



MODERN AWARDS REVIEW 2014

PAYMENT OF WAGES (AM2016/8)

**SUBMISSIONS IN REPLY ON BEHALF OF
ABI & NSWBC**

5 DECEMBER 2017

1. INTRODUCTION

1.1 On 31 October 2017, ABI and NSWBC filed submissions in these proceedings (**the Primary Submissions**) in relation to three categories of matters raised in a Statement published by the Commission on 19 September 2017. Those three categories of matters related to:

- (a) the provisional 'payment of wages and other amounts' model term (**Provisional Payment of Wages Term**) set out at paragraph [34] of the Full Bench decision dated 1 December 2016 [2016] FWCFB 8463 (**the Decision**);
- (b) the provisional 'payment on termination of employment' model term at [117] of the Decision; and
- (c) the issue related to accrual of payments referred to at paragraphs [19] to [22] of the Statement of the Full Bench issued on 19 May 2017.

1.2 The ACTU and some other union parties have filed submissions in relation to the above three categories of matters. Given that the majority of the union party submissions adopt or align with the ACTU approach, these submissions predominately respond to the submissions of the ACTU dated 30 October 2017 (**ACTU Submissions**).

2. THE STATUTORY FRAMEWORK

2.1 ABI and NSWBC were not intending to address the statutory framework relevant to the review in their submissions as the statutory framework is a matter which has been canvassed at length in a number of Commission decisions, including *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 (**the Preliminary Issues Decision**).

2.2 However, the ACTU Submissions advance a view in relation to the statutory framework that ABI and NSWBC maintain is incorrect. For this reason, it has become necessary to address the statutory framework again in detail.

2.3 The ACTU has advanced a view that:

- (a) Firstly, any *variation proposed* to an award must be necessary to achieve the modern awards objective.¹
- (b) Secondly, a modern award must not be meeting the modern awards objective in a particular respect before the Commission can exercise its power under section 156(2) of the FW Act to vary the relevant award.²

2.4 Each of these contentions are addressed separately below.

Variation must be necessary to achieve the modern awards objective

2.5 The first contention advanced by the union parties, namely that the *variations proposed* must be necessary to achieve the modern awards objective in order for the variations to be made, arises from a misconceived application of section 138 of the FW Act.

2.6 Section 138 provides as follows:

“A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.”

2.7 Section 138 must be read alongside the other provisions of Part 2-3 of the FW Act, specifically:

- (a) section 134 (the modern awards objective)
- (b) section 284 (the minimum wages objective);
- (c) section 156 (4 Yearly Review of Modern Awards); and

¹ ACTU Submissions at [17]

² ACTU Submission at [10] - [14]

- (d) section 157 (variations of modern awards outside of the 4 Yearly Review of Modern Awards).

Sections 134 & 284

- 2.8 The modern awards objective requires that modern awards along with the National Employment Standards provide a “*fair and relevant minimum safety net*” of terms and conditions, having regard to certain specified matters identified in section 134(1)(a) to (h).
- 2.9 Section 284 of the FW Act uses similar nomenclature to establish the minimum wages objective. Section 284 is also concerned, at its heart, with the establishment of a fair minimum safety net.
- 2.10 The creation of the minimum safety net by sections 134 and 284 of the FW Act illuminates what the phrase “*only to the extent necessary*” in section 138 relates to.
- 2.11 That is, section 138 is dictating that the Commission may only include terms in a modern award to the extent necessary to create the minimum safety net. Once a fair and relevant minimum safety net is created, section 138 restrains the Commission from going any further irrespective of what historically would be called the ‘general industrial merits’ of the case.
- 2.12 In addition, the Commission cannot vary a modern award if to do so would take the award below this minimum safety net.
- 2.13 Obviously, what blend of terms and conditions in a particular modern award create this fair and relevant minimum safety net could vary greatly. There may be many different formulations in a modern award that achieve the modern awards objective depending on the blend and balance of terms and conditions adopted in the context of the industry the modern award covers. This was recognised in the Preliminary Issues Decision:

“[34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.”³

2.14 Having regard to the fact that a variety of different permutations and combinations could meet the modern awards objective, there is no provision in FW Act which requires that one permutation should be preferred in a modern award over another.

2.15 All section 138 requires is that, once varied, a modern award must still only include terms to the extent necessary to meet the modern awards objective. This is consistent with the Full Bench position in the Preliminary Issues Decision at [36]:

“In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.”

Section 156 - 4 Yearly Review of Modern Awards

2.16 Section 156(2) of the FW Act is the provision which empowers the Commission to vary modern awards as part of its 4 Yearly Review.

