



STATEMENT AND DIRECTIONS

Fair Work Act 2009

s.156 – 4 yearly review of modern awards

4 yearly review of modern awards

(AM2014/1)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
COMMISSIONER HUNT

MELBOURNE, 25 JANUARY 2019

4 yearly review of modern awards—Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018—Australian Government Industry Award 2016, modern enterprise awards and State reference public sector modern awards

[1] Schedule 1 to the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (Cth) (Amending Act) repealed the provision for 4 yearly reviews of modern awards in the *Fair Work Act 2009* (Cth) (Act) with effect from 1 January 2018. Under the application and transitional provisions, a review of an award that commenced but was not completed before 1 January 2018 can continue under the terms of the repealed provisions.

[2] On 13 December 2018 the Community and Public Sector Union (CPSU) wrote to the President of the Fair Work Commission (Commission) requesting that the Commission clarify whether reviews of certain modern awards in which the CPSU has an interest, have commenced as part of the current 4 yearly review process and consequently can continue as part of the 4 yearly review pursuant to the application and transitional provisions (CPSU's correspondence). The CPSU's correspondence is at **Attachment A**.

[3] This Statement concerns the application of the 4 yearly review processes to the *Australian Government Industry Award 2016* (AGIA), modern enterprise awards and State reference public sector modern awards, in consequence of the Amending Act.

The amendments and their application and transitional provisions

[4] The former Division 4 of Part 2-3 of the Act required the Commission to conduct 4 yearly reviews of all modern awards. The current 4 yearly review commenced with a

conference on 5 February 2014.¹ While many aspects of the review have been finalised, the review is not yet completed.

[5] Schedule 1 to the Amending Act removed the provision for 4 yearly reviews from the Act by repealing Division 4 of Part 2-3 and references to the reviews throughout the Act, and making consequential amendments to Division 5 of Part 2-3.² The Amending Act received Royal Assent on 11 December 2018, but the amendments made by Schedule 1 commenced on 1 January 2018.³

[6] The repeal of Division 4 leaves Division 5 of Part 2-3 of the Act (retitled ‘Exercising modern award powers’) as the ‘residual framework’ under which modern awards (other than their default fund terms) may be made, varied or revoked. The Revised Explanatory Memorandum states:

‘This framework allows changes to a modern award where emerging social and economic matters demonstrate that change is necessary. For example, in exercising its modern award functions, the FWC is required to take into account a range of criteria, such as the need to promote social inclusion through increased workforce participation. This requires the FWC to consider the changing labour market and the manner in which work is evolving. It must also promote flexible modern work practices and the efficient and productive performance of work, which again requires the FWC to look beyond the way work has been performed historically and to make sure the safety net of terms and conditions continues to meet community expectations.’⁴

[7] Schedule 1 to the Amending Act also amended ss.582 and 616 of the Act so as to provide that determinations revoking or amending modern awards under Division 5 of Part 2-3 generally must be made by a Full Bench of the Commission.

[8] A modern award must be made by a Full Bench (s.616(1)), but, prior to the amendments, in some circumstances an award could be revoked or varied by a single Member of the Commission under Division 5 of Part 2-3. The Amending Act inserted into the Act new ss.616(3B)–(3D)⁵ as follows:

(3B) A determination that revokes a modern award under Division 5 of Part 2-3 must be made by a Full Bench.

(3C) Subject to subsection (3D), a determination that varies a modern award under Division 5 of Part 2-3 (other than a determination varying the default fund term of a modern award under section 159A) must be made by a Full Bench.

(3D) The President may direct a single FWC Member to perform a function or exercise a power:

¹ See [\[2014\] FWCFB 916](#)

² Amending Act Schedule 1 items 1–10, 12–13 and 17

³ Amending Act s.2

⁴ EM [7]

⁵ Amending Act Schedule 1 item 18. Consequential amendments are made to ss.157(1) and 582(4) by items 11, 15 and 16

- (a) under section 159, 160 or 161 (varying a modern award); or
- (b) in relation to any other variation under section 157 that the President considers appropriate of:
 - (i) a modern award; or
 - (ii) if 2 or more modern awards relate to the same industry or occupation—those awards.

Note: The President may give directions as to the manner in which the FWC is to perform its functions or exercise its powers (see section 582).’

[9] According to the Revised Explanatory Memorandum, these changes reflect:

‘the fact that the residual framework under Division 5 of Part 2-3 of the Act will now be the principal mechanism for the making, varying and revoking modern awards ... In the absence of the 4 yearly review mechanism, where reviews were conducted by a Full Bench, it is appropriate for a Full Bench to consider such matters before making any determinations to vary modern awards.’⁶

[10] Schedule 4 to the Amending Act inserted application and transitional provisions for the amendments into the Act. Relevantly for present purposes, the application and transitional provisions include the following:

‘Division 1—General

25 Definitions

In this Part:

4 yearly review of modern awards has the meaning given by this Act, as in force immediately before the commencement of Schedule 1 to the amending Act ...

amending Act means the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018*.

