[2018] FWCFB 4732

The attached document replaces the document previously issued with the above code on 15 August 2018.

The reference to "[2015] FWCFC 644" in endnote 1 has been replaced with "[2015] FWCFB 644". The reference to "[2017] FWCFB 2792" in the endnote to Attachment 1 has been replaced with "[2017] FWCFB 2797".

Modern Award Team
On behalf of the Associate to President Ross

Dated 16 August 2018

DECISION

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Proposed Norfolk Island Award
(AM2018/8)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER SAUNDERS MELBOURNE, 15 AUGUST 2018

4 yearly review of modern awards – proposed Norfolk Island Interim Award 2018 – State-based difference terms – s.154(1)(b) of the Fair Work Act 2009 (Cth)

Introduction

[1] The New South Wales Business Chamber Ltd and the Norfolk Island Chamber of Commerce Inc. (the Applicants) have applied for an interim award known as the *Norfolk Island Interim Award 2018* to be made under s.156 of the *Fair Work Act 2009* (Cth) (Act) for private sector employers and employees on Norfolk Island (proposed Interim Award).

[2] The history behind Norfolk Island becoming a non-self-governing territory of Australia and the application of relevant Commonwealth legislation to Norfolk Island is set out in a Background Paper prepared by the research area of the Fair Work Commission (Commission) and published on 12 July 2018, a copy of which is at Annexure A to this decision.

[3] Clause 4 of the proposed Interim Award deals with coverage and provides:

> '4.1 Subject to this clause, this award:
>
> (a) covers employees in the classifications listed in clause 14 – Minimum wages working on Norfolk Island employed by private sector employers operating a business on Norfolk Island; and
>
> (b) operates to the exclusion of any other modern award.
>
> 4.2 The award does not cover those classes of employees who, because of the nature or seniority of their role, have not traditionally been covered by awards including managerial employees and professional employees such as accountants and finance, marketing, legal, human resources, public relations and information technology specialists.
>
> 4.3 The award does not cover Norfolk Island Regional Council or its employees.
>
> 4.4 The award does not cover employees excluded from award coverage by the Act.

4.5 The award does not cover employees who are covered by a modern enterprise award, or employers in relation to those employees.'

[4] Clause 3 of the proposed Interim Award includes the following relevant definitions:

'**Norfolk Island** means the land mass known as Norfolk Island [and] is not a reference to the Territory of Norfolk Island.

Territory of Norfolk Island means Norfolk Island and all the other islands and rocks lying within the area bounded by the parallels 28 degrees 59 minutes and 29 degrees 9 minutes south latitude and the meridians 167 degrees 54 minutes and 168 degrees east longitude.'

[5] The above definition of the 'Territory of Norfolk Island' is the same as that in Schedule 1 to the *Norfolk Island Act 1979* (Cth).

[6] It was agreed by the parties that the jurisdictional issues would be determined by a Full Bench of the Commission prior to consideration of the merits of the application. On 16 July 2018, the Commission published a list of issues relating to the jurisdiction of the Commission to make the proposed Interim Award, a copy of which is at Annexure B.

[7] In general terms, Australian Business Industrial (ABI) and the Applicants submit that the Commission can make the proposed Interim Award, while the Australian Council of Trade Unions (ACTU) submits on various grounds that the Commission does not have jurisdiction to do so.

[8] Notwithstanding the range of jurisdictional issues raised in response to the application, we need only deal with one of those issues, namely, whether the proposed Interim Award includes any 'State-based difference terms' as prohibited by s.154(1)(b) of the Act.

Section 154(1)(b) of the Act

[9] Section 154(1)(b) of the Act forms part of Division 3 ('Terms of modern awards') in Part 2-3 ('Modern awards'). It provides:

'154 Terms that contain State-based differences

General rule – State-based difference terms must not be included

(1) A modern award must not include terms and conditions of employment (**State-based difference terms**) that:

(a) are determined by reference to State or Territory boundaries; or

(b) are expressed to operate in one or more, but not every, State and Territory.'

[10] Section 154 of the Act was considered in earlier proceedings concerning the inclusion of a term in four modern awards which gave employees in the County of Yancowinna in New South Wales (Broken Hill) an allowance of 4.28% of the standard rate for the exigencies of working in Broken Hill (the Broken Hill term).

