closing; and

(ii) be paid for any public holiday during such leave for which the employee is entitled to payment.

24.7 Payment of accrued annual leave on termination

Where an employee is entitled to a payment on termination of employment as provided in s.90(2) of the Act, the employer must also pay to the employee an amount calculated in accordance with clause 24.4(a). The employer must also pay to the employee a loading of 17.5% in accordance with clause 24.4(b) unless the employee has been dismissed for misconduct.

24.8 In relation to any employee **ordinary pay** means:

(a) remuneration for the employee's normal weekly number of hours of work calculated at the ordinary time rate of pay; and

(b) where the employee is provided with board or lodging by the employer, ordinary pay includes the cash value of that board or lodging.

24.9 For the purpose of the definition of the term ordinary pay in clause 24.8:

(a) where no ordinary time rate of pay is fixed for an employee's work under the terms of employment, the ordinary time rate of pay is deemed to be the average weekly rate earned during the period in respect of which the right to the annual leave accrues;
(b) where no normal weekly number of hours is fixed for an employee under the terms of employment, the normal weekly number of hours of work is deemed to be the average weekly number of hours worked during the period in respect of which the right to the annual leave accrues;

(c) the cash value of any board or lodging provided for an employee is deemed to be its cash value as fixed by or under the terms of the employee's employment or, if it is not so fixed, must be computed at the rate of $2.49 a week for board and $1.25 a week for lodging; and

(d) the value of any board or lodging or the amount of any payment in respect of board or lodging must not be included in any case where it is provided or paid for not as part of the ordinary pay but because:

(i) the work done by the employee is in such a locality as to necessitate their sleeping elsewhere than at their genuine place of residence; or

(ii) because of any other special circumstances.

(e) Week in relation to any employee means the employee's ordinary working week.

[51] The amount of annual leave prescribed by the National Employment Standards (the NES)[6] is set out below.

> **87 Entitlement to annual leave**
>
> Amount of leave
>
> (1) For each year of service with his or her employer, an employee is entitled to:
>
> (a) 4 weeks of paid annual leave; or
>
> (b) 5 weeks of paid annual leave, if:
>
> (i) a modern award applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or
>
> (ii) an enterprise agreement applies to the employee and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards; or
>
> (iii) the employee qualifies for the shiftworker annual leave entitlement under subsection (3) (this relates to award/agreement free employees).
>
> Note: Section 196 affects whether the FWC may approve an enterprise agreement covering an employee, if the employee is covered by a modern award that is in operation and defines or describes the employee as a shiftworker for the purposes of the National Employment Standards.
> Accrual of leave
>
> (2) An employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and accumulates from year to year.
>
> Note: If an employee's employment ends during what would otherwise have been a year of service, the employee accrues paid annual leave up to when the employment ends.
>
> Award/agreement free employees who qualify for the shiftworker entitlement
>
> (3) An award/agreement free employee qualifies for the shiftworker annual leave entitlement if:
>
> (a) the employee:
>
> (i) is employed in an enterprise in which shifts are continuously rostered 24 hours a day for 7 days a week; and

(ii) is regularly rostered to work those shifts; and

(iii) regularly works on Sundays and public holidays; or

(b) the employee is in a class of employees prescribed by the regulations as shiftworkers for the purposes of the National Employment Standards.

(4) However, an employee referred to in subsection (3) does not qualify for the shiftworker annual leave entitlement if the employee is in a class of employees prescribed by the regulations as not being qualified for that entitlement.

(5) Without limiting the way in which a class may be described for the purposes of paragraph (3)(b) or subsection (4), the class may be described by reference to one or more of the following:

(a) a particular industry or part of an industry;

(b) a particular kind of work;

(c) a particular type of employment.

[52] If the variation is sought is in relation to a disadvantage said to arise from the shift roster of an employee referred to as, four days x 12 hours four days off, it is appropriate to consider how the Award provisions apply in such circumstances. The relevant employee will, under the provisions of the NES and the Award, be paid for the days of a roster which would have been worked during a period of annual leave. Thus, if any relevant full-time employee seeks to take eight days leave over a period when they are rostered to work accordingly they would be paid for 48 hours and their accrued paid annual leave entitlement under the NES would be reduced by 48 hours. If an employee on that roster were to take four weeks leave they would be entitled to be paid for the days that they would be rostered on during that period. The amount of annual leave over the four week period which would be "paid annual leave" would be debited against the employees' accrued annual leave.

[53] In a full year, a full-time employee will accrue entitlements of either four or five weeks of paid annual leave under the NES. In the case of a full-time employee covered by the Award, whose paid annual leave entitlement is four weeks, the employee will accrue four times 38 ordinary hours of paid annual leave. The employees' annual leave entitlement is therefore 152 hours of paid annual leave. Should the roster arrangements in any year and the incidence of paid leave for that year result in the employee being paid less than 152 hours for annual leave the employee will carry forward accrued paid annual leave entitlements to the amount of the relevant difference. Any such difference accrued is an employee entitlement which may be taken in the future and if not taken must be paid out at termination of employment, pursuant to Clause 24.7 of the Award. Days upon which an employee would not have been rostered to work during a period of annual leave do not constitute *paid* annual leave, for the purposes of the NES, or the Award. It may also be relevant in the circumstances referred to in the Application to have regard to Clause 24.9 of the terms of the Award.

[54] Having regard to the clear entitlements to paid annual leave, I am not satisfied that it is necessary to vary the Award to achieve the modern awards objective in relation to annual leave entitlements or payment therefore. The entitlements ensure that a full-time employee is entitled to 152 paid hours of annual leave if accruing four weeks annual leave under the NES regardless of the configuration of the roster of work and must be paid accordingly. The same applies if five weeks annual leave is accrued, except that the number of hours of paid annual leave will be 190.

[55] For all of these reasons I will issue an Order dismissing the Application.

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[1] PR985126

[2] *Fair Work Act 2009* s.157.

[3] [2009] AIRCFB 645.

[4] *Fair Work Act 2009* s.134.

[5] Ibid s.134.

[6] *Ibid s*.87.