

[2012] FWAFB 5401

The attached document replaces the document previously issued with the above code on 27 June 2012.

The document has been edited to correct typographical errors as follows:

- By deleting the name “Whelahan” appearing in paragraph [6] and in the Appearances and replacing with “Wheelahan”.
- By deleting “Senior Council” from the Appearances and replacing with “Senior Counsel”.

Janet Hall  
Associate to Vice President Lawler

Dated 29 June 2012





FAIR WORK  
AUSTRALIA

## DECISION

*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*  
Item 5 Sch. 6—Application to terminate an enterprise instrument - award

**Telstra Corporation Limited**

v

**Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; CPSU, the Community and Public Sector Union; Association of Professional Engineers, Scientists and Managers, Australia, The; Media, Entertainment and Arts Alliance; "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) (EM2010/2503)**

*Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*  
Item 4 Sch. 6—Modern enterprise award

**Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia; CPSU, the Community and Public Sector Union; Association of Professional Engineers, Scientists and Managers, Australia, The; "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU); Media, Entertainment and Arts Alliance**

v

**Telstra Corporation Limited**

(EM2011/1)

VICE PRESIDENT LAWLER  
SENIOR DEPUTY PRESIDENT HAMBERGER  
DEPUTY PRESIDENT SMITH

SYDNEY, 27 JUNE 2012

*Consideration of industry or enterprise award. Found an enterprise award should be made.*

[1] There are two sets of applications before this Full Bench. The first is an application by Telstra Corporation Limited (Telstra) to terminate a series of enterprise instruments. Those instruments are:

- Telstra Corporation General Conditions Award 2001 (AP806392)

- Telstra/AMWU Award 2001 (AP806391)
- Telstra/CEPU Technical and Trades Staff (Salaries and Specific Conditions of Employment) Award 2001 (AP806451)
- Telstra/CPSU Award 2001 (AP806385)
- Telstra/CEPU Lines and General (Salaries and Specific Conditions of Employment) Award 2003 (AP806384)
- Telstra/APESMA Award 2001 (AP806388)
- Telstra Employees (Conditions of Redundancy) Award 2003 (AP822302)
- Telstra/CEPU Operators (Salaries and Specific Conditions of Employment) Award 2001 (AP806383)
- Telstra/MEAA Award 2003 (AP823119)
- Telstra (Remote Localities) Award 2002 (AP813059)

[2] Telstra submits that in the event that the application is granted, then its relevant employees would be covered by:

- Telecommunications Services Award 2010 (TSA) (MA000041)
- Professional Employees Award 2010 (PEA) (MA000065) and
- Commercial Sales Award 2010 (CSA) (MA000083).

[3] The position adopted by Telstra is that it is opposed to an enterprise award and submits that its business squarely falls within the relevant definition of the modern awards and they provide an appropriate safety net of terms and conditions of employment from which the parties can bargain.

[4] The second set of applications are made by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Unions of Australia (CEPU); the Community and Public Sector Union (CPSU); the Association of Professional Engineers, Scientists and Managers, Australia (APESMA); the “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU) and the Media Entertainment and Arts Alliance (MEAA) (referred to as the Unions). These applications are for a new enterprise award to be created for Telstra. The position of the Unions is that a new enterprise award should be made where consideration can be given to the specific history of the various Telstra awards and the reasons for current provisions.

[5] The Telstra application was made pursuant to item 5 of Schedule 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (the TPCA Act) and the applications by the Unions were made pursuant to item 4 of Schedule 6 of the TPCA Act. The Unions’ applications must be heard by a Full Bench.<sup>1</sup> Given that the Unions’ applications must be heard by a Full Bench, Telstra’s application was referred to this Full Bench.

[6] In the proceedings Telstra was represented, with permission, by Mr M. McDonald Senior Counsel and with him Mr P. Wheelahan of Counsel. Mr E. White of Counsel represented, with permission, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union (CEPU), the Community and Public Sector Union (CPSU) and Association of Professional Engineers, Scientists and Managers, Australia (APESMA); Mr P. O’Donnell represented the Media, Entertainment and Arts Alliance (MEAA). Mr J. Fetter, sought and was granted permission to appear for the Australian Council of Trade Unions (ACTU).