[11] In the *Broken Hill* decision[1] a Full Bench of the Commission considered the Broken Hill term together with a range of other transitional provisions concerning accident pay, district allowances and redundancy in a variety of modern awards. The Full Bench noted that 'little or no attention' was given to the Broken Hill term in the proceedings before it.[2] The Full Bench then reasoned as follows in deciding to retain the Broken Hill term in the four modern awards under consideration:

> '[62] We note that the Broken Hill allowance is in different terms to the transitional provisions relating to district allowances in Western Australia and the Northern Territory. The entitlement to the allowance is specified in the four awards and is expressed as a percentage figure of the standard rate under the award. It does not require reference to any other instruments. The calculation of the allowance is therefore straightforward and the allowance is not a term or condition of employment determined by reference to State or Territory boundaries.
>
> [63] In these circumstances, we cannot conclude on a similar basis as in relation to the district allowances in Western Australia and the Northern Territory that the Broken Hill allowance should not be maintained as part of the safety net for workers covered by the relevant awards. On the basis of the limited material before us, we are satisfied that the maintenance of the Broken Hill allowance in the awards is appropriate having regard to the modern awards objective (ss.134 and 138) and other relevant considerations. The allowance will therefore be retained in the awards.'

[12] Section 154(1)(a) of the Act was considered by the Full Bench in paragraph [62] of its decision. However, it appears that no separate consideration was given to s.154(1)(b) of the Act in relation to the Broken Hill term.[3]

[13] The Australian Chamber of Commerce and Industry made an application to the Federal Court for judicial review of the *Broken Hill* decision. A Full Court of the Federal Court in *ACCI v ACTU*[4] dismissed the application for judicial review. Justice Buchanan, with whom Justice North agreed,[5] wrote the leading judgment. Justice Flick agreed with the orders proposed by Justice Buchanan, but stated different reasons.

[14] The central matter in the Federal Court proceedings was whether the Broken Hill term is a State-based difference term within the meaning of s.154(1)(b) and is therefore prohibited by s.136(2)(a) and has no effect by reason of s.137. The applicant's contention is summarised at [33] of Buchanan J's judgment:

> 'The applicant's thesis was that s 154(1)(b) prevents any modern award terms that are expressed to operate *in* (even if not throughout) only one or some States or Territories and ensures that such a term must operate in every State or Territory. Indeed, the language of the Broken Hill term ("in the County of Yancowinna in New South Wales) was said to identify the particular vice to which s 154(1)(b) was directed, because the term clearly only operated in one State. The applicant also appealed to the idea that s 154(1)(b) should be given a meaning which was not co-extensive with s 154(1)(a) to support this construction.'

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[1] *4 yearly review of modern awards – transitional provisions* [2015] FWCFB 644

[2] Ibid at [60]

[3] Though it was referred to in the Full Bench's consideration of the WA and NT District allowances: [2015] FWCFB 644 at [53]

[4] *Australian Chamber of Commerce and Industry v Australian Council of Trade Unions* [2015] FCAFC 131

[5] Ibid at [1]

[15] His Honour rejected the applicant's contention, at [36]:

> 'That approach suggests that the drafters of the FW Act set out to elevate form over substance. I find the suggested approach to be so artificial that I do not accept that it can have been intended.'

[16] Justice Buchanan considered the objective of s.154(1) of the Act before assessing the interaction between s.154(1) and s.139(1)(g)(iii), which permits the inclusion in a modern award of a term about allowances for 'disabilities associated with the performance of particular tasks or work in particular conditions or locations':

> '[38] In my view, both limbs of s.154(1) are directed to the same general objective, although they address that question by reference to different possibilities which they are intended to exclude. The objective is to prohibit differences between entitlements in States or Territories as such – i.e. to eliminate "State-based" differences. The two elements of s.154(1) address different matters. Section 154(1)(a) addresses the manner of determination of such terms, including the possibility that entitlements applying in one State (or more than one) might be fixed differently from others – e.g. at different times, in different amounts, subject to different qualifying conditions, etc. Section 154(1)(b) prevents the possibility that terms and conditions might apply (i.e. as a matter of general application) in one or some but not every State or Territory, thereby discriminating (facially at least) against employees in those States or Territories which are excluded.
>
> [39] More particularly, the proposition that all modern award terms must operate uniformly throughout Australia is, in my view, impossible to reconcile with s.139(1)(g)(iii). Although the note to s.136 indicates that s.136(2) (which incorporates the limits imposed by s.154) prevails over any permissive or mandatory provisions referred to in s.136(1), the conflict between the obvious intent of s.139(1)(g)(iii) and the construction of s.154(1)(b) urged by the applicant is too stark not to take into account. It can only be resolved by finding against the applicant's construction of s.154(1)(b). Otherwise, s.139(1)(g)(iii) would have no useful work to do unless that was achieved by contrivance and artifice.
>
> [40] Section 154, in my view, does not prohibit disability allowances for *particular* locations, or for *a* particular location. Any restriction upon an award of compensation for such matters is found only in the limitations expressed by s.139 – that the allowance is for disabilities, that it applies at a particular location or locations and that it is separately and clearly expressed in the modern award.
>
> [41] In my view, s.154(1) does not apply to prevent or prohibit the Broken Hill term. I would dismiss the application.'

