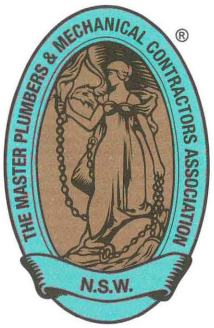

MASTER PLUMBERS ASSOCIATION OF NSW™

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The Master Plumbers and Mechanical Contractors Association of NSW

Fair Work Act 2009
s.156—4 yearly review of modern awards

4 Yearly Review of Modern Awards - AM2014/280

Exposure Draft – Plumbing and Fire Sprinklers Award 2016 – Drafting and Technical Issues Submissions

Clause 18 Industry Specific Redundancy Scheme

The Fair Work Commission
30 June 2016

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1 Introduction

1.1 The Master Plumbers & Mechanical Contractors Association of New South Wales (MPMCA) is a registered employer association representing the interest of plumbing contractors in New South Wales.

1.2 MPMCA makes these submissions in relation to the current four yearly review (Current Review) of the Plumbing and Fire Sprinklers Award 2010 (Award), and, in particular, in relation to the industry specific redundancy scheme set out in clause 18 of the Award (ISRS). Clause 33 of the Exposure Draft of the Award published by the Fair Work Commission (Commission) on 26 May 2016 (Exposure Draft) does not purport to substantially vary the ISRS.

1.3 MPMCA supports a modification of the ISRS to more closely align with the meaning of the term 'redundancy' under the Fair Work Act 2009 (Cth) (FW Act), rather than the current state of affairs where an employee is entitled to redundancy pay in all circumstances where that employee's employment with an employer ceases except for reasons of misconduct or refusal of duty.

2 The issue

2.1 The ISRS in the current Award departs from the definition of 'redundancy' in section 119(1) of the FW Act in a number of respects, including in that it:

(a) allows employees (other than casuals) to access redundancy entitlements even when they choose to resign from their employment;

(b) does not exclude small businesses from the requirement to provide redundancy pay; and

(c) does not allow employers to apply to the Commission to seek a variation of redundancy pay as is generally provided by section 120 of the FW Act.[1]

2.2 While MPMCA understands the circumstances in which predecessors to the ISRS were introduced to apply in the 'building and construction' industry in the late 1980s and early 1990s, it contends that it is appropriate for the ISRS to be modified, particularly in light of two quite separate developments in the intervening years:

(a) development in the regulation of redundancy pay (including the enactment of a legislative entitlement to redundancy pay) in the intervening years; and

(b) the introduction of the concept of weekly hire employees in the plumbing industry through the award modernisation process.

2.3 Problems caused by the divergence between the definition of redundancy in the ISRS and the FW Act are well highlighted by the submission made by an individual to the Commission dated 23 November 2015 and posted to a page relating to this matter on the Commission's website, a copy of which is annexed to these submissions and marked 'A'.

[1] Please note the decision of Senior Deputy President Richards in *Lewis Plumbing (QLD) Pty Ltd* [2015] FWC 3117 at [7].

3 Legislative context

3.1 Under section 119(1) of the FW Act, an employee engaged by a national system employer is entitled to redundancy pay if his/her employment is terminated:

(a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

(b) because of the insolvency or bankruptcy of the employer.

3.2 The amount of redundancy pay (also known, although this term is not used in the FW Act, as 'severance pay') payable to an employee in such circumstances is determined by his/her period of service with the employer.

3.3 This general obligation is subject to certain exceptions, including if:

(a) the employee in question had less than 12 months' continuous service with the employer at the time he/she is dismissed by reason of redundancy; or

(b) the employer is a small business employer when the dismissal occurs (that is, has less than 15 employees).

In these circumstances, the employee has no entitlement to redundancy pay.

3.4 Under section 120 of the FW Act, an employer who:

(a) obtains other acceptable employment for an employee; or

(b) cannot pay the amount of redundancy pay to which the employee would be entitled,

may apply to the Commission seeking a determination that the amount of redundancy pay is reduced to a specified amount (which may be nil) that the Commission considers appropriate.

3.5 The FW Act also allows for certain other exclusions to the general obligation, including if the employee is covered by a modern award that contains an ISRS as provided by section 123(4)(c) of the FW Act.