[7] We now turn to the statutory context in which we must consider these applications. The relevant sections of the TPCA are set out below:

**“4 The enterprise instrument modernisation process**

- (1) The enterprise instrument modernisation process is the process of making modern awards under this Division to replace enterprise instruments.
- (2) On application, FWA may make a modern award (a modern enterprise award) to replace an enterprise instrument.
- (3) The application may be made only:
  - (a) by a person covered by the enterprise instrument; and
  - (b) during the period starting on the WR Act repeal day and ending at the end of 31 December 2013.
- (4) A modern enterprise award must be made by a Full Bench.
- (5) In deciding whether or not to make a modern enterprise award, and in determining the content of that award, FWA must take into account the following:
  - (a) the circumstances that led to the making of the enterprise instrument rather than an instrument of more general application;
  - (b) whether there is a modern award (other than the miscellaneous modern award) that would, but for the enterprise instrument, cover the persons who are covered by the instrument, or whether such a modern award is likely to be made in the Part 10A award modernisation process;
  - (c) the content, or likely content, of the modern award referred to in paragraph (b) (taking account of any variations of the modern award that are likely to be made in the Part 10A award modernisation process);
  - (d) the terms and conditions of employment applying in the industry in which the persons covered by the enterprise instrument operate, and the extent to which those terms and conditions are reflected in the instrument;
  - (e) the extent to which the enterprise instrument provides enterprise-specific terms and conditions of employment;
  - (f) the likely impact on the persons covered by the enterprise instrument, and the persons covered by the modern award referred to in paragraph (b), of a decision to make, or not make, the modern enterprise award, including any impact on the ongoing viability or competitiveness of any enterprise carried on by those persons;

- (g) the views of the persons covered by the enterprise instrument;
- (h) any other matter prescribed by the regulations.

Note: A variation referred to in paragraph (c) may, for example, be a variation to reflect the outcome of the AFPC's final wage review under the WR Act, or to include transitional arrangements in the modern award.

- (5A) If FWA makes a modern enterprise award before the FW (safety net provisions) commencement day, the modern enterprise award must not be expressed to commence on a day earlier than the FW (safety net provisions) commencement day.

Note: For when a modern enterprise award is in operation, see item 17.

- (6) The regulations may deal with other matters relating to the enterprise instrument modernisation process.

## **5 Enterprise instruments: termination by FWA**

- (1) A person covered by an enterprise instrument may apply to FWA for FWA to terminate the instrument.
- (2) The application may be made only during the period starting on the WR Act repeal day and ending at the end of 31 December 2013.
- (3) If an application for FWA to terminate the enterprise instrument is made under subitem (1), FWA may:
  - (a) terminate the enterprise instrument; or
  - (b) decide that the enterprise instrument should not be terminated; or
  - (c) decide to treat the application as if it were an application under item 4.
- (4) In making a decision under subitem (3), FWA must take into account the following:
  - (a) the circumstances that led to the making of the enterprise instrument rather than an instrument of more general application;
  - (b) whether there is a modern award (other than the miscellaneous modern award) that would, but for the enterprise instrument, cover the persons who are covered by the instrument, or whether such a modern award is likely to be made in the Part 10A award modernisation process;
  - (c) the content, or likely content, of the modern award referred to in paragraph (b) (taking account of any variations of the modern award that are likely to be made in the Part 10A award modernisation process);

- (d) the terms and conditions of employment applying in the industry in which the persons covered by the enterprise instrument operate, and the extent to which those terms and conditions are reflected in the instrument;
- (e) the extent to which the enterprise instrument provides enterprise-specific terms and conditions of employment;
- (f) the likely impact on the persons covered by the enterprise instrument, and the persons covered by the modern award referred to in paragraph (b), of a decision to terminate, or not terminate, the enterprise instrument, including any impact on the ongoing viability or competitiveness of any enterprise carried on by those persons;
- (g) the views of the persons covered by the enterprise instrument;
- (h) any other matter prescribed by the regulations.

Note: A variation referred to in paragraph (c) may, for example, be a variation to reflect the outcome of the AFPC's final wage review under the WR Act, or to include transitional arrangements in the modern award.

- (5) If FWA terminates the enterprise instrument, the termination operates from the day specified in the decision to terminate the instrument, being a day that is not earlier than the FW (safety net provisions) commencement day.”