[17] Justice Flick observed that, if s.154(1)(b) 'stood alone, there may have been considerable force in the Applicant's argument as to the invalidity of a Broken Hill allowance. In that case there would be much force in an argument that terms providing for the payment of a Broken Hill allowance are all terms "*expressed to operate in one ... State*".'[6] Justice Flick then reasoned that s.139(1)(g)(iii) is to be construed as either 'an exception to the otherwise general operation of s.154 or as a specific statutory provision dealing with a question not sought to be addressed in that section'.[7]

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[6] Ibid at [43]

[7] Ibid at [46]

[18] The conclusions reached by Justice Buchanan, with whom Justice North agreed, in relation to s.154(1)(b) of the Act may be summarised as follows:

- s.154 of the Act does not require all modern award terms and conditions to operate uniformly throughout Australia;

- both limbs of s.154(1) are directed to the same general objective — to prohibit differences between entitlements in States or Territories as such, that is, to eliminate 'State-based' differences; and

- s.154(1)(b) 'prevents the possibility that terms and conditions might apply (ie as a matter of general application) in one or some but not every State or Territory, thereby discriminating (facially at least) against employees in those States or Territories which are excluded'.

Does the proposed Interim Award include any 'State-based difference terms' within the meaning of s.154(1)(b) of the Act?

[19] With effect from 1 July 2016, the Territory of Norfolk Island became a Territory within the meaning of s.154(1)(b) of the Act. It is therefore necessary to consider whether the proposed Interim Award includes any terms and conditions of employment that 'are expressed to operate in one or more, but not every, State and Territory'.

[20] ABI and the Applicants initially contended that the coverage clause of the proposed Interim Award is 'a term of the instrument itself, being an essential part of the machinery of an award rather than a term and condition of employment (of an employee)'.[8] This was said to raise a preliminary question as to whether a 'coverage term', within the meaning of s.143 is a 'term and condition of employment' within the meaning of s.154. ABI and the Applicants submitted that s.154 is not 'expressly qualified against' s.143 and nor is s.143 'expressly said to be subject to' s.154, and that there 'is a need to move cautiously in reconciling the work of section 143 and section 154'.[9] This point was abandoned during the course of oral argument. Having regard to the terms of s.168H,[10] counsel for ABI and the Applicants submitted:

> 'It's not our intention to argue that a coverage term is not a term and condition of employment as contemplated by section 14.'[11]

[21] This concession was entirely appropriate. Coverage terms determine when a modern award applies to an employee – in other words, it is the coverage term which determines whether any of the terms and conditions in a modern award apply to an employee (in the sense of giving rise to an obligation or entitlement; see ss.46 to 49). It would be highly artificial to exclude coverage terms from the prohibition in s.154.

[22] Section 154 of the Act states that a 'modern award must not include terms and conditions of employment … that are determined' in a particular way (s.154(a)) or 'are expressed to operate' in a particular way (s.154(b)). On an ordinary reading, s.154 concerns the 'terms and conditions of employment' that may be established by an award in its

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[8] ABI & Applicants submissions dated 24 July 2018 at [25]

[9] Ibid at [26]-[28]

[10] Transcript 3 August 2018 at PN19–36

[11] Ibid at PN36

operation under the Act. It cannot sensibly be read in terms of some typology of award terms under which terms that are 'terms and conditions of employment' are distinguished from terms such as 'coverage terms'.

[23] In any event, having regard to the terms of s.43 and the fact that s.143 is in Chapter 2 of the Act (which is titled 'Terms and Conditions of Employment'), the better view is that a coverage term *is* a term and condition of employment for the purposes of s.154(1).

