From:	Luis Izzo
To:	AMOD
Cc:	Chambers - Ross J
Subject:	AM2014/305 - Penalty Rates Case - Transition Submissions
Date:	Friday, 21 April 2017 3:26:58 PM
Attachments:	image001.png ABI and NSWBC Penalty Rates Submissions.pdf

Dear Sir/Madam

On 20 April 2017, our office filed submissions in these proceedings.

Our office has made an update to a table contained on page 8 of the submissions. For this reason, we would be grateful if the submissions posted on the website can be withdrawn and replaced with the **attached** submissions (which are otherwise identical to the submissions filed on 20 April 2017).

Should you have any queries in relation to this correspondence, please do not hesitate to contact me.

Yours faithfully

Luis Izzo
Director
Australian Business Lawyers & Advisors

140 Arthur Street North Sydney NSW 2060
Dir: +612 9458 7640 | Fax: +612 9954 5029 | Mob: 0408 109 622
Tel: +612 9458 7005 | Web: www.ablawyers.com.au | LinkedIn

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AM 2015/305

FOUR YEARLY REVIEW OF MODERN AWARDS - PENALTY RATES

SUBMISSIONS IN REPLY REGARDING

TRANSITIONAL ARRANGEMENTS

FILED ON BEHALF OF ABI AND NSWBC

20 April 2017

Australian Business Lawyers & Advisors

Level 10, 140 Arthur Street

NORTH SYDNEY NSW 2060

AUSTRALIAN BUSINESS
Lawyers & Advisors

1. INTRODUCTION

1.1 On 23 February 2017 the Fair Work Commission issued a Decision in these proceedings (**the Decision**), in which the Commission determined to reduce the Sunday penalty rates in the *General Retail Industry Award 2010* (*GRIA*), the *Hospitality Industry (General) Award* 2010, the *Fast Food Award 2010* and the *Pharmacy Industry Award* 2010.

1.2 At the conclusion of the Decision, the Commission sought submissions from interested parties regarding the transitional arrangements that should be adopted as part of the implementation of the Sunday penalty rate reductions proposed by the Commission.

1.3 Submissions regarding transitional arrangements were filed by 29 parties on or about 24 March 2017.

1.4 On 5 April 2017, the Commission issued a Statement (**the 5 April Statement**) in which it raised questions with the parties regarding matters raised in the submissions filed to date.

1.5 These submissions in reply are filed on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber (**NSWBC**) and address:

(a) three themes that emerge from the submissions filed on 24 March 2017, namely:

(i) the Labor party and union submissions that urge the Commission to reverse or set aside its decision;

(ii) the ACTU and SDA proposals that the implementation of the penalty rate reduction be delayed by 2 years; and

(iii) the failure by many parties to address the fact that the impact of the Sunday penalty rate reduction will vary significantly depending upon the proportion of an employee's weekly hours that are actually worked on a Sunday; and

(b) the matters raised in the 5 April Statement.

1.6 Given that ABI and the NSWBC only filed a claim seeking a reduction in the Sunday penalty rate in the GRIA, these submissions in reply particularly focus on the GRIA, although broader cross-award submissions are addressed where relevant to ABI and NSWBC's claim.

2. LABOR PARTY AND UNION SUBMISSIONS CONTENDING THE COMMISSION SHOULD REVERSE ITS DECISION

2.1 The ACT Government, South Australian Government, Victorian Government, Queensland Government, Western Australian Government, Northern Territory Government, Tasmanian

Labor Party, New South Wales Labor Party and Federal Labor Opposition have all filed submissions in response to the Decision. None of these parties have made any submissions in relation to the appropriate transitional arrangement to be adopted in relation to the Decision. Instead they submit that the Commission should either reconsider or set aside the Decision.

2.2 The United Voice, SDA, AWU, ACTU, Retail and Fast Food Workers Union, amongst other parties, have also stated that the Commission should reconsider or set aside the Decision as their primary position in response to the Decision.

