
Fair Work Commission: 4 yearly review of modern awards

4 YEARLY REVIEW OF MODERN AWARDS: (2019/7)

**AMUSEMENT, EVENTS AND RECREATION AWARD 2010
SUBMISSIONS IN REPLY**

Australian Business Industrial and NSW Business Chamber

13 AUGUST 2019

1. BACKGROUND

- 1.1 On 13 June 2019, the Fair Work Commission (**Commission**) directed that any party wishing to make further changes to the Exposure Draft of the *Amusement, Events and Recreation Award 2010* (**Award**) must provide details of the change/s sought and an outline of submissions by no later than 4.00pm on 13 July 2019.
- 1.2 The Australian Workers' Union (**AWU**) filed submissions on 12 July 2019 (**AWU Submissions**) in support of a claim to insert a 17.5% annual leave loading entitlement into the Award.
- 1.3 ABI and NSWBC oppose this claim and wish to make submissions regarding the matters raised by the AWU in accordance with the directions.

2. OUR CLIENTS' POSITION IN RELATION TO THE AWU CLAIM

- 2.1 Our clients oppose the AWU claim on the following two bases:
 - (a) the variation sought by the AWU offends section 138 of the *Fair Work Act 2009* (Cth) (**FW Act**), as the variation goes beyond what is necessary to achieve the modern awards objective; and
 - (b) the merit arguments advanced in support of the variation are misconceived and/or do not weigh in favour of granting the variation.
- 2.2 As to the second ground above, we submit that:
 - (a) First, there is no evidence before the Commission that would support a conclusion that there was some "error" on the part of the AIRC when making the Award and not including an entitlement to annual leave loading;
 - (b) Second, there is no proper basis to depart from the Full Bench decision of the AIRC in making the Award, nor the subsequent Full Bench decision during the two yearly review of the Award;
 - (c) Third, the AWU Submissions in respect of the Award Modernisation process and the events leading up to the making of the Award are incomplete, and do not properly represent what occurred during the Award Modernisation process;
 - (d) Fourth, the AWU have misrepresented the historical development of annual leave loading as an employee entitlement.
- 2.3 These submissions:
 - (a) set out an analysis of the history and rationale for annual leave loading,
 - (b) analyse the AWU's failed attempts in both the two yearly review and four yearly review to vary awards to include annual leave loading, and
 - (c) analyse the pre-modern awards,in support of the submission that annual leave loading is not a national standard and was not accidentally omitted from the making of the Award.

3. THE AWARD MODERNISATION PROCESS

- 3.1 The AWU assert that it was simply a mistake or “error” that annual leave loading was not included in the Award when it was first made by the AIRC during the Award Modernisation process.
- 3.2 As stated by the 7 member Full Bench in the creation of the modern award process, the modern award process involved:
- “the lodgement of proposals, submissions and other material by interested parties, pre-drafting consultations, publication of exposure drafts by the Commission, lodgement of proposals submissions and other material in relation to the drafts by the parties, further consultations and, finally, publication of the modern awards by the Commission.”¹
- 3.3 It is incorrect to submit that the Award omission of annual leave loading was an “error” on the part of the Commission.
- 3.4 Contrary to the submissions of the AWU, this proposed Award was disputed at length and submissions were put forward and various conferences had between the parties such as the Media, Entertainment and Arts Alliance (“the Alliance”), Ai Group, the Australasian Bowling Proprietors Association, AFEI, Australian Amusement Leisure and Recreation Association, Luna Park Sydney Pty Ltd, Chamber of Commerce & Industry WA, AEG Ogden Group and Moreton Hire Pty Ltd, Media, Entertainment & Arts Alliance, Macquarie Leisure Trust Group (“Dreamworld”).
- 3.5 There were also numerous draft awards that were presented to the AIRC and the Alliance’s own draft determination published on 6 March 2009 did not include annual leave loading as did Dreamworld’s draft determination also submitted on 6 March 2009.²
- 3.6 Although it is true that the Full Bench in a statement³ published on 22 May 2009 stated that the exposure draft was based to a “large extent on the terms of the AWU Theme Park and Amusement Award 2001”, it also stated that it incorporated many proposals advanced by the Alliance and as previously stated, the Alliance’s draft determination did not include annual leave loading.
- 3.7 In its reply submission, the Alliance did not raise annual leave loading as an issue that had arisen from the exposure draft.⁴
- 3.8 Further, in the decision which created the Amusement Award,⁵ although there is no mention of annual leave loading regarding this award, there was much discussion regarding annual leaving loading in other awards such as *Aluminium Industry Award 2010* and the *Gas Industry Award 2010*.

¹ [2009] AIRCFB 450 at [3]

² Macquarie Leisure Operations (“Dreamworld”) Draft Theme Park Industry Award 2010 - 6 March 2009 Annexure A. Can be accessed at:

http://www.airc.gov.au/awardmod/databases/entertainment/Draft/MLTG_ent_draft.pdf

³ [2009] AIRCFB 450

⁴ Media, Entertainment & Arts Alliance submission regarding Events Exposure Draft, 12 June 2009 can be accessed at:

<http://www.airc.gov.au/awardmod/fullbench/industries/awardmoddocument.cfm?award=entertainment&document=Submissions>

⁵ [2009] AIRCFB 826

3.9 Having regard to a proper consideration of the Award Modernisation process, it cannot be said that it was simply an accident that the AIRC chose not to include annual leave loading.

