

Submission – Four year review of modern awards

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Statement [2016] FWC 2837 seeks submissions from interested persons to comment on the four modern awards selected for redrafting. In part my submission seeks to respond to the research paper (submission) provided to your review on 20 May 2014 by the Chief Counsel of the Fair Work Ombudsman, Janine Webster. But also outlines other considerations I feel the review should take into account as part of the review.

The Fair Work Ombudsman research paper - *Outlines of coverage issues in modern awards*

The research paper provided by the FWO Chief Counsel Janine Webster details examples of potential overlapping coverage in modern awards. Appendix A.2 of the paper states there is a potential overlap in the functions and overlapping multiple coverage clause specifically between:

- General Retail Industry award 2010 - Clause 3.1 Schedule B.1 and B.2; and
- Storage Services and Wholesale award 2010 - Clause 3.1 and clause 4.2

The view of the FWO is that if the employer is primarily operating a retail business, but with some warehousing and distribution in place to facilitate the operation of a retail business, the retail award is the relevant award to cover retail warehousing and distribution storage services.

The FWO states therefore the Storage Services Award excludes the duties of *retail* warehousing and distribution employees as clause 4.2 (a) of that award states it does not cover an employer covered by another award containing classification or functions included in the industry definition with respect to an employer covered by another award.

In my opinion, the position set out in research paper is flawed. I believe there is no potential overlap for a number of reasons. My employer industry award is the Retail Industry Award wherein it states it does **not** cover warehousing and distribution (clause 3.1). This means there is no potential overlap and this removes 4.2 as an overlap issue.

AIRC Modernisation Process

If you look at the decisions, statements and transcripts of the modernisation process regarding the Retail Industry Award and the Storage Services Award, it shows there was never any intention that the retail award would cover retail distribution. This is why the AIRC determined that the terms and conditions of the Retail and Wholesale Industry - Retail Distribution Centres Shop, Distributive and Allied Employers Award 2003 were replaced by the Storage Services and Wholesale Award 2010.¹

In order to avoid overlap the Retail Industry Award states it does not cover warehousing and distribution (clause 3.1 - Definitions and Interpretations). The information provided by the AIRC

¹ 28 March 2008 (AIRC FB 550) AIRC decision (880) The SDA proposed that the retail award not include warehouse activities except storage functions within the shop.

shows there was never any intent that the Retail Industry Award would cover warehousing and distribution offsite or onsite of a retail establishment.²

Victorian Common Rule

I am employed as a store person and work in a warehouse and report to the warehouse manager. My employer is Wedilla Pty Ltd that trades as Harvey Norman Furniture Moorabbin. My employer was covered by two industry awards prior to the award modernisation. The SDA Employees Association Victorian Award 2000 covered the furniture sales staff and the Storage Services General Award 1999 covered the warehouse staff. Both of these awards were Victorian Common Rule Awards and this was effectively a common law contract. As my employer was covered by these awards prior to 26 March 2006, the terms and conditions of employment remain binding on the employer. This means that the Storage Services – General Award 1999 became the transitional instrument and was the pre modern award. Furthermore, the FWO website states these terms and conditions of employment were replaced by the Storage Services and Wholesale award 2010. This therefore removes any potential overlap between the Retail industry and the Storage Services awards as otherwise it would appear to be a breach of a common law agreement.

Workplace Relations (Work Choices) Amendment Act 2005

Professor Andrew Stewart (Law School, University of Adelaide) an authority in employment law and workplace relations provided expert advice on the drafting and structure of the Fair Work legislation in a submission on the 12 October 2009.

His submission regarding coverage of transitional instruments pre work choices employees stated that:

For Federal system employees that were covered by an award as at 26 March 2006 the day before the work choices amendments took effect, the Work Choice Act had the following effect - if the award was a Federal award it became a pre-modern award that remained binding on the employer by virtue of Cl 4 of schedule 4 of the Work Choices Act.

If the award was a Notional Agreement Preserving State Awards (NAPSA) it was binding on the employer by virtue of part 3 of schedule 8 of the amended Workplace Relations Act 1996. The pre reform award and NAPSA continued to be in force and the coverage of these instruments is determined by the coverage provisions in the award from which they were originally derived.³

This also removes any potential overlap between the Retail and Storage Services Awards detailed in coverage clauses review by Chief Counsel Janine Webster. In regards to the

² 22 May 2009 Melbourne (AIRC FB450)-full bench statement (200) At this stage it is proposed the Storage Services should cover retail distribution and steel distribution and classifications have been included.

³ Professor Andrew Stewart Submission to AIRC Full Bench *Model Transitional Provisions for Modern Awards*

<http://www.airc.gov.au/awardmod/fullbench/industries/awardmoddocument.cfm?award=storage&document=Submissions>

potential overlap stated in appendix A.2, it appears the Chief Counsel has also failed to consider a number of facts. The AIRC decided that the Retail Industry Award does not cover warehousing and distribution; the research paper appears to disregard that Victorian Common Rule Awards and the Work Choices Amendment Act 2005 coverage remain binding if they were in effect prior to 26 March 2006. I believe these need to be considered if the scope of the coverage provisions is to be changed or amended.

Fair Work Ombudsman

The FWO have provided advice that it is their opinion the Retail Industry Award can provide coverage for retail warehousing and distribution. This contradicts the information provided on their website and further also appears to be inconsistent with Common Law, Workplace Relations (Work Choices) Amendment Act 2005, and the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009. If there were any changes to legally established award coverage I believe this would also be inconsistent with the Fair Work Act 2009.

Conclusion

My submission seeks to provide the Fair Work Commissioner with further information I believe is important for consideration as part of its review into modern awards, particularly in terms of redrafting certain provisions to plain language.

In my opinion, within the General Retail Industry Award it should be added that it does **not** cover **retail** warehousing and distribution into clause 3.1. Further should the Storage Service and Wholesale Award be reviewed, the definition stated at clause 3.1 of that Award should **not** be removed. This would assist in ensuring the correct and legal award coverage is enforced and removes any possibility of potential overlap.

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