2.3 Given the nature of the exercise that has just been concluded by the Full Bench in these proceedings, the submissions by the above mentioned parties are astounding. It is trite to note that these proceedings have involved the most detailed consideration of any award variation claim filed since the introduction of modern awards and constitute one of the largest industrial proceedings in recent memory. The proceedings were conducted over the course of almost 3 years and involved:

(a) over 143 witness statements from lay and expert witnesses;

(b) cross examination of 128 witnesses;

(c) 39 days of hearing;

(d) the review of considerable Commission-published research papers;

(e) the consideration of over 5900 public submissions; and

(f) a thorough exploration of all issues in dispute (with every key party involved in the proceedings being legally represented).

2.4 The Decision itself extends for over 500 pages and, in such circumstances, it cannot be credibly suggested that the Commission has not had proper regard to the impact of a reduction in Sunday penalty rates.

2.5 There is nothing contained in any of the submissions filed on 24 March 2017 that suggests that new developments or materially different information has become available since the hearing of these proceedings.

2.6 In such circumstances, and in the absence of any material factual development since 23 February 2017 that would have the probability of altering the views of the Full Bench, it is submitted that it is entirely inappropriate for the Commission to re-open, or for the parties to re-litigate, the matters that have been determined in the Decision.

2.7 Should the Commission determine to re-open its findings in the absence of any material new development, it is likely that extreme prejudice would be caused to employer organisations such as the ABI and NSWBC. By way of example, ABI and NSWBC alone expended approximately $1,000,000 in conducting the proceedings. To be required to re-incur further costs in proceedings where the issues in dispute have already been determined would be an unacceptable outcome for ABI and NSWBC.

The Commission is prohibited from varying or revoking its decision

2.8 Section 603(3) of the FW Act provides as follows:

> "*The FWC must not vary or revoke any of the following decisions of the FWC under this section:*
>
> *(a) a decision under Part 2-3 (which deals with modern awards)…*"

2.9 It should be uncontroversial that the Commission has issued a decision in relation to the appropriate Sunday penalty rates to be included in the GRIA, *Fast Food Award 2010, Hospitality Industry (General) Award 2010* and *Pharmacy Industry Award 2010*.

2.10 It should also be uncontroversial that the Decision is made under Part 2-3 of the FW Act, given that the Decision was made as part of the Commission's 4 Yearly Review of Modern Awards and that the Decision arises from the exercise of the Commission's modern award powers.[1]

2.11 In such circumstances, it is respectfully submitted that the Commission is not empowered to vary or revoke its Decision. Instead, having made a Decision indicating that the current modern award provisions do not meet the modern awards objective, the Commission must proceed to vary the awards to ensure that they will meet the modern awards objective.[2]

Appropriate course for aggrieved parties to adopt

2.12 If some parties to the proceedings believe the Commission has improperly exercised its functions in issuing the Decision or that the Decision is affected by some manifest error, then the appropriate course of action would be for such parties to seek judicial review of the Decision in the Federal Court.

[1] See sections 134(20, 156 of the FW Act
[2] This submissions is developed further at paragraphs 3.2 to 3.4

3. DELAYING THE IMPLEMENTATION OF THE SUNDAY PENALTY RATE REDUCTION BY 2 YEARS

3.1 Both the SDA and ACTU contend that the implementation of the Sunday penalty rate reduction should be delayed for at least a period of 2 years.

3.2 The difficulty with this contention is that it fails to address the Commission's finding that the GRIA (as presently drafted) is not "*fair*" nor "*relevant*", meaning that the GRIA is not meeting the modern awards objective.[3]

3.3 Once satisfied that the GRIA is not meeting the modern awards objective as part of the 4 Yearly Review of Modern Awards, it is incumbent on the Commission to take steps to vary the GRIA to ensure the terms included in the award are consistent with the modern awards objective. This obligation arises from the application of s134(1) of the FW Act to the exercise of the Fair Work Commission's modern award powers (the exercise of the Commission's modern award powers includes the conduct of the 4 Yearly Review of Modern Awards[4]).

3.4 Should the Commission fail to implement the Sunday penalty rate reductions in the GRIA for a period of 2 years (as proposed by the SDA/ACTU), the Fair Work Commission would be maintaining the deleterious effects of penalty rates on employment for a prolonged period, which the Commission itself has found to be inconsistent with the modern awards objective.[5] Such an approach is both undesirable and inconsistent with maintaining a fair and relevant safety net as required by the modern awards objective.

