
Fair Work Commission: 4 yearly Review of modern awards

AM2014/197: CASUAL EMPLOYMENT

**CLOSING SUBMISSIONS IN RESPECT OF
AWU'S CASUAL OVERTIME CLAIM**

HORTICULTURE AWARD 2010

Costa Group (Costa)

-and-

Australian Business Industrial (ABI)

-and-

NSW Business Chamber (NSWBC)

6 SEPTEMBER 2016

1. INTRODUCTION

1.1 These submissions are filed in relation to proceedings AM2014/197 (**Proceedings**) by:

- (a) Costa Group (ABN 002 687 961) (**Costa**), which is one of Australia's largest horticultural companies and a major grower, packer and distributor of fresh fruit and vegetables. Costa has farms located across every state of Australia and the business presently consists of seven fresh produce categories which include berries, mushrooms, tomatoes, bananas, citrus, table grapes and avocados. Six of these categories are vertically integrated enterprises with activities spanning farming through to retail and wholesale sales. Avocados are a predominantly marketing enterprise. During the peak of the harvest season, Costa Group has 6,000 people working across its farms which cover 3,000ha of farmed land and 30ha of protected glasshouse production across Australia;
- (b) Australian Business Industrial (**ABI**), which is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and has some 3,900 members; and
- (c) New South Wales Business Chamber (**NSWBC**) which is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth) and has some 18,000 members.

1.2 We have also been instructed that the position advocated by Costa in these proceedings is supported by:

- (a) Gromor Enterprises Pty Ltd, which grows mushrooms and produces compost which results in 600 tonnes of compost per week within the Marland operation over 4 locations in NSW and Queensland. The company has through a season up to 20 full time employees and 20 contractors to support harvest and other peak work periods;
- (b) Dorrian Consultancy Pty Ltd, which cultivates mangoes and avocados on over 350 hectares and operates across three locations. The company has 10 permanent employees, which are supplemented with an additional 50 employees during the picking seasons of January to February and March to August;
- (c) Capel Farms Pty Ltd, which is a vegetable growing business on 270 hectares. The company has roughly 5 full time equivalent employees supplemented with up to 30 casual employees to support harvest, packing and growing through the year;
- (d) Olam Orchards Australia Pty Ltd which in the horticultural industry across 18 locations in Australia:
 - (i) grows almonds on approximately 13,000 hectares with an estimated production volume of 35,000mt (processing the almonds it produces);
 - (ii) handles around 20,000mt mung beans from approximately 22,000 hectares of third party grower farms and exports in the order of 18,00mt;
 - (iii) handles and exports around 60,000mt from approximately 60,000 hectares of third party grower farms; and
 - (iv) has throughout a season up to 258 full time employees and 370 contractors to support harvest and other peak periods;and

- (e) Perfection Fresh Australia Pty Ltd which produces 30,000 tonnes of fresh produce across 12 locations in Australia. The company engages through a season up to 200 people to support harvest and other peak work periods.

2. BACKGROUND

- 2.1 The Australian Workers Union (**AWU**) initially filed an application on 17 July 2015 concerning the payment of overtime to casual employees in the Horticulture Award 2010 (**Award**).
- 2.2 This application was supported by submissions dated 14 October 2015 and the following witness statements:
 - (a) Adam Algate dated 18 February 2016;
 - (b) Ron Cowdrey dated 18 February 2016;
 - (c) Keith Ballin dated 9 October 2015.
- 2.3 On 22 February 2016, Costa Group, ABI and NSWBC filed comprehensive submissions in response (**Primary Submissions**).
- 2.4 In support of these Primary Submissions, two witness statements were filed:
 - (a) Peter John McPherson dated 22 February 2016;
 - (b) Richard Neil Roberts dated 22 February 2016.
- 2.5 The Primary Submissions addressed the AWU's submissions dated 14 October 2015 and outlined the historical context in which this claim is made. These submissions also articulate the unambiguous position that under the current terms of the Award, casuals are not entitled to overtime rates.
- 2.6 Contemporaneous submissions were also filed by the National Farmers Federation alongside a number of witness statements, the following of which are now in evidence before the Full Bench:
 - (a) Alice De Jonge dated 22 February 2016;
 - (b) Andrew Bulmer dated 22 February 2016;
 - (c) Andrew Young dated 22 February 2016;
 - (d) Ann Young dated 22 February 2016;
 - (e) Brendan Miller dated 22 February 2016;
 - (f) Brock Sutton dated 22 February 2015;
 - (g) John Dollisson dated 22 February 2016;
 - (h) Steve Chapman dated 22 February 2016;
 - (i) Donna Louise Mogg dated 21 February 2016;
 - (j) Kylie Collins dated 19 February 2016;
 - (k) Mick Dudgeon dated 19 February 2016;
 - (l) Clint Edwards dated 18 February 2016;
 - (m) Stephen Pace dated 18 February 2016;
 - (n) Susan Finger dated 16 February 2016;