2.17 Section 156(2) provides as follows:

“(2) In a 4 yearly review of modern awards, the FWC:

(a) must review all modern awards; and

(b) may make:

(i) one or more determinations varying modern awards; and

³ See also summary item 6 in para 60 [2014] FWCFB 1788

(ii) one or more modern awards; and

(iii) one or more determinations revoking modern awards.”

2.18 Section 156 does not place any express fetters on the Commission regarding how it exercises its discretion to vary a modern award during the 4 Yearly Review - save for the requirements to:

(a) review each modern award in its own right; and

(b) identify work value reasons to justify any variations to minimum wages.

Section 157 - Variation of awards outside of the 4 Yearly Review

2.19 The terms of sections 138 and 156 are to be contrasted with the requirements imposed by the FW Act to vary a modern award outside of the 4 Yearly Review of Modern Awards.

2.20 For variations outside the 4 Yearly Review of Modern Awards, section 157(1) of the FW Act relevantly provides that:

“The FWC may... make a determination varying a modern award.... if the FWC is satisfied that making the determination... outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.”

2.21 This language differs markedly to that used in section 138 and section 156. It is also the type of language used in the ACTU Submissions at [17].

2.22 Had the legislature intended the additional hurdles imposed by section 157 to be imposed in relation to the 4 Yearly Review of Modern Awards, it should be inferred that the legislature would have used similar language in section 156 of the FW Act to that used in section 157.

Conclusion

- 2.23 In light of the above, it is submitted that the test outlined at paragraph 36 of the Preliminary Issues Decision correctly applies section 138 of the FW Act.
- 2.24 The test articulated at paragraph 36 of the Preliminary Issues Decision recognises that there is no statutory hurdle in section 156 which requires variations themselves to be necessary to meet the modern awards objective. Rather, what is required is that the modern award, once varied, achieves the modern awards objective and goes no further.
- 2.25 This view was also shared by the Full Bench of the Commission in *4 Yearly Review of Modern Awards - Penalty Rates* [2017] FWCFB 1001, where the Full Bench held as follows:

“[137] The SDA and United Voice submit that the terms of s.138 require that the Commission be satisfied that the variations proposed by the various employer parties are necessary to achieve the modern awards objective. The submission put focuses attention on the particular variation proposed, rather than on the terms of the modern award, as varied.

[138] We do not think the Unions’ contention is correct.” (original emphasis)

Modern award must not be meeting the modern awards objective before a variation is made in the 4 Yearly Review

- 2.26 The second contention advanced by the ACTU is that a modern award must not be meeting the modern awards objective, before the Commission may exercise its discretion to vary the award during the 4 Yearly Review.
- 2.27 This contention is also misconceived.
- 2.28 Section 156 of the FW Act is the provision which empowers the Commission to review modern awards and to exercise a discretion to make determinations varying

modern awards. Section 156 does not refer to any fetter being imposed on the discretion that it confers on the Commission.

- 2.29 As has already been explained at paragraphs 2.13 to 2.15 above, the fact that a variety of different permutations and combinations of terms could meet the modern awards objective militates against reaching a conclusion that it is necessary to demonstrate a modern award no longer meets the modern awards objective in order to vary a modern award. This is because a different formulation of terms proposed by a party or the Commission might still meet the modern awards objective. In this statutory context, there is no basis to imply into section 156 a fetter on the Commission's discretion to vary awards, provided the award as varied meets the modern awards objective.

3. THE ACTU MODEL TERM

- 3.1 The ACTU has proposed a model term to be applied by the Commission in its review of awards.

- 3.2 Each element of the ACTU model term is addressed below:

Clause X.1

- 3.3 Clause X.1 of the ACTU model term provides for wages to accrue on a day to day basis.
- 3.4 This approach does not appear to address the situation of casuals, who are ordinarily engaged by the hour.
- 3.5 If a casual employee's employment is terminated half way through the course of a day, it is unclear under the ACTU's proposed term whether the casual would be entitled to any payment for that day.
- 3.6 Such an approach appears unsatisfactory for the employee concerned and creates uncertainty for the relevant employer required to pay the employee.

3.7 As indicated in the Primary Submissions, the introduction of any model term regarding accrual of wages would need to take into account special arrangements pertaining to:

- (a) the averaging of hours of work;
- (b) piecework payments; and
- (c) other forms of payment by result.

3.8 The ACTU model term attempts to deal with this issue but does not comprehensively address the matter. By way of example, the references to wages accruing on the basis of:

- (a) *“the applicable piecework payment”*; or
- (b) *“an average over a roster cycle worked under this award”*,

do not provide clarity over what wages specifically accrue and specifically when they accrue.