3.6 Section 141(1) of the FW Act provides that a modern award can only have an ISRS if it was included during the award modernisation process which concluded in 2009, as was the case with clause 18 of the Award. Section 141(5), however, does allow for the removal of an ISRS.

4 Previous consideration of the ISRS

4.1 Concerns associated with the inclusion of an ISRS in the Award were considered by the Australian Industrial Relations Commission (AIRC) during the award modernisation process in 2009 and by Fair Work Australia (as the Commission then was) in the 2012 review of modern awards under the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Transitional Act). On both occasions, variations sought by MPMCA and others to the ISRS were refused.

2009 Award Modernisation Decision

4.2 During the award modernisation process, the AIRC had to consider whether an ISRS should be inserted into what is now the Award - see Award Modernisation – Decision – Full Bench [2009] AIRCFB 345 (3 April 2009) (2009 Full Bench Decision).

4.3 In determining this issue, the AIRC noted that it had to take into account the following factors:[2]

(a) when considered in totality, whether the scheme was no less beneficial to employees in an industry than the general redundancy provisions of the FW Act; and

(b) whether the scheme was an established feature of a relevant industry.

4.4 The AIRC made a number of determinations about the operation of ISRSs within the building and construction industry and applied that reasoning to the operation of an ISRS within the plumbing industry. In particular, the AIRC found that:[3]

(a) redundancy benefits in the building and construction industry had historically been distinguished from other industries, and had been made more rather than less beneficial than the norm, because of the high labour mobility involved. In the AIRC's view, the provision of an ISRS was appropriate to act as a minimum award or safety net condition for building and construction industry workers, and was necessary to compensate them for the lack of notice they would otherwise be likely to receive in circumstances where their employment was terminated; and

(b) the provision of an ISRS was an established feature of the building and construction industry (and by inference, the plumbing industry as well), having regard to the content of relevant pre-modern awards industrial instruments. The AIRC felt that the terms of the relevant pre-modern industrial instruments set a precedent which made it appropriate to include an ISRS in the Award.

4.5 It is relevant to note that, in the 2009 Full Bench Decision, the AIRC addressed submissions it had received from a number of industry groups who were concerned about the inconsistency between the redundancy definition found in the FW Act and the proposed ISRS. In particular, it was submitted that redundancy under an ISRS, which typically only excluded an entitlement to redundancy pay to circumstances where an employee had engaged in serious misconduct (but included circumstances where an employee resigned), extended the redundancy entitlement beyond the general obligation provided by the FW Act.

[2] 2009 Full Bench Decision at [76].
[3] 2009 Full Bench Decision at [102].

4.6 The AIRC did not accept these submissions, and referred to the provisions of the FW Act which expressly allowed an ISRS to operate outside the redundancy provisions of the FW Act, noting that there was no requirement for the redundancy provisions of the NES and an ISRS to complement or be consistent with one another. In this context, no specific submissions regarding the particularities of the plumbing industry appear to have been considered by the AIRC.

4.7 The relevant industrial history discloses that the genesis of the redundancy provision in the building industry included the following features:

(a) employee-initiated redundancy based on a declaration that the employee no longer intended to work in the industry; and

(b) payments by employers into redundancy scheme(s).[4]

4.8 By consent of various industrial parties, the concept of employer-initiated redundancy was thereafter introduced into the building industry awards.[5]

2012 Decision

4.9 In 2012, the Commission was required by the Transitional Act to conduct a review of modern awards (2012 Review) – see Modern Awards Review 2012 [2012] FWAFB 5600 (29 June 2012) (2012 Full Bench Decision).

4.10 The 2012 Review was relatively narrow in scope and aimed to remove anomalies and technical problems which came out of the award modernisation process rather than providing an avenue for significant changes to award entitlements.

4.11 The Full Bench of the Commission also made plain that the 2012 Review was not intended to constitute a 'fresh assessment' of modern awards without regard to previous authority.[6] The Full Bench stated that where a party wanted to seek a variation that had already been considered (for instance by the Commission during the modernisation process), that party would need to show that there were cogent reasons for departing from the previous decisions, such as a significant change in circumstances that warranted a different outcome.[7]

4.12 As part of the 2012 Review, MPMCA made an application to vary the Award on a number of bases. These included excluding from the operation of the Award's ISRS:

(a) a termination which is initiated by an employee; and

(b) an employee of a small business employer.