- (o) Vicky Forsyth dated 16 February 2016;
 - (p) Tracey McGrogan dated 15 February 2016;
 - (q) Nick Leitch dated 12 February 2016;
 - (r) Andreas Reahberger - undated;
 - (s) Chris Fullerton - undated;
 - (t) Pennie Patane - undated;
 - (u) Rhonda Jurgens - undated;
 - (v) Ross Turnbull - undated;
 - (w) Tim Wollens - undated.
- 2.7 On 11 July 2016, the Full Bench heard evidence in relation to claim of the AWU and during this hearing the AWU indicated the possibility that it would vary the terms of its claim.
- 2.8 On 5 August 2016, the AWU filed its closing submissions including an amended claim seeking the following variations to the Award:

10.4 Casual employment

~~(a) A casual employee is one engaged and paid as such. A casual employee's ordinary hours of work are the lesser of an average of 38 hours per week or the hours required to be worked by the employer.~~

(a) A casual employee is one engaged and paid as such. A casual employee's ordinary hours of work are prescribed in clause 22.

....

22. Ordinary hours of work and rostering

~~22.1 The ordinary hours of work for all full time and part time employees other than shiftworkers will not exceed 152 hours over a four week period provided that:~~

~~(a) The ordinary hours will be worked between Monday and Friday inclusive except by arrangement between the employer and the majority of employees in the section/s concerned that the ordinary hours will be worked between Monday and Saturday inclusive.~~

~~(b) The ordinary hours will be worked between 6.00 am and 6.00 pm except if varied by arrangement between the employer and the majority of the employees in the section/s concerned.~~

~~(c) The ordinary hours will not exceed eight hours per day except by arrangement between the employer and the majority of employees in the section/s concerned in which case ordinary hours should not exceed 12 hours on any day.~~

~~(d) All time worked by full time and part time employees in excess of the ordinary hours will be deemed overtime.~~

22.1 The ordinary hours of work for all employees other than shiftworkers are as follows:

(a) The ordinary hours of work for full-time and part-time employees will not exceed 152 hours over a four week period and will be worked between Monday and Friday inclusive except by arrangement between the employer and the majority of full-time and part-time employees in the section/s concerned that the ordinary hours will be worked between Monday and Saturday inclusive.

(b) The ordinary hours of work for casual employees will be the lesser of 38 hours per week or the hours required to be worked by the employer and will be worked between Monday and Sunday inclusive.

(c) The ordinary hours for all employees will be worked between 6.00 am and 6.00 pm except if varied by arrangement between the employer and the majority of the employees in the section/s concerned.

(d) The ordinary hours for all employees will not exceed eight hours per day except by arrangement between the employer and the majority of employees in the section/s concerned in which case ordinary hours should not exceed 12 hours on any day.

(e) All time worked in excess or outside of the ordinary hours will be deemed overtime.

2.9 These submissions will refer to this latest formulation of the claim as the '**AWU Claim**'.

2.10 The AWU Claim seeks to extend an entitlement to overtime rates under the Award to casual workers other than shiftworkers. Despite the nature of its proposal, the AWU has curiously characterised its proposal as an attempt to "*clarify*" overtime entitlements for casual employees under the Award.

3. SCOPE OF THESE SUBMISSIONS

3.1 These submissions should be read alongside our Primary Submissions which responded to the AWU's submissions dated 14 October 2015.

