

Australian Industry Group

# 4 YEARLY REVIEW OF MODERN AWARDS

## **Reply submission**

4-Yearly Review of Modern Awards

Food, Beverage and Tobacco

Manufacturing Award 2010

(AM2018/22)

**5 August 2019**

**Ai**  
GROUP

**4 YEARLY REVIEW OF MODERN AWARDS**  
**AM2018/22 – FOOD, BEVERAGE AND TOBACCO**  
**MANUFACTURING AWARD 2010 – SUBSTANTIVE ISSUES**

**1. INTRODUCTION**

1. These submissions are made by the Australian Industry Group (**Ai Group**) in response to the Directions issued by the Fair Work Commission (**Commission**) on 5 April 2019 (**Directions**).
2. Ai Group opposes the variations to the *Food, Beverage and Tobacco Manufacturing Award 2010* (**FBTM Award**) proposed by the Australian Manufacturing Workers' Union (**AMWU**) outlined in a draft determination filed on 29 April 2019 (**AMWU Determination**) and in submissions filed by the union in support and dated 10 June 2019 (**AMWU Submissions**).
3. The variations proposed by the AMWU may be briefly summarised as follows:
  - Incorporation of a definition of “equivalent” in Schedule A – Classification Structure and Definitions of the Exposure Draft of the FBTM Award. (paragraph [8] of the AMWU Submissions).
  - Removal of the requirement to have completed a structured induction program or 38 hours of induction training in order to progress from Level 1 to Level 2, as defined in Schedule A (paragraph [16] of the AMWU Submissions).
  - Replacement of the title “Competencies” in each level outlined in Schedule A with “Indicative tasks” (paragraph [17] of the AMWU Submissions).
  - Insertion of the word “Eligibility” in the first part of the description of each classification level in Schedule A (paragraph [18] of the AMWU Submissions).

4. Ai Group opposes the abovementioned variations (**Proposed Variations**):
- The AMWU has not demonstrated that the Proposed Variations are necessary to achieve, or are consistent with, the modern awards objective. None of the considerations in s.134 of the *Fair Work Act 2009* (**FW Act**), which the Commission is required to take into account, have even been referred to in the AMWU Submissions.
  - The Proposed Variations would impact upon minimum wage entitlements, yet the AMWU has not demonstrated that the variations are necessary to achieve, or are consistent with, the minimum wages objective. None of the considerations in s.284, which the Commission is required to take into account, have even been referred to in the AMWU Submissions.
  - The AMWU has failed to address the work value requirements of the FW Act in its submissions.
  - The Proposed Variations are inconsistent with the modern awards objective, the minimum wages objective and the work value requirements of the FW Act.
  - The Proposed Variations are inconsistent with s.138 of the Act.
  - The Proposed Variations have the potential to cause significant cost increases for employers.
  - The Proposed Variations are inconsistent with previous relevant decisions of the Commission.
5. In addition to the Proposed Variations referred to above, the AMWU has proposed the replacement of numerals in the names of certificates in Schedule A of the Exposure Draft, with Roman numerals (paragraph [19] of the AMWU Submissions). This variation is inconsequential.

## 2. THE STATUTORY FRAMEWORK UNDER THE FW ACT

6. The AWMU's submission to amend the FBTM Award is made in the context of the 4 yearly modern award review.
7. The *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 (Amending Act)* removed the requirement for the Commission to conduct 4 yearly reviews from the beginning of 1 January 2018. Schedule 4 of the Amending Act inserted Part 5 of Schedule 1 of the *Fair Work Act 2009 (FW Act)* which allows for the continued application of Division 4 of Part 2-3, (including s.156) in the context of the current 4 yearly review proceedings.
8. In exercising its powers under the transitional arrangements, the Commission must apply the modern awards objective in s.134(1).
9. In the *4 Yearly Review of Modern Awards - Penalty Rates Decision* (the **Penalty Rates Decision**), the Full Bench made the following commentary concerning the modern awards objective:

While the Commission must take into account the s.134 considerations, the relevant question is whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions... fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.<sup>1</sup>

10. The FWC's task in the context of the 4 yearly review was summarised at paragraph [269] of the *Penalty Rates Decision* as follows (emphasis added):
  1. The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.
  2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be

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<sup>1</sup> [2017] FWCFB 1001, [116] – [117].

supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.