3.5 The SDA and ACTU proposal does not explain why some elements of the penalty rate reductions cannot be passed on earlier than 1 July 2019, particularly given that annual wage increases will likely take effect on 1 July 2017 and 1 July 2018.

3.6 Given the extensive media coverage of these proceedings, it should be uncontroversial that employees have been on notice of the likely introduction of the penalty rate reductions since 23 February 2017. Taking into account such notice with the increase in minimum wages that will likely take effect on 1 July 2017, ABI and NSWBC submit that there is no reason why the penalty reductions cannot commence being introduced from 1 July 2017.

[3] See Decision at [1701] and section 134(1) of the FW Act
[4] See section 134(2) and section 156 of the FW Act
[5] See, by way of example, the Decision at [68](2) and [1701]

4. FAILURE BY PARTIES TO ADDRESS THE DIFFERENCES IN THE IMPACT OF THE DECISION DEPENDING UPON THE PROPORTION OF SUNDAY WORK AS A PERCENTAGE OF AN EMPLOYEE'S WEEKLY HOURS

4.1 A number of parties have generalised about the significant reduction in Sunday payments that will be experienced by employees engaged under the GRIA.

4.2 However, the level of impact of a Sunday penalty rate reduction on an employee's take home pay will be significantly affected by the spread of the employee's usual weekly hours.

4.3 The more hours that the employee works on days other than Sunday, the more likely that the Sunday penalty rate reduction will be wholly or substantially offset by increases in the minimum wage over time.

4.4 The submissions of the ARA, NRA and Master Grocers (**Retail Employers**) are one of the few submissions filed in the proceedings that attempt to grapple with this issue. The Retail Employers have focused on the retail employee witnesses that gave evidence in the proceedings to identify the impact of the Decision on such employees.

4.5 Of the 7 SDA witnesses that gave evidence in the proceedings, Annexure A to the Retail Employer Submissions dated 24 March 2017 identifies that, if the transitional arrangements proposed by the NSWBC, ABI and Retail Employers are adopted by the Commission:

(a) most of the employees would see an increase in their take home pay from 1 July 2017; and

(b) only 1 employee will experience any negative impact in relation to their take home pay in 2017 and two employees will experience a negative impact in their take home pay from 1 July 2018.[6]

4.6 In all cases, any reduction in take home pay is negligible, with the wage reduction ranging from $0.12 a fortnight in 2017 to a worst case scenario of $0.78 a fortnight in 2018.

4.7 This demonstrates that the effect of the Decision depends critically on just how much Sunday work forms part of an employee's working week.

4.8 One cannot simply assume that all (or a majority) Sunday employees are worse off (contrary to a number of the submissions filed to date).

4.9 On the contrary:

[6] These calculations assume a notional annual wage increase of 2.5% per year

(a) the impact of the reduction in penalty rates will be minimal for full time employees (who would necessarily have a large number of working hours on days other than Sunday);

(b) it is only the unique category of employees who predominately work all or most of their weekly hours on a Sunday who will see a material level of change in their earnings; and

(c) most employees under an operating enterprise agreement will not be affected.

5. THE 5 APRIL STATEMENT

5.1 We address those elements of the 5 April Statement that are relevant to the GRIA and NSWBC and ABI below:

[6] It appears to be common ground that the Commission should take steps to mitigate the impact of the Decision on affected employees

(a) ABI and NSWBC broadly accept this position for the reasons identified in paragraphs 4.1 to 4.6 of the 24 March 2017 ABI/NSWBC Transition Submissions (**ABI Initial Transition Submissions**). Specifically, ABI and NSWBC contend that the Commission needs to balance the needs of the low paid with the regulatory burden and dis-employment factors identified in the ABI Transitional Submissions. Such a balancing act will likely require some steps to be taken to mitigate the impact of the Decision on employees.

[6] Each party is advised to provide an estimate of the number of employees affected by the penalty rate reductions determined in the Decision by award and the basis of that assessment

(a) The total number of employees engaged under the GRIA and who may be affected by the Decision has been estimated by ABI and NSWBC to be between 80,200 and 183,464.

