



ISSUES PAPER

4 YEARLY REVIEW OF MODERN AWARDS - COMMON ISSUES (AM2014/1)

JUSTICE ROSS, PRESIDENT

MELBOURNE, 24 FEBRUARY 2014

Introduction

[1] On 24 January 2014 the Commission released an [issues paper](#) relating to the 4 yearly review of modern awards (the Review) and parties were invited to make submissions outlining any claims they wished to pursue that would affect multiple modern awards, the so-called 'common issues', in addition to making comment on certain jurisdictional issues canvassed in the paper. The Commission received 35 submissions in response to the issues paper. These submissions are available on the [4 yearly review of modern awards page](#) of the Commission's website.

[2] This paper deals with common issues related to the Review. The initial stage of the Review commenced with a conference on 5 February 2014. The purpose of the initial stage of the review is to determine any threshold issues in relation to the legislative framework and to identify any 'common issues' which will arise in all, or most, modern awards.

[3] This paper sets out the common issues in the Transitional Review of modern awards which commenced in 2012 (Transitional Review) and the views which have been expressed about the matters which should be regarded as common issues in the 4 yearly review. It concludes with some tentative views in relation to these issues.

[4] At the 5 February conference the Commission outlined a process for the resolution of the jurisdictional issues. The Commission issued a [statement](#) on 6 February 2014 following the conference and also issued [directions](#) for filing further submissions. A hearing in relation to the jurisdictional issues will take place on 6 March 2014. The Commission also indicated that a further conference would be convened at 10:30 am on 26 February 2014 for the purpose of identifying 'common issues' in relation to the Review. The conference is scheduled to begin at 10:30 am on 26 February 2014 and is likely to conclude by 2:30 pm.

[5] The purpose of this paper is to facilitate discussion at the 26 February 2014 conference. The conference will identify any agreement between the parties about the matters which should be dealt with as 'common issues' and at which stage of the review each common issue is to be dealt with. The President has the power under ss.156 and 582 of the *Fair Work Act 2009* (the FW Act) to issue directions about the conduct of 4 yearly reviews.

The determination and scheduling of common issues related to the review falls within this power.

The Transitional Review of modern awards - common issues

[6] A number of common issues were dealt with by Full Benches as part of the Transitional Review. The table below outlines the common issues from the Transitional Review with a link to the decision which determined those matters.

Issue	Decision
Public holidays	[2013] FWCFB 2168
Annual leave (Cashing out annual leave, requirement to take annual leave, leave loading provision)	[2013] FWCFB 6266
Award Flexibility	[2013] FWCFB 2170
Penalty rates	[2013] FWCFB 1635
Apprentices, Trainees and Junior Rates	[2013] FWCFB 5411

Four yearly review of modern awards - common issues identified by parties in submissions

[7] As noted, an issues paper was published by the Commission prior to the 5 February conference and parties were invited to make submissions outlining any claims they wished to pursue that affect multiple modern awards, the so-called common issues. A range of views were expressed in the submissions and a number of organisations noted they have not yet finalised their position in relation to these issues.

[8] The table below identifies the sections of some parties' submissions that were received prior to the 5 February conference which deal with, or mention, issues that the parties believe to be common issues.

Organisation	Topic	Paragraph/page number of submission
Master Grocers Australia	Common issues generally "MGA looks forward to the proposed conference to consider which General Retail clauses will be classified as common matters"	Paragraph 4: Submission dated 10 February 2014

Organisation	Topic	Paragraph/page number of submission
National Retail Association	<p>Common issues generally</p> <p>“It is our view that the term common matters should refer to issues that are identical or largely identical across the majority of awards, such as consultation and award flexibility provisions.”</p>	<p>Paragraph 8: Submission dated 4 February 2014</p>
Australian Retailers Association	<p>Common issues generally</p> <p>“It is our view, however, that the FWC, in referring to common matters, is intending to limit this to circumstances where parties are seeking variations to provisions which are standardised across all, or the majority of modern awards.”</p>	<p>Paragraph 8 Submission dated 3 February 2014</p>
Ai Group	<p>Annual Leave:</p> <ul style="list-style-type: none"> - Annual leave flexibility including: <ul style="list-style-type: none"> o Cashing out of annual leave as provided for in s.93 of the Act o Purchased leave o The granting of annual leave in advance - Provisions which enable employers to deal with excessive leave accruals - Close down provisions <p>Model flexibility clause: amendments to the model flexibility clause to increase flexibility for employers and employees</p> <p>Part-time employment:</p> <p>inclusion of sufficiently flexible part-time provisions in all modern awards</p> <p>Transitional Provisions:</p> <p>removal of the transitional provisions in modern awards after the relevant sunset date has been reached, e.g. transitional provisions dealing with wages, more generous redundancy provisions, accident pay and district allowances</p> <p>Public Holidays:</p>	<p>Paragraph 3.2 Submission dated 3 February 2014</p>