3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.
11. Section 138 of the FW Act provides that a modern award may only include terms “to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective”.
12. In the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision (Preliminary Jurisdictional Issues Decision)*<sup>2</sup>, the Full Bench accepted that s.138 is relevant to the Review and endorsed the observations of Tracey J in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)*<sup>3</sup> that a distinction is to be drawn between that which is necessary and that which is desirable:

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

13. Relevant to the current proceedings, in the Preliminary Jurisdictional Issues Decision the Full Bench made the following comments concerning the burden on an applicant to demonstrate that a particular variation is necessary to achieve the modern awards objective (emphasis added):

The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a ‘stable’ modern award system (s.134(1)(g)). The need for a ‘stable’ modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI’s submission that some proposed changes may be self evident and can be determined with little formality. However, 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 properly directed to demonstrating the facts supporting the proposed

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<sup>2</sup> [2014] FWCFB 1788, [39].

<sup>3</sup> *SDA v NRA (No 2)* (2012) 205 FCR 227.

variation.<sup>4</sup>

14. The AMWU is proposing significant changes that are likely to disturb the existing classifications and minimum wage rates of many employees covered by the FBTM Award. In the circumstances, it is incumbent upon the AMWU to submit cogent evidence in support of why the amendments are necessary to achieve the modern awards objective and the minimum wages objective. It has failed to do so and therefore the Proposed Variations should be rejected.

### **3. DEFINITION OF 'EQUIVALENT'**

20. Clause 20 of the FBTM Award contains a 6-level wage structure which is aligned with classification definitions in Schedule B – Classification Structure and Definitions (Schedule A in the Exposure Draft).
21. Levels 3, 4, 5 and 6 are aligned with particular formal qualifications. Classification at each level is based on either the employee having completed the relevant formal qualification or the employee having “equivalent recognised enterprise or industrial experience, training or prior learning experience and/or skills” to the relevant formal qualification.
22. The AMWU has proposed amending the FBTM Award to include the following definition of the word ‘equivalent’:

In this Schedule "equivalent" shall include:

- (a) any relevant qualification at the same AQF level as a qualification which is specified as the minimum training requirement for classification in this Award;
- (b) experience, training, or skills that align with relevant competencies from the Food, Beverage & Pharmaceutical Training Package that are cumulatively equivalent to the minimum training requirement;
- (c) experience, training, or skills that align with any other relevant AQF competencies that are cumulatively equivalent to the minimum training requirement.

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<sup>4</sup> [2014] FWCFB 1788, [23].

23. Ai Group strongly opposes the proposed variation.

24. The AMWU's proposed wording:

- Would most likely lead to a raft of reclassification claims and associated cost increases for employers;
- Would lead to increased disputation;
- Would lead to uncertainty for employers and employees covered by the Award;
- Would deem all arguably relevant qualifications at a particular AQF level to be “equivalent” for classification purposes, when it is obvious that such qualifications are often not equivalent. For example, some qualifications at the same AQF level involve double the training hours of other qualifications.
- Would enable arguments to be pursued that an employee’s experience, training or skills aligns with the competency standards in a very large number of qualifications in the training packages for other industries and that these are “equivalent” for the purposes of the FBTM Award.
- Is an attempt to, in effect, overturn the decision of His Honour Deputy President Gostencnik in *Franca Viceconte; Rosario (Ross) Condello v Fresh Cheese Co (Aust) Pty Ltd* (**Fresh Cheese Decision**).<sup>5</sup>
- Is an attempt to re-argue a matter that has already been dealt with by the Commission in the context of a largely similar proposal by the AMWU in 2009/10 to vary the definition of “or equivalent” in the *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**),<sup>6</sup> which was rejected by a seven Member Full Bench of the Commission.

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<sup>5</sup> [2018] FWC 6106.

<sup>6</sup> [2010] FWAFB 2196.

