

IN THE FAIR WORK COMMISSION

4 YEARLY REVIEW OF MODERN AWARDS

AM2017/40 – HAIR AND BEAUTY INDUSTRY AWARD 2010 (HBIA)

SUBMISSIONS IN REPLY BY THE UNION PARTIES

1. Pursuant to amended directions made on 2 June 2021, employers and opposing parties were directed to file and serve any materials (submissions and/or evidence) by Monday, 12 July 2021. In accordance with that direction, AI Group Workplace Lawyers on behalf of Hair and Beauty Australia (**HABA**) filed submissions in response to the evidentiary case and earlier submissions filed by the Shop, Distributive and Allied Employees' Association (**SDA**) and the Australian Workers Union (**AWU**) (collectively the **Union Parties**).
2. No other employer or opposing party has filed reply submissions in this proceeding or otherwise sought to intervene in the proceeding.
3. Pursuant to the same amended directions, the Union Parties were directed to file and serve any reply material by Thursday, 22 July 2021.
4. Having regard to the matters traversed in the reply submissions filed on behalf of HABA and noting that the Commission has listed the matter for mention by telephone or videoconference at 1.00pm on Wednesday, 21 July 2021 (before the final date for the Union Parties to file their reply material), the Union Parties consider that it may be convenient and of assistance for the Commission to have the benefit of these reply submissions prior to that mention date.

HABA'S POSITION

5. The position of HABA in its submissions most recently filed and in its capacity as the only opposing party which has sought to be heard in this proceeding, may be distilled to the following relevant propositions:
 - (a) HABA will no longer oppose the application by the Union Parties to vary the HBIA to introduce a casual loading for casuals in addition to the currently specified penalty rates which presently apply. Consistent with that position, HABA does not seek to cross-examine the expert witness (Associate Professor Dr Martin O'Brien) proposed to be called by the Union Parties in relation to his filed expert report or any of the lay witnesses whose witness statements have previously been filed. It is inferred by reason of this concession that HABA does not oppose the tendering and the receipt into evidence of the expert report of Dr O'Brien and the witness statements in the form as filed with the Commission.
 - (b) HABA's position is that it is willing to accede to a phased-in timetable for the variation sought by the Union Parties to take effect which has been agreed as between HABA and the Union Parties.

- (c) HABA's position is premised upon a concession by the Union Parties that they will not press at this time, and will withdraw, the claim for variation of the HBIA in relation to the introduction of a casual loading for casual work on public holidays.

AGREED POSITION AS BETWEEN HABA AND THE UNION PARTIES

6. To the extent that HABA has advised the Commission in its reply submissions that the above position is an agreed position as between HABA and the Union Parties, the Union Parties confirm that the above matters are agreed.

COMMISSION IS EMPOWERED TO ACT CONFORMABLY WITH THE AGREEMENT OF THE PARTIES

7. The giving effect to by the Commission of such agreement between HABA and the Union Parties is necessarily contingent upon the Commission accepting that there is a proper jurisdictional basis to entertain the Union Parties' application and to effect a variation to the HBIA in the agreed terms proposed on the evidentiary case which has been submitted.
8. In this regard, the Union Parties refer to and rely upon their previous submissions as filed. Simply put, the variation as sought corrects an anomaly which was identified by the Commission itself in its decision not to accede to an earlier application for unrelated variation of the HBIA brought by employer parties¹. In that decision, the Full Bench noted² that current provisions of the HBIA, insofar as they did not provide for the payment of a casual loading in addition to weekend penalty rates for casual employees, were not consistent with conclusions earlier reached by the Full Bench in the Penalty Rates Decision³. The Full Bench however considered that it did not have sufficient material before it at that time to establish a case for change.
9. That is no longer the position. The evidentiary case submitted by the Union Parties for correcting the position in the HBIA, conforms with the Full Bench's conclusions as considered and applied in relation to counterpart provisions in the former General Retail Industry Award 2010. The justification for the variation has been articulated in the Union Parties' submissions which are not contested by any opposing party. The Modern Awards Objective is submitted to be met for the reasons advanced in the submissions made on behalf of the Union Parties.

PHASED-IN IMPLEMENTATION

10. In relation to the matters upon which HABA relies in its submissions to support a phased-in implementation of the Union Parties' variation, the Union Parties, conformably with the agreement reached with HABA, note the submissions made by HABA as to why a phased-in implementation is appropriate and do not seek to be heard to argue for any different position. The position as agreed between HABA and the Union Parties in relation to phased-in implementation can be considered to be consistent with the approach of the Commission in other proceedings in which corresponding rates have been increased. The reasons relied

¹ 4 yearly review of modern awards – Hair and Beauty Industry Award 2010 [2020] FWCFB 39.

² At [215]-[216]

³ 4 yearly review of modern awards – Penalty Rates – [2017] FWCFB 1001 at [887]-[898], esp [897]

upon by the Commission to conclude that such a phased-in implementation was consistent with the Modern Awards Objective in those proceedings are equally apposite in the present proceedings.

VARIED DRAFT DETERMINATION

11. A revised draft Determination tracked as to the amendments incorporating the agreed position in relation to phased-in implementation is the subject of present discussions between the parties and will be shortly separately filed for the consideration of the Commission.

OTHER MATTERS

12. Subject to what may be determined at the mention scheduled for Wednesday, 21 July 2021, the proceeding is presently fixed for hearing on 28 and 29 July 2021. HABA's representatives have expressed the view that in light of the position now reached between the parties, there is no need for a second hearing date. The Union Parties agree that if a further hearing is required, the matter should be capable of being transacted within a day.
13. The Commission may also separately wish to consider whether it has sufficient material before it in order to determine the application on the papers without further recourse to the parties. The Commission may consider it useful to canvass this issue with the parties at the scheduled mention date.
14. If a further hearing is required, present external factors beyond the control of the parties would suggest the appropriateness of transacting the matter by external teleconferencing by Microsoft Teams as the Commission has proposed. That course of action has been supported by HABA and the AWU. As confirmed by separate email, it is not opposed by the SDA.

DATED: 19 July 2021

A J MACKEN & CO.

Solicitors for the Union Parties