4.13 In its application, MPMCA submitted that:

[4] Print H9967 per Grimshaw C.
[5] Industrial Relations Commission Decision 1129/1990 (Print J4870, 10 October 1990) [1990] AIRC 1101, per Palmer C; referred to in the 2009 Full Bench Decision at [78].
[6] 2012 Full Bench Decision at [99].
[7] 2012 Review at [89].

(a) the definition of 'redundancy' and the failure to exclude small business employers from the operation of the ISRS reflected an error on the part of the AIRC in the 2009 Full Bench Decision;

(b) the operation of the ISRS within the Award was inconsistent with the conventional understanding of redundancy and its meaning in the FW Act; and

(c) the Award's ISRS placed significant hardship on small business employers, which made up the majority of employers the plumbing industry.

4.14 Senior Deputy President Watson heard the application to vary the Award – see National Fire Industry Association, Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia [2013] FWC 2838 (13 June 2013) (2013 Decision). In rejecting the relevant parts of the application, his Honour made a number of observations, including that:

(a) the 2009 Full Bench Decision had considered and rejected the argument that the ISRS was inconsistent with the general redundancy provisions of the FW Act, noting that the ISRS definition of redundancy did not need to be complementary to the definition of redundancy in the FW Act and that the wording of the FW Act supported that finding;[8]

(b) it was not appropriate to remove small business employers from the operation of the ISRS in the Award because, historically, they had not been excluded from the redundancy provisions operating in the pre-modern award industrial instruments applicable to the plumbing industry;[9]

(c) the application was seeking a 'fresh assessment' of the ISRS;[10] and

(d) the evidence led in support of the application was not convincing enough to provide a basis for variation of the Award's ISRS in the context of the 2012 Review.[11]

5 The Commission's approach to the Current Review

5.1 The Current Review has a broader scope than the 2012 Review. As part of the Current Review, the Commission may determine to vary existing modern awards, revoke existing modern awards or create new modern awards. The Commission also needs to ensure that modern awards are meeting the modern awards objective detailed in section 134 of the Act.

5.2 In March 2014, the Full Bench of the Commission issued the decision 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 (17 March 2014); (2014) 241 IR 189 (2014 Full Bench Decision) which outlined the broad manner in which the Current Review was to be conducted, and included guidance on the matters that the Commission would consider and what parties must address if they seek any variations to existing modern awards. Those matters include:

[8] 2013 Decision at [32].
[9] 2013 Decision at [33].
[10] 2013 Decision at [29].
[11] 2013 Decision at [30].

(a) 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 directed to demonstrating facts supporting the proposed variation;[12]

(b) the Commission will take into account into previous decisions relevant to any contested issue (including the context in which it was made). It will generally follow previous decisions unless it is provided with cogent reasons for not doing so;[13] and

(c) the Commission will also have regard to the historical context of each modern award.[14]

6 MPMCA's main points of contention

6.1 MPMCA's main points of contention regarding the ISRS are as follows:

(a) the 2009 Full Bench Decision and the 2013 Decision were incorrectly decided, in that the predecessor industrial instruments to the Award considered in the 2009 Full Bench Decision and the 2013 Decision did not accurately reflect the way in which workers were engaged in the plumbing industry specifically, as opposed to the broader collection of construction-related industries;

(b) whilst the FW Act allows an ISRS to operate outside of the FW Act formulation of redundancy, the definition of redundancy within the ISRS is inconsistent with not only the statutory meaning of redundancy but also the current understanding of redundancy in the Australian labour market;

(c) the reasoning adopted in both the 2009 Full Bench Decision and the 2013 Decision did not have adequate regard to the modern awards objectives in section 134 of the FW Act; in particular, the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden, accordingly creating disadvantage for the small businesses who make up the majority of the plumbing industry; and

(d) the Award provisions extend beyond what the predecessor instruments provided and create anomalies within the operation of the Award itself, for the following reasons:

(i) historically, most plumbing workers were engaged under the pre-modern award instruments as 'daily hire' employees. Many of the predecessor industrial instruments to the Award only provided for daily hire and casual employees, and daily hire employees were only entitled to one day's notice. It followed that there was a clear basis for saying that plumbing employees whose employment was regulated by those instruments needed an additional safety net when their employment came to an end;