**[8]** It can immediately be seen that the criteria for deciding whether or not to terminate an enterprise award is identical to that required to be considered in making a modern enterprise award. Indeed, if an application is made to terminate an enterprise award, FWA may decide not to do so and treat that application as if it were an application to create a modern enterprise award.

**[9]** In this matter the parties have agreed that should FWA decide not to terminate the industrial instruments but instead move to create a modern enterprise award, then the parties should be given the opportunity to enter into negotiations in relation to the content of any such award.<sup>2</sup> This would be consistent with an approach of adopting a two stage process.<sup>3</sup>

**[10]** In relation to the evidence put before the Bench, we were advised that there would be no cross-examination of the various witnesses. Nevertheless, it is important to outline that evidence so that a proper understanding can be distilled of the relative merits of each application.

**[11]** To begin, there was a statement of agreed facts tendered.<sup>4</sup> Of note in these agreed facts is that Telstra and Optus Administration Pty Ltd (Optus) are the two largest employers in the telecommunications industry with each having their own enterprise instruments.

**[12]** Telstra tendered evidence from two witnesses, Mr F. Gerdtz, who was the Principal HR Specialist, Workplace Relations and Policy. Mr Gerdtz has been employed in various human resources roles within Telstra for approximately 35 years.<sup>5</sup> The second witness was

Mr S. Smith, Director - National Workplace Relations of the Australian Industry Group (Ai Group).

[13] The first witness statement of Mr Gerdtz<sup>6</sup> went to the history of Telstra and the creation of the enterprise awards. This history noted that the terms and conditions of employment had their origins in determinations made by the Public Service Board under the *Public Service Act 1922* (Cth).

[14] Briefly stated, the Australian Telecommunications Commission was established in 1975 when it was separated from the Postmaster-General's Department. It was created to take over the operation of the national telecommunications service as well as take over, from the Overseas Telecommunications Commission, the international telecommunication service. It was at that time a monopoly which is in contrast to the highly competitive market today.

[15] Each award and its history was examined by Mr Gerdtz. Evidence was also provided on the agreements, both collective and individual, which formed a part of Telstra's industrial regulation history. Mr Gerdtz examined the modern awards and how they would operate and finally the impact of granting the application sought by Telstra. In providing evidence, Mr Gerdtz did so against the background of each of the criteria which FWA must take into account when considering whether or not to terminate the enterprise instruments. Of particular interest were the efforts made by Telstra to advise its employees of its intentions to become a part of the modern award system and the responses received from employees. Telstra's responses were in terms of the existing agreement coverage and the continuation of those provisions unless replaced by another agreement.

[16] Mr Smith's evidence went to the making of the *Telecommunications Service Industry Award 2002*. Which we shall turn to shortly.

[17] The following persons provided evidence for the unions:

- Mr D. Irons           CEPU
- Mr L. Benfell        CPSU
- Ms R. Easin          CEPU
- Mr B. Blackburne   CEPU
- Ms S. Herrington   APESMA
- Mr C. Cooper        CEPU

[18] The evidence of these persons also went to the history of the Telstra awards and the bargaining that took place to arrive at certain conditions such as hours of work and redundancy. Material was also presented which went to the approach by Telstra to individual bargaining and its approach to industrial regulation.

[19] Evidence dealt with the making of the *Telecommunications Services Industry Award 2002* and the *Telecommunications Services Award 2010*. Material was presented which overviewed the industry and Telstra's position in that industry vis-à-vis other providers. The level of employment and regulatory framework was canvassed. Of particular interest was the plebiscite conducted by the CEPU so that it could make submissions in relation to the views of persons covered by the enterprise instruments.

[20] In the proceedings it was confirmed that the Unions did not rely upon the evidence of Mr Blackburne and Telstra did not rely upon certain elements<sup>7</sup> of the second statement by Mr Gertz.

[21] Against the background of the written submissions and evidence each party made brief oral submissions. It is to those submissions that we now turn.

[22] To begin, the Australian Council of Trade Unions (ACTU) submitted that it saw these proceedings as a test case for the making of enterprise awards. It submitted that there were a select number of industries where enterprise awards existed and that it was not appropriate for those awards to disappear in favour of the industry based modern award. It argued that industries such as telecommunications, airlines, the public service, banking and metalliferous mining should be considered as the very type of industries the government had in mind when it provided for enterprise based awards. The ACTU submitted that that these sectors have the potential to exercise their bargaining power against employees and make decisions not to engage in collective bargaining.

