

26 September 2014

Associate to the Honourable Justice Ross AO, President  
Fair Work Commission  
11 Exhibition Street  
Melbourne VIC 3000

By email: [chambers.ross.j@fwc.gov.au](mailto:chambers.ross.j@fwc.gov.au)

Dear Associate,

We write in response to the Statement of the Full Bench of the Fair Work Commission of 13 August 2014 setting out the timetable and procedure for the remainder of the 4 yearly review of modern awards (Review) ([\[2014\] FWCFB 5537](#)). In particular, we would like to address paragraph 28 of that Statement referencing the [correspondence from the Fair Work Ombudsman dated 4 April 2014](#) (FWO Correspondence) and calling for submissions in relation to potential inconsistencies of award provisions with the National Employment Standards (NES) by 26 September 2014. These submissions are proposed to be dealt with at the same time and called on for mention and hearing on 17 October 2014 and 23 October 2014 respectively.

ACCI has reflected upon the proposed approach described above and has identified some practical issues which ACCI submits require further attention and consideration. These issues relate to:

- common issues proceedings already on foot in relation to the [claim of the ACTU](#) seeking variation to a number of awards to require payment of annual leave loading on termination;
- the nature of the FWO's observations relating to the interaction of award provisions with the NES;
- procedural considerations.

#### **Payment of annual leave loading on termination**

The annual leave common issues claim made by the ACTU related to annual leave entitlements on termination is currently the subject of Full Bench proceedings. To ensure efficiency of process and to minimise confusion and duplication, it is ACCI's view that issues raised by the Fair Work Ombudsman related to the payment of annual leave loading on termination should not be re-agitated in fresh proceedings.

#### **The nature of FWO observations**

We note that the FWO Correspondence identifies other terms in awards which it considers are inconsistent with the NES and which relate to:

- annual leave accrual;
- entitlements to personal/carer's and compassionate leave;
- notice of termination;
- payment for absences on public holidays.

LEVEL 3  
486 ALBERT STREET  
EAST MELBOURNE 3002

PO BOX 18008  
COLLINS STREET EAST  
MELBOURNE VIC 8003  
ABN 85 008 391 795

PH: 61-3-9668 9950  
FAX: 61-3-9668 9958  
WEB: [www.acci.asn.au](http://www.acci.asn.au)

Appendix A of the FWO Correspondence identifies a number of specific clauses within the following 21 individual awards:

- *Group 1:*
  - Textile, Clothing, Footwear and Associated Industries Award 2010 [MA000017] (clause 13.9);
- *Group 2:*
  - Fire Fighting Industry Award 2010 [MA000111] (clause 28.3(b));
  - Alpine Resorts Award 2010 [MA000092] (clause 11.5);
  - Horse and Greyhound Training Award 2010 [MA000008] (clause 10.2);
- *Group 3:*
  - Business Equipment Award 2010 [MA000021] (clause 31.8(a));
  - Labour Market Assistance Industry Award 2010 [MA000099] (clause 25.3);
  - Higher Education Industry – Academic Staff – Award 2010 [MA000006] (clause 25.3);
  - Sugar Industry Award 2010 [MA000087] (clause 16.5(f));
  - Silviculture Award 2010 [MA000040] (clause 10.4(c));
  - Contract Call Centres Award 2010 [MA000023] (clause 30.5);
  - Waste Management Award 2010 [MA000043] (clause 32.2);
  - Educational Services (Post-Secondary Education) Award 2010 (clause 11.2(b));
  - Marine Towing Award 2010 [MA000050] (clause 11.5);
- *Group 4:*
  - Airline Operations – Ground Staff Award 2010 [MA000048] (clause 34.2);
  - Live Performance Award 2010 [MA000081] (clauses 19.2(a), 19.4);
  - Mobile Crane Hiring Award 2010 [MA000032] (clause 25.2(c)(i));
  - Airport Employees Award 2010 [MA000049] (clauses 31.9, 32.6);
  - Air Cabin Crew Award 2010 [MA000047] (clause 25.9);
  - Air Pilots Award 2010 [MA000046] (clause 27.8(a));
  - Hair and Beauty Industry Award 2010 [MA000005] (clause 34.2(b));
  - Racing Industry Ground Maintenance Award 2010 [MA000014] (clause 10.3(d)).

As evident from the above list, the observations traverse a diverse range of awards and industries and the wording of each identified clause is generally distinct from the others. The award specific nature of the wording may involve consideration of industry specific circumstances and this may result in multiple interested parties seeking to be involved in the proceedings. Accordingly, it is ACCI's view that it will be difficult for these matters to be dealt with via shared proceedings. To the extent that matters identified in the FWO correspondence as being 'inconsistent with the NES' or otherwise problematic are not considered to be so by interested parties, it is ACCI's view that the matter should not proceed.

#### **Annual leave accrual for shift workers**

The outstanding issue in the FWO Correspondence relates to the 27 modern awards in relation to which the FWO makes observations about the accrual of annual leave for shift workers. It should be noted that FWO correspondence makes mere observations and does not propose orders for variations to the identified awards. It is open to those with a material interest in each of these awards to make submissions which are prompted or in part prompted by the relevant observation should they feel it appropriate. This part of the FWO Correspondence should not of itself provide the trigger for proceedings.

The appropriateness of dealing with this matter through shared proceedings seems difficult to gauge in advance of any submissions about shift work provisions are received. It is ACCI's view that any decision about whether there should be shared proceedings should be deferred until competing contentions and their interaction with other award specific shift work related claims are identified. For this reason, we would propose a directions hearing following filing of submissions, to determine whether this matter should be dealt with via shared or individual award proceedings and indeed whether the matter should proceed at all.

#### **General concerns**

As noted above, ACCI holds concerns that some of the matters identified in the FWO correspondence as being 'inconsistent with the NES' or otherwise problematic may not be considered to be so by interested parties. ACCI would have concern if review proceedings encouraged the FWO to press concerns or offer views as to its preferred interpretation of the provisions given its role as an independent statutory agency.

ACCI holds the view that FWO Correspondence should not of itself provide the trigger for proceedings.

Yours Sincerely,

A handwritten signature in blue ink, appearing to read 'Richard Clancy', written in a cursive style.

**RICHARD CLANCY**  
Director, Workplace Relations