3.2 Given the paucity of evidence filed in support of the AWU Claim (and the fact that no AWU witnesses were subject to cross-examination), these submissions primarily address the arguments advanced by the AWU in its submissions dated 5 August 2016.

4. THE LEGISLATIVE FRAMEWORK OF THE 4 YEARLY REVIEW

4.1 The legislative framework applicable to the 4 Yearly Review has been canvassed in great detail in various proceedings currently before the Full Bench and was also summarised in our Primary Submissions. In summary, this legislative framework is as follows:

(a) Section 156(2) of the FW Act requires the Full Bench to review all modern awards. In doing so, the Full Bench may make determinations varying modern awards.

(b) While the hearing of common issues is clearly allowable under s 156(5) of the FW Act, such section requires the Full Bench to review "*each modern award... in its own right.*"

(c) Section 134(1) of the FW Act sets out the modern awards objective. The modern awards objective requires that modern awards along with the National Employment Standards provide a "*fair and relevant minimum safety net*" of terms and conditions.

(d) What is "*fair and relevant*" is conditioned by the requirement to take into account the matters set out in s 134(1)(a) to (h) of the FW Act.

- (e) Section 138 of the FW Act outlines 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.*
- (f) Given the above, regardless of the process relating to the hearing of these matters, the Full Bench must be satisfied that the AWU's proposal is necessary to ensure a fair and relevant minimum safety net in accordance with s 134 of the FW Act for the Award.
- (g) The above legislative framework was considered in detail in the Preliminary Issues Decision.¹
- (h) The Preliminary Issues Decision at [23] confirms that the Full Bench remains at all times obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.
- (i) This means that, when considering any variation, the Full Bench should be focused upon ensuring that any new version of the minimum safety net is consistent with the modern awards objective.
- (j) The discretion conferred on the Full Bench to make determinations varying modern awards is expressed in general terms. However, the need for a 'stable' modern award system suggests that parties seeking to vary a modern award must advance a merit argument in support of the proposed variation.²
- (k) When considering the merit basis to make variations to modern awards, the Preliminary Issues Decision held that:
- (i) there may be cases where the need for an award variation is self-evident. In such circumstances, proposed variations can be determined with little formality;³ and
 - (ii) where significant award changes are proposed, they must be supported by submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.⁴

5. TASK OF THE FULL BENCH

- 5.1 Given the considerations outlined in the Preliminary Issues Decision, the Full Bench is now required to determine whether:
- a) the AWU has advanced a case (as contemplated by the Preliminary Issues Decision), including the requirement for probative evidence properly directed to demonstrating the facts supporting the proposed variation⁵, such as to warrant the Full Bench exercising its discretion pursuant to s 139 of the FW Act;

¹ [2014] FWCFB 1788

² Preliminary Issues Decision at [60]

³ Preliminary Issues Decision at [23] and [60]

⁴ Ibid

⁵ Preliminary Issues Decision at [23] and [60].

- b) any such exercise of discretion is consistent with s 134 of the FW Act; and
- c) the proposed changes would be consistent with s 138 of the FW Act.

6. HAS THE AWU ADVANCED A SUFFICIENT EVIDENTIARY CASE?

- 6.1 The evidence filed in support of the AWU Claim is wholly inadequate to support the granting of the claim.
- 6.2 If anything can be said of the AWU evidence, it is that such evidence supports the position (which we submit is self evident) that casuals are not currently entitled to overtime rates under the Award and that to grant the AWU Claim would not be to “clarify” the position, but to create a new substantive entitlement.
- 6.3 Three statements have been filed in relation to the Award and these witnesses were not called for cross-examination.
- 6.4 In summary, the statements:
 - (a) seek to describe the make-up of employees engaged under the Award;
 - (b) identify that currently overtime is not paid to casuals;
 - (c) confirm the nature of the industry (including the existence of short periods of intense work during harvest);
 - (d) identify that some unnamed workers have complained that they do not receive penalty rates;
 - (e) make unsubstantiated and non-specific allegations against unnamed employers alleging non-compliance with the Award.
- 6.5 Given the effect of the AWU Claim, consistent with the requirements of the Preliminary Issues Decision, a sufficient evidentiary case is required before the claim can be granted.
- 6.6 Instructively, a Full Bench in *Security Services Industry Award* [2015] FWCFB 620 noted at [8]:

While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.

