



## REASONS FOR DECISION

*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*  
Sch. 6, Item 4—Application to make a modern award to replace an enterprise instrument

**Commonwealth Scientific and Industrial Research Organisation**  
(EM2013/89)

**CSIRO (SALARIES AND CONDITIONS OF SERVICE) AWARD 1999**  
[AP772288]

Commonwealth employment

VICE PRESIDENT CATANZARITI  
DEPUTY PRESIDENT KOVACIC  
COMMISSIONER JOHNS

SYDNEY, 19 AUGUST 2016

*Application for a modern enterprise award to replace the CSIRO (Salaries and Conditions of Service) Award 1999 - whether modern enterprise award should be made - modern enterprise award should be made in the circumstances - order to be settled by member of Full Bench.*

### Introduction

[1] This decision relates to an application under item 4 of Schedule 6 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Transitional Act) for the Fair Work Commission to make a modern enterprise award to replace the *CSIRO (Salaries and Conditions of Service) Award 1999* (**Current Enterprise Award**).

[2] The application was made by the Commonwealth Scientific and Industrial Research Organisation (**CSIRO**).

[3] On 28 April 2016 the applicant filed the following material in support of the application:

- a) Joint outline of submissions (**Exhibit A**);
- b) Statement of Alexandra Allars, Manager of Human Resources at the CSIRO (**Exhibit B**);
- c) Draft Order; and
- d) Draft of the Proposed Award.

[4] The application was supported by the CSIRO Staff Association (a section of the CPSU) and the AMWU.

[5] At the hearing of this matter on 9 June 2016:

- Mr P McNulty appeared from Ashurst, Solicitor with permission pursuant to s.596(2)(a) of the *Fair Work Act 2009*, appeared on behalf of the CSIRO;
- Ms A Allars appeared for the CSIRO;
- Ms A Donnellan appeared for Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (AMWU);
- Mr K Barlow, appeared for Community and Public Sector Union (CPSU)

[6] At the conclusion of the hearing we announced our decision to make the *CSIRO Enterprise Award 2016 (Proposed Award)* which had been agreed between the parties, subject to the finalisation of its terms in conference with Commissioner Johns.

[7] On 1 July 2016, the parties jointly filed a further amended version of the Proposed Award incorporating amendments proposed during the Hearing, namely the inclusion of the revised model term for the cashing out of annual leave.

[8] On 20 July 2016, the Commission's Awards Modernisation team suggested further amendments to the Proposed Award because of the decision in the Annual Wage Review 2015–16 on 31 May 2016 [\[\[2016\] FWCFB 3500\]](#). It was proposed to adjust the wages and allowances, along with other minor changes.

[9] The Commission provided the parties with:

- a copy of the Proposed Award (including changes incorporated from [\[\[2016\] FWCFB 3500\]](#));
- a table clarifying the changes made to the Proposed Award.
- a memorandum about the changes (**the memo**).

[10] The parties were directed to consider the “*questions*” posed in the memo, and provide comments and/or objections to the amended version of the Proposed Award, by 22 July 2016.

[11] On 22 July 2016, CSIRO submitted that it agreed with most of the proposed changes, but suggested further amendments to the calculation of the wages and allowances figures.

[12] On 28 July 2016, the Commission provided the parties with a final version of the Proposed Award, and informed the parties that most of CSIRO's proposed calculations have been adopted; however the meal allowance figures will remain as calculated by the Commission. A brief explanation was provided on how the meal allowance figures were calculated.

[13] On 29 July 2016, CSIRO wrote to the Commission, confirming it has no objection to the final version of the Proposed Award, incorporating the Commission's calculated wages and allowances figures.

[14] These are the reasons for our decision.

## The approach

[15] The approach to be taken to the making of an enterprise modern award was established by a Full Bench in Commonwealth of Australia acting through the Minister Assisting the Prime Minister for the Public Service v the Community and Public Sector Union and Others.<sup>1</sup> We adopt that approach in this matter.