[24] ABI and the Applicants contend that the proposed Interim Award would, if made, apply in Norfolk Island, but not throughout the Territory of Norfolk Island, which also includes islands such as Phillip Island and Nepean Island. In support of this argument, they rely on clause 4.1(a) of the proposed Interim Award, which limits coverage to 'employees … working on Norfolk Island' and the definitions of 'Norfolk Island' and the 'Territory of Norfolk Island' in clause 3 of the proposed Interim Award.

[25] ABI and the Applicants also point to the existence of a range of enterprise awards which they say have a limited geographic operation.[12] However we observe that the provisions of the Act dealing with enterprise awards are not relevant to the current matter, because the provisions in Division 7 ('Additional provisions relating to modern enterprise awards') of Part 2-3 'have effect despite anything else in this Part'.[13]

[26] It is not in dispute that all the approximately 1,748 residents of the Territory of Norfolk Island live on Norfolk Island and all approximately 150 to 300 businesses in the Territory of Norfolk Island operate on Norfolk Island. Other islands within the Territory of Norfolk Island, such as Phillip Island and Nepean Island, form part of the Norfolk Island National Park and do not have any residents or business based on them. ABI and the Applicants submit that some employees based on Norfolk Island may 'operate guided treks on Phillip Island' in the summer months. But during the course of oral argument ABI and the Applicants conceded that they were not presently in a position to say with any certainty whether or not any work does take place in the Territory of Norfolk Island other than on the landmass of Norfolk Island.[14]

[27] In the circumstances of the present case, we have no difficulty in concluding that all the terms and conditions of employment included in the proposed Interim Award are State-based difference terms within the meaning of s.154(1)(b) of the Act. It is unnecessary for us to express a view as to whether the terms and conditions included in the proposed Interim Award are State-based differences terms within the meaning of s.154(1)(a).

[28] Section 154(1)(b) provides that a 'modern award must not include terms and conditions of employment … that … are expressed to operate in one or more, but not every, State and Territory'. ABI and the Applicants submit that in construing s.154(1)(b), it is important to consider the 'change in statutory language' from the corresponding provision in the then *Workplace Relations Act 1996* (Cth) (WR Act). The provision corresponding to s.154 was s.576T of the WR Act, which relevantly provided:

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[12] For example, the Australian Capital Territory Public Sector Enterprise Award 2016, the Northern Territory Public Sector Enterprise Award 2016, and the Christmas Island Administration Enterprise Award 2016

[13] Section 168A(1) of the Act

[14] Transcript 3 August 2018 at PN75

'**576T Terms that contain State-based differences**

(1) A modern award must not include terms and conditions of employment that:

(a) are determined by reference to State or Territory boundaries; or

(b) do not have effect in each State and Territory.

(2) Despite subsection (1), a modern award may include terms and conditions of employment of the kind referred to in subsection (1) for a period of up to 5 years …'

[Emphasis added]

[29] ABI and the Applicants submit that:

> 'In simple terms, section 576T operated such that, irrespective of the language that was contained in the modern award, a term and condition of employment under consideration would offend the section if it did not actually operate in each State and Territory.'[15]

[30] ABI and the Applicants further submit that the difference in the language of ss.576T(1)(b) and 154(1)(b) supports the view that Parliament intended them to operate differently.[16] They also submit that many modern awards would 'fall foul of' s.576T(1)(b) if it was still in force and suggest as examples: the majority of enterprise awards (which in practice will not apply in all States and Territories); the *Seagoing Industry Award 2010* (which could not have effect within the ACT due to the lack of a coastline), and the *Alpine Resorts Award 2010* (which could not operate in the NT due to the absence of any alpine resort).[17]

[31] ABI and the Applicants suggest that the critical change in wording was to replace 'have effect' with 'are expressed', where 'express' connotes the concept of putting into words. They submit that on an 'ordinary grammatical meaning', s.154(1)(b):

> 'Simply put … means that a modern award cannot include a term and condition of employment that is expressed through the words used in the modern award to operate in one or more but not every State and Territory. The enquiry here is the actual words that are adopted in distinction to the effect of those words.'[18] [Emphasis in original]

[32] ABI and the Applicants submit that 'the purpose of section 154 is limiting but section 154 no longer concerns itself with 'effect'' and that if it did 'a number of extant modern awards would fail this test'.[19]

[33] The ACTU accepts that the change in language between s.576T(1) of the WR Act and s.154(1)(b) of the Act suggests the former was more restrictive, but submits that the ordinary meaning suggests:

