

## BEFORE THE FAIR WORK COMMISSION

*Fair Work Act 2009 (Cth)*

**Title of matter:** 4 yearly review of modern awards—Review of certain C14 rates in modern awards

**Matter Number:** C2019/5259

**Document:** Submissions in reply – Jurisdictional issues

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## Background

1. The Fair Work Commission ('Commission') published a Statement introducing the 'Review of certain C14 rates in modern awards' matter (C2019/5259) as a major case, on 28 August 2019.<sup>1</sup> The preceding day, the Commission published a Statement introducing the undergraduate qualifications review matter (C2019/5255) as a major case, on 27 August 2019.<sup>2</sup>
2. The Commission's 27 August 2019 Statement (in relation to the undergraduate qualifications review) invited submissions from interested parties on various matters, including the provisional view that a separate full Bench be constituted for the review of 29 Awards. AFEI filed submissions on 4 October 2019 in that matter, which concurred with reservations expressed by AI Group about the Commission's jurisdiction to initiate a review under s157 of the *Fair Work Act 2009* (Cth) ('the Act').<sup>3</sup>
3. The Commission held a conference on 8 October 2019 in relation to this matter, and subsequently issued a Statement on 17 October 2019.<sup>4</sup>
4. The 17 October 2019 Statement also includes a comment that 'other than Ai Group, no party who filed a submission or attended the conference contested the *provisional* view that I should refer the 14 awards mentioned in the *August 2019 Statement...* to a Full Bench for review.'<sup>5</sup>
5. Although AFEI's submissions on 4 October 2019 were filed in the undergraduate qualifications review proceedings, (and not these proceedings) the question of the Commission's jurisdiction to initiate a review under s157 is an overlapping subject matter. Accordingly, to the extent the same question is to be addressed in these proceedings, AFEI has a particular interest in the matter.
6. AFEI not only has an interest in this matter in relation to its overlap with the undergraduate qualifications review, AFEI also has a particular interest in the following Awards which the Commission proposes to review as part of these proceedings:
  - a. Concrete Products Award 2010
  - b. Meat Industry Award 2010
  - c. Quarrying Award 2010
  - d. Broadcasting, Recorded Entertainment and Cinemas Award 2010
  - e. Dry Cleaning and Laundry Industry Award 2010
  - f. Funeral Industry Award 2010
  - g. Travelling Shows Award 2010

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<sup>1</sup> [2019] FWC 5863

<sup>2</sup> [2019] FWC 5934 ('27 August 2019 Statement')

<sup>3</sup> [AFEI Submissions of 4 October 2019](#) at page 2, paragraph 4

<sup>4</sup> [2019] FWC 7182 ('17 October 2019 Statement')

<sup>5</sup> *Ibid* at [5]

## Submissions in reply

7. AI Group filed submissions in accordance with Directions contained in the 17 October 2019 Statement on 11 November 2019 ('the AI Group submissions').<sup>6</sup>
8. We understand the AI Group submissions to be a general position in relation to whether the Commission has power to conduct wide-ranging reviews on its own motion under s157. AFEI generally concurs with the AI Group's submissions in relation to limitations on the Commission's powers under s157 of the Act. AFEI also makes the following submissions.
9. It is also AFEI's position that the Commission's power under s157(3) to 'make a determination' under s157(3) 'on its own initiative' is a power that may only be exercised in relation to a particular ascertainable variation. That is, it is AFEI's position:
  - a. Section 157(3) does not empower the Commission to initiate proceedings which are a broad 'review;' and
  - b. Section 157 requires the nature and details of the proposed variation be known to the potential interested parties, at the time when proceedings are initiated and certainly before they proceed to any hearing.