[23] The ACTU submitted that if an enterprise award could not continue at Telstra then it would be hard to see why the Parliament made provision for enterprise based awards.

[24] Telstra submitted that the *Telecommunications Services Award 2010* can be seen as the appropriate safety net for the majority of employees at Telstra. It argued that the history of the award, seen against the modern environment of the telecommunications industry, demonstrated that existing awards are no longer relevant or appropriate. Other telecommunication providers are covered by a safety net award and so the same outcome should apply to Telstra. It drew our attention to a decision of Smith C in *Australian Municipal, Administrative, Clerical and Services Union v Virgin Mobile (Australia) Pty Ltd*<sup>8</sup> where he stated that “*Virgin Mobile should be subject to the same safety net of terms and conditions of employment as other businesses in the telecommunications industry*”.

[25] For convenience we extract the full quote:

“Having heard from the parties I will make an award binding upon Virgin Mobile and the ASU. The award will be in identical terms to the TSI award as I consider that to be an appropriate benchmark by which safety nets should be determined for Virgin Mobile. I agree with the submissions put by Mr Hargraves and Mr Nucifora that the TSI awards should be the industry standard and that Virgin Mobile should be subject to the same safety net of terms and conditions of employment as other businesses in the telecommunications industry.

There is no good reason as to why I should depart from the industry safety net when making this award. As to the future, the parties to the award share the view that this award is the tail not the dog and I expect that approach to continue. It is because of this combination of circumstances that I have adopted this approach in an endeavour to maintain stability.”<sup>9</sup>

[26] Telstra submitted that the enterprise award proposed by the Unions did not provide a fair and relevant minimum safety net and in many respects sought to prescribe terms currently contained in the enterprise agreement. This approach, it was submitted, is contrary to the proper fixation of a safety net award.

[27] Consideration was then given to two Full Bench decisions where it was decided that modern enterprise awards would not be made in favour of bringing the enterprises under the industry modern award. Those decisions were: *Bank of Queensland Agents Award 2004*<sup>10</sup>(BOQ) and *Yum Restaurants Australia Pty Ltd and Shop, Distributive and Allied Employees Association*<sup>11</sup> (Yum).

[28] It was the submission of Telstra that those decisions favoured the granting of its application in that a history of enterprise regulation did not militate against an employer being covered by the industry modern award.

[29] In dealing with specific terms and conditions of employment that may apply to Telstra, it submitted that remote localities allowances may fall into this category but that Telstra would consent to a variation of the industry award to include remote localities provisions. Telstra submitted that there was no thinly veiled conspiracy plan to reduce terms and conditions of employment by using the award and that the parties had a long history of bargaining and being able to reach agreement. It submitted that should the Unions wish to vary the industry award/s, once they applied to Telstra, then the award modernisation review was the appropriate proceeding in which to do that.

[30] In addition, Telstra argued that its delivery of service is changing considerably with the introduction of the National Broadband Network. Finally it was submitted that absent the intervention of the Tribunal, then the awards would expire in December 2013.

[31] For the unions it is argued that:

- The telecommunications industry is characterised by the dominance of Telstra. In this connection the Unions submitted that Telstra is four times bigger than its nearest competitor.
- Telstra is a significantly different enterprise from other participants in the industry and provides a range of different services.
- The history of industrial regulation of Telstra demonstrates that it has reflected the specific needs of Telstra. In this connection, all major changes in the relevant enterprise instruments have been consequent upon technology changes and the bargaining in relation to productivity has been to deal with the specific needs of Telstra.
- Until the current application Telstra has never sought to terminate its awards and seek an instrument in the same terms as other industry players.
- Telstra took no part in the making of the *Telecommunications Service Industry Award 2002* or the *Telecommunications Services Award 2010*.
- The *Telecommunications Services Award 2010* was based upon the *Telecommunications Services Industry Award 2002* where Telstra and Optus were specifically excluded from consideration.
- The terms and conditions of employment under the *Telecommunications Services Award 2010* apply to a minority of employees in the industry.