## The AMWU's application in 2009/10 to vary the definition of "or equivalent" in the Manufacturing Award

25. In December 2009, the AMWU applied to vary the definition of "or equivalent" in the Classification Schedule and to make various other changes to the classification provisions in the Manufacturing Award.<sup>7</sup>
26. The changes that were sought by the AMWU to the definition of "or equivalent" in the Classification Schedule of the Manufacturing Award are marked up as follows:

### Or equivalent means:

- any training which a registered training provider (e.g. TAFE), or State recognition authority recognises as equivalent to **an accredited course a qualification** which Manufacturing Skills Australia recognises for this level, which can include advanced standing through recognition of prior learning and/or overseas qualifications; or
  - where competencies meet the requirements set out in the Manufacturing Skills Australia, **or other relevant Industry Skills Council's** competency standards in accordance with the **principles and processes** in the National Metal and Engineering Competency Standards Implementation Guide **(the Guide)**. For employees covered by Clause 23.4(c) the principles and processes in the Guide include skills used/acquired, skills used occasionally, skills gaps, employees with qualifications and those without, assessment processes and other relevant matters.
27. In Ai Group's reply submission of 22 December 2009, Ai Group made the following relevant comments in opposition to the AMWU's proposal to link the classifications in the Manufacturing Award to competency standards in other industries:
48. The AMWU's sweeping approach of trying to link the classification structure in the Manufacturing Modern Award to undisclosed competency standards in numerous industries is highly inappropriate. Before any award variation is considered there should be a thorough analysis of what such link would mean in practice in terms of wage rates for particular work. Relatively few award classification structures are linked to competency standards and such links have typically only been established after years of working through all the complexities involved. The link between the Metals Classification structure and the Metals competency standards took many years to work through. The issue in the Graphic Arts industry was

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<sup>7</sup> AM2019/175.



even more problematic with three Members of the Commission being involved over a 15 year period before the classification structure and its link to competency standards was finally resolved.

28. In its decision of 19 March 2010<sup>8</sup> rejecting the AMWU's proposed amended definition of "or equivalent" to link the classifications in the Manufacturing Award to competency standards in other industries, a seven Member Full Bench of the Commission said: (emphasis added)

**[14]** The AMWU also sought to vary the definition of "or equivalent" and "Work within the scope of this level" in cl.B.3.1 to include reference to other relevant Industry Skills Councils and associated changes. The AIG strongly opposed the variation. We are not persuaded the variation is necessary. The impact of varying the modern Manufacturing Award as sought is uncertain. Further, the parties have agreed to include a new cl.B.4 containing indicative tasks as an aid in the classification of employees. With an adequate indicative tasks clause included in the modern Manufacturing Award, the variations sought by the AMWU to the "or equivalent" and "Work within the scope of this level" definitions seem unnecessary.

29. The outcome in the Manufacturing Award case has increased relevance, given the relationship between the Manufacturing Award and the FBTM Award.
30. When the FBTM Award was being developed, the parties and the Commission were faced with modernising awards in an industry where there were a number of major food industry awards with different union respondents. For this reason, the FBTM Award was based on the Manufacturing Award.
31. As set out in Ai Group's Award Modernisation Stage 3 Pre-Exposure Draft Submission of 6 March 2009:<sup>9</sup> (emphasis added):

"124. In developing the terms of our proposed *Food, Beverage and Tobacco Manufacturing Industry Award 2010*, Ai Group has largely based the provisions on the Modern Manufacturing Award."

32. In its Stage 3 Award Modernisation Statement of 22 May 2009,<sup>10</sup> the Award Modernisation Full Bench stated that the exposure draft was largely based on Ai Group's draft award (emphasis added):

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<sup>8</sup> [2010] FWAFB 2196.

<sup>9</sup> AM2008/36, *Submission of Ai Group* 6 March 2009, 41.

<sup>10</sup> [2009] AIRCFB 450.

“[87] The exposure draft is largely based on that submitted by the AiGroup. However, the definition of “food, beverage and tobacco manufacturing” has been altered to reduce the potential for overlap with other modern awards and exposure drafts. Further, the draft specifically excludes those covered by the Manufacturing Modern Award and the proposed Meat Industry Award 2010, Poultry Processing Award 2010 and Wine Industry Award 2010. Our preliminary view is that the award should not cover clerical employees.”

