

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission – Substantive Claims

Hair and Beauty Industry Award 2010
(AM2017/50)

8 MARCH 2018

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GROUP

4 YEARLY REVIEW OF MODERN AWARDS

AM2017/50 Hair and Beauty Industry Award 2010

1. On 21 February 2018, the Fair Work Commission (**Commission**) issued directions requiring the filing of written submissions and any evidence in support of the substantive variations proposed to the *Hair and Beauty Industry Award 2010* (**Award**) by 8 March 2018.
2. This submission is filed in accordance with the aforementioned directions on behalf of the Australian Industry Group (**Ai Group**) and Hair and Beauty Australia (**HABA**).

THE VARIATIONS PROPOSED

3. On 22 February 2018, Ai Group and HABA filed a draft determination that identifies the proposed variations to the Award.
4. The variations proposed are the product of extensive and detailed discussions between Ai Group, HABA and the Shop, Distributive and Allied Employees' Association (**SDA**). They reflect a consent position reached between those parties. The discussions focussed on the variations proposed by the aforementioned parties and were underpinned by a common desire to address certain anomalies arising from the rostering provisions of the Award.
5. We also understand that the variations are not opposed by the Australian Workers' Union or Australian Business Industrial and the NSW Business Chamber. No other organisation has identified themselves as an interested party for the purposes of these proceedings.

6. The effect of the proposed variations is as follows:
- a) To stipulate that the ordinary hours of a full-time employee are to be rostered such that they are averaged over a 1 – 4 week period¹, whilst preserving any alternate existing arrangements² (**the Ordinary Hours Variation**).
 - b) To clarify that clause 29.1 of the Award requires the provision of a written roster to full-time and part-time employees, which can be provided by electronic means³ (**the Roster Notification Variation**).
 - c) To clarify that the roster of a full-time or part-time employee can be changed at any time by mutual agreement between the employer and employee⁴ (**the Mutual Change Variation**).
 - d) To provide employers with an ability to alter the roster of a full-time employee for a particular day with 48 hours' notice in certain specified circumstances⁵ (**the Unilateral Change Variation**).
7. At the commencement of the current 4 yearly review of modern awards, a Full Bench of the Commission issued its *Preliminary Jurisdictional Issues Decision*⁶. Relevantly, the decision dealt with the extent to which evidence and a formal hearing may be necessary in certain circumstances: (emphasis added)

[22] ABI generally accepted that submissions in support of award variations should be founded on merit based arguments that address the relevant legislative provisions, but contended that the procedure adopted by the Commission should reflect the nature of the issues involved. In some cases this approach may require a formal hearing with the presentation of evidence sufficient to move the Commission to exercise its discretion to vary a modern award. This is likely to be the case where a major change is sought to be made to a modern award and the proposal is contested. In other cases a formal hearing or evidence may not be necessary. Two examples were given of circumstances where a formal hearing or evidence would not be necessary:

¹ Paragraph 1 of the draft determination.

² Paragraph 2 of the draft determination.

³ Paragraph 3 of the draft determination.

⁴ Paragraph 4 of the draft determination.

⁵ Paragraph 6 of the draft determination.

⁶ *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

(i) An award variation may be self-evidently necessary. The most obvious example of such circumstances arises where typographical errors or other anomalies appear in awards. During the Transitional Review, the Commission regularly accepted the notion that self-evident anomalies within awards could, of themselves, provide a basis for the making of variations.

(ii) There may be a high level of consensus from well informed industrial 'parties' which, when combined with logical and persuasive submissions, justifies the variation of an award. This consensus, together with appropriate submissions addressing the legislative framework could itself form a sufficiently persuasive basis for the Commission to exercise its discretion to vary an award. In this regard, ABI referred to the decision of Senior Deputy President Harrison in *Modern Awards Review 2012 - Road Transport and Distribution Award 2010* [2013] FWC 9805 in that case, 16 variations were made to the Road Transport and Distribution Award 2010, the majority of which were not the subject of any evidence filed in the proceedings.

[23] The Commission is obliged to ensure that modern awards, together with the NES, 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. We agree with ABI's submission that 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 be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.⁷

8. In our submission, the circumstances of the current matter are such that the matter can be determined with little formality, without a hearing or the receipt of evidence. Namely:
 - a) Major industrial parties representing employers and employees covered by the Award have, after lengthy and detailed discussions, reached a consent position. That consent position should be attributed due weight by the Commission. It reflects an outcome that is underpinned by a common desire to clarify the operation of the Award in certain respects and to introduce certain modest substantive changes that are supported and/or unopposed by the parties identified in this submission.

⁷ *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWC 1788 at [22] – [23].

- b) The changes are modest in nature and the arguments in support of them are based on various self-evident propositions of which the Commission can take notice. We identify those propositions later in this submission.
9. It is on this basis that Ai Group and HABA do not file any evidence in relation to the proposed variations.
10. If, notwithstanding our submissions, the Commission determines that the matter requires a formal hearing or that, based on the material before it, the Commission is not convinced the proposed variations should be made, we request that the matter be called on for mention/directions, such that interested parties might be heard as to an appropriate course of action.