- 6.7 When assessed against this evidentiary standard, the comparison between the case made by the AWU and the significance of the AWU Claim is stark.

6.8 Given the paucity of evidentiary material in support of the AWU Claim, we submit that the claim should be dismissed.

7. SUBMISSIONS OF THE AWU

7.1 The submissions of the AWU filed 5 August 2016 provide four central arguments in support of the AWU Claim:

- (i) the strong economic performance of the horticultural industry means that it is readily able to absorb any cost implications from the granting of the AWU Claim;
- (ii) casual employees would like to receive overtime rates;
- (iii) requiring the payment of overtime rates would increase employment opportunities across the industry; and
- (iv) the granting of the AWU Claim is consistent with the modern awards objective.

7.2 We address each of these arguments as follows:

8. ECONOMIC PERFORMANCE OF THE INDUSTRY

8.1 We addressed the relevance of the economic performance of the horticulture industry in our submissions filed 8 August 2016. Other employer parties have also made relevant submissions in respect of this issue.

8.2 For the purposes of these submissions it is sufficient to note that, given the legislative framework outlined above, economic performance of an industry cannot be determinative of the adoption of a proposed variation in the 4 Yearly Review.

8.3 As extensively outlined in these and other 4 Yearly Review proceedings, the Review is directed to the creation of a fair and reasonable safety net. Proposed variations to that safety net must be supported by submissions and evidence directed to establishing that the variations sought will satisfy, only to the extent necessary, the modern awards objective.

8.4 Regardless of the economic security of the industry (a position which AWU overstates), the AWU is required to demonstrate that the adoption of its proposal will result in an Award which satisfies the modern award objective.

8.5 The AWU has plainly failed to do this.

9. PREFERENCE OF EMPLOYEES

9.1 No direct evidence of employee preference or opinion was provided in support of the AWU Claim.

9.2 The AWU submissions at [37]-[38] repeat the evidence of AWU organisers Mr Algate and Mr Ballin who provided unspecific assertions that employees within the industry are “*constantly complaining*”⁶ about not receiving penalty rates and that employees are too scared to complain about the operation of the current Award.

9.3 The Full Bench has not been afforded the assistance of actual evidence from employees subject to the Award.

⁶ See Statement of Mr Algate at [19]

- 9.4 For the purposes of these proceedings, it is accepted that, all things being equal, a casual employee will prefer to receive higher rates of pay.
- 9.5 The particular effect of the proposed variation would need however to be assessed in a comprehensive way including having regard to the effect that the variation would have on hours worked by casual employees.
- 9.6 A consideration of the particular conditions of the horticulture industry is also relevant when assessing this argument. By way of example, the Full Bench heard the evidence of Mr John Dollisson who under cross-examination at PN1067 stated:

I mean, I agree, about 60 hours of that hard work without any penalty payments in a week is pretty unattractive, isn't it?---

It's quite attractive to the workers. They might work 60 hours. They might do nothing the next week. So it gives them flexibility

- 9.7 In the absence of evidence, it is very difficult (if not impossible) to ascertain the view of employees as to the full effect of the AWU's proposal.
- 9.8 Given this lack of evidence, an assessment of the AWU Claim against the relevant legislative requirements above is difficult, especially with respect to an assessment of relative living standards and the needs of the low paid.

