



## DECISION

*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*  
Sch. 6A, Item 4 - Application to make a State reference public sector modern award  
Sch. 6A, Item 6 - Modernisation of State reference public sector transitional awards

**Australian Nursing and Midwifery Federation**  
(AM2013/39)

**NURSES (ANF - VICTORIAN LOCAL GOVERNMENT) AWARD 2002**  
**[TRANSITIONAL]**

**State reference public sector transitional award modernisation**  
(AM2014/40)

**VICTORIAN LOCAL AUTHORITIES AWARD 2001 [TRANSITIONAL]**

Health and welfare services

Local government administration

VICE PRESIDENT WATSON  
DEPUTY PRESIDENT SMITH  
COMMISSIONER LEE

SYDNEY, 13 JULY 2015

*State reference public sector transitional award modernisation - Nurses (ANF - Victorian Local Government) Award 2002 [Transitional] - Victorian Local Authorities Award 2001 [Transitional] - State reference public sector modern awards to replace predecessor award - Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 - Sch. 6A Items 4, 6, 7, 8 and 9 - Fair Work Act 2009 - ss. 134 and 284.*

### **Introduction**

[1] This matter arises from the operation of Schedule 6A to the *Fair Work (Transitional Provisions and Consequential Provisions) Act 2009* (the Transitional Act) in relation to awards that fall within the definition of ‘State reference public sector transitional awards’ under the Transitional Act. Those awards are the *Nurses (ANF - Victorian Local Government) Award 2002 [Transitional]* and the *Victorian Local Authorities Award 2001 [Transitional]*.

[2] The Australian Nursing and Midwifery Federation (the ANMF) has made an application to make a State reference public sector modern award under Schedule 6A, Item 4

to replace the first of the above awards. The ASU has made application for a new modern award to be known as the Victorian Local Government Award. The major issues for our determination concern the content of the awards concerned.

[3] The application to make a State reference public sector award is governed by Item 4 of the Schedule 6A to the Transitional Act which provides as follows:

**“4 Making State reference public sector modern awards on application**

(1) An employer or organisation that is covered by a State reference public sector transitional award (the *current award*) may apply to the FWC for the making of a State reference public sector modern award (the *proposed award*).

(2) The application may be made only during the period starting on the WR Act repeal day and ending at the end of 31 December 2013.

(3) The application must specify the employers, employees and organisations (the *proposed parties*) proposed to be covered by the proposed award.

(4) The FWC must consider the application, and must make a State reference public sector modern award covering the proposed parties if the FWC is satisfied that:

(a) the proposed parties are covered by State reference public sector transitional awards; and

(b) the employers and organisations that are proposed parties have agreed to the making of the application.

Note: The proposed parties will cease to be covered by State reference public sector transitional awards when the State reference public sector modern award comes into operation: see item 29 of Schedule 3.”

[4] Item 6 of Schedule 6A requires the Commission to make or vary a State reference public sector modern award so that employees covered by State reference public sector transitional awards are covered by a State reference public sector modern award. Item 6 states in full:

**“6 Further obligation of the FWC to make or vary State reference public sector modern awards at end of application period**

If, at the end of the period referred to in subitem 4(2), there are one or more State reference public sector transitional awards that still cover some employers and employees, the FWC must make, or (in accordance with section 168L of the FW Act) vary the coverage of, one or more State reference public sector modern awards so that all those employers and employees are covered by State reference public sector modern awards.

Note: The employers and employees will cease to be covered by the State reference public sector transitional awards when they start to be covered by a State reference public sector modern award that is in operation: see item 29 of Schedule 3.”

**[5]** Items 7 to 9 of Schedule 6A concern the approach to formulating the terms of a State reference public sector modern award. These provisions state:

**“7 The State reference public sector modern awards objective**

(1) If the FWC is required by item 4 or 6 to make a State reference public sector modern award, the modern awards objective and the minimum wages objective apply to the making of the modern award.

(2) However, in applying the modern awards objective and the minimum wages objective, the FWC must recognise:

(a) the need to facilitate arrangements for State reference public sector employers and State reference public sector employees that are appropriately adapted to the effective administration of a State; and

(b) that State reference public sector modern awards may provide terms and conditions tailored to reflect employment arrangements that have been developed in relation to State reference public sector employers and State reference public sector employees.

This is the *State reference public sector modern awards objective*.

Note 1: See also item 13 (State reference public sector transitional award modernisation process is not intended to result in reduction in take-home pay).

Note 2: See also item 19 (how the FW Act applies in relation to the State reference public sector transitional award modernisation process before the FW (safety net provisions) commencement day).

