



Fair Work Commission: s.157 FWC may vary modern awards if necessary to achieve the modern awards objective

REVIEW OF CERTAIN C14 RATES

AUSTRALIAN BUSINESS INDUSTRIAL

and -

THE NSW BUSINESS CHAMBER LTD

SUBMISSIONS IN REPLY TO AI GROUP'S SUBMISSIONS

19 NOVEMBER 2019

1. INTRODUCTION

1.1 These submissions are filed on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**) in accordance with the directions affirmed in correspondence on 13 November 2019 which invited parties to file submissions in reply to Ai Group's submissions filed on 11 November 2019 (**Ai Group Submissions**).

1.2 ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and the NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth).

2. AI GROUP SUBMISSIONS

2.1 Ai Group originally submitted that the Fair Work Commission (the **Commission**) did not have jurisdiction to conduct the proceedings in the manner proposed. Ai Group now concede that the Commission does have jurisdiction.

2.2 Given this concession we make the following short submission to assist the Commission generally.

3. JURISDICTIONAL BASIS FOR PROCEEDINGS

3.1 The proceedings are being conducted under section 157 of the *Fair Work Act 2009* (Cth) (the **Act**).

3.2 Section 157 is in the following terms:

“FWC may vary etc. modern awards if necessary to achieve modern awards objective

(1) The FWC may:

(a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or

(b) make a modern award; or

(c) make a determination revoking a modern award;

if the FWC is satisfied that making the determination or modern award is necessary to achieve the modern awards objective.

Note 1: Generally, the FWC must be constituted by a Full Bench to make, vary or revoke a modern award. However, the President may direct a single FWC Member to make a variation (see section 616).

Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 3: If the FWC is setting modern award minimum wages, the minimum wages objective also applies (see section 284).

(2) The FWC may make a determination varying modern award minimum wages if the FWC 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 is necessary to achieve the modern awards objective.

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

(2A) Work value reasons are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

(a) the nature of the work;

(b) the level of skill or responsibility involved in doing the work;

(c) the conditions under which the work is done.

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

(a) on its own initiative; or

(b) on application under section 158.”

3.3 Section 157(3) of the Act expressly empowers the Commission to act on its own initiative (or otherwise on application) which the Commission in these proceedings is doing.

3.4 Prior to the repeal of section 156, the scheme of the Act was that it provided:

(a) for reviews of modern awards on a 4-yearly cycle at the initiative of the Commission (s 156); and

(b) a mechanism for the variation, making etc of modern awards outside of this 4 yearly cycle (s 157) at the initiative of the Commission or on application.

3.5 Both section 156 (now repealed) and 157 should be understood in the context of what modern awards are under the Act.

3.6 Modern awards are “regulatory instruments” setting minimum standards and the Commission has an overarching duty to ensure that they meet the modern awards objective.

3.7 This was affirmed by the Commission in *4 yearly review of modern awards – Penalty Rates – Transitional Arrangements* (AM2014/305):

“[27]...As the Commission has observed on a number of occasions, modern awards are very different to awards of the past. Modern awards are not made to prevent or settle industrial disputes between particular parties. Rather, modern awards are, in effect, regulatory instruments that

set minimum terms and conditions of employment for the employees to whom the modern award applied.”¹

- 3.8 In this context, it should not be seen as controversial that section 157 provides for the Commission to act on its own initiative. Previously outside of the 4 Yearly Review process but now at large, the Commission may seek to inquire into whether a modern award is meeting the modern awards objective rather than simply stand by awaiting a ‘party’ to apply to agitate such a case if at all.
- 3.9 This squarely fits with the nature of modern awards under the Act, sections 134, 284 and section 3 of the Act.
- 3.10 In exercising its powers under section 157 the Commission must have regard to:
- (a) Chapter 5, Part 5-1, Division 3 of the Act,
 - (b) Section 577 and 578 of the Act; and
 - (c) Section 3 of the Act.
- 3.11 Nothing in the Act prevents the Commission hearing matters concurrently or from joining matters being dealt with pursuant to section 157 of the Act.
- 3.12 Nothing in the Act prevents the Commission from dealing with more than one modern award in a matter being dealt with pursuant to section 157 of the Act.
- 3.13 What is apparently most relevant regarding such procedural issues is section 577 of the Act.

¹ *4 yearly review of modern awards – penalty rates – hospitality and retail sectors – transitional arrangements* [2017] FWCFB 3001.

3.14 Section 577 states as follows:

“Performance of functions etc. by the FWC

The FWC must perform its functions and exercise its powers in a manner that:

(a) is fair and just; and

(b) is quick, informal and avoids unnecessary technicalities; and

(c) is open and transparent; and

(d) promotes harmonious and cooperative workplace relations.”

3.15 The Commission is required in exercising its powers under section 157 to have regard to section 577.

3.16 In this regard the Commission will need to conduct itself with care to ensure that the process adopted accords with section 577.

3.17 In a context where the Commission is acting of its own initiative this may require a more involved and iterative process than might otherwise be the case when the jurisdiction is enlivened by way of application.

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