> 'that the real basis of the change was to distinguish between prohibiting terms and conditions that are incapable of operating in all States or Territories because of the circumstances pertaining in particular States or Territories (no coastline in the ACT, no snow or Alpine resorts in the Northern Territory), versus prohibiting only terms and conditions that do not

[15] ABI & Applicants submissions 24 July 2018 at [50]

[16] ABI & Applicants submissions 24 July 2018 at [48]

[17] ABI & Applicants submissions 24 July 2018 at [51]–[55]

[18] ABI & Applicants submissions 24 July 2018 at [57]–[60]

[19] ABI & Applicants submissions 31 July 2018 at [9]

operate in all States or Territories because *the* criterion for their operation or non-operation is based on the fact that a place is or is not a particular State or Territory.'[20]

[34] Further, the ACTU submits that the legislative history tends to confirm that reading.[21] Section 576T(1)(b) (reproduced at [28] above) prohibited terms and conditions of employment 'that do not have effect in each State and Territory'. The Explanatory Memorandum (EM) to the Bill that introduced it, the Workplace Relations (Transition to Forward to Fairness) Bill 2008, provides:

'*New section 576T - Terms that contain State-based differences*

81. New subsection 576T(1) would provide that, as a general rule, modern awards must not contain terms and conditions of employment that are determined by reference to State or Territory boundaries and that do not have effect in each State and Territory.

82. However, new subsection 576T(2) would permit modern awards to include such terms for a transition period of up to 5 years from the date the modern award commences. This would allow employers and employees time to adjust to the terms of a modern award.

83. New subsection 576T(3) would provide that if, by the end of the transition period, a modern award includes terms and conditions of employment that are determined by reference to State or Territory boundaries or that do not have effect in each State and Territory those terms will cease to have effect at the end of the transition period.

84. This direction to the Commission reflects the move to a national workplace relations system. Ensuring there are no State-based differences in modern awards is an essential element of this.'

[35] Clause 154(1) of the Fair Work Bill 2008 as originally introduced into the Parliament provided:

'154 Terms that contain State-based differences

General rule—State-based difference terms must not be included

(1) A modern award must not include terms and conditions of employment (***State-based difference terms***) that:

(a) are determined by reference to State or Territory boundaries; or

(b) are not capable of having effect in each State and Territory.

When State-based difference terms may be included…'

[Emphasis added]

[36] The Explanatory Memorandum for that Bill as originally introduced provides:

'595. Clause 154 prohibits a modern award from containing State-based difference terms; that is, terms that:

- are determined by reference to State or Territory boundaries; or
- are not capable of having effect in each State and Territory.

596. However, clause 154 allows a modern award to contain State-based difference terms for up to five years from award modernisation, to allow for the orderly phasing out of such arrangements (subclauses 154(2) and (3)).

[20] ACTU submissions in reply 31 July 2018 at [9]

[21] ACTU submissions in reply 31 July 2018 at [10]

> 597. It is not intended that clause 154 would prohibit modern awards including terms that have differing practical operation in different States and Territories, provided that they are capable of applying in each State or Territory. For example, a modern award could contain a provision that allowed for the payment of a remote location allowance or tropical allowance to address a particular degree of remoteness or particular climatic conditions.'

[37] Finally, cl.154(1)(b) of the the Fair Work Bill 2008 as introduced, was replaced by Government amendment in the Senate with the present wording of s.154(1)(b) ('are expressed to operate in one or more, but not every, State or Territory'). The Supplementary EM for the Bill describes the present wording as follows:

> State-based differences
>
> 69. Item 4 is designed to make clear that the requirement that terms of modern awards be expressed to operate in each State and Territory, does not necessarily mean that the terms will always have effect in each State or Territory because of circumstances specific to that State or Territory.
>
> - For example, a modern award could contain a provision that allowed for the payment of a remote location allowance or tropical allowance even if such a provision would not have effect in a particular State or Territory.

[38] ABI and the Applicants submit that the coverage term of the proposed Interim Award 'does not have "effect" in each State and Territory of Australia; however this is not expressed through the words used'.[22] They submit that pursuant to s.154, you:

> '(a) cannot say the employee gets X because they are in Y State or Territory;
>
> (b) cannot express in words that X applies in one but not all States and Territories.
>
> (c) can however, otherwise adopt a formulation of words that has "the effect" of a term and condition of employment:
>
> (i) applying in part of a State or Territory only; and
>
> (ii) not applying in all States and Territories.'[23]

[39] It may be accepted that s.154 is not concerned with a requirement that each modern award has practical operation in every State or Territory. Modern awards which are expressed to cover particular industries or occupations throughout the Commonwealth may not in practice apply to any employers or employees in a particular State or Territory at a given time because, for historical, geographic, demographic, economic or other reasons, the relevant industry or occupation is not carried out in that State or Territory. We accept the Applicants' submission that the change in language from the former s.576T(1)(b) of the WR Act to the current s154(1)(b) was intended to make that clear.

