

***FAIR WORK (TRANSITIONAL PROVISIONS AND CONSEQUENTIAL
AMENDMENTS) ACT 2009***

Award Modernisation 2011

Termination of Modernisable Instruments

Matter Number: AM2010/53

Submission by the
Chamber of Commerce and Industry Western Australia

4 March 2011

Introduction

1. The Chamber of Commerce and Industry of Western Australia (CCIWA) is the leading business association in Western Australia (WA).
2. It is one of the largest organisations of its kind in Australia, with a membership of over 5,800 organisations in all sectors, including:
 - manufacturing;
 - resources;
 - agriculture;
 - transport;
 - communications;
 - retailing;
 - hospitality;
 - building and construction;
 - community services; and
 - finance.
3. Most of CCIWA's members are private businesses, although CCIWA also has members in the not-for-profit sector and the government sector.

4. CCIWA members employ a significant number of employees:
 - nearly 73 per cent (over 4100 members) employ up to 19 employees;
 - 21 per cent (nearly 1200 members) employ between 20 and 99 employees; and
 - six per cent (over 340 members) employ over 100 employees.
5. CCIWA members are located in all geographical regions of WA.

Background

6. On 22 December 2010 the Full Bench of Fair Work Australia (FWA) issued a decision¹ in relation to the termination of modernisable instruments.
7. The Full Bench found that FWA is required to terminate all modernisable instruments as soon as practicable after the completion of the award modernisation process, subject to certain exceptions outlined in the *Fair Work (Transitional Provisions and Consequential Amendment) Act 2009* (the TPCA Act).
8. The Full Bench noted that a large number of questions of interpretation and application had not been dealt with adequately or passed without comment in many submissions, and therefore allowed a further period of time for interested persons and bodies to consider the matters covered in the decision of 22 December 2010.
9. CCIWA supports the approach taken by the Full Bench in seeking to terminate modernisable instruments.
10. CCIWA submits that there are two WA specific modernisable instruments that must be included in the termination process. These are the *General Order on Termination, Change and Redundancy NAPSA* and the *Minimum Conditions of Employment Act (WA) 1993 NAPSA*.

¹ Award Modernisation [2010] FWA 9916 (22 December 2010)

The formation of modernisable instruments

11. Part 2, schedule 5 of the TPCA Act sets out the *Workplace Relations Act 1996* (WR Act) award modernisation process, including the variation and termination of certain transitional instruments to take into account the commencement of new modern awards.
12. The process for the variation and termination of certain transitional instruments is outlined at item 3, part 2, schedule 5 of the TPCA Act. The Full Bench dealt with the construction of item 3 in its decision of 22 December 2010.
13. Item 3(2) requires that FWA terminate any remaining modernisable instruments as soon as practicable after modern awards have come into operation.
14. 'Modernisable instruments' are defined in Item 3(1)(a) as:

- i. "award-based transitional instruments;*
- ii. transitional APCSSs."*

15. 'Award based transitional instruments' are defined at item 2(5)(a), part 2, schedule 3 of the TPCA Act as:

"awards, State reference transitional awards or common rules, and notional agreements preserving State awards."

16. Notional agreements preserving State awards (NAPSAs) formed on the commencement of the *Workplace Relations Act (Work Choices) Amendment Act 2005* (Work Choices)². Under section 31, part 3, schedule 8 of the WR Act a NAPSA is taken to come into operation in respect of a business or part of a business if:

"immediately before the reform commencement, the terms and conditions of employment of one of more employees in a single business or a part of a single business:

- (a) were not determined under a State employment agreement;*
and
- (b) were determined, in whole or in part, under a State award or a State or Territory industrial law."*

² 27 March 2006

17. On 13 July 2010 FWA prepared a document listing modern awards and related award-based transitional instruments. The list contained industry/occupation award-based transitional instruments which are potentially affected by award modernisation, as well as links to transitional awards to the extent that they are State reference transitional awards. The list was last updated on 7 January 2011.
18. CCIWA submits that the list must be amended to include the *General Order on Termination, Change and Redundancy (WA) NAPSA* and the *Minimum Conditions of Employment Act NAPSA*.