33. The abovementioned 19 March 2019 decision of a seven Member Full Bench of the Commission has obvious relevance to the AMWU’s proposed variation to the FBTM Award. In the Preliminary Jurisdictional Issues Decision,<sup>11</sup> a Full Bench of the Commission relevantly stated: (emphasis added)

**[25]** Although the Commission is not bound by principles of *stare decisis* it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:

“When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see *Queensland v The Commonwealth* (1977) 139 CLR 585 per Aickin J at 620 *et seq.*”

**[26]** While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel)* (*Cetin*)<sup>17</sup>:

“Although the Commission is not, as a non-judicial body, bound by principles of *stare decisis*, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so.”

**[27]** These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.

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<sup>11</sup> [2014] FWCFB 1788.

## The Fresh Cheese Decision

34. The inappropriate nature of the AMWU's proposed variation is demonstrable considering the fact that the Commission has recently clarified the meaning of "equivalent" in the FBTM Award through the decision of Deputy President Gostencnik in *Franca Viceconte; Rosario (Ross) Condello v Fresh Cheese Co (Aust) Pty Ltd (Fresh Cheese Decision)*.<sup>12</sup> The decision related to an application by the AMWU under s.739 of the FW Act alleging, amongst other claims, incorrect classification under the FBTM Award. In order to determine the dispute, it was necessary for the Deputy President to examine the meaning of the phrase "equivalent" as it appears in the Award. Gostencnik DP stated (emphasis added, references omitted):

[31] As Ms Viceconte does not meet the qualification requirements in B.2.5(a)(i), it is necessary to consider the constituent elements of B.2.5(a)(ii). In order to meet B.2.5(a)(ii), it must be shown that an employee has equivalent recognised enterprise or industrial experience, training or prior learning experience and/or skills to Level 5.

[32] This raises first a consideration of the meaning of the word "equivalent". The use of "equivalent" in B.2.5(a)(ii) is as an adjective and carries its ordinary meaning, that is, "equal in value, measure, force, effect, significance, et cetera" and "corresponding in position, function, et cetera". Its use in the context of B.2.5(a)(ii) requires an assessment of the relevant enterprise or industrial experience, training or prior learning experience and/or skills to Level 5 asserted against the comparator, namely, an AQF Certificate III in Food Processing.

[33] The relevant question is whether the asserted enterprise or industrial experience, training or prior learning experience and/or skills to Level 5 is equal in value, measure, force, effect, significance to an AQF Certificate III in Food Processing. The assessment is an objective one.

[34] Next is the meaning of the word "recognised". It is used as a past participle passive verb form to modify that which follows, namely "enterprise or industrial experience, training or prior learning experience and/or skills to Level 5". Its ordinary meaning is variable and depends upon the context in which it is used. It seems to me that relevantly "recognised" as used in B.2.5(a)(ii) means "to identify from knowledge of appearance or character or to acknowledge or treated as valid".

[35] The Company submitted that the grammatical use of the word "recognised" in B.2.5(a)(ii) had the result that the relevant recognition was by the employer at first instance and in the case of a dispute by the Commission.

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<sup>12</sup> [2018] FWC 6106.

[36] In my view, this submission is plainly wrong and is rejected. Whether particular prior experience or learning is “equivalent” is, as I have already indicated, something that is objectively ascertained. The addition of the word “recognised” merely underscores this point. That is, the prior experience or learning is from its appearance or character objectively acknowledged as being equivalent to an AQF Certificate III in Food Processing. In this sense, “equivalent recognised” is a composite phrase used to qualify particular prior experience or learning. Whether that is ultimately so is objectively assessed.

[37] It seems to me also that on a proper construction of the provision in B.2.5 of the Award, the identified prior experience or learning in B.2.5(a)(ii) may repose in an employee the requisite “equivalent recognised” to an AQF Certificate III in Food Processing by reason that prior experience is relevantly equivalent, or that prior learning is relevantly equivalent, or that prior experience combined with prior learning is relevantly equivalent.

[38] I am not persuaded that the Certificate III in Process Manufacturing held by Ms Viceconte is equivalent to AQF Certificate III in Food Processing. Although there is doubtless some overlap between the two qualifications.

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[41] There are, however, a number of significant differences between the two qualifications. The first and most obvious difference is that the Certificate III in Food Processing is plainly a qualification designed for production related roles carried out by food-processing workers employed in relevantly, dairy processing. Certificate III in Process Manufacturing is conversely a qualification designed for use across three process manufacturing sectors namely:

- chemical, hydrocarbons and oil refining
- plastics, rubber and cable making
- manufactured mineral products.”

