

Submission to the Inquiry into Penalty Rates and Fair Pay Ian McSparran – 14 May 2017

Penalty Rates and
Fair Pay Select Committee
Submission No. 7
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I am making this submission in an attempt to highlight serious concerns about decisions that have been made in the four yearly review of Modern Awards by the Fair Work Commission (FWC). I also have concerns regarding the role played by the Fair Work Ombudsman (FWO) in this process.

The review has resulted in significant changes to Modern Awards and altering coverage that has led to a significant reduction in take home pay for low paid employees. These reductions in take home pay have been compounded by the FWC decision to reduce Sunday and Public Holiday penalty rates.

I believe these decisions are inconsistent with the modern award objectives in the *Fair Work Act 2009* (the FW Act) but also the principles behind the creation of Modern Awards.

Background

1. **28 March 2008** Julia Gillard, then Minister for Employment and Workplace Relations, pursuant to section 576C(1) of the Workplace Relations Act 1996 (the WR Act), requested the President of the Australian Industrial Relations Commission (AIRC) to undertake award modernisation. The award modernisation request needs to be read in conjunction with Part 10A of the WR Act and there were two distinct principles (as noted below) in this request that are clearly stipulated in the award modernisation objective:

Clause 2 – the creation of Modern Awards is not intended to:

- (c) disadvantage employees;
- (d) increase costs for employers.

2. **2 September 2009** AIRC Full Bench Decision [2009] AIRCFB 800 where:

Clause 4 stipulates that the award modernisation process is not intended to disadvantage employees.

Clause 9 refers to Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the Transitional Act). This Schedule provides for the continuation of the modernisation process under Part 10A, despite the commencement of the FW Act on 1 July 2009. Item 2(5) of the Schedule is also important and states - "2 AIRC to continue and complete the modernisation process."

In *Part 3 of Schedule 5 – Avoiding Reductions in Take Home Pay* it states that "Part 10A award modernisation process is not intended to result in a reduction in take home pay."

Clause 11 states the legislature has been specifically enacted for award modernisation. Those are the provisions in:

- Part 10A of the WR Act and
- Item 2(5) of Schedule 5 of the Transitional Act

These should be added to the terms stated in clause 1 and 2 of the consolidated request (noted in point 1 above).

Clause 20 states the process is not intended to cause a reduction in take home pay. This includes for new employees. This results in a model provision to ensure there is no reduction in take home pay.

This process appears to result in a fair, balanced, stable and sustainable outcome that provides a fair minimum safety net of enforceable terms and conditions for employees.

Four Yearly Review of Modern Awards

3. On **9 December 2013**, the Hon Eric Abetz, then Minister for Employment requested the FWO assist the FWC in the four yearly review of Modern Awards with specific focus on issues in awards where there is ambiguity or lack of clarity.

Clause 160(1) of the FW Act allows the FWC to vary the award to remove ambiguity, uncertainty or to cover an error.

4. **24 January 2014** Department of Employment statement to the FWC states that:

Clause 2.3 “The Commission must use this review to ensure Modern Awards remain consistent with the Modern Awards objective”

Clause 2.6 “The government acknowledge the potential for significant changes to Modern Awards to occur as a result of this Review. With education being one of its core functions, the FWO will play an important role in ensuring that the community is made aware and has access to information about significant changes to Modern Awards arising from this process. The FWO can also provide the Commission with information about difficulties in the community in understanding Modern Awards.”

Clause 7.2 “The government supports the decision to conduct the Review by way of submissions rather than application to vary a modern award.”

The significant changes to the legal effect of clauses in Modern Awards including varying coverage disadvantages low paid employees as it results in a reduction in take home pay.

5. At a conference on **5 February 2014** the FWC outlined a process for the resolution of the jurisdictional issues canvassed in the FWO issues paper. In the transcript of these proceedings there was a potential jurisdictional issue on whether or not the FWO has the power to file draft determination in respect to awards and if the FWO has the power to vary the award [coverage].

There does not appear to be a statement or decision that clarifies this issue. There was no FWO guidance notice to explain changes to award coverage.

Who is responsible for varying an award – the FWC or the FWO?

6. **4 March 2014** the FWC Background Paper Clause 6 Note 1 ” Special criteria to changing coverage of Modern Awards or revoking Modern Awards (see sections 163 and 164)” in the FW Act gives the FWC the power to alter award coverage. Clause 163 (1) special rule about reducing coverage

7. Senator Abetz and the FWC request the FWO to assist in identifying ambiguity of particular clauses for Modern Awards including those relating to coverage. This results in Janine Webster Chief Counsel for the FWO making a submission to the Review of Modern Awards “Coverage Issues in Modern Awards” **on 24 May 2014**.