Organisation	Topic	Paragraph/page number of submission
	<p>Substitution of public holidays by agreement between the employer and the employee</p> <p>Time off in lieu of overtime and make up time</p>	
<p>Australian Federation of Employers and Industries</p>	<p>AFEI intends to have the following issues reconsidered as part of the 4 yearly review.</p> <p>Cashing out annual leave</p> <p>Requirement to take annual leave</p> <p>Penalty rates.</p>	<p>Paragraphs 6-9 Submission dated 3 February 2014</p>
<p>Restaurant & Catering Australia</p>	<p>Common issues generally</p> <p>Should be restricted to a criteria that impact all modern awards.</p>	<p>Paragraph 10 Submission dated 3 February 2014</p>
<p>Accommodation Association of Australia and Motor Inn Motel and Accommodation Association</p>	<p>Claims AAA and MIMA wish to pursue which affect multiple or all modern awards:</p> <ul style="list-style-type: none"> ○ Penalty Rates ○ Part time work ○ Public holidays 	<p>Submission dated 3 February 2014</p>
<p>Australian Government</p>	<p>“The government would not object to the same common issues reviewed during the Transitional Review”</p>	<p>Paragraph 7.5 Submission dated 3 February 2014</p>
<p>ACTU (supported by CEPU)</p>	<p>Accident pay</p> <p>Apprentice conditions</p> <ul style="list-style-type: none"> ○ Payment of excess travel for block release training at distant location ○ Reimbursement of course fees and text books ○ Time in training and assessment to be considered time at work ○ All award conditions apply to apprentices ○ No overtime or shiftwork to interfere with attendance at training ○ Specifying that notice of termination provisions in the NES apply to apprentices 	<p>Appendix 1 - 7 Submission dated 3 February 2014</p>

Organisation	Topic	Paragraph/page number of submission
	<p>Casual employment</p> <ul style="list-style-type: none"> ○ Definitional issues ○ Conditions/entitlements ○ Rostering ○ Conversion <p>Support for victims of domestic violence</p> <p>Public Holidays</p> <p>Return to work and flexibility (after parental leave, accommodating flexible work requests for parents and personal leave for pregnancy matters)</p> <p>Sunsetting allowances</p>	
Fair Work Ombudsman	<p>Expression of base hourly rates, overtime and penalty rates in Modern Awards</p> <p>Consistency with the NES and Modern Award clauses</p>	<p>Paragraph 3 Submission dated 3 February 2014</p>
Chamber of Commerce and Industry Queensland	<p>Penalty rates</p> <p>Public Holidays</p> <p>Flexible part-time provisions</p>	<p>Paragraph 6 Submission dated 3 February 2014</p>
Queensland Tourism Industry Council	<p>Penalty rates</p> <p>Public Holidays</p> <p>Flexible part-time provisions</p>	<p>Paragraph 5 Submission dated 3 February 2014</p>
Australian Hotels Association	<p>Public Holidays</p> <p>Part-time employment conditions</p> <p>Penalty rates</p>	<p>Page 3 Submission dated 3 February 2014</p>
CEPU	<p>Introduction of electrical licence allowance into 3 awards</p>	<p>Paragraph 4 Submission dated 3 February 2014</p>
Shop, Distributive and Allied Employees'	<p>Common matters refer to far-reaching variations in the nature of a 'test case'</p>	<p>Paragraph 9 Submission dated 3 February 2014</p>

Organisation	Topic	Paragraph/page number of submission
Association		
Australian Business Industrial	Small business schedule Penalty rates IFAs and flexibility	Paragraphs 9.4 - 9.12 Submission dated 3 February 2014
Housing Industry Association	Common matters to be confined to only those applications/submissions that pertain to model award clauses Award coverage	Paragraphs 3.1.7 and 3.1.8 Submission dated 3 February 2014
CFMEU	‘Sunset’ provision inserted into modern awards The sunset provision has the effect of terminating the operation of accident pay provisions	Paragraphs 3-4 Submission dated 31 January 2014
Coal Mining Industry Employer Group	‘Sunset’ provision inserted into modern awards	Paragraphs 7-8 Submission dated 30 January 2014

Preliminary Consideration

[9] It may assist the parties to be informed of the tentative views I have formed in relation to the identification of the ‘common issues’. It will also provide an opportunity for anyone with a contrary view to persuade me to adopt a different course. I emphasise that the views expressed are tentative only and I have not reached a concluded view on any of these matters.