- Telstra acknowledges the importance of the “BOOT” test and implicitly state that it intends to rely on an inferior BOOT in the future.
- There has been no evidence led that would show that the current enterprise instruments would disadvantage Telstra in negotiations.
- The only discernable reason for Telstra seeking to terminate the enterprise instruments covering its employees would be to disadvantage its employees particularly given the negotiating approach adopted by Telstra in relation to enterprise agreements covering its employees.

[32] Finally the Unions submitted that a survey undertaken by the CEPU demonstrated that employees of Telstra did not want the awards cancelled in favour of the modern awards. The CEPU conducted a survey and had 2380 financial members vote against the approach proposed by Telstra. Telstra’s material did not compare with this response by members of the CEPU.

## CONCLUSION

[33] We now turn to consider each of the statutory criteria necessary in reaching our conclusion.

- “(a) the circumstances that led to the making of the enterprise instrument rather than an instrument of more general application;”**

[34] Generally speaking, the Telstra awards have a very long history which commenced with terms and conditions arising from public sector employment. Whilst there have been important changes, nevertheless the history of these awards predates any consideration of awards with more general application. Further, there has been extensive bargaining over the years to take into account matters of particular interest to Telstra that have been reflected in awards. The impact of those bargains at the enterprise level may be important but at the very least they should be available for argument. These are factors in favour of examining the enterprise awards and deciding, on merit, the changes that are necessary to suit the modern award environment having regard to the modern award objective. As Smith C observed when making the Virgin award, to use the general application awards which are of more recent origin as the norm, would be to have the tail wag the dog. Indeed it appeared from his decision that it was the view of the participating parties at the time.

[35] We also observe that the two decisions referred to by Telstra - BOQ and Yum - dealt with circumstances where the enterprise instruments were below the safety net contained in the industry modern award. The reverse is the case in this matter.

- “(b) whether there is a modern award (other than the miscellaneous modern award) that would, but for the enterprise instrument, cover the persons who are covered by the instrument, or whether such a modern award is likely to be made in the Part 10A award modernisation process;**
- (c) the content, or likely content, of the modern award referred to in paragraph (b) (taking account of any variations of the modern award that are likely to be made in the Part 10A award modernisation process);**

- (d) **the terms and conditions of employment applying in the industry in which the persons covered by the enterprise instrument operate, and the extent to which those terms and conditions are reflected in the instrument;”**

[36] We deal with each of these criteria together because they create interlinking considerations.

[37] First, there are modern awards which would cover the majority of employees. It may well be that many of the provisions could apply, but the issue remains as to whether or not the provisions of those awards would be an appropriate safety net given the history of this enterprise and its industrial regulation. The provisions have been established having regard to the particular circumstances of the enterprise including, no doubt, the particular circumstances facing it from time to time when it had to deal with, amongst other matter, technological changes which led to both employment rebalancing and changes in skills required.

[38] In dealing with the concern expressed by the Unions that there is a potential to reduce terms and condition of employment if the safety net is lowered, Telstra argue that the existence of the agreement and the history of bargaining means that such an outcome will not occur. It is not an answer to say that the content of the current enterprise agreements means that there would be no change to the terms and conditions of employment of employees at Telstra and that the history of bargaining would support such a conclusion. Such an approach misunderstands the role of an enterprise award. Its role is to provide base terms and conditions of employment which are relevant to the enterprise. This is a significant enterprise with varying skills and an enterprise award better permits the parties to tailor the safety net of wages and conditions to the systems of work within the enterprise as well as the history of its employment conditions.

[39] An examination of paid rates awards, of which this was once one, would show that the focus was on the particular needs of the enterprise as well as removing arguments about the appropriate rate to pay employees having regard to the market. The impact of the market is now a matter for bargaining but the safety net specific provisions in enterprises are still a relevant consideration in making enterprise specific awards.

[40] By providing for enterprise awards in the legislation, the Parliament decided that the provision would have work to do. In this connection we agree with the ACTU that if the history and circumstances of Telstra do not fall within what was provided for by the Parliament, then it would be difficult to see what enterprise would be able to enliven the operation of the provision.