(b) This estimate has been arrived by relying upon the following information/calculation:

Information/Calculation	Running total of employees affected
There are 1,228,300 persons employed in the retail sector.[7]	1,228,300
We have removed from this figure 153,700 employees engaged in the following businesses which are not likely covered by the GRIA: (a) subdivision 39 – Motor Vehicle and Motor Vehicle Parts Retailing; (b) subdivision 40 – Fuel Retailing; (c) subdivision 43 – Non-Store Retailing and Retail Commission-Based Buying and/or Selling.[8]	1,074,600
Of these employees, approximately 62,553[9] are engaged in businesses likely covered by the *Pharmacy Industry Award 2010*.	1,012,047
46.3% of employees in the retail industry have their conditions set by an award. This figure has been derived from the following information: - 68.5% of all retail employees have their pay set by an award or collective agreement;[10] and - 22% of all retail employees are covered by a collective agreement.[11]	468,578
Research data suggests that approximately 15.3% - 35% of retail industry employees sometimes work on Sundays.[12]	71,692 - 164,002
Total employees remaining	**71,692 - 164,002**

[7] See ABS*, Labour Force, Australia, Detailed, Quarterly, February 2017*, Catalogue No. 6291.0.55.003.
[8] See ABS*, Labour Force, Australia, Detailed, Quarterly, February 2017*, Catalogue No. 6291.0.55.003.
[9] See 2011 Census data identified at Table 70 of the Decision. We acknowledge that this figure is from 2011. However, it appears to be the best available data regarding employees covered by the *Pharmacy Industry Award 2010*
[10] *ABS, Employee Earnings and Hours, Australia*, May 2016, Cat 6306, Data Cube 4
[11] This percentage is taken from Figure 15.2 of the Productivity Commission Inquiry Report no 76, 30 November 2015 (**Productivity Commission Report**), page 511
[12] The 15.3% figure is taken from the Productivity Commission report Table 11.2, page 429; the 35% figure is taken from Exhibit SDA 36

[7] A number of parties submit that the Commission should reconsider or set aside the Decision

(a) For the reasons advanced at section 2 above, ABI and NSWBC submit that the Commission should not reconsider or set aside the Decision in so far as it relates to the GRIA.

[9] ACOSS propose an option for mitigating the impact of the Decision on the affected employees by ensuring loaded rates are paid to compensate for potential loss of pay

(a) Care needs to be adopted when discussing the concept of "loaded rates".

(b) ABI and NSWBC understand that the Commission is considering including a schedule of loaded rates in some awards to provide an alternate means of remunerating employees.[13] The schedule of loaded rates would likely aggregate existing minimum rates of pay, loadings and penalty rates to provide a simple 'all-up' rate for employers to pay employees.

(c) Although ABI and NSWBC are yet to form a view on the merit of such a course of action, ABI and NSWBC have assumed that the application of any loaded rates schedule would be at the employer's discretion – that is, employers could choose whether to apply the minimum award monetary entitlements separately or whether to apply the award loaded rates.

(d) Assuming the above comments to broadly reflect the approach being considered by the Commission, the implementation of loaded rates in the above manner would not have the effect intended by ACOSS (namely, to mitigate the impact of a reduction in penalty rates). This is because:

  (i) employers could still utilise the minimum award provisions instead of the loaded rates schedule; and

  (ii) even if loaded rates were utilised by the employer, the loaded rates would presumably be calculated to reflect the lower Sunday penalty rate arising from the Decision.

(e) The only way in which loaded rates in an award could ensure that employees are not impacted by the reduction to Sunday penalty rates would be if the Sunday

[13] See Decision at [90] – [94] and [2063] – [2084]

penalty rate was not lowered as part of the calculation of the loaded rate. This approach would be tantamount to reversing the Decision itself. This is a course of action that should not be adopted for the reasons identified at section 2 above.

[16] It seems to be common ground that the take home pay order provisions of the TPCA Act are not an available option to mitigate the impact of the reductions in penalty rates set out in the Decision. Does any party take a different view?

(a) ABI and NSWBC agree with this statement.

[18] It appears to be common ground that the Commission has power to make transitional arrangements relating to the staggered introduction of the reduction to existing Sunday penalty rates. Does any party take a different view?

