

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *Re: Making of a modern award - General Employees (Queensland Government Departments) and Other Employees Award - State 2015* [2015] QIRC 169

PARTIES: **State of Queensland (Office of Industrial Relations, Queensland Treasury)**

Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland

Queensland Services, Industrial Union of Employees

Queensland Teachers Union of Employees

Together Queensland, Industrial Union of Employees

The Australian Workers' Union of Employees, Queensland

CASE NO: MAP/2015/1

PROCEEDING: Making of a modern award

DELIVERED ON: 18 September 2015

HEARING DATE: 2 September 2015

MEMBERS: Deputy President O'Connor
Deputy President Kaufman
Industrial Commissioner Neate

ORDERS:

- 1. That the *General Employees (Queensland Government Departments) and Other Employees Award – State 2015* be made pursuant to s 140CE(1)(a) of the *Industrial Relations Act 1999* and operate from 18 September 2015.**
- 2. That the *Employees of Queensland Government Departments (Other than Public Servants) Award – State 2012; Forestry Employees’ Award – Department of Agriculture, Fisheries***

and Forestry 2012; Rabbit Board Employees Award - State 2012 are repealed on and from 18 September 2015, subject to the provisions of s 824 of the Act.

3. That the *Cafe Restaurant and Catering Award - State (Excluding South-Eastern Queensland) 2012; Hospitality Industry - Restaurant, Catering and Allied Establishments Award - South-Eastern Division 2012* and the *Motoring Services Award - South-Eastern District 2012*, to the extent they apply to employees of employers covered by the *General Employees (Queensland Government Departments) and Other Employees Award - State 2015*, are repealed on and from 18 September 2015, subject to the provisions of s 824 of the Act.

CATCHWORDS:

MAKING OF A MODERN AWARD - Section 140C(1) of the *Industrial Relations Act 1999* - Request from the Treasurer, Minister for Employment and Industrial Relations and Minister for Aboriginal and Torres Strait Islander Partnerships - *General Employees (Queensland Government Departments) and Other Employees Award - State 2015* - Modern Award made.

CASES:

Industrial Relations Act 1999, Chapter 5, Division 2, ss 140BB, 140C(1), 140CE, 687, 824
Public Service Act 2008, ss 52, 53, 54

Together Queensland Industrial Union of Employees and Others v State of Queensland (Chief Executive of the Public Service Commission) (AR/2013/4) - Decision
 <<http://www.qirc.qld.gov.au>>

APPEARANCES:

Mr C.J. Murdoch, Counsel instructed by the State of Queensland (Office of Industrial Relations, Queensland Treasury)
 Mr M. Thomas for Together Queensland, Industrial Union of Employees
 Mr B. Watson for The Australian Workers' Union of Employees, Queensland

Mr S. Ong for United Voice, Industrial Union of Employees, Queensland

Ms R. Huskie for the Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland

Ms K. Roy for the Queensland Teachers Union of Employees

Decision

- [1] The Queensland Industrial Relations Commission ("the Commission") recommenced the award modernisation process following the passing of amendments to the *Industrial Relations Act 1999* ("the Act")¹ and the issuing of a variation to the existing Ministerial Request (the Consolidated Request) on 17 July 2015.
- [2] Section 140BB of the Act sets out the Commission's Award Modernisation functions, as follows:

"140BB Commission's award modernisation function

- (1) The functions of the commission include carrying out a process (**award modernisation process**) to reform and modernise pre-modernisation awards.
- (2) In performing its functions under this part, the commission must have regard to the following factors -
 - (a) promoting the creation of jobs, high levels of productivity, low inflation, high levels of employment and labour force participation, national and international competitiveness, the development of skills and a fair labour market;
 - (b) the need to help prevent and eliminate discrimination in employment;
 - (c) protecting the position in the labour market of young people, employees engaged as apprentices or trainees and employees with a disability;
 - (d) the needs of low-paid employees;
 - (e) the need to promote the principle of equal remuneration for work of equal value;
 - (f) the need to help employees balance their work and family responsibilities effectively and to improve retention and participation of employees in the workforce;
 - (g) the safety, health and welfare of employees;

¹ See *Industrial Relations (Restoring Fairness) and Other Legislation Amendment Act 2015* (Qld).

