



STATEMENT

Fair Work Act 2009

s.285—Annual wage reviews to be conducted

Annual Wage Review 2016–17

(C2017/1)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
DEPUTY PRESIDENT ASBURY
COMMISSIONER HAMPTON
MR COLE
PROFESSOR RICHARDSON
MR GIBBS

MELBOURNE, 1 NOVEMBER 2017

Annual Wage Review 2016-17 – application under s.602(2)(b) of the Fair Work Act 2009 (Cth)

[1] On 10 October 2017 the CPSU, the Community and Public Sector Union (CPSU) made an [application](#) under s.602(2)(b) of the *Fair Work Act 2009* (Cth) (the Act) to correct a purported error in paragraph [699] of the *Annual Wage Review 2016–17 decision*¹ (the 2016–17 Review decision).

[2] Paragraph [699] outlines the method for adjusting wages in copied State awards, as follows:

‘[699] A different approach applies in relation to copied State awards currently in operation. Given the absence of any submissions on this matter, we have decided that increases to these instruments should be consistent with the approach set down in previous Review decisions,² and the following increases will apply to copied State awards:

- an increase of 3.3 per cent applies to wage rates in copied State awards that were not the subject of a state minimum wage decision that commenced on and before 1 July 2016;
- an increase of 1.65 per cent applies to wage rates in copied State awards that were the subject of a state minimum wage decision that commenced after 1 July 2016 and before 1 January 2017; and

- no increase applies to wage rates in copied State awards that were the subject of a state minimum wage decision that commenced on or after 1 January 2017 and before 1 July 2017.’ [emphasis added]

[3] The CPSU’s application specifically concerns employees of the New South Wales Department of Primary Industry, who were transferred to a state owned corporation, State Water Corporation, trading as WaterNSW (WaterNSW), on 1 July 2016. As a result, various NSW awards became copied State awards for those transferring employees. WaterNSW has taken the view that under the formulation in paragraph [699] of the 2016-17 Review decision, the transferred employees are entitled to half of the full federal wage increase (1.65%) awarded in the 2016-17 Review decision.

[4] In its application, the CPSU has proposed amending paragraph [699] to read:

- an increase of 3.3 per cent applies to wage rates in copied State awards that were not the subject of a state minimum wage decision that commenced ~~on~~ after 1 July 2016 and before 1 July ~~2016~~ 2017;

[5] [WaterNSW](#) opposes the CPSU’s application, on both jurisdictional and merit grounds.

[6] As we observe below, the CPSU’s application may affect other entities and employees, as it will apply to other copied State awards. The purpose of this Statement is to bring the CPSU’s application to the attention of any other interested party, and to provide them with an opportunity to make a submission.

What are copied State awards?

[7] The *Fair Work Amendment (Transfer of Business) Act 2012*, which inserted Part 6–3A into the Act, commenced on 5 December 2012.

[8] Section 768AA ‘Guide to this Part’ in Part 6-3A provides:

‘This Part provides for the transfer of certain terms and conditions of employment when there is a transfer of business from a non-national system employer that is a State public sector employer (called “the old State employer”) to a national system employer (called “the new employer”).

...

This Part achieves the transfer of those terms and conditions by creating a new instrument—a “copied State instrument”—for each transferring employee. The new instrument is a federal instrument and is enforceable under this Act.

[9] Section 768AD sets out when a transfer of business occurs.

[10] Section 768AF ‘What this Division is about’ explains:

‘There are 2 types of copied State instruments—a copied State award and a copied State employment agreement.

A copied State award copies the terms of a State award that covered the transferring employee and the old State employer immediately before the termination of the employee’s employment with the old State employer.

A copied State employment agreement copies the terms of a State employment agreement that covered the transferring employee and the old State employer immediately before the termination of the employee's employment with the old State employer.'

[11] Copied State awards come into operation immediately after the start of the day the transferring employee's employment is terminated by the old State employer.³

[12] While it is unclear how many copied State awards exist, a review of Commission decisions suggests that at least a small number of copied State awards may be in operation. A copied State award continues in operation under the national system for a period of five years, unless terminated or extended by regulation.⁴

How do Annual Wage Reviews apply to copied State awards?

[13] Section 768AW in Part 6-3A of the Act specifies the limited circumstances in which the Commission may vary copied State instruments. One of the circumstances is that a copied State instrument may be varied under:

'item 20 of Schedule 9 to the Transitional Act (which deals with variation of instruments in annual wage reviews) as that item has effect because of section 768BY'.⁵

[14] Section 768BY provides that, from the start of the day the transferring employee becomes employed by the new (national system) employer, Part 5 of Schedule 9 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (Transitional Act) applies in relation to a copied State award in the same way as it applies to a Division 2B State award.