## The legislative requirements

[16] The role of the Commission in an application to make a modern enterprise award is governed by sub-item 4(5) of Schedule 6 to the *Fair Work (Transitional Provisions and Consequential Amendments Act 2009 (Transitional Act)* which provides:

“(5) In deciding whether or not to make a modern enterprise award, and in determining the content of that award, the FWC must take into account the following:

- (a) the circumstances that led to the making of the enterprise instrument rather than an instrument of more general application;
- (b) whether there is a modern award (other than the miscellaneous modern award) that would, but for the enterprise instrument, cover the persons who are covered by the instrument, or whether such a modern award is likely to be made in the Part 10A award modernisation process;
- (c) the content, or likely content, of the modern award referred to in paragraph (b) (taking account of any variations of the modern award that are likely to be made in the Part 10A award modernisation process);
- (d) the terms and conditions of employment applying in the industry in which the persons covered by the enterprise instrument operate, and the extent to which those terms and conditions are reflected in the instrument;
- (e) the extent to which the enterprise instrument provides enterprise-specific terms and conditions of employment;
- (f) the likely impact on the persons covered by the enterprise instrument, and the persons covered by the modern award referred to in paragraph (b), of a decision to make, or not make, the modern enterprise award, including any impact on the ongoing viability or competitiveness of any enterprise carried on by those persons;
- (g) the views of the persons covered by the enterprise instrument;
- (h) any other matter prescribed by the regulations.”

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<sup>1</sup> [2015] FWCFB 616.

[17] Item 6 links the modern enterprise award objective to the modern award objective and the minimum wages objective found at ss.134 and 284 of the Act. It provides:

**“6 The modern enterprise awards objective**

(1) The modern awards objective and the minimum wages objective apply to the FWC making a modern enterprise award under this Division.

(2) However, in applying the modern awards objective and the minimum wages objective, the FWC must recognise that modern enterprise awards may provide terms and conditions tailored to reflect employment arrangements that have been developed in relation to the relevant enterprises. This is the **modern enterprise awards objective.**”

[18] This is a legislative requirement for the Commission to recognise, in the context of the modern awards objective and the minimum wage objective, that modern enterprise awards may provide terms and conditions tailored to reflect employment arrangements that have been developed in relation to the relevant enterprises. The modern awards objective, set out in s.134 of the *Fair Work Act 2009* (the Act), is as follows:

**“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
- (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.**”

[19] It is also relevant to draw attention to item 11 of Division 3 which provides:

**“11 Enterprise instrument modernisation process is not intended to result in reduction in take-home pay**

- (1) The enterprise instrument modernisation process is not intended to result in a reduction in the take-home pay of employees.
- (2) An employee’s **take-home pay** is the pay an employee actually receives:
  - (a) including wages and incentive-based payments, and additional amounts such as allowances and overtime; but
  - (b) disregarding the effect of any deductions that are made as permitted by section 324 of the FW Act.

Note: Deductions permitted by section 324 of the FW Act may (for example) include deductions under salary sacrificing arrangements.

- (3) An employee suffers a modernisation-related reduction in take-home pay if, and only if:
  - (a) a modern enterprise award made in the enterprise instrument modernisation process starts to apply to the employee when the award comes into operation; and
  - (b) the employee is employed in the same position as (or a position that is comparable to) the position he or she was employed in immediately before the modern enterprise award came into operation; and
  - (c) the amount of the employee’s take-home pay for working particular hours or for a particular quantity of work after the modern enterprise award comes into operation is less than what would have been the employee’s take-home pay for those hours or that quantity of work immediately before the award came into operation; and
  - (d) that reduction in the employee’s take-home pay is attributable to the enterprise instrument modernisation process.

[20] Item 11 highlights the injunction contained in the original request provided by the then Minister which related to disadvantage to employees.

**The application of the legislative task**

[21] We now turn to each of the matters that we took into account.