- (h) the Queensland minimum wage;
 - (i) the desirability of reducing the number of awards operating under this Act; and
 - (j) the representation rights of organisations and associations under this Act."
- [3] In accordance with Chapter 5, Part 8, Division 2 of the Act (i.e. the Modernisation of Awards provisions of the Act) and the Consolidated Request under s 140C(1) - Award Modernisation by the Treasurer, Minister for Employment and Industrial Relations and Minister for Aboriginal and Torres Strait Islander Partnerships, the Award Modernisation Team ("the AMOD Team") of the Commission has prepared an Exposure Draft of a proposed *General Employees (Queensland Government Departments) and Other Employees Award* ("the Proposed Award").
- [4] The State of Queensland and the Unions provided a draft Proposed Award to the AMOD Team on 3 August 2015. The draft Proposed Award was presented as a consent position between the Employer (the State of Queensland) and Union parties.
- [5] On 20 August 2015, Deputy President Bloomfield referred a finalised version of the Proposed Award to the Vice President for referral to a Full Bench of the Commission.
- [6] The Vice President referred the Proposed Award to this Full Bench for hearing and the matter was listed and heard on 2 September 2015.
- [7] The State of Queensland and the Unions raised the following three objections to the Proposed Award:
- 1. the non-inclusion of references to directives in the GEOE Award;
 - 2. the non-inclusion of subclause (b) to Schedule 7; and
 - 3. the non-inclusion of Right of Entry provisions.
- [8] After considering the draft consent position, an Exposure Draft was issued by the AMOD Team on 7 August 2015.

No reference to directives

- [9] The AMOD Team's Exposure Draft did not contain references to directives made under ss 54 and 55 of the *Public Service Act 2008*² but it did contain, at clause 5 of the draft, the following:

"The QES and minimum safety net of conditions contained in this Award may be supplemented or otherwise impacted, but not diminished, by public service directives made pursuant to section 53 or section 54 of the Public Service Act 2008. As such, chief executives and employees covered by this Award should

² See *Together Queensland Industrial Union of Employees and Others v State of Queensland (Chief Executive of the Public Service Commission)* (AR/2013/4) - Decision <<http://www.qirc.qld.gov.au>>.

consider the content of directives published by the Public Service Commission on its website (www.psc.qld.gov.au/publications/directives.aspx) to establish whether a particular directive supplements or replaces a comparable condition of employment contained in this Award."

[10] The Consolidated Request deals with the inclusion of directives at paragraph 25:

"Certain rulings made under section 53 and 54 of the Public Service Act 2008 provide enforceable conditions of employment for many public service employees. The Commission is requested to include references to relevant directives in a modern award where a reference to that directive appeared in a relevant pre-modernisation award."

[11] Further, the Request provides the following at paragraph 2:

"Award modernisation is not intended to reduce or remove employee entitlements and conditions from what is available in pre-modernisation awards..."

and

"...the Commission must also have due regard to any agreement reached by the parties on a particular matter for inclusion in a modern award"

[12] The Full Bench was also referred to and considered s 52 of the *Public Service Act 2008* and s 687 of the Act, which relevantly provide as follows:

"52 Relationship between directives and industrial instruments

- (1) This section applies if a directive deals with a matter all or part of which is dealt with under an industrial instrument of the IRC.
- (2) A directive of the commission chief executive prevails over an industrial instrument, unless a regulation provides otherwise.

Note -

See however, the *Industrial Relations Act 1999*, section 687 (Conflict between industrial instruments etc. and statutory decision).

- (3) An industrial instrument prevails over a directive of the industrial relations Minister, unless the directive provides otherwise.
- (4) In this section -

directive includes a decision made in the exercise of a discretion under a directive."

"687 Conflict between industrial instruments etc. and statutory decision

- (1) This section applies if there is an inconsistency between -

- (a) any of the following directives -
 - (i) a directive under the *Public Service Act 2008* made by the chief executive of the Public Service Commission that is the subject of a regulation under section 52(2) of that Act;
 - (ii) a directive under the *Public Service Act 2008* made by the Minister administering this Act;
 - (iii) a directive under the *Ministerial and Other Office Holder Staff Act 2010* that is the subject of a regulation under section 28(2) of that Act; and
 - (b) an award, industrial agreement, certified agreement or decision of the commission (the **industrial instrument**).
- (2) If the commission decides that the subject matter of the directive is within its jurisdiction, the industrial instrument prevails to the extent of the inconsistency.
- (3) Subsection (2) applies to a directive of the Minister, unless the directive otherwise provides.
- (4) In this section -

directive includes a decision made in the exercise of a discretion given in a directive."

Schedule 7

[13] Under the *Employees of Queensland Government Departments (other than Public Servants) Award - State 2012* ("OPS Award"), certain Directives apply to discrete categories of employees. These provisions are found in Schedules 3 and 5 of the OPS Award.

[14] Whilst the AMOD Team retained reference to these Directives, they included, in Schedule 7 of the Proposed Award, the following provision:

"The terms and conditions of employment of the directives specified in the table below shall apply to the classifications of employees in the departments, classifications, groups or areas listed herein, until 18 September 2017 after which, where a directive about the matters contained in column 2 covers an employee, the provisions of the directive apply to the employee."

