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**Fair Work Commission: 4 yearly review of modern awards**

**AM 2014/305: PENALTY RATES  
RESTAURANT INDUSTRY AWARD 2010**

**Australian Chamber of Commerce and Industry (ACCI)**

**Australian Business Industrial (ABI)**

**NSW Business Chamber (NSWBC)**

**29 JUNE 2015**

## 1. INTRODUCTION

1.1 This outline of submissions is filed in relation to proceedings AM2014/305 by:

- (a) the Australian Chamber of Commerce and Industry (**ACCI**); and
- (b) Australian Business Industrial (**ABI**), which is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and has some 3,900 members; and
- (c) New South Wales Business Chamber (**NSWBC**) which is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth) and has some 18,000 members.

1.2 ABI and the NSWBC have made claims in these proceedings (**Claim**) to vary the *Restaurant Industry Award 2010* (**Award**) as follows:

- (a) A claim to reduce the Public Holiday rate for full-time and part-time employees under the Award from 250% to 200%;
- (b) A claim to reduce the Public Holiday rate for casual employees under the Award from 250% to 125%;
- (c) A claim to vary the relevant pay rates for employees who work on a prescribed holiday and elect to receive a pay rate lower than the penalty rate in addition to time off in lieu.

1.3 ACCI supports the Claim.

## 2. THE TASK BEFORE THE COMMISSION

2.1 The Claim is being advanced as part of the 4 Yearly Review of modern awards arising from section 156 of the *Fair Work Act 2009* (the **FW Act**).

2.2 The Claim seeks the Full Bench to exercise its discretion pursuant to section 156 (2) and 139 of the FW Act.

2.3 Section 156 (and 139) are conditioned by section 134 by virtue of section 134 (2) which applies the modern awards objective (section 134 (1)) to the performance or exercise of modern award powers.

2.4 The *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (**Preliminary Issues Decision**) addresses the legislative framework applying to these proceedings in detail.

2.5 We draw particular attention to three specific principles determined in the Preliminary Issues Decision when considering the variation of Modern Awards:

- (i) The Modern Awards Objective must be considered;
- (ii) Merit based evidence is required;
- (iii) Requirement for probative evidence.

## **i) Modern Awards Objective Must Be Considered**

2.6 The Preliminary Issues Decision confirms (at [23]) that the Commission remains at all times obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the limbs of section 134 of the FW Act.

2.7 Section 134 of the FW Act is in the following terms:

### ***FAIR WORK ACT 2009 - SECT 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;*
- (b) the need to encourage collective bargaining*
- (c) the need to promote social inclusion through increased workforce participation*
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work*
- (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;*
- (e) the principle of equal remuneration for work of equal or comparable value;*
- (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**.*

- 2.8 The purpose of section 134 is the creation of a “fair and relevant minimum safety net of terms and conditions” that is constituted by the National Employment Standards and modern awards.
- 2.9 It is implicit within this that the reference to modern awards should be read as a reference to the modern awards cumulatively but also individually in relation to their specific content.
- 2.10 It should be uncontroversial that what section 134 is setting is the terms and conditions of employment that no employee in a given circumstance should fall below; such is clear from the words “minimum safety net”.
- 2.11 In arriving at this fair and relevant minimum safety net, the Commission is to “take into account” those matters set out in section 134(1)(a)-(h) inclusive. This said the ultimate outcome is the creation of a “fair and relevant minimum safety net” having taken into account and weighed up the matters set out in section 134 (1) (a)-(h).
- 2.12 The phrase “take into account” has a relationship with similar phrases such as “consider” and “have regard to”. Such expressions are frequently used in legislation that vests a discretion in a decision making body to condition the scope of the discretion otherwise vested in the decision-maker. Relevantly section 134 is not the section in the FW Act that vests the discretion but rather a section that conditions the exercise of “modern award powers” which include for instance the discretion vested by section 139.
- 2.13 Such phrases have been consistently interpreted to mean that the decision-maker must take into account the matter to which regard is to be had and give weight to it as an element in making the decision. However, the significance of the stated matters will depend upon their context<sup>1</sup>. The authorities referred to also make it clear that the weight to be given the matter is for the decision-maker to determine, provided that the consideration of the matter is genuine. The fact that a decision-maker is directed to have regard to certain matters that are specified does not preclude consideration of other factors thought to be relevant<sup>2</sup>.