(a) ABI and NSWBC agree with this statement in so far as it relates to the transitional arrangements proposed by ABI and NSWBC and the Retail Employers.

(b) ABI and NSWBC maintain that the Commission has power to implement the transitional arrangements proposed by ABI, NSWBC and the Retail Employers because the relevant clauses required to be inserted into the GRIA can be drafted in a manner to ensure that the clauses are about matters contained in section 139 of the FW Act. Specifically, the clauses can be drafted in a manner to ensure that the clauses are about "penalty rates" (see section 139(1)(e) of the FW Act.)

(c) By way of example, the following draft clauses would be about "*penalty rates*" and therefore permitted by section 139 of the FW Act:

> "*A penalty payment will be payable to permanent employees for all hours worked on Sundays as follows:*
>
> *(a) from 1 July 2017 – 175%;*
>
> *(b) from 1 July 2018 – 150%*"

[19] Does any interested party hold a different view to the views expressed at paragraph [43] of the Ai Group submission?

(a) ABI and NSWBC agree with the submissions outlined in paragraph [43] of the Ai Group submissions filed on 24 March.

(b) However, for the sake of completeness, ABI and NSWBC note that there is one matter that must also be considered in the setting of the transitional rates which has not been expressly mentioned by Ai Group in paragraph [43] of its submissions.

This is, of course, the Commission's obligation to ensure that the terms of modern awards meet the modern awards objective.

(c) The Commission will need to ensure that any transitional arrangements:

(i) meet the modern awards objective (see section 134 of the FW Act); and

(ii) are included only to the extent necessary to meet the modern awards objective (see section 138 of the FW Act).

(d) This matter is dealt with at paragraph 44 of the Ai Group submissions.

[19] Is it also relevant that the terms of a particular modern award may limit the incidence of Sunday work (as proposed by the Retail Associations at paragraph [14] of its submission)?

(a) The short answer to this question is yes.

(b) When considering the appropriate transitional measures to implement, the Commission should have regard to the number of people likely to be affected by reduction in penalty rates and the totality of the terms and conditions applicable to their employment.

(c) If, as is the case with the GRIA, there are award clauses which otherwise limit the number of ordinary hours that can be worked on a Sunday, such clauses should be taken into account when determining the impact of the implementation of the Decision and the appropriate transitional arrangements to be applied.

[20] Parties are invited to comment on the ABI and NSWBC formulation regarding the question the FWC should ask itself when determining the appropriate transitional rate:

"Which transitional proposal will provide a substantive opportunity to employees to mitigate any adverse effects of the Decision whilst not significantly prejudicing the employment and regulatory benefits associated with the Decision?"

(a) Naturally, the primary consideration for the Commission is ensuring that the transitional arrangements implemented meet the modern awards objective. This is the statutory test to be applied.

(b) However, given that the Decision identifies three types of consequences associated with the reduction in Sunday penalty rates, namely:

(i) a reduction in take-home pay of employees;

(ii) a reduction in the regulatory burden imposed on employers; and

(iii) an increase in employment/workforce participation,

the question formulated by ABI/NSWBC provides a practical way of assessing how transitional arrangements can best meet the modern awards objective through the prism of these key consequences.

[25] What is the source of the Commission's power to preserve the current Sunday penalty rates for existing employees as advanced by the SDA?

(a) The way in which the SDA's proposal is intended to operate is unclear based on the drafting proposal contained in the SDA's 24 March 2017 submissions.

(b) ABI/NSWBC assume that the effect of the proposed drafting is to maintain existing Sunday rates of pay until such time as the increases in minimum wages ensure that the hourly money rate under GRIA's 150% Sunday loading equates to the present monetary value of the 200% Sunday loading.

The Commission's power to insert clauses into an award

(c) In order for any new clauses to be inserted into an award, the prerequisites specified in Part 2-3 of the FW Act must be satisfied.

(d) Section 136 of the Act prescribes that terms may only be included in a modern award if they are permitted or required by:

(i) Subdivision B or C of Part 2-3 of the Act;

(ii) section 55 of the Act (which deals with interaction rules pertaining to the National Employment Standards); or

(iii) Part 2-2 of the Act (which deals with the National Employment Standards).