[15] The categories of employees referred to in Schedule 7 are not covered by any directive. Their entitlement to the entitlements provided by directives are due to the force of the pre-modernisation awards by which they are covered.

[16] Schedule 7 was designed to recognise the "Award entitlement" which certain employees currently enjoy and to operate as a transitional provision during which time

the State of Queensland can act to put in place alternative arrangements, whether by means of an amendment to the relevant Directives or certified agreement.

Requirements for review of relevant modern award

[17] Chapter 20, Part 20 of the Act includes s 842 which relevantly provides:

"(2) ... the commission must vary the relevant modern award to include a provision that was in a relevant pre-modernisation award about...

(d) right of entry; ..."

(3) For subsection (2), the commission may amend the provision for insertion in the relevant modern award as the commission considers appropriate having regard to—

(a) the desirability of a modern award not duplicating provisions of the Queensland Employment Standards; and

(b) the modern award objectives under section 140D; and ..."

Right of entry

[18] The AMOD Team attempted to come to an agreed position with all relevant parties on the terms of a provision to be included in all modern awards of the Commission dealing with directives. These include those modern awards made prior to the enactment of the *Industrial Relations (Restoring Fairness) and Other Legislation Amendment Act 2015*, as well as pre-modernisation awards which are still to be modernised. Such an exercise was intended to ensure compliance with the provisions of s 842(2)(d) of the Act.

[19] Despite productive discussions, the AMOD Team was not able to come to an agreed position which would overcome its concerns about including provisions in a modern Award of the Commission which, on their face, appear to be inconsistent with similar provisions already contained in ss 372 and 373 of the Act, which deal with right of entry.

[20] We accept the assurance of the State of Queensland that the proposed clause is not inconsistent with the provisions of the Act. On our reading of the two provisions that seems to be correct.

[21] During the course of submissions we indicated that it was our view that cl 34(b)(iii) in the right of entry provision in the Proposed Award: "A person must not obstruct or hinder any authorised industrial officer exercising their right of entry." Is consistent with the Act.

[22] The parties agreed that all other provisions of the proposed clause would mirror the provisions of the Act.

- [23] We indicated that we would make the award with the inclusion of clause 34(b)(iii), but that otherwise the right of entry clause would adopt the wording of the Act, with necessary adaptations.
- [24] After hearing the parties, the Full Bench on 8 September 2015 issued the following Statement:

"STATEMENT

1. On 2 September 2015 we expressed a preliminary view to the effect that we would include references to directives in the new award, that we would remove sub-clause (b) of Schedule 7 and that we would include a right of entry clause in the award in similar terms to those proposed by the parties.
2. We consider that clauses such as clause 10(b) which reads: "Where a directive about redundancy arrangements covers an employee, the entitlements prescribed in the directive apply to the employee [to] the extent they provide a more generous entitlement" should be included in the award.
3. Such a clause does not create rights or entitlements. It merely states the effect of the operation of s 52 of the *Public Service Act 2008* and s 687 of the *Industrial Relations Act 1999*.
4. As submitted by Mr C Murdoch of Counsel, who appeared for the State of Queensland, the utility of such a clause is as a pointer to the reader that there exists additional entitlements in relation to the relevant subject matter that are not terms and conditions of the award. This is consistent with clause 25 of the Minister's Consolidated Request of 17 July 2015, which requests the Commission to include references to relevant directives in a modern award where a reference to that directive appeared in a relevant pre-modernisation award. Given that the purpose of such references to directives is to draw the reader's attention to their existence, we consider it more appropriate to refer to them as notes, rather than as clauses of the award.
5. The Schedule 7 matters appear in relevant pre-modernisation awards. However, Schedule 7 is of a different character to clauses such as 10(b). Its intent is to provide to the classes of employees listed in the first column, the benefits of the directives or parts of directives listed in the second column. As we understand Mr Murdoch's submissions, the listed directives do not presently extend to those classes of employees. It is only by operation of the relevant pre-modernisation awards that the affected employees obtain the benefit of the directives. We understand that it is the intention of the Government that the relevant directives will be amended to apply to those employees.
6. The AMOD Team agreed to include Schedule 7 on that basis and proposed a "sunset" clause which would result in the schedule ceasing to operate two years after the making of the award. This was to provide ample time for the relevant directives to be amended.

