

Senate Standing Committee on Education and Employment

QUESTIONS ON NOTICE Additional Estimates 2016 - 2017

Agency - Fair Work Commission

Department of Employment Question No. EMSQ17-003966

Senator Abetz provided in writing.

Question

FWC - AM2014/35 (correct number is AM2014/305)

Without commenting on the Commission's decision in AM2014/305, clarification is sought on some machinery matters:

1. Must the Commission conduct four yearly reviews of the modern awards pursuant to section 156 of the Fair Work Act?
2. Must the review decide whether an award achieves the Modern Awards Objective?
3. Are the Modern Award Objectives as set out in section 134 central to the review?
4. When was s134(da) inserted into the Act?
 - a. Does it specifically require consideration of rates for weekend work?
5. Please advise all the parties (if any) which were involved in AM2014/35 which made submissions calling for a two year phase in of its outcome?
6. Does the Fair Work Commission have a practice of notifying parties in advance of when decisions are going to be delivered?
 - a. If so, what is the basis of determining whether parties are to be notified?
7. In relation to AM2014/35:
 - a. When was the public notified that the Fair Work Commission would hand down its decision? Specifying the date and time?
 - b. When were the parties notified?
 - c. In relation to a & b, please specify in what manner they were notified.
 - d. Were other parties notified (either formally or informally – specifying which) of the pending decision?
 - e. In relation to each such other party, please specify how they were notified.

Answer

1. Section 156 of the *Fair Work Act 2009* (FW Act) provides:
 - (1) FWC must conduct a *4 yearly review of modern awards* starting as soon as practicable after each 4th anniversary of the commencement of this Part.
 - (2) In a 4 yearly review of modern awards, the FWC:
 - (a) must review all modern awards; and
 - ...
2. & 3. The Full Bench Decision [\[2014\] FWCFB 1788](#) dealt with the preliminary jurisdictional issues related to the review, including the scope of the review. At paragraphs [29] to [36] the Decision states (endnotes omitted):

[29] The modern awards objective applies to the performance or exercise of the Commission's 'modern award powers', which are defined to include the Commission's functions or powers under

Part 2-3 of the FW Act. As we have mentioned the Review function in s.156 is in Part 2-3 of the FW Act and so will involve the performance or exercise of the Commission's 'modern award powers'. It follows that the modern awards objective applies to the Review.

[30] Section 134(1)(da) was inserted into the FW Act by the *Fair Work Amendment Act 2013* and commenced on 1 January 2014. It is apparent from the submissions before us that the proper construction of s.134(1)(da) is a contentious issue and it is appropriate that this issue not be determined at this stage, but rather be addressed in the context of considering a specific proposal to vary a particular provision in a modern award.

[31] The modern awards objective is directed at ensuring that modern awards, together with the NES, provide a 'fair and relevant minimum safety net of terms and conditions' *taking into account* the particular considerations identified in paragraphs 134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed. The obligation to take into account the matters set out in paragraphs 134(1)(a) to (h) means that each of these matters must be treated as a matter of significance in the decision making process. As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:

"To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously discarded as irrelevant."

[32] No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[33] There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.

[34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.

[35] Section 138 of the FW Act is also relevant, it emphasises the importance of the modern awards objective in these terms:

"A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective."

[36] We deal later with the terms which may or must be included in a modern award. Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'. 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. 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.

4. Section 134(1)(da) was inserted into the FW Act by the *Fair Work Amendment Act 2013* and commenced on 1 January 2014.

a. Section 134(1)(da) states:

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

...

(da) the need to provide additional remuneration for:

- (i) employees working overtime; or
- (ii) employees working unsocial, irregular or unpredictable hours; or
- (iii) employees working on weekends or public holidays; or
- (iv) employees working shifts; and

...

5. As outlined in a Statement issued on 5 April 2017 ([\[2017\] FWCFB 1934](#)), 29 submissions about transitional arrangements were received from employer organisations, unions, governments, other interested organisations and individuals. Twelve of the 29 submissions call for a two year phase in period. These were the submissions from:

[Australian Business Industrial and the NSW Business Chamber](#)

[Australian Chamber of Commerce and Industry](#)

[Australian Federation of Employers and Industries](#)

[Australian Hotels Association and the Accommodation Association of Australia](#)

[Australian Industry Group](#)

[Australian Retailers Association and others](#)

[Australian Small Business and Family Enterprise Ombudsman
Business SA](#)

[Chamber of Commerce and Industry of Western Australia](#)

[Chamber of Commerce and Industry Queensland](#)

[National Retail Association](#)

[Pharmacy Guild of Australia](#)

Submissions in relation to AM2014/305 are generally available on the Commission website, see: [Penalty rates case - submissions](#)

6. Cases of significance are sometimes listed for decision. Whether parties are notified in advance of a decision being delivered is a matter for the discretion of the Full Bench or single Member dealing with the case.

a. The basis upon which parties will be notified is a matter for the discretion of the Full Bench or single Member dealing with the case.

7.a. The following methods were used to notify interested persons that the penalty rates matter (AM2014/305) was listed for decision at 11:00 am on 23 February 2017:

1. A notice of listing was emailed from the Chambers of Justice Ross at 11.06am on 22 February 2017 to 34 recipients from, or representing, key participants in the matter from employer and employee organisations and associations.
2. The notice of listing was published on the Commission's website on the afternoon on 22 February 2017
3. Subscribers were notified by email at 12.13pm on 22 February 2017, via the penalty announcements subscription service, that the matter was listed for decision on 23 February 2017.

4. The details of the hearing to hand down the decision were published on the Commission's hearings page late in the afternoon on 22 February 2017.
 5. A latest news item was also published on the Commission's homepage on the afternoon of 22 February 2017, providing the time and date of the decision being handed down.
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- b. See answer to 7a.
 - c. See answer to 7a.
 - d. See answer to 7a.
 - e. See answer to 7a.