3.10 We turn now to the two yearly review of the Award.

4. TWO-YEARLY REVIEW PROCEEDINGS

4.1 During the two-yearly review of modern awards, the AWU attempted to vary the annual leave clause in the Award as well as the *Alpine Resorts Award 2010 (Alpine Award)* and the *Dredging Industry Award 2010 (Dredging Award)*. A Full Bench of the Commission rejected that claim.⁶

4.2 The AWU is now attempting to effectively re-agitate and re-litigate the issues that were considered and determined in the two yearly review. The Full Bench stated:

“[107] We are not persuaded we should make the variations sought by the AWU. They have not established that without the variations the modern awards are not achieving the modern awards objective. Further, the mere absence of a provision for annual leave loading in these modern awards in question and its inclusion in the vast majority of other modern awards is not sufficient to establish the modern awards are not operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process. Nor are the references in the Dredging Industry Award 2010 to annual leave loading in its award flexibility clause and in respect of the content of the 25% loading for casual employees sufficient to establish that that modern award is not operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process because of the absence of a specific provision for annual leave loading in that modern award. We decline to make the variations sought by the AWU.”⁷

4.3 While the Full Bench observed that the claim would be “more appropriate for consideration in the four year review”,⁸ that of itself does not mandate the granting of the claim.

4.4 Relevantly, there is no evidence upon which the Commission could rely to conclude that the Award “is not operating effectively without anomalies or technical problems.”

5. HISTORY AND RATIONALE FOR ANNUAL LEAVE LOADING

5.1 In the early 1970’s, the Labour Movement lodged an argument in the *Metal Industry Award 1971* with consent by the Metal Trades Industry Association of Australia that employees working in this industry could not afford to take their annual leave as in this particular industry, employees were so heavily reliant on their overtime payments that on annual leave, a payment of their ordinary hours entitlement was not satisfactory and it was creating a problem in the industrial space for both employers and employees.

⁶ [2013] FWCFB 6266

⁷ [2013] FWCFB 6266 at [107]

⁸ [2013] FWCFB 6266 at [108]

- 5.2 In 1971, the concept of annual leave loading was introduced in this industry⁹ to rectify this imbalance for particular industries that performed a great deal of overtime and were not being adequately compensated for when the employees took annual leave.¹⁰ This particular entitlement did not apply to every single industry but was introduced to those which were most affected by the loss of overtime.
- 5.3 Although this entitlement was introduced in many modern awards and enterprise agreements, it was not included in the Australian Fair Work and Conditions Standards under the *Workplace Relations Act 1996*, nor included under the creation of the National Employment Standards under the *Fair Work Act 2009*. It became an industry specific entitlement.
- 5.4 While there does not appear to be any dispute between the parties as to the purpose of annual leave loading, it is relevant that the AWU have not addressed why they say the introduction of annual leave loading in the amusements industry is consistent with that purpose. For example, there is no material before the Commission that would provide a basis to conclude that there is a well established practice in this industry of employees regularly working overtime so as to lead to them being worse off when taking annual leave.

6. THE DREDGING FULL BENCH IN THE 4 YEARLY REVIEW

- 6.1 The AWU has already sought to vary the Dredging Award in the 4 yearly review process, which was also unsuccessful and should be considered analogist to this award.
- 6.2 The Full Bench held that regarding annual leave loading:

[74] In terms of the modern awards objective, there is no evidence before us that the annual leave provisions in the Dredging Award are not meeting the modern awards objective. It could be argued that the loading would be additional remuneration for employees who work unsociable hours and shiftwork as per s. 134(da) of the Act. However it could equally be said that the introduction of annual leave loading would be an increased cost to employers which is a relevant consideration under s. 134(f) of the Act.

[75] We are not persuaded that there is sufficient material before us to determine the issue, and accordingly do not propose to make the change sought, at this time. If a party wishes to pursue the variation they can make a separate application to that effect. For now, we will not vary clause 14 of the exposure draft to include annual leave loading.”

This case can be seen as analogist to this case and likewise in that case, there is no evidence before the Commission that the annual leave loading provisions in the Award is not meeting the modern awards objective.

- 6.3 As stated previously, the rationale for annual leave loading is to compensate employees for the notional loss of overtime earnings while they are on leave. At no point has the AWU attempted to state that employees in this industry are doing any overtime at all. The introduction of annual leave loading in this Award would be an unnecessary cost on the employer which goes against the modern awards objective.

⁹ (1972) 146 CAR 775

¹⁰ Creighton, B and Stewart, A, “Labour Law,” Federation Press, 5th edition, 397.

6.4 For these reasons, ABI and NSWBC submit that this claim should be rejected.

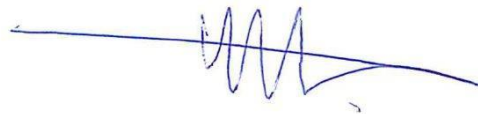
AUSTRALIAN BUSINESS LAWYERS & ADVISORS

On behalf of Australian Business Industrial and the New South Wales Business Chamber Ltd

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Kyle Scott
Associate Director
Australian Business Lawyers & Advisors Pty Ltd
(02) 4989 1010
kyle.scott@ablawyers.com.au



Helen Hamberger
Associate
Australian Business Lawyers & Advisors Pty Ltd
(02) 9458 7307
helen.hamberger@ablawyers.com.au