[40] However that does not mean that s.154 is merely concerned with the linguistic formulation of the modern award term in question. The effect of ABI and the Applicants' submission appears to be that a term which, expressed in one way, infringes the prohibition in s.154 may, by the use of a different formulation of words, be permissible even though its

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[22] ABI & Applicants submissions 24 July 2018 at [61]

[23] ABI & Applicants submissions 24 July 2018 at [65]

legal effect is exactly the same. That cannot be accepted. That is essentially the same proposition which in the judgment of Buchanan J in *ACCI v ACTU* was described as '…elevat[ing] form over substance…' and 'artificial', and was rejected.[24] It allows the avoidance of what Buchanan J characterised as the general objective of s.154(1), namely to eliminate 'State-based' differences.[25] Section 154, we consider, is concerned with prohibiting modern award provisions which have the legal effect of establishing terms which operate differentially between States or Territories as such. That s.154(1)(b) prohibits terms and conditions which are *expressed to operate* in one or more but not every State and Territory does not mean that an award provision will offend s.154(1)(b) only if it literally recites the words of the statute. Rather, an award provision which is expressed in such a way as to give legal effect to a proscribed geographic limitation will offend s.154(1)(b).

[41] On an ordinary reading the proposed Interim Award is expressed to operate in one and only one Territory, that being the Territory of Norfolk Island. That is because, on the face of it, the proposed Interim Award seeks to exclude employees working in other States and Territories from its coverage based entirely on the fact that they work in those other States and Territories. This is exactly what s.154(1)(b) was enacted to prevent. Accordingly, all the terms and conditions of employment included in the proposed Interim Award are prohibited by s.154(1)(b) of the Act.

[42] In our view it is immaterial that clause 4.1 of the proposed Interim Award carves out the Norfolk Island landmass from the Territory of Norfolk Island so that the proposed Interim Award does not apply geographically throughout the Territory of Norfolk Island. Even if we were to accept, as submitted by ABI and the Applicants, that *ACCI v ACTU* is authority for the proposition that s.154(1)(b) is only concerned with terms and conditions of employment which have application geographically to the entirety of a State or Territory (which is at odds with a plain reading of s.154(1)(b)), that does not assist the Applicants. ABI and the Applicants' case centres on the proposition that the landmass of Norfolk Island, by reference to which the coverage provision of the proposed Interim Award would operate, does not constitute the geographic entirety of the Territory of Norfolk Island as legally defined. But it seems to us that this is a distinction without a difference and that the coverage of the proposed Interim Award is simply a contrivance to seek to avoid the prohibition in s.154(1). The following points support that proposition:

- There are no business premises located on either Nepean Island or Phillip Island.[26]
- There is no evidence before us to suggest that any work (other than by public sector employees) takes place in the Territory of Norfolk Island other than on the landmass of Norfolk Island.
- The Applicants effectively conceded that if the references in clause 4.1(a) of the proposed Interim Award (the coverage term) to 'Norfolk Island' were instead references to 'the Territory of Norfolk Island' the coverage of the instrument 'wouldn't in any material sense differ'.[27]

[24] [2015] FCAFC 131 at [35]-[36]

[25] [2015] FCAFC 131 at [38]

[26] Transcript 3 August 2018 at PN48

[27] Ibid at PN48-65 and PN74-75

[43] In the alternative, ABI and the Applicants contend that the proposed Interim Award could 'express coverage on the basis of "named employers".'[28] Mr Ward, on behalf of ABI and the Applicants, expanded on this alternative proposal in his oral submissions by suggesting that the proposed Interim Award could cover every business operating on Norfolk Island by naming each such employer in the coverage clause, or alternatively naming each business operating on Norfolk Island save for 'some very large employers on Norfolk Island whose economics … really have nothing to do with Norfolk Island'.[29]

[44] We would need to consider the precise terms of any alternative coverage clause proposed by the Applicants for the proposed Interim Award in order to determine whether it was prohibited by s.154 of the Act or on any other basis. For example, it would be necessary to understand whether any employer identified in the coverage clause of a proposed award operates a business on the mainland as well as on Norfolk Island.[30]

[45] However, in view of our determination that an award which 'covers employees … working on Norfolk Island employed by private sector employees operating a business on Norfolk Island' is prohibited by s.154(1)(b) of the Act, we can indicate that if the coverage clause of the proposed Interim Award was amended so that it covered (by name) every employer operating a business on Norfolk Island and the employees of such employers, it would offend the principle that what cannot be done directly cannot be done indirectly (*quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud).*[31]

Conclusion

[46] For the reasons given, we dismiss the application for the proposed Interim Award.

