

Summary of Decision

17 March 2014



4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues

AM2014/1

[1] Section 156 of the *Fair Work Act 2009* (Cth) (the FW Act) provides that the Fair Work Commission (the Commission) must conduct a 4 yearly review of modern awards (a Review) starting as soon as practicable after each 4th anniversary of the commencement of Part 2-3 of the FW Act. Part 2-3 commenced on 1 January 2010 and so the first Review is to start as soon as practicable after 1 January 2014.

[2] A [draft statement](#) was published on 15 November 2013 providing a preliminary outline of the process for the Review. A [further statement](#) was issued on 24 December 2013. On 24 January 2014 an [issues paper](#) was made available on the website to assist in the facilitation of a conference to be held on 5 February 2014. The issues paper also set out a number of draft propositions related to jurisdictional issues and called for submissions from interested parties on these propositions. At the 5 February conference the Commission outlined a process for the resolution of the jurisdictional issues canvassed in the issues paper. In [Directions](#) issued on 6 February 2014, parties were invited to make any further submissions on the draft propositions and preliminary jurisdictional issues by 20 February 2014 and submissions in reply by 27 February 2014. The Commission received 47 submissions in response to the Issues Paper and 6 submissions in reply. A hearing took place on 6 March 2014. Prior to this hearing the Commission published a [background paper](#) which provided an overview of the parties' submissions in response to the draft propositions.

[3] This decision deals with the Commission's conclusions regarding some of the preliminary jurisdictional issues related to the Review.

[4] The Statement issued on 15 November 2013 provided an outline of the process for the Review. The Review is comprised of an initial stage, dealing with issues associated with the legislative framework, followed by an award stage. This decision marks the completion of the initial stage of the Review.

[5] The Commission's general observations about the Review are summarised at paragraph [60] of the decision.

1. Section 156 sets out the requirement to conduct 4 yearly reviews of modern awards and what may be done in such reviews. The discretion in s.156(2) to make determinations varying modern awards and to make or revoke modern awards in a Review, is expressed in general terms. The scope of the discretion in s.156(2) is limited by other provisions of the FW Act.

In exercising its powers in a Review the Commission is exercising ‘modern award powers’ (s.134(2)(a)) and this has important implications for the matters which the Commission must take into account and for any determination arising from a Review. In particular, the modern awards objective in s.134 applies to the Review.

2. The Commission must be constituted by a Full Bench to conduct a Review and to make determinations and modern awards in a Review. Section 582 provides that the President may give directions about the conduct of a Review. The general provisions relating to the performance of the Commission’s functions apply to the Review. Sections 577 and 578 are particularly relevant in this regard. In conducting the Review the Commission is able to exercise its usual procedural powers, contained in Division 3 of Part 5-1 of the FW Act. Importantly, the Commission may inform itself in relation to the Review in such manner as it considers appropriate (s.590).
3. The Review is broader in scope than the Transitional Review of modern awards completed in 2013. The Commission is obliged to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a ‘stable’ modern award system (s.134(1)(g)). The need for a ‘stable’ modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. Some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and is accompanied by probative evidence properly directed to the demonstrating the facts supporting the proposed variation. In conducting the Review the Commission will also have regard to the historical context applicable to each modern award and will take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so. The Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made.
4. The modern awards objective applies to the Review. The objective is very broadly expressed and is directed at ensuring that modern awards, together with the NES, provide a ‘fair and relevant minimum safety net of terms and conditions’.
5. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is ‘necessary’ in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations.
6. There may be *no one set* of provisions in a particular modern award which can be said to provide a fair and relevant minimum safety net of terms and conditions. There may be a number of permutations of a particular modern

award, each of which may be said to achieve the modern awards objective.

7. The characteristics of the employees and employers covered by modern awards varies as between modern awards. To some extent the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations. It follows that the application of the modern awards objective may result in different outcomes between different modern awards.
8. Any variation to a modern award arising from the Review must comply with s.136 of the FW Act and the related provisions which deal with the content of modern awards. Depending on the terms of a variation arising from the Review, certain other provisions of the FW Act will be relevant. For example, Division 3 of Part 2-1 of the FW Act deals with, among other things, the interaction between the National Employment Standards (NES) and modern awards. These provisions will be relevant to any Review application which seeks to alter the relationship between a modern award and the NES. The Review will also consider whether any existing term of a modern award is detrimental to an employee in any respect, when compared to the NES (see s.55(4)).
9. Division 5 of Part 2-3 (ss. 157-161) of the FW Act deals with the exercise of powers outside 4 yearly reviews and annual wage reviews. These provisions are not relevant to the conduct of the Review but the Review process is not of itself a barrier to an application or determination being made under Division 5, provided the Commission is satisfied that the requirements of Division 5 have been met. In the event that the Review identifies an ambiguity or uncertainty or an error, or there is a need to update or omit the name of an entity mentioned in a modern award the Commission may exercise its powers under ss.159 or 160, on its own initiative. Interested parties will be provided with an opportunity to comment on any such proposed variation.
10. Division 6 of Part 2-3 contains specific provisions relevant to the exercise of modern award powers. These provisions apply to the Review. If the Commission were to make a modern award or change the coverage of an existing modern award in the Review, then the requirements set out in s.163 must be satisfied.

Determinations varying modern awards arising from the Review will generally operate prospectively and in relation to a particular employee the determination will take effect from the employee's first full pay period on or after the 'specified day'. Section 165(2) provides an exception to the general position that variations operate prospectively. A variation can only operate retrospectively if the variation is made under s.160 (which deals with variations to remove ambiguities or uncertainties, or to correct errors) *and* there are exceptional circumstances that justify retrospectivity.

Section 166 deals with the operative date of variation and determinations which vary modern award minimum wages and it also applies to the Review.

The Next Step in the Review

[6] In the award stage the 122 modern awards will be reviewed, in four sequential stages with about 30 awards in each stage. A final list of the awards allocated to each stage is set out

at Attachment A of the decision.

[7] The Commission will release a draft document setting out how it proposes to conduct the award stage of the Review in the week commencing 14 April 2014. Interested parties will be given an opportunity to comment on this document before it is finalised. A conference in relation to the awards to be reviewed in stage 1 will be held on Tuesday 13 May 2014. Directions will be issued in due course.

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- *This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.*

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