[42] Each course is designed to impart skills for use in particular environments. As is evident from the description, not only of the relevant certificates but also of the industries towards which they are geared, the training provided and the skills imparted are designed for application to those industries. I accept however that some skills and knowledge obtained during the course are transferable.

[43] The length of time taken to complete each certificate also differs. While completion of each certificate is determined by reference to the requirement to complete the requisite number of competency units, the Australian Government publishes relevant course information about each course on its “MySkills” website and provides an average course duration. The identified average course duration for a Certificate III in Process Manufacturing is 1 year, while the identified average course duration for a Certificate III in Food Processing is 2 years.

[44] Though there is some overlap between the units of competency in each certificate, it is also plain that a substantial number of the units of competency, their subject matter and content differ considerably.

[45] Nonetheless, the prior learning or training obtained in undertaking and completing the Certificate III in Process Manufacturing, though not itself sufficient to be equivalent recognised training or prior learning, may combine with her enterprise or industrial experience and/or skills, so that together they constitute the relevant equivalency for the purposes of meeting the qualification or experience component of the Level 5 classification under the Award.

[46] In addition to the Certificate III in Process Manufacturing, Ms Viceconte has also undertaken training in good manufacturing practices, occupational health and safety, hygiene and hazard analysis and critical control points (HACCP). Her unchallenged evidence was that she followed and applied these learnings while working at the Company.

[47] Ms Viceconte gave detailed evidence about the duties that she performed in her role as Bocconcini Assistant. The Company did not call any supervisor or any other employee with relevant knowledge to contradict the evidence given by Ms Viceconte about the duties that she performed.

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[49] The issue then, is whether the combination of the Certificate III in Process Manufacturing, the additional training that she has undertaken and the duties that she has undertaken in her role as a Bocconcini Assistant can be taken to be equivalent recognised enterprise or industrial experience, training or prior learning experience and/or skills to Level 5.

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[53] I am therefore not satisfied that Ms Viceconte meets the qualification and experience component of the Level 5 classification descriptor of the Award. This is because on objective analysis of the evidence about her qualification, training and experience and skills it cannot, as the analysis above discloses, be said that these are relevantly “equivalent recognised enterprise or industrial experience, training or prior learning experience and/or skill to Level 5” within the meaning of the Award.

[54] It is unnecessary for me to therefore consider whether Ms Viceconte meets the competencies component of the Level 5 classification descriptor because as I have earlier discussed both components need to be satisfied.

35. As held by His Honour, the word “equivalent” in the classification Schedule of the FBTM Award “carries its ordinary meaning, that is, ‘equal in value, measure, force, effect, significance, et cetera’ and ‘corresponding in position, function, et cetera’.” To determine whether the “equivalent” condition is met, “requires an assessment of the relevant enterprise or industrial experience, training or prior learning experience and/or skills”.<sup>13</sup>

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<sup>13</sup> [2018] FWC 6106, [32].

36. The AMWU's application in these proceedings is a transparent attempt to amend the FBTM Award in response to an outcome in the Commission that it did not agree with. The decision of Deputy President Gostencnik, as it relates to the classification structure issues, is correct and should not be disturbed by the AMWU's application to vary the Award. The proposed variation would not only have obvious adverse cost implications for Fresh Cheese Co (Australia) Pty Ltd, it would also have cost implications for many other employers in the Food, Beverage and Tobacco Manufacturing Industries.
37. There is nothing surprising about the conclusion reached by Deputy President Gostencnik in the Fresh Cheese Decision. It is obvious that the two qualifications that were considered in the case are not genuinely equivalent. As his Honour highlighted: "The identified average course duration for a Certificate III in Process Manufacturing is 1 year, while the identified average course duration for a Certificate III in Food Processing is 2 years".<sup>14</sup>

### **The purpose of industry training programs and the qualifications they contain**

38. The Australian Skills Qualifications Authority (**ASQA**) publishes a [glossary](#) on its website that includes numerous definitions, including the following definition of "Training Package":

#### **training package**

Training package means the components of a training package endorsed by the Industry and Skills Council or its delegate in accordance with the Standards for Training Packages. The endorsed components of a training package are: units of competency; assessment requirements (associated with each unit of competency); qualifications; and credit arrangements. The endorsed components form part of the requirements that an RTO must meet under these Standards. A training package also consists of a non-endorsed, quality assured companion volume/s which contains industry advice to RTOs on different aspects of implementation.