**The circumstances that led to the making of the enterprise instrument rather than an instrument of more general application: Item 4(5)(a)**

[22] The parties provided a history of the Current Enterprise Award. That history can be summarised as follows:

- (a) Historically, the terms and conditions of CSIRO employees (and employees of its predecessor organisation) were determined by the CSIRO Executive, subject to the approval of the Public Service Board;
- (b) The passage of the *Prime Minister and Cabinet Legislation Amendment 1991* removed the requirement for the approval of the Public Service Board, and the terms and conditions of employment relating to CSIRO employees began to evolve independently of the terms and conditions relating to APS employees;
- (c) In 1990, a number of awards and public sector instruments were, to the extent they covered CSIRO employees, set aside and replaced with the *CSIRO Award 1990*. This award was the result of significant negotiations and reflected substantial changes in the structure of the CSIRO;
- (d) The Decision of the Commission to make the *CSIRO Award 1990* outlined a number of agreed facts that contributed to the making of the award. One of the agreed facts was that “existing classification structures and salaries are not suited to CSIRO’s needs in the 1990s and beyond”;
- (e) The Current Enterprise Award was made as a result of the Award Simplification process conducted pursuant to Item 51 of Part 2 of Schedule 5 of the *Workplace Relations and Other Legislation Amendment Act 1996*, out of a combination of the following instruments:
  - *CSIRO Award 1990*;
  - *CSIRO Redeployment and Retirement (Redundancy) Award 1989*; and
  - *CSIRO Tenure Award 1989*.

[23] It can be seen from this brief review that the Current Enterprise Award has had a long and distinct history. This factor weighed in favour of making a modern enterprise award.

**Whether there is a modern award (other than the miscellaneous modern award) that would, but for the enterprise instrument, cover the persons who are covered by the instrument, or whether such a modern award is likely to be made in the Part 10A award modernisation process: Item 4(5)(b).**

[24] It was submitted that there is no single award that would, but for the Proposed Award, cover all employees who are covered by the Current Enterprise Award.

[25] It was also submitted that a limited number of employees may be covered by one of the following occupation-based modern awards:

- *Manufacturing and Associated Industries and Occupations Award 2010*; and
- *Professional Employees Award 2010*.

[26] It may be observed that coverage by a number of modern awards may lead to difficulties in enterprise bargaining. Further, it might lead to an unnecessary fragmentation of the award safety net and would fail to achieve the modern awards objective.

[27] These circumstances weighed in favour of creating a modern enterprise award.

**The content, or likely content, of the modern award referred to in paragraph (b) (taking account of any variations of the modern award that are likely to be made in the Part 10A award modernisation process): Item 4(5)(c)**

[28] It was submitted that the content of the *Manufacturing and Associated Industries and Occupations Award 2010* and the *Professionals Award 2010* does not reflect the terms and conditions currently operating in the CSIRO.

[29] It is apparent from the history of the industrial arrangements which have applied to the applicant that the content of the various industry specific modern awards do not reflect the needs, terms and conditions of its employees. This factor weighed in favour of making a modern enterprise award.

**The terms and conditions of employment applying in the industry in which the persons covered by the enterprise instrument operate, and the extent to which those terms and conditions are reflected in the instrument: Item 4(5)(d)**

[30] The parties directed the Commission's attention to the decision in *Coleambally Irrigation Co-operative Limited v AWU and ors* in which the parties submitted that the Commission considered enterprise agreements that appeared to cover activities in the relevant industry.

[31] The parties submitted that the following instruments apply to employees covered by the provisions of the Current Enterprise Award:

- *CSIRO Enterprise Agreement 2011-2014*;
- *CSIRO Canberra Deep Space Communication Complex (CDSCC) Enterprise Agreement 2014-2017*; and
- contracts of employment (for senior managers).

[32] The parties submitted that the following terms and conditions of the Current Enterprise Award are reflected in the instruments above:

- Clause 13 – CSIRO specific classifications;
- Clause 10 – types of employment and, relevantly, restrictions on the types of employment;
- Clause 27.2 – Flextime;

- Clause 24 – a more generous entitlement to personal leave; and
- Clause 11 – a more generous entitlement to redundancy pay.

[33] These factors weighed in favour of making a modern enterprise award.