Schedule 1 commencement day means the day on which Schedule 1 to the amending Act commences ...

Division 2—Amendments made by Schedule 1 to the amending Act

26 Incomplete review of modern award

Scope

- (1) This clause applies in relation to a review of a modern award conducted as part of a 4 yearly review of modern awards if:

⁶ EM [30]–[31]

- (a) the review of the modern award commenced before the Schedule 1 commencement day; and
- (b) immediately before that day, the review of the modern award had not been completed.

Saving

- (2) Despite the repeal of:
 - (a) Division 4 of Part 2-3 (which deals with 4 yearly reviews of modern awards); and
 - (b) paragraph 582(4)(a) (which deals with directions by the President); and
 - (c) subsections 616(2) and (3) (which deal with the FWC's functions etc. that must be performed by a Full Bench);

by the amending Act, those provisions continue to apply, in relation to the review of the modern award, as if those repeals had not happened.

- (3) Despite the repeal of paragraph 582(4)(a) (which deals with directions by the President) by the amending Act, a direction given by the President to an FWC Member under that paragraph that was in force immediately before the Schedule 1 commencement day continues to have effect, in relation to the review of the modern award, as if that repeal had not happened.

Common issues

- (4) For the purposes of this clause, it is immaterial whether the review of the modern award is conducted in relation to an issue that the modern award has in common with another modern award.

27 Dismissing applications

- (1) On or after the Schedule 1 commencement day, the FWC may dismiss an application under section 158 to vary, revoke or make a modern award if the FWC is satisfied that the specific matters in relation to which the application is made were dealt with, or are being dealt with, in a 4 yearly review of modern awards.

Note: For another power of the FWC to dismiss applications under section 158, see section 587.

- (2) This clause does not limit when the FWC may dismiss an application under section 158.

Sunset provision

- (3) This clause ceases to have effect at the end of 2 years after the Schedule 1 commencement day.⁷

⁷ Amending Act Schedule 4 item 1

[11] In relation to these application and transitional provisions the Revised Explanatory Memorandum states:

‘26 – Incomplete 4 yearly review of modern award

74. The 4 yearly review of modern awards mechanism in Division 4 of Part 2-3 will be repealed from the start of 1 January 2018 by item 8 of Schedule 1 to the Bill. This will ensure that the next phase of the 4 yearly review, currently scheduled to commence on 1 January 2018 will not commence.

75. New clause 26 provides a transitional provision in the event that the FWC has active 4 yearly review matters on foot as at the end of 31 December 2017 (i.e. matters that have commenced but have not yet been concluded). This clause provides that Division 4 of Part 2-3 and necessary consequential provisions as in force at the repeal time (i.e. 1 January 2018) will continue to apply in relation to matters commenced but not yet determined at that time.

76. The transitional provision extends to incomplete reviews of one or more modern awards as part of the ‘common issues’ stage of the 4 yearly review of modern awards process. The review of one or more modern awards commenced, but not concluded by the end of 31 December 2017, may continue until finalised.

27 – Dismissing applications

77. Under section 587 of the Act, the FWC has discretion to dismiss an application if it is not made in accordance with the Act; is frivolous or vexatious; or has no reasonable prospects of success.

78. New clause 27 inserts a limited transitional dismissal power in addition to the existing section 587 mechanism. This new provision allows the FWC to dismiss modern award applications under section 158, where it is satisfied that the specific matters in relation to which the application was made, were or are being dealt with in the 4 yearly review. This power will sunset two years after the commencement of Schedule 1.’⁸

The modern awards concerned

[12] The modern awards referred to in the CPSU correspondence are the AGIA and 12 modern enterprise awards listed in the attachment to the CPSU’s correspondence, including the *Australian Public Service Enterprise Award 2015* (APS Award).

[13] The CPSU correspondence notes that the AGIA, the APS Award and the other modern enterprise awards in which it has an interest, were made by the Commission after the commencement of the current 4 yearly review. The correspondence also notes that the AGIA was included in the Family and Domestic Violence Leave common issue process in the current 4 yearly review and was varied as a result of that process, but that none of the modern enterprise awards in which it has an interest ‘have been explicitly included in the common issue processes.’