3.9 ABI and NSWBC maintain that any attempt to introduce rules pertaining to accrual of wages would need to be conducted on an award by award basis so that any terms can be precisely drafted to indicate what particular payments are accruing and when they accrue.

Clause X.2

3.10 Clause X.2 of the ACTU model term contains a number of facets which are opposed by ABI and NSWBC.

Nomination of a pay day / inability to change pay day

3.11 Firstly, the ACTU model term prescribes a pay day and does not permit changes to be made to the pay day.

3.12 The ACTU's model term effectively compels employers to always pay on the same day, once a pay day has been set.

- 3.13 If, for some reason, employers are no longer able to pay on a particular pay day (for instance due to availability of staff or resources, changes to banking requirements or practices, changes in cashflow patterns or changes in operating hours), there is no accommodation afforded to the employer whatsoever to address this problem by setting a different pay day.
- 3.14 The absolute inflexibility of the ACTU clause simply ignores the possibility that factors beyond an employer's control might necessitate a change in the pay day.
- 3.15 ABI and NSWBC have articulated at paragraphs 2.9 to 2.16 of the Primary Submissions that it is not necessary or desirable to impose a pay day in awards, provided that a pay period is defined.
- 3.16 However, if the Commission is minded to prescribe that a pay day needs to be set by employers, it is essential that employers should be able to change pay days (with the provision of sufficient notice) in order to ensure that the award provisions can practicably be complied with in all circumstances.

Restriction on monthly pay

- 3.17 The ACTU model clause appears to limit monthly payments to those employees who were able to pay monthly before the introduction of the model term.
- 3.18 ABI and NSWBC submit that the limitation of monthly pay to a "red-circled" group of employers is unnecessary, given that:
- (a) no evidence has been filed in the proceedings demonstrating difficulties being caused by monthly pay; and
 - (b) 27 modern awards presently enable monthly payments being made⁴.
- 3.19 Monthly pay should continue to be available in those industries that previously permitted employers to pay monthly. Such an approach is consistent with maintaining a "*stable and sustainable* modern award system" (as identified in the

⁴ For the list of Awards, please see Schedule 2 to the ABI/NSWBC Submissions dated 31 October 2017

modern awards objective) as this approach ensures that employers will not be unnecessarily compelled to rearrange their payroll and financial arrangements on a workforce wide-scale.

Monthly pay in arrears

- 3.20 The ACTU does not propose to prescribe that monthly payments may only be made in arrears.
- 3.21 ABI and NSWBC concur with this approach for the reasons stated in paragraphs 2.23 to 2.27 of the Primary Submissions.

Clause X.3

- 3.22 ABI and NSWBC submit that clause X.3 of the ACTU model term is incredibly complex and unsuitable to be included in a modern award. The complexity of the clause is inconsistent with ensuring a “*simple, easy to understand, stable and sustainable modern award system*” (as required by the modern awards objective).
- 3.23 The variety of different circumstances contemplated by clause X.3 demonstrates the complexities that might arise when a modern award specifies the pay day upon which an employer must pay.
- 3.24 For the reasons already advanced above and in paragraphs 2.9 to 2.16 of the Primary Submissions, ABI and NSWBC submit that the model term should not require employees to specify a particular pay day.

Public holidays

- 3.25 If, notwithstanding the submissions above, the Commission does require employers to nominate a specific pay day, ABI and NSWBC submit that the ordinary approach applicable under the *Acts Interpretation Act 1901* should apply to payments that fall due on the public holiday. Specifically, the payment would be due on the next working day.

Clause X.4

3.26 ABI and NSWBC do not oppose clause X.4 of the ACTU model term.

4. PREVIOUS SUBMISSIONS

4.1 In order to assist the Commission's understanding of ABI and NSWBC's position, we have sought to identify all arguments raised by ABI and NSWBC in two documents, namely, the Primary Submissions and these Reply Submissions.

4.2 However, ABI and NSWBC also rely on previous submissions filed in these proceedings and consider that the position advanced in the Primary Submissions and these Reply Submissions are consistent with all previously filed submissions.

4.3 On 30 November 2017, the Commission published a summary of all parties' submissions. ABI and NSWBC will review this document and will notify the Commission as soon as possible whether any of the submissions attributed to ABI and NSWBC in the 30 November 2017 document are inconsistent with the position held by ABI and NSWBC.

Filed on behalf of ABI/NSWBC
5 December 2017