[15] Item 20 of Part 5 of Schedule 9 to the Transitional Act provides:

'20 Variation of Division 2B State awards in annual wage reviews under the FW Act

(1) In an annual wage review, the FWC may make a determination varying terms of a Division 2B State award relating to wages.

(2) For that purpose, Division 3 of Part 2-6 of the FW Act (other than section 292) applies to terms of a Division 2B State award relating to wages in the same way as it applies to a modern award.'

[16] Under s.285(2)(a)(i) of Division 3 of Part 2-6, the Commission must review modern award minimum wages. Accordingly, the Expert Panel for annual wage reviews (Panel) must review copied State awards and may make determinations varying their terms.

The 2012-13 Review decision

[17] The *Annual Wage Review 2012-13 decision*⁶ (the 2012-13 Review decision) introduced the tiered methodology for adjusting wages in copied State awards following the commencement of Part 6-3A.

[18] In the 2012-13 Review decision, the Panel discussed the operation of copied State awards and noted it was required to review, and if appropriate, make a determination varying minimum wages in copied State awards.⁷ The Panel took into account submissions from the ACTU that the variation of rates should be differentiated based on when the copied States awards came into effect, as some copied State awards may include rates of pay that had been

increased by State industrial relations tribunal minimum wage determinations in the preceding 12 months:

‘[559] In terms of the copied State awards, the Australian Government submitted that these instruments may be varied in the same way as Division 2B State awards. The ACTU noted that there is no information available as to the number of copied State awards (if any) in operation however it submitted that the Panel should still vary these rates. The ACTU however submitted that any increase to these rates should be differentiated on the basis of when they came into effect (as some copied State awards may include rates of pay that have been increased as a result of state Industrial Relations Commission minimum wage determinations in the previous 12 months). The ACTU therefore submitted that a flow on of the increase awarded in this decision should only apply to those copied State awards that do not include a minimum wage increase awarded by a state Industrial Relations Commission in the past 12 months, with those that include a state increase awarded in the second half of 2012 to receive 50 per cent, and those awarded in the first half of 2013 to receive no increase. The AAA submitted that it did not oppose the transitional copied State awards being adjusted in line with modern award minimum wages.’⁸ [emphasis added] [references omitted]

[19] The Panel held:

‘[560] We have decided that for copied State awards currently in operation, in order to limit the impact of any “double-dipping” as a result of this decision and minimum wage increases previously awarded by state Industrial Relations Commissions, a tiered increase will be applied to these instruments in the following terms:

- an increase of 2.6 per cent applies to wage rates in copied State awards that were not the subject of a state minimum wage decision that commenced after 1 July 2012 and before 1 July 2013;
- an increase of 1.3 per cent applies to wage rates in copied State awards that were the subject of a state minimum wage decision that commenced after 1 July 2012 and before 1 January 2013; and
- no increase applies to wage rates in copied State awards that were the subject of a state minimum wage decision that commenced on or after 1 January 2013 and before 1 July 2013.’⁹ [emphasis added]

Next steps

[20] At a Mention held on Tuesday 31 October 2017, the CPSU, WaterNSW and the ACTU were content to have the CPSU’s application dealt with by written submissions, without the need of an oral hearing. Directions for the filing of written submissions are set out at Attachment A of this Statement.



PRESIDENT

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¹ [2017] FWCFB 3500.

² Footnote 664 provides: 'See [2013] FWCFB 4000 at para. 560; [2014] FWCFB 3500 at para. 572; [2015] FWCFB 3500 at para. 536; and [2016] FWCFB 3500 at para. 593.'

³ Fair Work Act, s.768AO(1).

⁴ Fair Work Act, s. 768AO(2).

⁵ Fair Work Act, s. 768AW(c).

⁶ [2013] FWCFB 4000 at para 560.

⁷ [2013] FWCFB 4000 at para 556.

⁸ [2013] FWCFB 4000 at para 559.

⁹[2013] FWCFB 4000 at para 560.

ATTACHMENT A



DIRECTIONS

Fair Work Act 2009

s.602 – Correcting obvious errors etc. in relation to the FWC’s decision

Annual Wage Review 2016–17 (C2017/1)

JUSTICE ROSS, PRESIDENT
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MELBOURNE, 1 NOVEMBER 2017

The following directions are issued in respect of [application](#) ADM2017/6:

[1] Persons supporting the CPSU’s application are to file a written submission by **4pm** on **Thursday 16 November 2017**.

[2] WaterNSW and others opposing the CPSU’s application are to file written submissions by **4pm** on **Thursday 30 November 2017**.

[3] Persons supporting the CPSU’s application are to file any written submissions in reply by **4pm** on **Thursday 7 December 2017**.

[4] The application will be decided on the basis of written submissions, without an oral hearing.

[5] All submissions are to be sent to amod@fwc.gov.au.

[6] Liberty to apply.

PRESIDENT