[10] It is important to observe at the outset that a matter will not necessarily be regarded as a common issue, such that it requires some separate proceeding, just because a variation is sought to more than one award. For example, one of the submissions canvasses applications in prospect to vary a number of awards to provide for an annual closedown. It is unlikely that matter would be dealt with as a common issue. The same observation may be made about the proposed ‘flow on’ of the [Apprentices Full Bench decision](#). It would be dealt with on an award-by-award basis.

[11] In their submissions, HIA, Restaurant & Catering Australia and SDA submitted that ‘common issues’ should be restricted to matters and/or provisions which impact on, or are common to, all or most modern awards. There is considerable force in this proposition.

[12] ‘Common issues’ are likely to be proposals for significant variation or change across the award system, that is, those applications that seek to change a common or core provision

in most, if not all, modern awards. A model term dealing with part-time work would satisfy this definition of a 'common issue'. I do not envisage that there would be many of those sorts of matters. As I said at the 5 February 2014 conference, it is intended that the Commission will proceed cautiously in relation to the identification of common issues to ensure that all interested parties are fully consulted.

[13] An issue was raised in the CFMEU submission and in the Coal Mining Industry Employer Group submission relating to the 'sunset' provision inserted into modern awards by a Full Bench of the Australian Industrial Relations Commission (AIRC) in 2008¹. The sunset provision has the effect of terminating the operation of accident pay provisions contained in a large number of modern awards as of 31 December 2014. It was submitted by the Coal Mining Industry Employer Group that when these sunset sub-clauses were inserted into modern awards the then Full Bench of the AIRC anticipated that there would be a more general consideration of accident pay provisions before that date. The Full Bench said:

“[87] In light of these considerations we have decided to deal with accident pay on a transitional basis. Our intention is to preserve accident pay arrangements until 31 December 2014. We anticipate that in the period prior to that date an opportunity will arise to consider the formulation of a national standard to apply to all award covered employees. This task will be made considerably easier if uniformity is developed in relation to workers compensation schemes.”²

[14] The CFMEU and the Coal Mining Industry Employer Group propose that the Commission should deal with the issue of the appropriate accident pay provisions to replace the present transitional provisions as a 'common issue' in the review.

[15] In making the modern awards the Full Bench of the AIRC clearly contemplated that the Commission would give subsequent consideration to the formulation of a national standard in respect of accident pay, to apply to all modern awards. It seems appropriate that this matter be regarded as a common issue in the 4 yearly review. If it is designated as a common issue consideration will need to be given to the timing of proceedings in relation to this issue.

[16] On the basis of the submissions put to date the following matters could be regarded as common issues;

- Accident pay
- Annual leave
- Award flexibility
- Casual employment
- Part-time employment
- Public holidays

[17] Other common issues may arise during the course of the review.

[18] At this stage my preliminary view is that proposals to vary penalty rates should be dealt with during the award phase of the 4 yearly review and not as a common issue. This would not prevent proceedings in related awards being heard together. An exception to this proposition may be any proposal to vary, for example, the public holiday penalty rate across all or most modern awards.

¹ [2008] AIRCFB 1000 at paras [83] to [88].

² [2008] AIRCFB 1000 at para [87].

[19] To ensure that the rights of all interested parties are protected the review of a particular award will not be finalised until all of the common issues have been determined.

[20] The following timeframe is proposed for the consideration of the parties:

Time period for the hearing of the common issues	Common Issues
First half 2014	Annual Leave
Second half 2014 (commencing July)	Accident pay (commencing July) Part-time & Casual employment (commencing September)
First half of 2015	Award flexibility Public holidays

[21] Interested parties will be asked to comment on proposed common issues and timetable at the conference on Wednesday 26 February 2014. If a party is unable to attend they should file a short written submission with the Commission prior to 26 February 2014.

[22] Following the 26 February conference the Commission will release a draft statement for further consultation. The draft Statement will set out the common issues and when they will be heard.

PRESIDENT