(ii) however, under the current Award scenario, the more broadly applicable ISRS also applies to the relatively new category of weekly hire employees, who do not

[12] 2014 Full Bench Decision at [23].
[13] 2014 Full Bench Decision at [27].
[14] 2014 Full Bench Decision at [24].

require this additional 'safety net'. In other words, a weekly hire employee – who will be given (or must give) notice in accordance with the FW Act (which is far more generous than the one day's notice provided for daily hire employees) – will also receive the redundancy pay that is received by the daily hire employee. This appears to be an unintended consequence of the 2009 Full Bench Decision; and

(iii) a further apparently unintended consequence arises from the interaction between the notice and redundancy provisions in the Award. Clause 17.2 provides an employer with the right to withhold pay from a weekly hire employee's wages if the employee has not provided sufficient notice. Clause 18.5 (part of the ISRS), however, requires an employer to pay out the total relevant notice period even if an employee resigns. Again, it appears that clause 18.5 was intended to deal with daily hire employees only; but because its application has not been expressly limited in such a way, it also extends to weekly hire employees, creating a conflict between clauses 17.2 and 18.5.

6.2 MPMCA contends further that the current form of the ISRS has a detrimental impact on its members – that is, employers in the plumbing industry, most of whom are small businesses with only a handful of employees. In particular, unlike employers whose obligations in this area are governed simply by the FW Act's provisions on redundancy, an employer who is bound by the Award:

(a) must pay redundancy pay even if the employment ends for reasons other than 'redundancy' as generally understood – including, for example, if the employee resigns and commences new employment in the same industry;

(b) because there is no 'small business exemption' under the ISRS, even if the employer has less than 15 employees, must pay the entitlement[15]; and

(c) has no option to apply to the Commission to have the entitlement reduced or removed as a result of the employer's circumstances, or even if the employer obtains alternative employment for the employee.

6.3 Each of these issues inevitably imposes additional cost on these small businesses, and in MPMCA's submission this runs contrary to a number of aspects of the modern awards objective.

6.4 The Full Bench dealt with the construction of sections 134, 138 and 156 of the FW Act in the 2014 Full Bench Decision.[16] A modern award may relevantly include a term 'only to the extent necessary to achieve the modern award objective'.[17] The question of what is 'necessary' involves a 'value judgment' based on section 134 considerations.[18] The Full Bench cited with approval the decision of Tracey J in SDAEA v NRA (No 2) (2012) 205 FCR 227 wherein his Honour, in dealing with a cognate provision in the FW Act, stated (at [46]): 'That which is

[15] To which see 1675/96 Print N7314 [1996] AIRC 2091; (16 December 1996) at [3.2.2].
[16] 2014 Full Bench Decision at [14]-[17]; [28]-[39].
[17] 2014 Full Bench Decision at [36].
[18] *Ibid.*

necessary must be done. That which is desirable does not carry the same imperative for action'.[19]

6.5 By reason of the matters identified in [6.2] above, it is submitted that the ISRS goes beyond what is necessary to achieve the modern award objectives.

7 Proposed variations

7.1 In light of the issues raised in section 6 above, MPMCA submits that the ISRS in its current form is inappropriate.

7.2 In order to satisfy the requirements in sections 134, 138 and 156 of the FW Act, it is submitted that the modern award should be varied by:

(a) removing the ISRS altogether and deferring to the FW Act with regard to redundancy pay; or

(b) limiting the ISRS's application to daily hire employees only, thus deferring to the FW Act with regard to redundancy pay for weekly hire employees; and/or

(c) limiting its application to circumstances in which an employee neither resigns nor has his/her employment terminated for misconduct or refusal of duty (which also reflects the industrial history of the building awards where the parties had arrived at a consent position on this issue[20]).

7.3 In all the circumstances, MPMCA respectfully requests that the Commission considers the variations contended for in the course of the Current Review.

Paul Naylor, CEO
Master Plumbers & Mechanical Contractors Association of New South Wales
30 June 2016

[19] *Ibid* at [38].
[20] See [4.7]-[4.8] above.