10. EFFECT ON EMPLOYMENT OPPORTUNITIES ACROSS THE INDUSTRY

- 10.1 At [40] of its closing submissions, the AWU cite the decision of *Registered Clubs Association of NSW v Australian Liquor, Hospitality and Miscellaneous Workers' Union, NSW Branch* [2000] NSWIRComm 262 (14 December 2000) to support the following propositions:
- (a) overtime penalty rates are important to preserve "*hard fought conditions for shorter hours of work per week*";
 - (b) overtime penalty rates are important to create additional employment opportunities;
 - (c) overtime penalty rates are specifically designed to encourage employers to employ more people instead on getting a smaller number of people to work an excessive amount of hours.
- 10.2 The proposition that an entitlement to overtime for casuals under the Award is required to create additional employment opportunities sits uneasily with the wider context of these proceedings, specifically in relation to elements of the ACTU's common claims which seek to provide existing employees the opportunity to work additional hours in preference to offering new employees those hours.
- 10.3 Notwithstanding this incongruence, the propositions relied upon by the AWU also sit uneasily within the context of the Four Yearly Review.
- 10.4 An assessment of the AWU's proposed variation must be conducted against the requirements of s 156(5) of the FW Act.
- 10.5 In reviewing the Award "*in its own right*", it is apparent that a proposal to provide an entitlement to overtime rates for casual employees was considered but declined in Award Modernisation. Further, as noted by the Preliminary Issues Decision at [24]:

“In the Review 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.”

- 10.6 As such, a general principle that all employees must be paid overtime when working in excess of 38 hours self-evidently does not hold across all modern awards. Further, any need to provide additional remuneration for employees working overtime must be understood within the context of the modern awards objective as a whole as opposed to a limited and historical characterisation of penalty rates providing a disincentive or punishment for employers engaging employees in certain work practices.
- 10.7 Notwithstanding the AWU’s appeal to general principles relating to the Club Employees (State) Award, we submit that the considerations relevant to the Full Bench’s determination in this case are very different to those in the cited authority.
- 10.8 The evidence before the Full Bench establishes the unique nature of the horticulture industry particularly in relation to labour demand. As noted by Mr Dollisson at PN1067, workers may work 60 hours one week and no hours the next. Further, as noted in the evidence of Costa employees, the industry experiences extreme variability in labour demand given that labour requirements are strongly dictated by elements not in control of the employer.
- 10.9 As noted by Mr McPherson at [18] and [51]:

This means that the Company requires a large group of employees to work in short bursts of activity which, for most workers, ends when all the fruit is picked. This work cannot be staggered or easily regulated, it relies on nature.

.....

The concept of a working week of 38 ordinary hours followed by overtime does not fit with the operational requirements of the horticultural industry. Fruit does not stop ripening on certain days of the week or at certain times of the day in recognition of the fact that it might be more expensive to pick it. If a crop needs to be harvested, the labour must be organised to pick and pack it that day or it will be lost. It is simply not practical to only pick horticultural produce during a defined span of ordinary hours.

- 10.10 This unique character of the horticulture industry means that a generalised understanding of the utility of overtime rates is misplaced.

11. CONSISTENCY WITH THE MODERN AWARDS OBJECTIVE

- 11.1 Finally, we address each of the limbs of the modern awards objective below.

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

- 11.2 Given the extent and nature of the evidentiary material advanced in support of the AWU Claim, any potential findings in respect of needs of the low paid and living standards must be made by assumption and inference.
- 11.3 No evidentiary case has been made as to the effect of the current Award regime on relative living standards and the needs of the low paid, nor has one been made for the intended effect of the proposed clauses.
- 11.4 In these circumstances, we submit that this consideration should not influence the Full Bench to grant the AWU Claim.

11.5 The AWU's submissions dated 5 August 2016 submit at [47]-[48] that:

The National Minimum Wage rate is set according to a weekly rate for 38 ordinary hours of work – it is not intended that this rate should be paid for 50 or 60 hours of work per week.

If the employers are correct and casual employees are not currently entitled to overtime rates, the Award is clearly failing to meet the needs of the low paid because it is allowing the National Minimum Wage hourly rate to be paid for an indefinite amount of hours each week.

11.6 With respect to this submission, we note that in making a national minimum wage order, a Panel must be guided by the minimum wages objective located at s 284 of the FW Act, and, pursuant to s 294 of the FW Act a national minimum wage order:

(a) must set the national minimum wage; and

(b) must set special national minimum wages for all award/agreement free employees in the following classes:

(i) junior employees;

(ii) employees to whom training arrangements apply; and

(iii) employees with a disability; and

(c) must set the casual loading for award/agreement free employees.

11.7 There is no such limitation on the making of a national minimum wage order of the nature proposed by the AWU. It is true that the minimum hourly wage is calculated on the basis of a 38 hour week for a full time employee, however this is no basis to state that the minimum hourly rate is only applicable (or intended to apply) to hours up to 38.