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<sup>14</sup> [2018] FWC 6106, [43].

39. It can be seen that a Training Package sets out the standards and requirements that a Registered Training Organisation must meet when delivering accredited training. Those who successfully complete accredited training and achieve the required standard of competency receive credit towards a formal qualification.
40. As identified by Deputy President Gostencnik in the Fresh Cheese Decision, each qualification / course in a Training Package “is designed to impart skills for use in particular environments. As is evident from the description, not only of the relevant certificates but also of the industries towards which they are geared, the training provided and the skills imparted are designed for application to those industries...”.<sup>15</sup>
41. A Training Package is typically developed by industry training specialists – not industrial relations specialists.
42. Not surprisingly the ASQA glossary does not refer to awards, classification structures or wage rates. Such matters are not associated with the key purpose of Training Packages which is to set the standards for accredited industry training and formal qualifications.
43. Some specific qualifications are referred in particular classification level descriptors in particular awards (e.g. the Certificate III in Food Processing is referred to in the descriptor for classification level 5 in the FBTM Award). In such circumstances, the particular qualifications have been identified as being relevant to the industry in which the award applies and relevant to the particular classification level in the award.
44. It would not be appropriate for the classification structure in the FBTM Award to deem qualifications that are clearly not equivalent, to be “equivalent” through the inclusion of an ill-conceived definition of “equivalent” in the Award.

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<sup>15</sup> [2018] FWC 6106, [42].

45. The Fresh Cheese Case highlights that parties are able to seek the FWC's assistance in determining whether a qualification in a training package in another industry is genuinely equivalent to any of the specific qualifications referred to in the classification structure in the FBTM Award.

### **Inconsistency with s.138 of the FW Act**

46. As referred to in section 2 of this submission, s.138 of the FW Act imposes a significant hurdle on substantial award variations. This was recognised in the Preliminary Jurisdictional Issues Decision in the following terms (emphasis added):

**[36]** ... Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective.<sup>16</sup>

47. The following frequently cited passage from Justice Tracey's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)*<sup>17</sup> was adopted by the Full Bench in the above decision:

"... a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action."

48. The AMWU's proposed amendments are inconsistent with the modern awards objective and the minimum wages objective, for the reasons outlined in this submission. Also, the amendments are not "necessary" for the Award to achieve the modern awards objective or the minimum wages objective.

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<sup>16</sup> 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [36].

<sup>17</sup> [2012] FCA 480.



49. The AMWU has filed no evidence at all in support of its claim, let alone any probative evidence to demonstrate why its proposed award variations are “necessary” in order for the Award to achieve the modern awards objective and minimum wages objective.

### **Inconsistency with the modern awards objective**

50. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account each of the matters listed at ss.134(1)(a) – (h) of the Act.

51. In the *4 Yearly Review of Modern Awards – Penalty Rates Decision*,<sup>18</sup> the Full Bench made the observation about the proper construction of the expression “fair and relevant minimum safety net of terms and conditions” in s.134 of the Act:

Fairness in this context is to be assessed from the perspective of the employees and the employers covered by the modern award in question”.<sup>19</sup>

52. It is not fair for employers to be exposed to reclassification risks and associated costs as a result of the AMWU’s Proposed Variations.
53. In making any amendments to a modern award in the context of the Review, the Commission is required to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions, taking into account the considerations in s.134(1)(a) to (h).
15. As stated in the *Penalty Rates Decision*, no particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award:

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<sup>18</sup> [2017] FWCFB 1001.

<sup>19</sup> [2017] FWCFB 1001, [117] – [119].

“The Commission’s task is to take into account the various considerations and ensure that the modern award provides a ‘fair and relevant minimum safety net’”.<sup>20</sup>

**Paragraph 134(1)(a) – Relative living standards and needs of the low paid**

54. This is a neutral consideration in this matter.

**Paragraph 134(1)(b) – The need to encourage collective bargaining**

55. This is a neutral consideration in this matter.

**Paragraph 134(1)(c) – The need to promote social inclusion through increased workforce participation**

56. This is a neutral consideration in this matter.

**Paragraph 134(1)(d) – The need to promote flexible modern work practices and the efficient and productive performance of work**

57. The AMWU’s Proposed Variations would lead to an increase in reclassification disputes, given the much wider and much less certain concept of “equivalent” proposed by the AMWU. Such disputes would obviously have an adverse impact upon efficiency and productivity.