⁸ EM [74]–[78]

[14] In addition to the 13 modern awards referred to in the CPSU correspondence, all 12 of the other modern enterprise awards and all 8 of the State reference public sector modern awards that have been made to date, were also made after the commencement of the current 4 yearly review. The issue raised by the CPSU as to the application of the Amending Act's transitional provisions, applies to all 33 of these awards (the awards concerned).

[15] The 33 awards concerned are listed in **Attachment B**.

[16] The AGIA is the only one of the awards concerned to have been varied in the 4 yearly review processes. On 27 July 2018 a Full Bench issued a determination varying the AGIA so as to include the model term for unpaid leave to deal with family and domestic violence, with effect from 1 August 2018.⁹

[17] Modern enterprise awards and State reference public sector modern awards were referred to in the Statement regarding the timetable and procedure for the 4 yearly review dated 13 August 2014¹⁰ as follows:

'Enterprise modern awards and State reference public sector modern awards

[16] Pursuant to Schedule 6 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act) more than 140 applications were received prior to 31 December 2013 to make enterprise modern awards. Separate Full Benches have been constituted to determine the applications ...

[17] Schedule 6A of the Transitional Act requires the Commission to make State reference public sector modern awards. A Full Bench has been established and must consider all State reference public sector transitional awards regardless of whether an application was lodged ...

[18] Section 156 of the Act requires the Commission to review all modern awards. After the current processes are completed, any enterprise modern awards or state reference public sector awards made will be called on for review in 2015.¹¹

[18] The AGIA and review of modern enterprise awards and State reference public sector modern awards were discussed in the Statement and Directions in respect of the Family and Domestic Violence Leave common issue dated 3 August 2017¹² as follows:

'(ii) The Australian Government Industry Award 2016 and the review of modern enterprise awards

[8] In [correspondence](#) dated 19 July 2017, the CPSU raised the question of whether the *Australian Government Industry Award 2016* would be included in the current proceedings, given that it was made after the commencement of the claim ...

⁹ PR609457 made further to the Full Bench decision [2018] FWCFB 3936 issued on 6 July 2018

¹⁰ [2014] FWCFB 5537

¹¹ Ibid [16]–[18]

¹² [2017] FWCFB 4047

[11] We confirm that the *Australian Government Industry Award* will be considered as part of the ACTU application and any outcome in this matter may apply to the award. Accordingly, parties with an interest in that award are invited to make submissions in the proceedings.

[12] The inclusion of any model term(s) arising from this matter will also be considered during the review of the remaining enterprise and State reference public sector modern awards. The review of those instruments will occur after the current technical and drafting processes for the Group 1 to 4 awards are substantially complete (see [2014] FWCFB 5537 at [16]–[18]).¹³

[19] The position in relation to the AGIA, modern enterprise awards and State reference public sector modern awards as set out at [18] above, was reiterated in the Decision in respect of the Family and Domestic Violence Leave common issue dated 26 March 2018.¹⁴

[20] The history above indicates the extent to which, to date, the awards concerned have expressly been dealt with in the course of the current 4 yearly review.

The operation of the application and transitional provisions

[21] It appears that in the application and transitional provisions reproduced at [10] above, the notion of ‘a review of a modern award’ is quite narrow. In particular, it appears from the terms of cl.26(4) that the inclusion of an award in proceedings in relation to just one of the various common issues dealt with in the 4 yearly review, would constitute such ‘a review of a modern award’.

[22] It is clear from the history above that, for the purposes of the application and transitional provisions, the review of the AGIA in relation to the Family and Domestic Violence Leave common issue had commenced before 1 January 2018 and consequently could be completed under the terms of the repealed provisions pursuant to cl.26(2). That review was completed when the Full Bench issued the determination varying the AGIA to include the model term on 27 July 2018.

[23] However, on the basis of the narrow reading of ‘a review of a modern award’ outlined at [22] above, our *provisional* view is that, for the purposes of the application and transitional provisions, no other reviews of the 33 awards concerned had commenced before 1 January 2018. It follows that none of the 33 awards concerned can be further dealt with as part of the current 4 yearly review.

[24] While our *provisional* view is that none of the 33 awards concerned can be further dealt with as part of the 4 yearly review, this does not preclude the Commission on its own motion considering whether to vary any of these awards in proceedings under Division 5 of Part 2-3 of the Act, or an interested person making an application for the Commission to do so. In particular, a Full Bench of the Commission can, on its own initiative or on application

¹³ [2017] Ibid [8], [11] and [12]

¹⁴ [2018] FWCFB 1691 [274]

under s.158 of the Act, consider whether to vary the awards concerned under s.157 so as to include any of the model terms arising from the 4 yearly review common issues processes.

[25] Any interested party who opposes our *provisional* views should lodge a submission explaining their objection in accordance with the directions below.