[41] There are many differences between the parties on what might be appropriate content, but it appears that matters in relation to hours of work together with consultation and redundancy are key issues. These are important matters. The issue of district allowances was acknowledged by Telstra to be one which it was prepared to address in the context of the modern award review. However, in relation to that matter, it would seem that the modern award would face the prospect of being varied for matters relevant only to this enterprise. In making this observation we are not unmindful of the general concern about remote locality allowances which was discussed by the award modernisation Full Bench in its December 2008 decision.<sup>12</sup>

[42] In relation to the content, we do not believe it to be appropriate to sweep aside the enterprise awards given their long-standing history without giving the parties an opportunity to tailor an award to meet the particular circumstances of Telstra as they exist now. We are conscious that the parties have agreed to confer in the event that we decide that an enterprise award should be made. We are not unmindful of the changes to the telecommunications environment since Telstra and its predecessor organisations commenced operations. Changes to the competitive environment in which Telstra operates cannot be ignored. History demonstrates that Telstra had a monopoly position and now that is clearly not the case. It is in the market place like all other telecommunication providers although it does still enjoy significant areas of dominance.

[43] The other matter which is relevant to the content of the modern award and its applicability to Telstra is the circumstances in which the modern award was made.

[44] When the Australian Industrial Relations Commission examined the existing pre-reform awards it did so against the statutory criteria and this gave rise to a consideration as to how best to resolve the differences contained in the various awards. It became clear that an appropriate approach to the modern award objective was to examine where the “critical mass” existed in any particular term and condition of employment.

[45] The Commission stated:

“The dilemma faced by us in formulating the terms of the modern award is the widely divergent provisions in clerical instruments and in particular the existence of exemption or annual salaries provisions in clerical awards and NAPSAs in New South Wales, Queensland, Australian Capital Territory, Western Australia and Tasmania. Inserting or omitting an exemption provision will have an impact where the resultant provision is not consistent with the terms of the current instrument. We considered that adopting a provision which reflected the terms of the instrument applying widely in the largest state, where similar provisions of one sort or another apply in four of the six states and one of the two territories, was consistent with our approach in award modernisation of generally adopting appropriate minimum provisions applying to the critical mass of relevant employees.”<sup>13</sup>

[46] It is clear from the factual matrix of this matter that if the Telstra awards had been considered in the mix of awards, the impact of the “critical mass” of terms and conditions of employment would have been important. It appears to us that the decision by Telstra not to participate in the modern award process meant that the Full Bench was not able to take into consideration all of the terms and conditions of employment in the industry in which Telstra now states that it should be seen as an integral part. We don’t wish to overstate this as many factors will come to bear in the making of any new modern award.

**“(e) the extent to which the enterprise instrument provides enterprise-specific terms and conditions of employment;”**

[47] It has already been agreed by Telstra that there needs to be provision for remote localities and that, in its submission, this could be done during the modern award review process. It is not common ground that a remote locality provision is the only matter which may be relevant to a consideration of enterprise specific terms. We think the better course is to focus expressly on the enterprise specific needs, in a considered way, rather than making

that a point of contention in the general industry award where there may be little to no application. Telstra is such a large player in the sector that a tailored safety net, in line with the modern award objective, should at least be available for argument.

**“(f) the likely impact on the persons covered by the enterprise instrument, and the persons covered by the modern award referred to in paragraph (b), of a decision to terminate, or not terminate, the enterprise instrument, including any impact on the ongoing viability or competitiveness of any enterprise carried on by those persons;”**

[48] It is the submission of Telstra that there will be no impact upon employees if the enterprise instruments are terminated. The Unions, on the other hand, submit that given the approach to industrial regulation by Telstra in recent years, bargaining would be impacted by the lowering of the “BOOT”. We have already commented upon the appropriateness of having a properly fixed safety net enterprise award and its relationship or otherwise to the agreement making process. History shows that the making of the *Telecommunications Industry Award 2010* did not give consideration to the terms and conditions which apply to two of the biggest telecommunications companies in Australia.

[49] No submissions were made going to whether or not to terminate the enterprise instruments could impact adversely on the viability or competitiveness of the enterprise. Indeed Telstra submitted that issues which appeared to give the Unions cause for concern were all contained in enterprise agreements and there was no thinly veiled conspiracy plan to reduce terms and conditions of employment by using the award. However, we reiterate that we are conscious of changes which have occurred to technology and the dynamic nature of the industry. Any new modern enterprise instrument must consider these issues.

**“(g) the views of the persons covered by the enterprise instrument;”**

[50] The weight of the material before the Full Bench in this regard is in favour of the position adopted by the Unions. The Unions provided information in relation to the views of employees and we have had regard to the parties represented in the proceedings.