The Ordinary Hours Variation

11. As a result of the consent position reached between Ai Group, HABA and the SDA, it is proposed that a new clause 28.4 be inserted in the Award, which stipulates that the ordinary hours of a full-time employee will be rostered to average 38 hours per week over a period of one, two, three or four consecutive weeks:

28.4 38 hour week rosters for full-time employees

A full-time employee will be rostered for an average of 38 ordinary hours per week, worked in any of the following forms:

- (a) 38 hours in one week;
- (b) 76 hours in two consecutive weeks;
- (c) 114 hours in three consecutive weeks;
- (d) 152 hours in four consecutive weeks.

12. Importantly, a new clause 28.5 has also been proposed. It will have the effect of preserving any existing arrangements that might otherwise be disturbed by clause 28.4 which, for the first time, will require that the ordinary hours of work of a full-time employee under the Award cannot be averaged for a period of over four weeks:

28.5 Notwithstanding clause 28.4, a full-time employee may be rostered to work an average of 38 ordinary hours per week in accordance with an arrangement implemented prior to [insert date of effect of Commission’s determination].

13. The proposed clause 28.5 will enable the continuation of an arrangement implemented prior to the date of effect of the proposed variations; thereby ensuring that such arrangements are not disrupted. This is important because the manner in which ordinary hours are averaged can have a bearing on when an employee is required to work ordinary hours and the manner in which an employer structures their roster.

The Roster Notification Variation

14. It is proposed that clause 29.1 of the Award be varied as follows:

29.1 The employer will provide permanent employees with a written roster (which may be by electronic means) that identifies ~~notify staff of:~~

- (a) the number of ordinary hours to be worked each week;
- (b) the days of the week on which work is to be performed; and
- (c) the commencing and ceasing time of work for each day of the week.

15. The proposed change makes clear that:

- a) The clause applies only to full-time and part-time employees (consistent with clause 13.4 of the Award).
- b) The requirement “to notify” employees of the matters listed at clauses 29.1(a) – (c) is a requirement to include those matters in a written roster, which is required to be provided pursuant to clause 29.3. That is, the variation makes clear that the obligation to “notify” under clause 29.1 and the obligation to “notify” a “roster” under clause 29.3 are not two separate obligations.

- c) The rosters may be provided by electronic means.
16. The clause proposed is necessary to achieve the modern awards objective. It will:
- a) Promote flexible modern work practices and the efficient and productive performance of work;⁸ and
 - b) Make the award simple and easy to understand.⁹
17. Accordingly, the Roster Notification Variation should be made.

The Mutual Change Variation

18. Clauses 29.2 and 29.4 of the Award deal, in inconsistent terms, with the circumstances in which the roster of a permanent employee may be varied by mutual agreement:
19. Clause 29.2 states:
- 29.2** Due to unexpected operational requirements, an employee's roster for a given day may be changed by mutual agreement with the employee prior to the employee arriving for work.
20. Clause 29.4 states:
- 29.4** Rosters may be changed at any time by mutual agreement between the employer and employee.
21. Whilst clause 29.4 provides a broadly framed ability to change rosters by agreement at any time for any reason, clause 29.2 is more confined in its application:
- a) It applies only where there is an unexpected change in operational requirements;
 - b) It enables a change only to an employee's roster for a given day; and

⁸ Section 134(1)(d).

⁹ Section 134(1)(g).

- c) The requisite agreement must be reached with an employee before they arrive at work.
22. There is a clear inconsistency and overlap between the two clauses. Indeed, it would appear that clause 29.2 has no work to do, as the circumstances in which it would operate are wholly subsumed by clause 29.4.
23. In order to remedy this apparent anomaly, and for the purposes of ensuring that the Award includes only clauses that are necessary to achieve the modern awards objective, it is proposed that clause 29.2 be deleted.
24. The proposed change will ensure that the Award is simple and easy to understand¹⁰ by removing the current inconsistency between clauses 29.2 and clause 29.4.
25. Accordingly, the Unilateral Change Variation should be made.

The Unilateral Change Variation

26. Once a roster is notified (which must occur at least 14 days in advance, pursuant to clause 29.3), the Award does not presently afford an employer any ability to change a full-time employee's roster without that employee's agreement. Rather, the roster of a full-time employee can only be changed pursuant to clauses 29.2 or 29.4 (addressed above) with the employee's consent.
27. It is in our submission self-evident that there will be circumstances in which an employer needs to alter the roster of a full-time employee due to unexpected changes in operational requirements. This could include, for example, the need to relieve an employee on unplanned leave or because of an unexpected change in customer demand. An example of the latter is the cancellation of a booking by a bridal party with little notice, which would otherwise have required the labour of multiple hairdressers and/or beauticians.

¹⁰ Section 134(1)(g).