### **The Limbs of section 134 considered**

- 2.14 A deeper examination of the various limbs of section 134(1) illuminates a set of quite different requirements. Some of the limbs are written in terms of the “need” to do

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<sup>1</sup> Barwick CJ in *Rathborne v Abel* (1964) 38 ALJR 293 at 295

<sup>2</sup> Kitto J in *Rathborne v Abel* (1964) 38 ALJR 293 at 301, *R v Hunt*; *Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 286; 25 ALR 497 at 504; *R v Toohey*; *Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 333; 44 ALR 63 at 67; *Haplin v Lumley General Insurance Ltd* (2009) 261 ALR 741 at 748; *Minister for Immigration and Citizenship v Khadgi* [2010] FCAFC 145 at [57]-[67].

something, others not. The degree to which the Commission is moved in relation to these “needs” is qualified using different phrases:

- (a) “encourage”;
- (b) “promote”;
- (c) “provide”; and
- (d) “ensure”.

2.15 In addition, some of the provisions are focused on the impact of a possible exercise of power.

2.16 This means that, when considering any variation, the Commission should be focused upon ensuring that any new version of the minimum safety net is consistent with the modern awards objective.

#### **ii) Merit based evidence required**

2.17 The discretion conferred on the Commission to make determinations varying modern awards is expressed in general terms. However, the need for a “stable” modern award system suggests that parties seeking to vary a modern award must advance a merit argument in support of the proposed variation.<sup>3</sup>

#### **iii) Requirement for probative evidence**

2.18 Finally, when considering the merit basis to make variations, the Preliminary Issues Decision held that:

- (a) there may be cases where the need for an award variation is self-evident. In such circumstances, proposed variations can be determined with little formality,<sup>4</sup> and
- (b) where significant award changes are proposed, they must be supported by submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.<sup>5</sup>

2.19 It is uncontroversial to say that this is not a case where the proposed changes to the relevant awards are “self-evident” and that it is case seeking to bring about a “*significant change*” which must be supported by submissions which addresses the relevant legislative provisions

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<sup>3</sup> *Preliminary Issues Decision* at [60]

<sup>4</sup> *Preliminary Issues Decision* at [23] and [60]

<sup>5</sup> *Ibid*

and must be accompanied by: *probative evidence properly directed to demonstrating the facts supporting the proposed variation*<sup>6</sup>.

2.20 The gravamen of section 134 (1) is the setting of a “fair and relevant minimum safety net of terms and conditions” arising from the modern award in question and the National Employment Standards.

2.21 The Commission is therefore required to determine in this case whether:

- (a) A case has been advanced in support of the Claim as contemplated by the Preliminary Issues decision<sup>7</sup> such as to warrant the Commission exercising its discretion pursuant to section 156 and 139;
- (b) any such exercise of discretion is consistent with section 134; and
- (c) whether at the conclusion of the 4 Yearly Review the relevant awards (in their post Review form) would be consistent with section 138.

2.22 This is the framework within which the Claim now before the Commission must be considered.

### **3. CONTENTIONS**

3.1 The notion of what is “fair” in the context of section 134 of the FW Act is a balance of considerations and interests for both national system employees and employers. That is to say that fairness is not the exclusive domain of those advancing the employee cause but a more sophisticated consideration that extends to ensuring that the minimum safety net is “fair” for employers as well.

3.2 The notion of “relevance” is both contextual and temporal. What may have been relevant in 1920 may very well not be relevant in 2015 or later.

3.3 It is inherent in the notion of “modern awards” that the awards are in fact “modern” and as such look to today and the future not the past.

### **4. CHARACTERISTICS OF THE RESTAURANT AND CATERING SECTOR**

4.1 The Restaurant and Catering Sector represents a significant part of the Australian economy in terms of revenue generation and employment. In 2014-15 there were over 15 thousand businesses in the cafe and restaurant industry employing almost 155 thousand people and generating over \$16 billion in revenue. The industry is very labour intensive with wages

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<sup>6</sup> See Preliminary Issues Decision, [2014] FWCFB 1788, at [60]

<sup>7</sup> See *Preliminary Issues Decision* [2014] FWCFB 1788, at [60]

accounting for 28 percent of total expenses and 69 percent of value added. The average profit margin in the industry is 8.6 percent.<sup>8</sup>

- 4.2 The Restaurant and Catering Sector operates as an important vestibule employing industry for many key demographics. The industry by its nature is a major contributor to generating employment opportunities for part time and casual employment as well as attracting a diverse workforce. Increased employment opportunity in the Restaurant and Catering Sector is not only measured in increased jobs but also work hours.
- 4.3 The outputs of the industry are very responsive to price and income as restaurant meals and drinks are luxury goods. When prices rise or incomes fall, consumers can cease or reduce consumption, thereby directly and immediately influencing the operation of the industry.
- 4.4 The Restaurant and Catering Sector operates to meet community expectations and preferences and as such businesses within the sector often open on Sundays and public holidays. This is especially the case during certain times of the year and in areas that service holiday and recreational customers.
- 4.5 For restaurant and catering operators, increased wage costs associated with periods such as public holidays can lead to reduction in employment opportunity (through business closure or reduced operating hours) when employers close on public holidays to reduce costs and/or not make a loss.

