

Fair Work Commission: 4 yearly review of modern awards

**AM2017/60 - 4 YEARLY REVIEW OF MODERN
AWARDS - GENERAL RETAIL AWARD 2020**

FURTHER SUBMISSIONS

AUSTRALIAN BUSINESS INDUSTRIAL

AND-

THE NSW BUSINESS CHAMBER LTD

11 NOVEMBER 2020

1. BACKGROUND

- 1.1 This submission is filed on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**).
- 1.2 This submission is filed in accordance with the Directions issued in a Statement of the Fair Work Commission (**Commission**) dated 8 October 2020 ([2020] FWCFB 5371) (the **Statement**).
- 1.3 The Commission directed the parties to file written submissions, by 4:00pm 11 November 2020, in respect of the following matters:
- (a) responses to questions posed by the Commission in the Statement; and
 - (b) the findings that should be made based in the expert report of Dr O'Brien and the survey report.

1.4 We set out our submissions below.

2. QUESTION ONE - DOES ANY PARTY TAKE ISSUE WITH THE SUMMARY OF THE LEGISLATIVE FRAMEWORK AT [7] – [22]?

2.1 Substantively no.

2.2 By way of minor technical observation, paragraph [7] refers to s156 of the *Fair Work Act 2009* (Cth) in the present tense. The section has been repealed.

3. QUESTION TWO: DOES ANY PARTY TAKE ISSUE WITH THE SUMMARY OF THE EXPERT REPORT AND DR O'BRIEN'S EVIDENCE AT [26] – [33] ABOVE?

3.1 No.

4. QUESTION SEVEN: UNDER THE RETAIL AWARD WHAT IS AN APPRENTICE PAID IF THEY ARE 19 YEARS OLD ON THE COMPLETION OF THEIR APPRENTICESHIP?

4.1 On text of the Award, the employee would receive the relevant junior rate percentage.

4.2 ABI submits that, as a general proposition, if an award states that juniors get a % of the adult rate, this applies to all juniors regardless of classification or qualification. There are some exceptions (such as the Manufacturing Award) where trade qualified juniors are explicitly entitled to adult rates. This does not apply in the Retail Award.

5. QUESTION EIGHT: WHAT IS THE MINIMUM AWARD RATE FOR A 20 YEAR OLD TRADESPERSON UNDER THE RETAIL AWARD? IS THIS RATE THE SAME AS THE C10 RATE IN THE MANUFACTURING AND ASSOCIATED INDUSTRIES AND OCCUPATIONS AWARD 2020 (\$862.50)?

5.1 A 20 year old, with a trade qualification, who is required to use their qualification in the course of their work will be employed, at a minimum, as a Retail Employee Level 4.

5.2 The rate of pay for this individual will depend on whether the tradesperson has been employed for more than 6 months by their current employer. If yes, then the tradesperson will be paid the same rate as a C10 in the *Manufacturing and Associated Industries and Occupations Award 2020*.

5.3 If the 20 year old, has not been employed by their current employer for a period greater than 6 months, then they will be paid \$776.25 or \$20.43 per hour (on the basis that they are a permanent employee).

6. QUESTION TEN: ABI IS ASKED TO ELABORATE ON THE SUBMISSION AT PARA 7.8, AS THE USE OF DOUBLE NEGATIVES OBSCURES THE MEANING OF THE SUBMISSION.

6.1 Removing the double negatives and restating this submission directly, the practical effect of the ABI's submission at [7.8] is as follows:

1 - A junior employee engaged above Level 1 may require more supervision or oversight than an adult employee in the same position.

Put another way, ABI submit that merely because a junior employee is engaged above level 1, does not mean necessarily they are equivalent to an adult employee doing the same job (particularly in relation to supervision).

2- There are merit grounds to incentivise employers to engage junior employees at levels higher than Level 1.

ABI submits that providing increased responsibility and seniority to capable and interested junior employees in the workplace is entirely appropriate and worthy of encouragement.

3- A junior employed at levels above Level 1 in the Award will still enjoy additional monetary compensation in recognition of higher skills competencies and responsibilities.

Obviously, regardless of a junior percentage being applied, a junior employee who is 'promoted' will receive additional monetary compensation at a higher classification level.

6.2 ABI acknowledges that these three submissions are not supported by evidence in these proceedings. This fact had informed ABI's decision to put its original submission at [7.8] in the way that it initially did. ABI's intent in its submission at [7.8] was only to deny three submissions which appear to have been put by the SDA in support of its claim.

7. QUESTION ELEVEN - CONCERNING S134(1)(C) OF THE FAIR WORK ACT

7.1 ABI accepts the Full Bench's observation that subsequent AWR decisions have confirmed that 'promoting social inclusion' (within the meaning of ss.134(1)(c) and 284(1)(b)) is confined to obtaining employment *generally* and that no particular preference is afforded to obtaining employment for junior employees.

7.2 ABI submits however that the encouragement of obtaining employment for junior employees is obviously a relevant consideration to obtaining employment *generally*.

7.3 ABI accepts that encouraging junior employment *specifically* may, in some cases, not necessarily affect employment generally given that the encouragement of junior employment at levels 2 and above may simply result in the substitution of an adult employee for a junior employee.

7.4 ABI submits that this is not universal however.

7.5 ABI submits that should junior rates be removed from above Level 1, this may serve to reduce employment generally at those levels, given the higher wage costs providing a disincentive to engage an employee at the higher level.

8. QUESTION TWELVE: DOES ABI TAKE ISSUE WITH ANY ASPECT OF THE SUMMARY OF ITS SUBMISSIONS

8.1 No.

9. FINDINGS THAT SHOULD BE MADE ON THE BASIS OF THE OBRIEN REPORT

9.1 To the extent that the O'Brien Report is relied upon to demonstrate the number of junior employees engaged at levels 2 and above (the '**Relevant Figure**'), the report underestimates the Relevant Figure on a number of bases including that:

- (a) it excludes junior employees performing clerical functions at the retail establishment and clerks at levels 4-8;
- (b) it is possible that some of those junior employees who identified themselves as 'store persons' operate forklifts (and are level 2) and have been improperly excluded;
- (c) junior employees engaged as senior salespersons not performing supervisory duties have not been included; and
- (d) it does not include junior employees under 15.

9.2 It is not possible to identify with any certainty the precise effect these issues have on the Relevant Figure. ABI concedes that a minority of junior employees are engaged above Level 1.

10. FINDINGS THAT CAN BE MADE ON THE BASIS OF THE SURVEY

10.1 As noted at 2.1 of the Survey Analysis - '*Due to the small sample size, results should be viewed as indicative only and cannot be extrapolated across the industry as a whole*'.

10.2 Review of the actual data arising from the survey confirms this with extremely low figures being recorded in the relevant metrics for example:

- (a) the response rate was limited to 125 enterprises; and
- (b) those who responded to the survey collectively identified 17 employees were employed at levels above level 1 under the Award;

10.3 If the Full Bench is minded to take any finding from the survey, it should limit such findings to matters which are in any event uncontroversial such as:

- (a) the majority of junior employees are employed at Level 1;
- (b) there is a minority of junior employees at Levels 2 and above.

Submission made on behalf of Australian Business Industrial and the NSW Business Chamber Ltd

11 November 2020