General Order on Termination, Change and Redundancy

19. On 1 June 2005 the *General Order on Termination, Change and Redundancy 2005* (TCR GO) issued by the Western Australian Industrial Relations Commission (WAIRC) came into effect, and applied to all employees as defined by the *Industrial Relations Act 1979 (WA)* throughout WA³.
20. On the Work Choices reform commencement date a NAPSA formed for those employees whose terms and conditions of employment were determined, in whole or in part, under a State award or State or Territory industrial law.
21. A State award is defined at Section 4 of the WR Act as:

“an award, order, decision or determination of a State industrial authority.”

22. A NAPSA therefore formed for employees who, immediately prior to the reform commencement date, were covered by the TCR GO. As the TCR GO applied to all employees in WA a NAPSA would have formed for each employee employed in WA at 27 March 2006 (TCR GO NAPSA).
23. As a NAPSA is included in the definition of ‘award based transitional instruments’ under item 3, part 2, schedule 5 of the TPCA, it follows that the TCR GO NAPSA is a ‘modernisable instrument’ for the purposes of the TPCA Act.

Minimum Conditions of Employment Act NAPSA

24. In November 1993 the WA State Parliament passed the *Minimum Conditions of Employment Act 1993* (MCE Act). The MCE Act applied to all employers and employees in WA whether they were covered by a common law

³ Except for employees who held office for which the remuneration payable is determined or recommended under the *Salaries and Allowance Act 1975 (WA)*.

employment contract, Workplace Agreement, Employer-Employee Agreement or State award.

25. On the Work Choices reform commencement date a NAPSA formed for those employees whose terms and conditions of employment were determined, in whole or in part, under a State award or State or Territory industrial law.

26. Section 4 of the WR Act defines a State or Territory industrial law as including:

“an Act of a State or Territory that applies to employment generally and has one or one or more of its main purpose...

(ii) providing for the determination of terms and conditions of employment.”

27. This definition of State or Territory industrial law therefore extends to include the MCE Act.

28. A NAPSA therefore formed for employees who, immediately prior to the Work Choices reform commencement date, were covered by the MCE Act. Therefore the MCE Act NAPSA would have formed for all employees who, immediately before the reform commencement date, were covered by a common law employment contract, Workplace Agreement, Employer-Employee Agreement or State award.

29. As a NAPSA is included in the definition of ‘award based transitional instruments’ under item 3, part 2, schedule 5 of the TPCA, it follows that the Min Con NAPSA is a ‘modernisable instrument’ for the purposes of the TPCA Act.

Modernisable instruments under the TPCA Act

30. The above sections outline the process by which two NAPSAs formed for all employees in WA who were employed at the Work Choices reform commencement date: the TCR GO NAPSA and the MCE Act NAPSA.

31. Item 29(1), part 5, schedule 3 of the TPCA provides that if a modern award (other than the miscellaneous modern award) that covers an employee, comes into operation, then an award-based transition instrument ceases to cover (and can never again cover) the employee.

32. As a result, those employees in WA who are covered by a modern award will no longer be covered by either the TCR GO NAPSA or the MCE Act NAPSA.

33. However, those employees in WA who are not covered by a modern award will continue to be covered by the TCR GO NAPSA and the MCE Act NAPSA until the instruments terminate on 31 December 2013, or are terminated by FWA at an earlier date.

Fair Work Australia action

34. In its decision of 22 December 2010 the Full Bench of Fair Work Australia considered the terms of the TPCA Act that provide for the variation and termination of modernisable instruments.
35. The Full Bench concluded that item 3(2), part 2, schedule 5 of the TPCA Act provides for all of the remaining modernisable instruments to be terminated as soon as practicable once the modern award process has been completed⁴.
36. CCIWA supports the termination of all remaining modernisable instruments (other than those excluded by item 3(3), part 2, schedule 5 of the TPCA Act).
37. It has been established that NAPSAs formed for both the TCR GO and the MCE Act.
38. CCIWA submits that these NAPSAs must be included in the termination process by FWA.