[26] If no opposing submissions are lodged, in due course we will confirm our *provisional* views and the Commission will issue a timetable and directions for proceedings under Division 5 of Part 2-3 of the Act in relation to the 33 awards concerned — that is, the AGIA, the APS Award, the other modern enterprise awards and the State reference public sector modern awards, as listed in Attachment B. We anticipate that such proceedings would commence late in 2019.

[27] If any party opposes our *provisional* views, the matter will be called on for Mention in due course.

DIRECTIONS

1. Any interested person who wishes to oppose the *provisional* views at [23] above, is to lodge in the Commission written submissions explaining their objection on or before **4 pm on Friday 15 February 2019**.
2. All submissions should be sent in a Word document to amod@fwc.gov.au.
3. Copies of any submissions lodged in response to these directions will be published on the Commission's website.

PRESIDENT

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<PR704035>



13 December 2018

The Honourable Justice Iain Ross AO
President
Fair Work Commission
Melbourne
By email

Cc: APSC Commissioner

Your Honour,

Repeal of 4 Yearly Reviews – *Australian Government Industry Award 2016* and Modern Enterprise Awards

We are writing in relation to the Full Bench regarding the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* that has recently come into force.

We understand that the legislation repeals the requirement for the Fair Work Commission (FWC) to conduct 4 yearly reviews of modern awards. The transitional provisions in the legislation provide a savings provision for situations in which the review of a modern award commenced but has not been completed before 1 January 2018. In these situations, the 4 yearly review requirements continue to apply to that review.

The CPSU is seeking clarity about whether the *Australian Government Industry Award 2016* (AGIA) and modern enterprise awards fall within the scope of this savings provision.

The AGIA was made after the 4 yearly review started so has not been included in any of the Award stage reviews. However, the AGIA was included in the Family and Domestic Violence Leave common issue process and was varied as a result of the process. The CPSU has an interest in several modern enterprise awards which have also been made since the 4 yearly review started. The most notable of these modern enterprise awards are the Australian Public Service Enterprise Award 2015. A list of other modern enterprise awards which the union has an interest is attached (Attachment A). None of the modern enterprise awards that the CPSU

have an interest in have been explicitly included in the common issue processes.

It would be appreciated if the Commission could clarify whether, in its view, the reviews of the AGIA, and enterprise awards that the CPSU have an interest in, have commenced and will continue to be reviewed in accordance with the 4 yearly review process.

Yours sincerely

Aidan Nash
CPSU Industrial Officer

ATTACHMENT B**Awards Concerned**

Telstra Award 2015	MA000123
Australian Public Service Enterprise Award 2015	MA000124
Nurses and Midwives (Victoria) State Reference Public Sector Award 2015	MA000125
Printing Industry – Herald & Weekly Times – Production Award 2015	MA000126
Chullora Printing Award 2015	MA000127
Queensland Newspapers Pty Ltd Printing (Murarrie) Award 2015	MA000128
Northern Territory News Award 2015	MA000129
Metropolitan Newspapers (South Australia and Tasmania) Printing Award 2015	MA000130
Nurses (ANMF - Victorian Local Government) Award 2015	MA000131
Victorian Local Government Award 2015	MA000132
Optus Award 2015	MA000133
Victorian State Government Agencies Award 2015	MA000134
Victorian Public Service Award 2016	MA000135
Viterra Bulk Handling and Storage of Grains, Pulses and Minerals Award 2015	MA000136
Australia Post Enterprise Award 2015	MA000137
GrainCorp Country Operations Award 2015	MA000138
Aboriginal Legal Rights Movement Award 2016	MA000139
Reserve Bank of Australia Award 2016	MA000140
Airservices Australia Enterprise Award 2016	MA000141
Australian Federal Police Enterprise Award 2016	MA000142

Australian Bureau of Statistics (Interviewers) Enterprise Award 2016	MA000143
Australian Nuclear Science and Technology Organisation (ANSTO) Enterprise Award 2016	MA000144
Parliamentary Departments Staff Enterprise Award 2016	MA000145
Australian Capital Territory Public Sector Enterprise Award 2016	MA000146
Australian Broadcasting Corporation Enterprise Award 2016	MA000147
CSIRO Enterprise Award 2016	MA000148
Christmas Island Administration Enterprise Award 2016	MA000149
Victorian Local Government (Early Childhood Education Employees) Award 2016	MA000150
Northern Territory Public Sector Enterprise Award 2016	MA000151
Victorian Government Schools - Early Childhood - Award 2016	MA000152
Australian Government Industry Award 2016	MA000153
Victorian Government Schools Award 2016	MA000155
Note Printing Australia Award 2016	MA000156