## **DECISION**

[51] We have reached the conclusion that:

- the history of the industrial regulation of Telstra,
- the circumstances surrounding the making of the *Telecommunications Services Award 2010*,
- the salaries ( which have been created as minimum rates) and conditions contained in the current Telstra award,
- the views of the employer and employees and
- the legislative scheme which provides for the making of enterprise awards,

all lead us to conclude that an enterprise award should be made in this case.

[52] We dismiss the application made by Telstra and grant that made by the Unions. In accordance with the agreement of the parties we refer them into conference to consider the

terms of any enterprise instrument. We will list the matter for a report back before Hamberger SDP.

## SENIOR DEPUTY PRESIDENT

### *Appearances:*

*M. McDonald* Senior Counsel with *P. Wheelahan* of Counsel for Telstra Corporation Limited.

*E. White* of Counsel for the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union (CEPU), the Community and Public Sector Union (CPSU) and Association of Professional Engineers, Scientists and Managers, Australia (APESMA).

*P. O'Donnell* for the Media, Entertainment and Arts Alliance.

*J. Fetter* for the Australian Council of Trade Unions.

### *Hearing details:*

2011.

Melbourne:

December 5.

## **Decision Summary**

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TRANSITIONAL INSTRUMENTS – termination of instrument – enterprise instrument – enterprise instrument modernisation – enterprise award – Items 5, 6 Schedule 6 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 – Full Bench – Telstra application to cancel various enterprise instruments – instruments are former enterprise awards – if applications were granted, employment would be regulated by modern awards – second set of applications by various unions to make modern enterprise award – each party opposes the other's application – unions' application must be heard by Full Bench as modern enterprise award must be made by Full Bench – criteria for deciding whether or not to terminate enterprise award is identical to criteria for making modern enterprise award – parties have agreed that should FWA decide not to terminate industrial instruments but instead create modern enterprise award, opportunity should be provided to enter into negotiations about content of instrument – Telstra is one of the two largest employers in the telecommunications industry – each of these employers has an enterprise award – Telstra awards have very long history with terms and conditions arising from public sector employment – extensive subsequent bargaining has resulted in variations of particular interest to Telstra – there exist other modern

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awards which could cover majority of affected employees but question remains whether those awards contain appropriate safety net given history of enterprise and its industrial regulation – unions argued that safety net will be lowered as current award contains more beneficial terms than relevant modern awards – may be subsequent diminution of terms and conditions of employment – role of safety net is to provide base terms and conditions which are relevant to the enterprise – Telstra a significant enterprise with varying skills – an enterprise award better lets parties tailor safety net to systems of work within the enterprise and history of employment conditions – not appropriate to sweep aside enterprise awards, given long standing history, without giving parties an opportunity to tailor an award to meet Telstra’s present needs – application to terminate transitional instruments refused – Union applications granted – parties to confer as to terms of enterprise modern award – report back to be listed.

Telstra Corporation General Conditions Award 2001 and Ors

EM2010/2503 and Anor  
Lawler VP  
Hamberger SDP  
Smith DP

Sydney

[2012] FWAFB 5401  
27 June 2012

**Citation:** *Telstra Corporation General Conditions Award 2001 and Ors* [2012] FWAFB 5401 (27 June 2012)

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<sup>1</sup> See clause 4 of item 4 of Schedule 6 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

<sup>2</sup> Transcript PN221-223.

<sup>3</sup> *Yum! Restaurants Australia Pty Ltd v Full Bench of Fair Work Australia* [2011] FCA 1315 per Cowdroy J at paragraph 49.

<sup>4</sup> Exhibit T4.

<sup>5</sup> Mr Gerdtz provided two witness statements.

<sup>6</sup> Exhibit T1.

<sup>7</sup> Paragraphs 24 - 46.

<sup>8</sup> PR939547.

<sup>9</sup> PR939547 at paragraphs 5 and 6.

<sup>10</sup> (2010) 195 IR 358.

<sup>11</sup> (2011) 205 IR 117.

<sup>12</sup> (2008) 177 IR 364 at paragraph 79 and following.

<sup>13</sup> *Re Clerks - Private Sector Award 2010* (2009) 190 IR 286 at paragraph 23.