## **5. PUBLIC HOLIDAYS**

- 5.1 Australian society has evolved away from the stereotypical anglo-christian “9-5” Monday to Friday fulltime employment image that pervades the historical thinking on the setting of penalty rates. Further the concept of Public Holidays, both legally and socially, has evolved considerably over the course of Australian legal history from a historical protection of ‘special days’ as statutory bank holidays to the circumstances prevailing today.
- 5.2 As a matter of social reality, in 2015 it is a misnomer to suggest that all Public Holidays have a religious or cultural significance that is relevant to modern society.
- 5.3 With the commencement of the National Employment Standards, Public Holidays have operated in a new and particular statutory context that is relevant to a consideration of the appropriate penalty rate to be paid (if any) to employees working on them.
- 5.4 The scheme operating under the FW Act has the following salient features:
  - (a) An employee has a right to be absent from work on a public holiday (s 114 (1));

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<sup>8</sup> See Report of Prof Phil Lewis, University of Canberra, to be filed in these proceedings.

- (b) An employer may only “request” an employee to work on a public holiday “if the request is reasonable” (s 114 (2));
  - (c) An employee has a right to refuse such a request if “the request is not reasonable” or “the refusal is reasonable” (s 114 (3));
  - (d) Certain considerations are mandated for the purpose of testing the “refusal” (s 114 (4));
  - (e) 8 public holidays are mandated (s 115(1));
  - (f) Other days or part days are mandated if they are declared or prescribed by or under a relevant law (s 115) .
- 5.5 This scheme substantially reduces the historical rights of employers to require employees to work on public holidays and in effect allows employees a significant and material level of choice in whether or not they will or will not work such days.
- 5.6 Further this right to request is significantly conditioned by establishing two separate tests that can be triggered to decline such a request.
- 5.7 The scheme is therefore fundamentally protective of an employee and a material erosion of an employer’s prerogative to direct when employees work to meet the employers operational business needs.
- 5.8 It begs the question why when this paradigm has so shifted has the premium employees enjoy for “agreeing” to work such days and the penalty employers pay for “having a request accepted” not changed?
- 5.9 Against this back drop and in the context of the FW Act and a proper characterisation of the scheme for public holidays established by the NES, there can be no warrant for imposing a loading on the cost of labour on a public holiday to dissuade an employer from employing labour and/or operating their business.
- 5.10 Further the notion that time on each and every public holiday should be valued at a premium is difficult to reconcile with:
- (a) The preparedness for employees (especially in certain demographics) to want to work on such days;
  - (b) The properly assessed “comparative value of the time” on such days;
  - (c) The value employees place on public holidays evidenced by the limited ability of employees to even recall what days are public holidays.
- 5.11 This is amplified when casual employees are considered as the casual is not “missing out” on a public holiday if they work it as it is a term of their employment that they are either engaged to work or not work on any day of the week.

- 5.12 The course of these proceedings should be directed by the requirements of the current legislative regime and the prevailing social and economic conditions of 2015. In a context where the relevant jurisdiction has evolved, both with respect to the character of Public Holidays under the FW Act and through the creation of the Modern Awards Objective, ACCI, ABI and NSWBC submit that appeals to historical jurisprudence, rates or conditions in these proceedings are of limited relevance.
- 5.13 Rather, probative evidence relating to Public Holidays as they are **currently** understood, utilised and managed by employees and employers must be measured against the requirements of the FW Act in relation to the review of Modern Awards.
- 5.14 In the context of these contentions which will be supported by the collective evidentiary case advanced by employers we submit that there is a proper basis to:
- (a) Review penalty rates paid under the Award; and
  - (b) Reduce such rates to the level set out in the Claim.
- 5.15 Providing remuneration for Public Holidays at the level claimed is entirely consistent with the notion of a fair and relevant safety net and on balance satisfies the limbs enunciated in s 134 of the FW Act.



**Nigel Ward**

**CEO + Director**

Australian Business Lawyers & Advisors Pty Limited

(02) 9458 7286

nigel.ward@ablawyers.com.au

**On behalf of Australian Chamber of Commerce and Industry, Australian Business Industrial and the NSW Business Chamber Ltd**

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