7. The parties argued against the inclusion of the sunset clause on the basis that once the Schedule ceased to operate there would be no pointer to the existence of those over award entitlements, in contrast with clauses such as 10(b).
8. It was for this reason that we agreed that Schedule 7 should remain a part of the award and that there should be no sunset clause. Its removal, of course, would have the effect of denying the benefit of those directives to the relevant classes of employees in the event that they are not amended so as to cover them.
9. However, Schedule 7 performs two roles. It creates rights and it acts as a pointer to directives once they extend to the relevant employees. It is for the second reason that we considered it not appropriate to include sub-clause (b) which would have had the effect of removing Schedule 7 after two years.
10. It is not, in our view, generally appropriate that an award create rights by incorporation of the provisions of instruments created by others. In the proper exercise of its arbitral powers the Commission must consider the appropriateness of the terms and conditions of employment that are to apply to the persons covered by the award it makes. To incorporate the terms and conditions of directives or other instruments, as they may be from time to time, is an abrogation of the functions and responsibilities of the Commission.
11. We consider that what was said by a Full Bench of the Commission in *Together Queensland, Industrial Union of Employees and Others v State of Queensland (Chief Executive of the Public Service Commission)* (AR/2013/4), albeit in a different context, is apposite.
12. The situation here is different, in particular because the parties consent to the inclusion of Schedule 7 without a sunset clause and we are dealing with an Award Modernisation Request of the Minister that requires that in the making of modern awards, the Commission is requested to include references to relevant directives.
13. Nevertheless, given the terms of the Request, as well as the consent of the parties, we consider it appropriate to provide that the terms of the relevant directives be terms of the award for a period of time sufficient to allow the directives to be amended so as to include the classifications set out in column 1 of Schedule 7, or for the making of certified agreements providing those benefits. Given that the award, together with the Queensland Employment Standards, is to provide for a fair minimum safety net of enforceable conditions for employees, we consider that the subject matter of directives is more appropriately found in directives or certified agreements.
14. We will allow a period of two years as proposed by the AMOD Team for Schedule 7 to prescribe entitlements. Beyond that time, Schedule 7 will merely indicate that particular directives apply in respect of those classifications.
15. An appropriate preamble to Schedule 7 might be:

"The terms and conditions of employment of the directives specified in the table below shall apply to the classifications of employees in the

departments, classifications, groups or areas listed herein, until 14 September 2017 after which, where a directive about the matters contained in column 2 covers an employee, the provisions of the directive apply to the employee."

16. We have relisted this matter at 9.00 am on Wednesday 9 September 2015 to afford the parties the opportunity to make any further submissions they wish."
- [25] The parties advised the Commission on 8 September 2015 that they did not intend to make any further submissions to the Full Bench on the issues raised in the statement. Accordingly, the hearing scheduled for 9.00 am on 9 September 2015 was cancelled.
- [26] We will make the award conformably with what we indicated we were minded to do in our statement.
- [27] The making of the award will, subject to s 824 of the Act, repeal the following three pre-modernised awards:
1. *Employees of Queensland Government Departments (other than Public Servants) Award - State 2012* (the OPS Award);
 2. *Forestry Employees' Award - Department of Agriculture, Fisheries and Forestry 2012*; and
 3. *Rabbit Board Employees Award - State 2012*.
- [28] In addition, the Proposed Award will, subject to s 824 of the Act, repeal the following pre-modernised awards to the extent that they apply to employees of employers covered by the Proposed Award:
1. *Cafe Restaurant and Catering Award - State (Excluding South-Eastern Queensland) 2012*;
 2. *Hospitality Industry - Restaurant, Catering and Allied Establishments Award - South-Eastern Division 2012*; and
 3. *The Motoring Services Award - South-Eastern District 2012*.

Orders

- [29] Having heard from the representatives of the parties referred to in Clause 4 of the Proposed Award, and by consent of those parties, we make the following orders:
1. That the *General Employees (Queensland Government Departments) and Other Employees Award – State 2015* be made pursuant to s 140CE(1)(a) of the *Industrial Relations Act 1999* and operate from 18 September 2015.
 2. That the *Employees of Queensland Government Departments (Other than Public Servants) Award – State 2012*; *Forestry Employees' Award – Department of Agriculture, Fisheries and Forestry 2012*; *Rabbit Board*

Employees Award - State 2012 are repealed on and from 18 September 2015, subject to the provisions of s 824 of the Act.

3. That *the Cafe Restaurant and Catering Award - State (Excluding South-Eastern Queensland) 2012; Hospitality Industry - Restaurant, Catering and Allied Establishments Award - South-Eastern Division 2012* and the *Motoring Services Award - South-Eastern District 2012*; to the extent they apply to employees of employers covered by the *General Employees (Queensland Government Departments) and Other Employees Award – State 2015* are repealed on and from 18 September 2015, subject to the provisions of s 824 of the Act.