Impact

39. At present, the TCR GO NAPSA and the MCE Act NAPSA apply only to employees in WA who are employed by an employer who was in operation at the Work Choices reform commencement date and who are not covered by a modern award.
40. The termination of these two modernisable instruments will impact on this group of employees in two areas, access to unfair dismissal for high income earners and coverage of the *Miscellaneous Award 2010* (Miscellaneous Award).

Access to unfair dismissal for high income earners

41. The *Fair Work Act 2009* (the FW Act) provides at section 382 that a national system employee is protected from unfair dismissal at a time if, at that time

⁴ Award Modernisation [2010] FWA 9916 (22 December 2010) Para 15

the person has completed the minimum employment period, and one of the following apply:

- i. “a modern award covers the person;*
- ii. an enterprise agreement applies to the person in relation to the employment;*
- iii. the sum of the person’s annual rate of earnings, and such other amounts (if any) worked out in relation to the person in accordance with the regulations is less than the high income threshold”.⁵*

42. On 13 April 2010 FWA issued an important decision, *Midway*⁶, finding that an employee who earned in excess of the high income threshold⁷ was eligible to access the unfair dismissal jurisdiction because he was covered by the TCR GO NAPSA.

43. The TPCA Act provides that the reference to ‘modern award’ in section 382 of the FW Act includes award-based transitional instruments. As a NAPSA is an award-based transitional instrument, the employee was deemed to be covered by a modern award, and therefore permitted to make an unfair dismissal claim.

44. As a result of this decision, all employees in WA who have served the minimum notice period have access to unfair dismissal.

45. This is clearly at odds with the intention of the legislation. An exemption for high income earners was included in the legislation, so that those employees who are ‘award free’ and who earn in excess of the high income threshold cannot make application for an unfair dismissal claim.

46. Once the TCR GO NAPSA and MCE Act NAPSA have been terminated by FWA an employee who earns in excess of the high income threshold and who does not then fall within the scope of the Miscellaneous Award will be excluded from making an unfair dismissal claim under the FW Act.

Coverage of the Miscellaneous Award

47. Following the reasoning of the *Midway* decision, no employee in WA may be covered by the Miscellaneous Award if they were employees of an employer who was in operation at the Work Choices commencement date. Employees in WA will either be covered by a modern award, or a transitional instrument.

⁵ Currently at \$113,800.

⁶ Mr Timothy Eric Atkinson v Midway Community Care Inc [2010] FWA 2907 (13 April 2010)

⁷ The threshold was \$108,300 at the time of the decision.

48. Item 29 of the TPCA deals with coverage of modern awards and award-based transitional instruments. Sub item (1) provides that:

“If a modern award (other than the miscellaneous modern award) that covers an employee, or an employer or other person in relation to the employee, comes into operation, then an award-based transitional instrument ceases to cover (and can never again cover) the employee, or the employer or other person in relation to the employee.”

49. Sub item (2) deals specifically with the Miscellaneous Award, providing that:

“While an award-based transitional instrument that covers an employee, or an employer or other person in relation to the employee, is in operation, the miscellaneous modern award does not cover the employee, or the employer or other person in relation to the employee.”

50. The termination of the TCR GO NAPSA and the MCE Act NAPSA will allow employees in WA to be covered by the Miscellaneous Award if they fit within its scope.

Conclusion

51. The Full Bench decision of 22 December 2010 established that FWA is required to terminate all modernisable instruments that are not excluded by item 3(3), part 2, schedule 5 of the TPCA Act.

52. It has been established NAPSAs formed for the TCR GO and the MCE Act, which covered all employees of employers who were in operation at the Work Choices reform commencement date.

53. Both NAPSAs fall within the definition of ‘modernisable instrument’ under the TPCA Act.

54. The decision of the Full Bench requires FWA to terminate both the TCR GO NAPSA and the MCE Act NAPSA.