(e) Although the SDA has not articulated the power upon which the Commission may rely to include the SDA's transitional proposal into the award, it appears uncontroversial that Subdivision C, section 55 and Part 2-2 of the Act are not relevant to the SDA proposal.

(f) This means that the power to insert the transitional term into the modern awards must be derived from Subdivision B of Part 2-3 of the Act (sections 139 – 142), if it is to be included in modern awards at all.

Section 139 of the FW Act

(g) Section 139 of the FW Act is the opening provision in Subdivision B of Part 2-3.

(h) Section 139 of the FW Act empowers the Commission to insert terms into modern awards in that are "*about*" any of the following matters:

> *(a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:*
>
> > *(i) skill-based classifications and career structures; and*
> >
> > *(ii) incentive-based payments, piece rates and bonuses;*
>
> *(b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;*
>
> *(c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;*
>
> *(d) overtime rates;*
>
> *(e) penalty rates, including for any of the following:*
>
> > *(i) employees working unsocial, irregular or unpredictable hours;*
> >
> > *(ii) employees working on weekends or public holidays;*
> >
> > *(iii) shift workers;*
>
> *(f) annualised wage arrangements that:*
>
> > *(i) have regard to the patterns of work in an occupation, industry or enterprise; and*
> >
> > *(ii) provide an alternative to the separate payment of wages and other monetary entitlements; and*
> >
> > *(iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;*
>
> *(g) allowances, including for any of the following:*
>
> > *(i) expenses incurred in the course of employment;*

(ii) responsibilities or skills that are not taken into account in rates of pay;

(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

(h) leave, leave loadings and arrangements for taking leave;

(i) superannuation;

(j) procedures for consultation, representation and dispute settlement."

(i) The initial question that arises for consideration is when a term is "*about*" any of the subject matters prescribed above.

(j) The word "*about"* is a preposition which is defined by the Macquarie Dictionary as meaning:

"*1. Of, concerning, in regard to... 2. connected with...*"[14]

(k) However, the power to create terms "*about*" a particular matter should be distinguished from the power to create terms "*with respect to*" or "*in relation to*" a particular matter. The phrases "*with respect to*" and "*in relation to*" have been judicially held to constitute some of the broadest phrases which could denote a relationship between one subject matter and another.[15] The same cannot be said for the word "*about*".[16]

(l) Ultimately, when determining the extent to which a preposition such as "*about*" operates, the context within which it appears will be critical, just as has been held to be the case with phrases such as "*in relation to*".[17]

(m) In this case, the context within which section 139 indicates that the legislature not only deliberately chose the term "*about*" in section 139, but also intended there to be limits on the extent of the term's operation.

(n) This is borne out by an analysis of the entirety of Subdivision B of Part 2-3 of the FW Act:

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[14] Macquarie Concise Dictionary, 3rd edition, page 3

[15] See *Bank of NSW v the Commonwealth* 1947 76 CLR 1 per Latham CJ at 187; *Nordland Papier AG v Anti-Dumping Authority* (1999) 93 FCR 454 per Lehane J at 461.

[16] The only judicial analysis that we have been able to identify regarding the meaning of the term "*about*" simply notes that the term is no broader than the term "*with respect to*"- see *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 per Gleeson CJ at [11]

[17] *Workers' Compensation Board of Queensland v Techn ical Products Pty Ltd* (1988) 165 CLR 642 per Deane, Dawson and Toohey JJ at 653

(i) Section 139 creates the general power to include certain terms in awards, provided the terms are "*about*" specified subject matters.

(ii) Section 140(1) then entitles the Commission to include terms "*relating to*" the conditions of outworkers.

(iii) Section 142 then provides that:

> "*A modern award may include terms that are:*
>
> *(a) incidental to a term that is permitted to be included in a modern award;* ***and***
>
> *(b)* ***essential*** *for the purpose of making a particular term operate in a practical way.*" (emphasis added)

(o) Two conclusions can be drawn from the above provisions:

(i) Firstly, it is noteworthy that the FW Act does not empower the Commission to include terms "*about*" outworkers, despite the use of the word "*about*" in the previous subsection. Instead the FW Act states that the Commission may include terms "*relating to*" outworkers.