The paper uses clause 160 (1) and Clause 163 (1) in the FW Act as grounds to vary awards due to overlap which appears to have occurred in the case of employees who were covered by *The Storage Services and Wholesale Award 2010* and who are then moved to be covered by the *General Retail Industry Award 2010* resulting in a reduction in take home pay.

8. **16 August 2016** I was advised by the FWO that the submission made on the 24 May 2014 by the FWO Chief Counsel to the FWC resulted in altering award coverage for a retail Warehouse Storeman from the *Storage Services and Wholesale Award 2010* to the *General Retail Industry Award 2010*.

Award Coverage

The Storage Services – General Award 1999 was the award that applied throughout the State of Victoria to employees who were engaged in the duties of reception, handling, storage, packing and dispatch of goods.

The FWO *Pay and Conditions Guide* published on 26 February 2014 advises that these terms and conditions of employment were replaced by the *Storage Services and Wholesale Award 2010* effective from 1 July 2013.

The FWO is now enforcing the *General Retail Industry Award 2010* on employees who perform the duties mentioned above due to the Issues made in a submission paper by the FWO Chief Counsel Janine Webster to the FWC on the 24 May 2014. This is contrary to the FWO *Pay and Conditions Guide* which states a 19 year old storeman on 1 July 2013 would have been covered by *the Storage Services and Wholesale Award 2010*.

A 19 year old Retail Warehouse Level 1 Employee pay rates

Hourly Rates	Retail Award	storage Services Award	Difference
Base Rate	\$19.44	\$24.23	\$4.79
Saturday rate	\$20.99	\$33.92	\$12.93
Sunday rate	\$31.10	\$43.61	\$12.51
*Sunday rate	\$28.08	\$43.61	\$15.53
Public Holiday rate	\$42.76	\$53.30	\$10.54
*Public Holiday rate	\$38.88	\$43.30	\$14.42

*pending penalty rate decision 1 July 2017

The FWO decision to enforce the Retail Award instead of the Storage Services Award results in a \$103.44 reduction of take home pay for an 8-hour shift on a Saturday and \$100.08 reduction for an 8-hour shift on a Sunday. This would change to a reduction \$124.24 because of the FWC decision to cut Sunday penalty rates. For a 19 year old casual whose regular shifts are weekends, this results in a **\$11,839 reduction** in take home pay over a 12-month period. This is also due to adult rates beginning at 19 years in the Storage Services Award and beginning at 21 in the Retail Award.

The FWO decision to enforce the Retail Award instead of the Storage Services Award also results in changes to:

- Hours of work from a Monday to Friday roster to a seven-day roster
- Reduction in overtime payments
- Reduction of Saturday penalty rates
- Reduction in Sunday penalty rates due to the penalty rate decision
- Adult rate change from 19 to 21 years old
- Reduction in casual Saturday and Sunday rates
- Classification structure changes from 4 levels to only 2.

The FWC decision to reduce Sunday and public holiday penalty rates and the FWC/FWO decision to alter award coverage that allows the Retail Award to cover the duties stated in the Storage Services Award by way of the submission to the FWO results in a substantial reduction in take home pay for young low paid Victorian workers.

The original modernisation request was to be a balance between not disadvantaging employees or increasing cost to employers. In my opinion, the ARIC did an excellent job dealing with this difficult task. The four yearly review of Modern Awards has in my experience had the opposite effect. I believe it has failed to meet the Modern Awards objective as stated in the FW Act.

What is the Modern Award objective?

In my experience and observations, the four yearly review of Modern Awards by the FWC, with the assistance of the FWO results in:

- disadvantages to low pay employees, including woman, young workers and vulnerable low paid workers due to a reduction in take home pay
- reduction to a fair and relevant minimum safety net for terms and conditions of employment
- failure to take into account the rising living standards and ignores the needs of the low paid
- significant changes to Modern Awards that does not provide a stable and sustainable award system that is require by the FW act 2009.

In my opinion the decisions of the Fair Work Commission to alter award coverage and Sunday and public holiday penalty rates results in a distortion of the level playing field. These

decisions provide the employer with a commercial and financial advantage that disadvantages Victoria's lowest paid, award reliant workers that includes woman; single parents and from my experience young and vulnerable workers by reducing there take home pay.

If the FWC, FWO and the Federal Coalition Government believe that cutting the wages of Victoria's lowest award paid workers and lowering the minimum safety net for terms and conditions of employment when wage growth is at a historical low and the cost of living is increasing, then in my opinion they are seriously out of touch with community expectations. The Federal Reserve Bank of Australia has stated wage growth is having a drag on the economy, which in turn has a detrimental effect on the Victorian economy. It is basic economics that if you are getting paid less, you spend less.

It is my opinion, that the decisions of the FWC, which result in significant reductions in take home pay, primarily for low income workers, is potentially tantamount to wage theft.