**The extent to which the enterprise instrument provides enterprise-specific terms and conditions of employment: Item 4(5)(e)**

[34] It was submitted that there are enterprise specific terms and conditions that apply to employees of the applicant. A few are worthy of mention:

- Sea-going duty provisions; and
- A variety of allowances.

[35] The parties also submitted that, owing to the unique nature of the CSIRO's operations, the Current Enterprise Award contains provisions restricting the ability of the CSIRO to engage fixed-term and casual employees.

[36] It was further submitted that the Current Enterprise Award contains nine unified salary bands which apply to employees irrespective of the area of the CSIRO in which they work. The parties submitted that the structure of these salary bands reflects the nature of work at the CSIRO and were designed to adequately reflect career progression with the organisation.

[37] The parties submitted that the Full Bench of the Commission that modernised the *APS Award* recognised that the existence of established salary relativities was a factor in favour of making a modern enterprise award. The parties submitted that the existence of established wage relativities in the Current Enterprise Award is a factor in favour of making the Proposed Award.

[38] These factors weighed in favour of making a modern enterprise award.

**The likely impact on the persons covered by the enterprise instrument, and the persons covered by the modern award referred to in paragraph (b), of a decision to make, or not make, the modern enterprise award, including any impact on the ongoing viability or competitiveness of any enterprise carried on by those persons: Item 4(5)(f).**

[39] The parties jointly submitted that:

- While the majority of CSIRO employees are covered by an enterprise agreement, a decision to make, or not to make, the Proposed Award would be relevant to the operation of the better off overall test (the BOOT); and
- A decision to not make the Proposed Award would result in the BOOT being assessed against the *Miscellaneous Award 2010* and the aforementioned modern awards, which do not contain terms and conditions that reflect the particular circumstances of employment at the CSIRO.

[40] The parties submitted that the terms and conditions provided for in the *Miscellaneous Award 2010* do not provide a fair and relevant minimum safety net for the purpose of the BOOT.

[41] As was made clear in the award modernisation Full Bench decision dated 4 December 2009 ([2009] AIRCFB 945 at paragraph 153):

“We agree with those who have suggested that the coverage of the award is very narrow and likely to be limited in time where emerging industries are concerned or where the expansion of coverage of a modern award is involved. Accordingly we do not think the award should contain a comprehensive safety net designed for any particular occupation or industry. Rather it should contain basic conditions only, leaving room for the application of an appropriate safety net in another modern award in due course.”

[42] The Miscellaneous Award was not created or designed to be a universal safety net but to be a transition point to another modern award whose coverage may require review. These circumstances weighed in favour of creating a modern enterprise award.

**The views of the persons covered by the enterprise instrument: Item 4(5)(g)**

[43] All parties to the *CSIRO (Salaries and Conditions of Service) Award 1999* supported the making of this modern enterprise award. No person opposed the award. Whilst consent is not decisive of the matter, it is a factor in favour of making a modern enterprise award.

**Any other matter prescribed by the regulations: Item 4(5)(h)**

[44] There were no regulations relevant to this criterion.

**Should a modern enterprise award be made?**

[45] The CSIRO is a unique entity. There is no convenient alternative award that can be said to better satisfy the modern awards objective than a modernised the *CSIRO (Salaries and Conditions of Service) Award 1999*.

[46] The history of the award discloses a rationale for its existence which remains current today. The terms of the Current Enterprise Award contain enterprise specific terms. While some of these can and should be contained in enterprise agreements, the fact remains that the award was developed for this enterprise and once consolidated and modernised, remains the most suitable vehicle for a fair and relevant minimum safety net into the future. In our view there was a compelling case for the making of a modern enterprise award for the CSIRO.

[47] The above factors clearly made the case for such an outcome. We considered that the Proposed Award should be made.

[48] Consequently, we made the Proposed Award in the terms agreed between the parties as amended and provided by the Commission on 28 July 2016.

VICE PRESIDENT

*Appearances:*

*P McNulty*, of Ashurst for the CSIRO

*A Allars* for the CSIRO

*K Barlow* for the CPSU

*A Donnellan* for the AMWU.

*Hearing details:*

2014.

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