11.8 Given that the Award currently does not provide overtime rates for casuals (nor has it during the Fair Work era), the AWU's assertion that the national minimum wage is not intended to be paid for 50 or 60 hours of work per week in the horticulture industry under the Award is also incorrect.

11.9 Finally the AWU's contention that "*the Award is clearly failing to meet the needs of the low paid because it is allowing the National Minimum Wage hourly rate to be paid for an indefinite amount of hours each week*" appears to disregard the fact that:

(a) prima facie, the Award achieved the modern awards objective at the time it was made⁷;

(b) no evidentiary position was advanced which identified the position of casual workers who worked in excess of 38 hours per week and received ordinary casual rates (including casual loading).

11.10 Using the AWU's own example of a casual employee who worked 60 hours per week under the Award, such an employee would, taking into account casual loading, receive almost twice the minimum weekly wage for a fulltime employee (an equivalent payment of 76 full time ordinary hours).

⁷ Preliminary Issues Decision at [24]

(b) the need to encourage collective bargaining

- 11.11 The Full Bench has before it evidence of enterprise agreements within the industry being negotiated to include recognition of overtime for casuals.
- 11.12 It is not readily apparent as to how the inclusion of an additional entitlement in the minimum safety net could conceivably encourage collective bargaining.
- 11.13 Any impetus for parties to bargain for the creation of casual overtime rates will be removed by the granting of the AWU Claim.

(c) the need to promote social inclusion through increased workforce participation;

- 11.14 The Full Bench has heard evidence that an increase in labour costs resulting from the granting of the AWU Claim has the potential to lead to:
- (a) the consideration of the increased the use of mechanised processes by employers;⁸
 - (b) a decrease in the industry workforce;⁹
 - (c) less hours for casual workers.¹⁰
- 11.15 Should the AWU Claim have more serious economic effects, its effect on workforce participation will in turn be more serious.
- 11.16 We refer to Section 15 of our Primary Submissions and note that the evidence heard on 11 July 2016 supports the conclusions contained therein.

(d) the need to promote flexible modern work practices and the efficient and productive performance of work;

- 11.17 We refer to Section 15 of our Primary Submissions and note that the evidence heard on 11 July 2016 supports the conclusions contained therein.

(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***
- (iv) employees working shifts;***

- 11.18 It is acknowledged the current position of the Award sits uneasily with s 134(1)(da) of the FW Act.
- 11.19 Having regard however to the fact that s 134(1)(da) is but one of the limbs of the modern awards objective to be considered by the Full Bench, the mere existence of 134(1)(da) does not mandate overtime rates for all in all awards.
- 11.20 The existence of s 134(1)(da) simply requires the Full Bench to consider the need for additional remuneration in this scenario. When balanced against the competing elements of the modern awards objective, we submit that this limb is not determinative of the position under the Award.

⁸ See Statement of Richard Roberts at [47]

⁹ See Statement of Richard Roberts at [47]

¹⁰ See Statement of Richard Roberts at [26]

(e) the principle of equal remuneration for work of equal or comparable value;

11.21 This is a neutral consideration.

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

11.22 We refer to Section 15 of our Primary Submissions and note that the evidence heard on 11 July 2016 supports the conclusions contained therein.

(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;

11.23 This is a neutral consideration.

(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.

11.24 We refer to Section 15 of our Primary Submissions and note that the evidence heard on 11 July 2016 supports the conclusions contained therein.

12. CONCLUSION

12.1 It is apparent that the AWU Claim:

- (a) is not supported by probative evidence properly directed toward demonstrating the facts supporting the proposed variation¹¹ in respect of the Award, such as to warrant the Full Bench exercising its discretion pursuant to s 139 of the FW Act;
- (b) is not consistent with the modern awards objective as outlined in s 134 of the FW Act; and
- (c) does not seek terms that the Full Bench is permitted to include, or required to include, only to the extent necessary to achieve the modern awards objective within the scope of s 138 of the FW Act.

12.2 For all the above reasons, Costa, ABI and NSWBC submit that the AWU Claim should be dismissed.

¹¹ Preliminary Issues Decision at [23] and [60].