[47] We encourage the parties to consider engaging in enterprise bargaining under the Act, to meet the particular needs of employers and employees on Norfolk Island. To that end, Commissioner Saunders could be made available to facilitate any such enterprise bargaining.

PRESIDENT

Appearances:

Mr Ward (with Mr Kingston) for Australian Business Industrial New South Wales Business Chamber, Norfolk Island Chamber of Commerce and Australian Hotels Association

Mr Clarke for the ACTU.

Hearing details:

Sydney.
2018.

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[28] ABI & Applicants submissions in reply 31 July 2018 at [17]

[29] Transcript 3 August 2018 at PN134

[30] Ibid, at PN131-2

[31] *Fitzgerald v Woolworths* [2017] FWCFB 2797 at [54]; *Deakin v Webb* (1904) 1 CLR 585 at 612-3; *Caltex Oil (Aust) Pty Ltd v Best* (1990) 170 CLR 516 at [6]-[8]

3 August.

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ANNEXURE A

Fair Work Act

BACKGROUND PAPER

2009
s.156–4 yearly review of modern awards

4 yearly review of modern awards – Proposed Norfolk Island Award

(AM2018/8)

MELBOURNE, 12 JULY 2018

Note: This is a background document only. It has been prepared by the Commission research area and does not represent the view of the Commission on any issue.

Norfolk Island reform process – workplace relations

[1] Before 1 July 2016, the *Fair Work Act 2009* (Cth) (Fair Work Act) and the *Fair Work Regulations 2009* (Fair Work Regulations) did not apply to employers and employees on Norfolk Island. Workplace relations on Norfolk Island was regulated by the *Employment Act 1988* (NI) (NI Employment Act) and the *Employment Regulations 1991* (NI).

[1] The *Territories Legislation Amendment Act 2016* (Cth) (Territories Act) and associated Rules made Norfolk Island a non-self-governing territory of Australia and extended relevant Commonwealth legislation to Norfolk Island.[1] The Territories Act extended the Fair Work Act to Norfolk Island on 1 July 2016, *by inserting new definitions of 'Australia' and the 'Commonwealth' into s.12 of the Fair Work Act, as including Norfolk Island. This makes Norfolk Island employers and employees national system employers and employees for the purposes of the Fair Work Act.*

[2] Consequently, from 1 July 2016 Norfolk Island businesses have been required to comply with many provisions of the Fair Work Act (subject to the operation of the *Fair Work (Norfolk Island) Rule 2016* (the Rule) discussed below). These include:

- the National Employment Standards (NES);
- increased minimum pay rates;
- a loading of 25 per cent for casual employees, in accordance with national minimum wage orders; and
- record-keeping and payslip requirements.

[1] See Explanatory Statement, *Fair Work (Norfolk Island) Rule 2016*, p.1.

[3] The Territories Act also inserted s.32A into the Fair Work Act, which enables the responsible Minister, by legislative instrument, to prescribe modifications of the Fair Work Act in relation to Norfolk Island.

Fair Work (Norfolk Island) Rule 2016

[4] The Rule, which came into effect on 1 July 2016, sets out 'ongoing modifications' (Schedule 1) and 'transient modifications' (Schedule 2) of the Fair Work Act and the Fair Work Regulations relating to Norfolk Island. Schedule 2 to the Rule was repealed at the start of 2 July 2018.

[5] The transient modifications in Schedule 2 provided for increased minimum wages for Norfolk Island award/agreement free employees through a stepped transition. The Norfolk Island minimum wage was increased to 85 per cent of the national minimum wage or applicable special national minimum wage on 1 July 2016. The minimum wage increased to 100 per cent of the national minimum wage or applicable special national minimum wage on 1 July 2017.

[6] Schedule 2 also provided that modern awards 'covered' Norfolk Island employers and employees from 1 July 2016, but did not 'apply' to them until 1 July 2018. This was to enable Norfolk Island employers and employees to make enterprise agreements from 1 July 2016, and for the Fair Work Commission (Commission) to assess agreements against the relevant modern awards.