28. We note also that the provisions applying to full-time employees in this regard are different to those that apply to part-time employees. By virtue of clause 12.8 of the Award, an employer is given some latitude to unilaterally vary the roster of a part-time employee. The reason for the distinction made between full-time and part-time employees by the Award in this regard is not apparent and, in our submission, is anomalous.

29. For these reasons, it is proposed that the following new clause 29.3 be inserted in the Award:

29.3 A full-time employee's roster for a particular day may be varied by the provision of at least 48 hours' notice if this is due to an unexpected change in operational requirements (for example, staff absences or changes in customer demand).

NOTE: Clause 29.3 is to be read in conjunction with clause 8.2 of this Award.

30. It is relevant to note that the provision proposed does not give employers an unfettered right to vary the roster of a full-time employee. Rather, the proposed clause 29.3:

a) Grants an employer the right to change the roster for a particular day. These words are taken from the current clause 29.2. They limit the ability to vary the roster to a specific day; not a wholesale change to the entire roster.

b) Requires the provision of at least 48 hours' notice. The proposal seeks to strike a balance between granting an employer the ability to respond to unexpected changes in operational requirements and any concern that might arise from respondent parties and/or the Commission that employees should have a reasonable amount of notice of a roster change. It is trite to observe that the clause does not preclude an employer from giving more than 48 hours' notice where that is practicable.

- c) Limits the ability to change the roster to circumstances in which the change is due to an unexpected change in operational requirements. As a result, there must be a legitimate unplanned or unforeseen change in the business' operational requirements in order for the clause to apply.
- d) Provides examples of the circumstances in which the clause might operate (for example, staff absences or changes in customer demand). The examples are just that; possible instances in which the clause might apply so long as all other relevant criteria are met. They are not of themselves determinative. Nonetheless, in our submission they assist the reader in ascertaining the types of circumstances in which the clause might operate.
- e) Reminds the reader to have regard to clause 8.2 of the Award, through the inclusion of the note: clause 29.3 is to be read in conjunction with clause 8.2 of this Award. Clause 8.2 is relevant because it applies where an employer proposes to change an employee's regular roster or ordinary hours of work. In such cases, the employer must consult with the employee or employees affected (and their representatives, if any) about the proposed change. Amongst other requirements, the employer must invite the employee or employees affected (and their representatives, if any) to give their views about the impact of the proposed change and give consideration to any such views. Accordingly, clause 8.2 may apply in circumstances where an employer seeks to vary the roster of a full-time employee pursuant to the proposed clause 29.3.

31. In our submission, the proposed provision is necessary to ensure that the Award achieves the modern awards objective¹¹, taking into account:

- a) The provision of a safety net that is *fair* to employers.¹² It is not fair that an employer does not have any ability to change the rosters of full-time

¹¹ Section 138 of the Act.

¹² Section 134(1) of the Act.

employees under the Award. Such inflexibility is self-evidently unworkable and costly.

- b) The relative living standards and needs of the low paid.¹³ To the extent that the Award covers any low paid employees, the proposed clause will not adversely impact their relative living standards or needs in the relevant sense.
- c) The need to encourage collective bargaining.¹⁴ The modest change sought is, in our submission, highly unlikely to remove any incentive to bargain.
- d) The need to promote social inclusion through increased workforce participation.¹⁵ This is a neutral consideration in this matter.
- e) The need to promote flexible modern work practices and the efficient and productive performance of work.¹⁶ This factor self-evidently supports the variation proposed. The changed proposed will improve efficiency and the productive performance of work by providing employers with greater scope to manage their rosters and arrange them such that they align with operational requirements.
- f) The need to provide additional remuneration for employees performing work in various circumstances.¹⁷ This to a neutral consideration in this matter.
- g) The principle of equal remuneration for work of equal and comparable value.¹⁸ This is a neutral consideration in this matter.

¹³ Section 134(1)(a) of the Act.

¹⁴ Section 134(1)(b) of the Act.

¹⁵ Section 134(1)(c) of the Act.

¹⁶ Section 134(1)(d) of the Act.

¹⁷ Section 134(1)(da) of the Act.

¹⁸ Section 134(1)(e) of the Act.

- h) The likely impact of any exercise of modern award powers on business, including (but not limited to) productivity, employment costs and the regulatory burden.¹⁹ This consideration supports the grant of the proposed variation. It will provide employers with greater flexibility and scope to deal with unexpected operational changes. As a result, it will reduce employment costs and improve efficiency and productivity.
- i) The need to ensure a simple, easy to understand, stable and sustainable modern awards system.²⁰ The proposed change is simple and easy to understand. In particular we point to the proposed 'note' that refers to clause 8.2 of the Award and the inclusion of the examples.
- j) The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy²¹ is difficult to measure but, in our view, would not be adversely impacted by the proposed change.

32. Accordingly, the Unilateral Change Variation should be made.

¹⁹ Section 134(1)(f) of the Act.

²⁰ Section 134(1)(g) of the Act.

²¹ Section 134(1)(h) of the Act.