58. Accordingly, s.134(1)(d) weighs against the Proposed Variations.

**Paragraph 134(1)(da) – The need to provide additional remuneration**

59. This is a neutral consideration in this matter.

**Paragraph 134(1)(e) – The principle of equal remuneration for work of equal or comparable value**

60. This is a neutral consideration in this matter.

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<sup>20</sup> [2017] FWCFB 1001, [115], [116] and [196].

**Paragraph 134(1)(f) – The likely impact on business including productivity, employment costs and the regulatory burden**

61. Paragraph 134(1)(f) of the Act weighs heavily against the AMWU's proposed amendments.
62. The amendments proposed by the AMWU would increase the regulatory burden faced by employers covered by the FBTM Award. Employers would need to spend time familiarising themselves with, and understanding, a very large number of potentially relevant training packages, and the qualifications and competency standards in those packages, to ensure they are able to classify employees under the Award.
63. The amendments proposed by the AMWU would increase the cost of employment, including the cost of employing new staff. Given that the classification of an employee may require reference to numerous other training packages and the qualifications and competencies within them, HR and managerial staff will need to take the time to understand these complex matters.
16. The AMWU's Proposed Variations would lead to more reclassification disputes, given the much wider and much less certain concept of "equivalent" proposed by the AMWU. Disputes are typically very costly for employers. The costs usually include management time, lost productive time of the employees involved, legal costs, and reduced productivity, amongst other costs.
17. A further potential cost would be backpay arising from incorrect classification of employees. If the AMWU's Proposed Variations are adopted, there is likely to be a more confusion and more errors made by employers when classifying employees due to the complexity inherent in the AMWU's proposed definition of "equivalent".

**Paragraph 134(1)(g) – The need to ensure a simple, easy to understand, stable and sustainable modern award system that avoids unnecessary overlap of modern awards**

64. The AMWU’s Proposed Variations are not simple or easy to understand, but rather are complex and confusing.
65. In essence, the AMWU is attempting to enshrine a definition of “equivalent” in the Award that would result in clearly non-equivalent circumstances being deemed to be “equivalent”. This is obviously not simple or easy to understand.
66. The AMWU is attempting to overturn the Fresh Cheese Decision, in which “equivalent” was held to carry its ordinary meaning.<sup>21</sup> Rather than the ordinary meaning, the AMWU is attempting to enshrine an extraordinary meaning for the term in the Award.
67. The Proposed Variations would result in employers facing a significant degree of uncertainty regarding the classifications and wage rates of their employees. A very large number of training packages, qualifications and associated competencies would become relevant for the purposes of classifying employees under the FBTM Award.
68. The AMWU has provided no guidance as to what would constitute “any other relevant AQF competencies that are cumulatively equivalent to the minimum training requirement” or which align with a relevant competency. The number of competencies that could potentially meet this test would be considerable. Considering the extremely broad varieties of experience, training and skills the AMWU’s definition potentially imports, unconstrained by the ordinary meaning of “equivalent” referred to in the Fresh Cheese Decision,<sup>22</sup> the impact of the proposed variation carries such a level of ambiguity that the proposal is obviously inconsistent with s.134(1)(g) of the Act.

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<sup>21</sup> [2018] FWC 6106, [32].

<sup>22</sup> [2018] FWC 6106, [32].

69. Considering the recent clarification by the Commission of the meaning of “equivalent” in the FBTM Award, employers already benefit from greater certainty regarding the meaning of this term. To change the definition in a manner that would introduce greater ambiguity is not consistent with the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia.
70. For the above reasons, paragraph 134(1)(g) weights heavily against the Proposed Variations.

**Paragraph 134(1)(h) – The likely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy**

71. This is a neutral consideration in this matter.

**Conclusion**

72. In summary, the specific factors comprising the modern awards objective weigh heavily in favour of rejecting the AMWU’s Proposed Variations.