**8 Terms of State reference public sector modern awards**

(1) Division 3 (other than sections 143 and 154) of Part 2-3 of the FW Act (which deals with terms of modern awards) applies in relation to a State reference public sector modern award made under this Division.

Note: See also item 19 (how the FW Act applies in relation to the State reference public sector transitional award modernisation process before the FW (safety net provisions) commencement day).

(2) If FWA makes a State reference public sector modern award before the FW (safety net provisions) commencement day, the State reference public sector modern award must not be expressed to commence on a day earlier than the FW (safety net provisions) commencement day.

## 9 Coverage terms

### *Coverage terms must be included*

(1) A State reference public sector modern award must include terms (*coverage terms*) setting out, in accordance with this item, the employers, employees and organisations that are covered by the State reference public sector modern award.

### *Employers and employees*

(2) The coverage terms must be such that:

- (a) the only employers that are expressed to be covered by the modern award are one or more specified State reference public sector employers; and
- (b) the only employees who are expressed to be covered by the modern award are specified State reference public sector employees of those employers.

### *Organisations*

(3) A State reference public sector modern award may be expressed to cover one or more specified organisations, in relation to:

- (a) all or specified employees covered by the modern award; or
- (b) the employer, or all or specified employers, covered by the modern award.

### *Outworker entities*

(4) A State reference public sector modern award must not be expressed to cover outworker entities.

### *How coverage etc. is expressed*

(5) For the purposes of this item:

- (a) an employer or employers may be specified by name or by inclusion in a specified class or specified classes; and
- (b) employees must be specified by inclusion in a specified class or specified classes; and
- (c) organisations must be specified by name.”

[6] The references to the modern awards objective and the minimum wage objective in Item 7 refer to the objectives in ss. 134 and 284 of the *Fair Work Act 2009* (the Act). Section 134 relevantly states:

**“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
- (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; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the *modern awards objective*.”

[7] Section 284 relevantly states:

**“284 The minimum wages objective**

*What is the minimum wages objective?*

(1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:

- (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
- (b) promoting social inclusion through increased workforce participation; and
- (c) relative living standards and the needs of the low paid; and
- (d) the principle of equal remuneration for work of equal or comparable value; and
- (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

This is the *minimum wages objective*.”

[8] The ANMF led evidence from Mr Barry Megennis and Ms Maree Burgess concerning the work to be covered by the award and the history of the current award. It submits that there is no impediment to making the award, especially as submissions made on behalf of the Victorian Minister for Industrial Relations in 2014 have been formally withdrawn by the new Minister. It acknowledged that any residual concerns about the award travelling beyond the scope of the referral from Victoria to the Commonwealth could be overcome by minor wording changes to relevant clauses. We agree that this is a prudent course.

[9] The ASU and APESMA made submissions in support of making an award based on the previous Victorian Local Government Award rather than the national Local Government Industry Award. It submits that there is a history of different terms and conditions applying in Victoria that makes the national award an inappropriate safety net.

[10] Victorian local government authorities through their various representatives submit that an award based on the existing national award is more appropriate. They are in substantial agreement with the terms of the draft nurses award because it is based on the national nurses modern award. There is more disagreement over the terms of the Victorian Local Government Award. They submitted that the previous Victorian Award is lengthy, confusing and cumbersome whereas the national modern award has already undergone modernisation and reviews and is a suitable safety net. They have provided draft awards that are more based on the national modern award.

[11] The State of Victoria made revised submissions not opposing the making of the awards.

[12] As the legislative provisions above make clear, the Commission is required to make a modern state reference award covering employees previously covered by State public sector transitional awards. The disagreements between the parties relate to the terms of those awards.

[13] The legislative provisions make clear that the Commission should apply the modern awards objective in determining the content of the modern awards. The awards are intended to be a safety net. Actual terms and conditions are matters for parties based on the award minima. In our view, the modern awards objective is best served by a high degree of commonality between awards applying to comparable employees. It follows that the existing modern local government award will be a major influence over the terms of the state reference award. The award we have determined to make reflects this approach and has regard to the specific submissions of the parties on the proposed content.

[14] The Full Bench make the awards arising from these proceedings in the terms now published. We will provide that they operate from 20 July 2015.



VICE PRESIDENT

*Appearances:*

Ms A. Duffy, of counsel, with Mr B. Megennis for the ANMF.  
Mr M. Rizzo for the ASU.  
Ms S. Herrington for APESMA.  
Mr D. Tozer for the Local Councils.  
Mr B. Avallone, with Mr C. McInerney, for the State of Victoria.

*Hearing details:*

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