The choice of different phraseology when describing the scope of the Commission's powers in adjacent sections of the FW Act (namely, sections 139 and 140), tellingly suggests that the breadth of the powers conferred by sections 139 and 140 differs.

Given the well documented breadth of the phrase "*relates to*"[18], the NSWBC and ABI submit that the use of the phrase "*about*" in section 139 is intended to have more limited operation than the phrase "*relates to*" in subsection 140.

(ii) Secondly, the requirement that "*incidental terms*" must be <u>essential</u> for the practical operation of other award terms prior to being included in modern awards stands in contradistinction to the operation of sections 139 and 140 of the FW Act. Sections 139 and 140 impose no requirement to consider the essentiality of a term prior to its inclusion.

[18] See *Bank of NSW v the Commonwealth* 1947 76 CLR 1 per Latham CJ at 187; *Nordland Papier AG v Anti-Dumping Authority* (1999) 93 FCR 454 per Lehane J at 461.

This difference in approaches necessarily leads to the conclusion that phrase "*about*" in section 139 requires a more than "*incidental*" connection between an award term and the subject matters listed in section 139, prior to a term's inclusion in an award pursuant to the powers granted in section 139.

(p) Having considered the above, it is submitted that section 139 requires the Commission to characterise the nature of the term sought to be included into a modern award and determine whether the actual subject matter of the term is one which falls within the scope of section 139.

Does the SDA's term fall within the scope of section 139?

(q) The only provisions of section 139 which the SDA proposal might feasibly argue are relevant to its proposed transitional arrangement are:

(i) section 139(1)(a) – terms about minimum wages; or

(ii) section 139(1)(e) – terms about penalty rates.

(r) However, when properly characterised, the SDA proposal is about neither of these matters. Rather:

(i) The first clause of the SDA proposal is about preserving a state of affairs presently in existence until a future point in time. Even if the SDA successfully argued that the clause was not about 'preservation' but rather about 'transitioning' penalty rates, this would not bring the clause within the scope of section 139. A clause which has as its core focus the creation of a transitional regime is not a clause about a matter specified by clause 139.

This is to be contrasted with the ABI/NSWBC and Retail Employers proposal which would see different penalty rates payable on 1 July 2017 and 1 July 2018. Such a proposal could be drafted into the GRIA so that each sub-clause of the GRIA relating to Sunday rates of pay is about penalty rates. This has already been addressed above in the response to paragraph [18] of the 5 April Statement.

(ii) The second clause of the SDA proposal is about preventing the taking of adverse action by employers. This has no relationship to any of the subsections of section 139 of the FW Act.

(s) In light of the above, there is no power to include the SDA's proposed transitional clause into modern awards.

[25] If the Commission is vested with such a power, what do the other parties say about the merits of the proposal advanced by the SDA?

(a) Should the Commission be vested with the power to implement the SDA's clause, in ABI/NSWBC's understanding Sunday hourly payments to employees would not change until increases in minimum wages ensure that the hourly value of GRIA's 150% Sunday loading equates to the present hourly value of GRIA Sunday 200% Sunday loading.

(b) The operation of this clause is best demonstrated by analysing a sample Sunday pay and penalty rate for a Grade 3 GRIA permanent employee:

Current pay rate	**Current rate with 150% Sunday loading**	**Current rate with 200% Sunday loading**	**Percentage difference in Sunday rates**
$20.22	$30.33	$40.44	33.3%

(c) The above table demonstrates that the effect of the SDA proposal is to maintain existing Sunday rates until such time as there is a 33% increase in the Sunday monetary rate (with a 150% loading). It would likely take more than a decade of annual wage reviews for the 150% Sunday rate to equate to the 200% Sunday rate.

(d) This means that the SDA proposal would have the effect of delaying the implementation of the Decision in relation to Sunday rates in the GRIA for over a decade.

(e) This is an unacceptable outcome in circumstances where the Decision has found that the existing GRIA provisions do not provide a fair or relevant minimum safety net. It also means that the terms of the GRIA would not satisfy the modern awards objective for more than 10 years.

Filed on behalf of ABI and NSWBC by:

Luis Izzo
Australian Business Lawyers & Advisors
(02) 9458 7640
Luis.Izzo@ablaywers.com.au

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