**Inconsistency with the Minimum Wages Objective**

73. The proposed variation would impact upon minimum wage entitlements, yet the AMWU has not demonstrated that the variation is necessary to achieve, or is consistent with, the minimum wages objective. None of the considerations in s.284, which the Commission is required to take into account, have even been referred to in the AMWU Submissions.
18. The minimum wages objective requires that award minimum wages be “fair”. The AMWU’s proposed amendment would not be “fair” on employers for the reasons outlined in this submission.

## **Inconsistency with the work value requirements of the Act**

74. During the 4 Yearly Review, the Commission can only make a determination varying modern award minimum wages “if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons” (s.156(3)).
75. “Work value reasons” are defined in s.156(4) as follows:
- Work value reasons** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
- (a) the nature of the work;
  - (b) the level of skill or responsibility involved in doing the work;
  - (c) the conditions under which the work is done.
76. The AMWU has made no attempt to justify why its proposed amendment, that would lead to minimum wage increases, is justified by “work value reasons”. There is no evidence before the Full Bench about any change in work value of any employee covered by the FBTM Award.
77. Section 156(3) is a jurisdictional requirement before the Commission is able to vary any award in a manner that increases minimum wages. This jurisdictional requirement has not even been addressed, let alone met, by the AMWU. Accordingly, the FW Act requires that the Full Bench reject the AMWU’s claim.

## **4. PATHWAY TO LEVEL 2**

78. The AMWU has proposed removal of the current requirement for an employee to have completed a structured induction program or 38 hours of induction training in order to progress from Level 1 to Level 2 in the classification structure of the FBTM Award. Instead, the AMWU proposes a new subclause titled ‘Pathway to Level 2’ that is intended to make it clear that an employee must advance to Level 2 after three months of full or part-time employment or

specified appropriate periods for seasonal and casual employees.<sup>23</sup>

79. The interpretation of Level 1 which the AMWU is urging the FWC to adopt ignores the dual requirement for an employee to possess less than three months' relevant experience *and* not possess recognised enterprise or industrial or prior learning experience and/or skills sufficient for appointment to Level 2 or above.
80. If the AMWU's proposed variation were to be adopted, the FWC would be altering the requirements for Level 1 employees to reach Level 2 under the FBTM Award. This would vary modern award minimum wages for some employees currently classified at Level 1. Such an amendment would require the Commission to be satisfied that the variation is necessary to achieve the modern awards objective, the minimum wages objective and that the variation is justified by work value reasons. The AMWU has addressed none of these matters in its submissions and the proposed variation should be rejected.

## **5. NEW SUBHEADINGS IN SCHEDULE A**

81. The AMWU has proposed inserting new subheadings within each classification level in Schedule A of the Exposure Draft.
82. Currently, each level in the FBTM Award is described, as stated in the *Fresh Cheese Decision*, by reference to a combination of a "qualification or experience" criteria and the "competencies" set out for each level.<sup>24</sup> The "qualification or experience" criteria are set out at sub-paragraph (a) of each level, with the "competencies" outlined at each corresponding sub-paragraph (b).
83. The AMWU's proposed variations would insert a subheading that reads "Eligibility" at sub-paragraph (a) in each classification level. This is proposed, as stated in paragraph [18] of the AMWU's submissions, with a view to assisting

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<sup>23</sup> AM2018/22, Submissions of the AMWU, 10 June 2019, [14].

<sup>24</sup> [2018] FWC 6106, [25].

the reader to more clearly set out the two parts of each classification. Ai Group disagrees that this is necessary as an aid in clarification. The two “parts” of each classification descriptor are divided into two subparagraphs, with the “competencies” subparagraph separated with its own existing subheading.

84. The insertion of the word “eligibility” could serve to diminish the significance of the “competencies” paragraph by implying that the matters in subparagraph (a) are sufficient for the purpose of classification at each Level. Amending the headings in subparagraph (b) to read “indicative tasks” instead of “competencies” risks suggesting that the matters referred to in subparagraph (b) are of lesser significance than may be assumed as the Schedule is currently worded.
85. Given the potential for the proposed variations to alter the meaning of the classification Schedule with regard to the relative significance of the matters outlined in subparagraphs (a) and (b) of each Level, the AMWU’s proposed variation could have a substantive impact and should be rejected.
86. The proposed variations are not necessary to achieve the modern awards objective and hence are inconsistent with s.138 of the FW Act.