

5 May 2017

The Associate to the Hon Justice Iain Ross AO
Fair Work Commission
PO Box 1994
MELBOURNE VIC 3001

By email: amod@fwc.gov.au

Dear Associate

Four yearly review of modern awards – Location Allowance Applications; FWC Matter Nos AM2014/190; AM 2014/303

I refer to the matters above and the Statement issued by Justice Ross on 18 April 2017: [2017] FWC 2189.

On 27 October and 17 December 2014, the Shop, Distributive and Allied Employees' Association (SDA) filed a number of applications in the 'Award Stage' of the Commission's 4 yearly review of modern awards, proposing the introduction of an allowance to compensate employees for disabilities associated with the performance of work in remote locations.

Applications were filed in relation to the following modern awards:

- a. *Pharmacy Industry Award 2010*;
- b. *General Retail Industry Award 2010*;
- c. *Hair and Beauty Industry Award 2010*;
- d. *Fast Food Industry Award 2010*; and
- e. *Vehicle Manufacturing, Repair, Services, Retail Award 2010*.

(together, **Applications**)

I confirm the SDA wishes to pursue the Applications, and seeks the reconstitution of a Full Bench to deal with the Applications.

All correspondence to be addressed to the Branch Secretary

Shop, Distributive and Allied Employees' Association (Western Australia Branch)

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However, we note that there are a number of other proceedings on foot, yet to be concluded, the determination of which is likely to bear on the prospects and the outcome of the SDA and the ASU's applications.

First, the Penalty Rates Case (AM2014/305) which concerns penalty rates entitlements for employees covered by awards subject to the Applications, has not been concluded. We also respectfully note, United Voice, in its 'Reply Submissions of United Voice Regarding Transitional Arrangements' dated 20 April 2017, foreshadowed that it would seek judicial review of the Commission's decision of 23 February 2017 ([2017] FWCFB 1001).

Second, the 'Application by Mrs Penelope Vickers under s 225 of the Fair Work Act to terminate the *Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited Retail Agreement 2011*' (AG2016/3797) is also yet to be determined. It is a term of the 2011 Coles Agreement that Coles is obliged to pay its employees in certain regional and remote locations a 'district' allowance, which is intended to compensate employees for disabilities associated with living in remote and regional locations. If Ms Vickers succeeds in her application, the consequence would likely be that Coles would no longer be obliged to pay its employees these district allowances.

That is, the adverse financial consequences to regional or remote based low-paid employees caused by the proceedings referred to above, could, in our submission, affect the merits of the SDA Applications.

We also note that the interested employee and employer parties in the SDA and ASU applications have on a number of occasions in late 2014, 2015 and 2016, been required to file a number of rounds of amended submissions and witness statements, for reasons including delays caused by Justice Boulton's retirement, the Commission's limited resources in dealing with the Four Yearly Review of Modern Awards and, in particular, the Australia Chamber of Commerce and Industry's (ACCI) application on 19 May 2015 to the Federal Court for judicial review of decisions of a Full Bench of the Commission relating to the ACTU's application to remove 'sunset clauses' from transitional provisions in a number of modern awards, relating to district allowances and accident take home pay allowances ([2014] FWCFB 7767, [2015] FWCFB 644). Whilst, in our view, this was outside of the control of the parties and the Commission, the duplication in submissions and evidence was nevertheless undesirable, inefficient, and a burden on the Commission and the parties.

Therefore, to ensure the efficient progression of this matter and to avoid further duplicity, the SDA respectfully proposes that the Applications, and those filed by the Australian Services Union, be adjourned until a time and date to be fixed, pending the determination of the proceedings referred to above.

In support of this proposal, we note that on 25 May 2015, ACCI, SDA, and other interested parties attended a mention before Justice Boulton. At the conclusion of that mention, Justice Boulton adjourned the applications until a time and date to be fixed, pending the outcome of the 2015 ACCI Federal Court judicial review, referred to above, at which time parties could request the Full Bench to relist the matter for a mention, where the Full Bench could consider an appropriate timetable for hearings, and the need for further submissions and evidence. On 14 September 2015, the Full Bench of the Federal Court (North, Buchanan and Flick JJ) dismissed ACCI's application ([2015] FCAFC 131), and on 16 October 2015, the SDA wrote to the Commission seeking for the applications to be listed for a mention, in accordance with Justice Boulton's direction.

If his Honour is minded to approve the SDA's proposed approach, the SDA undertakes to write to the Full Bench to request a mention to deal with the programming of the SDA and ASU applications, when the outcomes of the proceedings referred to above are known.

Please contact me if his Honour requires anything further.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Dustin Rafferty', is written over the 'Yours sincerely' text.

Dustin Rafferty
Legal Officer