[7] Schedule 2 also continued Norfolk Island employment contracts under the NI Employment Act, enterprise agreements under the *Public Service Act 2014* (NI) and public sector wage determinations under the *Public Sector Remuneration Tribunal Act 1992* (NI) that were in effect immediately before 1 July 2016, as 'transitional NI instruments' under the Fair Work Act. Where transitional NI instruments contained less favourable terms than those contained in the NES, the relevant NES applied.

[8] The Commission was given powers to vary or terminate transitional NI instruments in limited specified circumstances. The termination of a transitional NI instrument did not terminate the employment of an employee by the employer.

[9] Any transitional NI instrument that had not been terminated before the end of 30 June 2018 terminated at the end of 30 June 2018. From 1 July 2018, modern awards apply to Norfolk Island employers and employees.

[10] The ongoing modifications of the Fair Work Act in Schedule 1 to the Rule include:

- a power for the Commission, from 1 July 2018, to make a 'take-home pay order' to ensure that the transition to modern awards does not result in a Norfolk Island employee having a reduction in their pay;
- Norfolk Island employees retaining any accrued (but unused) entitlements as at 1 July 2016 in relation to 'annual holidays' and 'sick leave' accrued under the NI Employment Act;
- the minimum period of notice of termination or payment in lieu of notice under the NES commencing from 1 July 2016, with service on Norfolk Island before 1 July 2016 not counted as service for this provision; and

- the redundancy pay entitlement under the NES commencing from 1 July 2016, with service on Norfolk Island before 1 July 2016 not counted as service for this provision (unless the employee had an entitlement under their terms and conditions of employment).

Other workplace relations laws relating to Norfolk Island

[11] The NI Employment Act:

- recognises Foundation Day, Bounty Day, Thanksgiving and Show Day as public holidays, in addition to the eight national public holidays legislated under the Fair Work Act;
- retains restrictions on employing persons under the age of 15 years; and
- retained the minimum statutory terms and conditions of employment in relation to rest periods and uniforms, until these provisions were repealed at the start of 1 July 2018.

[12] From 1 July 2016, the *Long Service Leave Act 1955* (NSW), with some modifications, has applied to Norfolk Island.

ANNEXURE B

LIST OF ISSUES RELATING TO THE JURISDICTION OF THE COMMISSION

In this document:

- **Act** means the *Fair Work Act 2009* (Cth);

- **Commission** means the Fair Work Commission;

- **proposed Interim Award** means the document titled *Norfolk Island Interim Award 2018* at Annexure A to the submission of the New South Wales Business Chamber Ltd and Norfolk Island Chamber of Commerce Inc. dated 9 July 2018.

1. Definition of 'Norfolk Island'

1.1 How does the definition of 'Norfolk Island' in the proposed Interim Award relevantly differ from the definition of the 'Territory of Norfolk Island' in Schedule 1 to the *Norfolk Island Act 1979* (Cth)? In particular, would the proposed Interim Award cover any additional employers or employees if the references in cl.4.1(a) of the document to 'Norfolk Island' were instead references to 'the Territory of Norfolk Island'?

2. Section 154 — State-based difference terms

2.1 Does the proposed Interim Award include any 'State-based difference terms' pursuant to s.154(a) of the Act? If so, which terms of the document constitute such terms?

2.2 Does the proposed Interim Award include any 'State-based difference terms' pursuant to s.154(b) of the Act? If so, which terms of the document constitute such terms?

2.3 If the proposed Interim Award does include any State-based difference terms within the meaning of s.154, are these terms prohibited by the Act?

3. Section 143 — Coverage terms of modern awards

3.1 Does cl.4.1(a) of the proposed Interim Award comply with ss.143(1)–(6) of the Act?

3.2 Would the coverage of any existing modern award need to be varied if the proposed Interim Award was to be made by the Commission? If so, which award(s)?

4. Section 156(3) — work value

4.1 As the employees to be covered by the proposed Interim Award are presently covered by minimum wage rates under existing modern awards, would s.156(3) of the Act apply to the fixing of the wage rates, if the proposed Interim Award was to be made by the Commission?

5. Interim award

5.1 Can the Commission make an interim award under Division 4 of Part 2–3 of the Act — that is, make an award on the basis of a preliminary view that the terms of the modern award satisfy s.138 of the Act, pending a full and final determination?