### *Section 157(1) – making a determination varying a modern award, otherwise than to vary modern award minimum wages*

10. Section 157(1) is significant to the relevant question, as it provides the statutory foundation for the Commission's power to vary modern awards.<sup>7</sup>
11. AI Group has already drawn attention to the relevant decision of *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd*<sup>8</sup>, which identifies the statutory task in s157(1)(a) as being limited to focusing on a posited variation.
12. The Commission's exercise of power under s157(1) is also conditioned upon it being satisfied that the determination (that is, the variation) is necessary in order to achieve the modern awards objective.<sup>9</sup> The words 'the determination' in s157(1) and s157(3) must be read as a reference a specific determination, thus a specific variation or specific proposed variation.
13. In order for the Commission to be satisfied that 'the determination' is necessary to achieve the modern awards objective, its nature and details must be known. This is so that the Commission can exercise its necessary task of assessing whether the proposed variation is necessary to achieve the modern awards objective.

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<sup>6</sup> [AI Group Submissions 11 November 2019](#)

<sup>7</sup> *Shop Distributive and Allied Employees Association v National Retail Association (No.2)*. [2012] FCA 480 ('SDA Decision') at [35]

<sup>8</sup> [2017] FCAFC 123 at [25], cited in the AI Group submissions at [10]

<sup>9</sup> SDA Decision at [35]

### *Section 157(2) – making a determination varying modern award minimum wages*

14. Similar to s157(1), the Commission’s exercise of power under s157(2) is conditional. In s157(2), the Commission’s exercise of power is conditional upon it being satisfied that (a) *‘the variation of modern award minimum wages is justified by work value reasons; and (b) making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective.’*
15. In order for the Commission to be satisfied that ‘the variation’ is justified by work value reasons pursuant to s157(2)(a), the Commission must assess ‘the variation’ with respect to the definition of ‘work value reasons’ in s157(2A). The Commission must be satisfied that ‘the variation’ is justified for 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.*

The Commission is however unable to undertake this assessment without the nature and details of ‘the variation’ being sufficiently known.

16. Similarly, to meet the additional condition in s157(2)(b), the nature and details of ‘the determination’ being proposed must also be known in order for the Commission to assess whether it is necessary to achieve the modern awards objective that ‘the determination’ (to vary modern award minimum wages) is made outside the system of annual wage reviews, and to be satisfied of such.

### *The need to disclose the proposed variation for procedural fairness*

17. The need to identify a proposed variation is not only supported by the language in s157, but also consistent with fundamental requirements of procedural fairness, to provide potentially affected parties the opportunity to respond in an informed way to that which may be adverse to their interests. As stated by Gleeson CJ in *Minister for Immigration and Multicultural Affairs v Bhardwaj*:

*Procedural fairness, which is one aspect of the rules of natural justice, requires that a person who may be affected by a decision be informed of the case against him or her and that he or she be given an opportunity to answer it. The opportunity to answer must be a reasonable opportunity.<sup>10</sup>*

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<sup>10</sup> 209 CLR 597 at [40]

18. Without such procedural fairness (including in award matters) parties such as AFEI are faced with the imperative to expend indeterminate resources in participating in proceedings for the chance that it could need to be defending against a possible (but indeterminate) adverse outcome for its members. In circumstances however, where the expenditure of such resources may be difficult to justify due to the lack of clarity about:
- c. whether there is a significant or insignificant variation to award minimum obligations being proposed; and
  - d. whether any such variation would be favourable or unfavourable; and
  - e. whether any such variation would be opposed or supported.
19. A 'review' unlike proceedings to address a posited variation, could be characterised as not necessarily involving proponents of a particular outcome, or advancement of a particular outcome, and or even the identification of a particular potential outcome. As a 'review' would not necessarily involve fundamental features of procedural fairness, the legislature's decision to empower a tribunal to conduct a 'review' (particularly where that tribunal also has the power to make determinations) is an extraordinary one. This is consistent with legislature only granting this power in limited circumstances.
20. It is open to conclude that legislature only intended to grant the Commission power to conduct a 'review' where this was stated expressly. That is, where the word 'review' appears in the granting of a power. This occurs in relation to annual wage reviews,<sup>11</sup> the 4-yearly review of Awards<sup>12</sup>, and the 2-yearly review of Awards.<sup>13</sup>
21. Finally, the Commission's power to make a determination on its own initiative pursuant to s157(3) must be exercised consistent with the safeguards and controls in s577 and s578, including in a manner that is fair and just, open and transparent, and taking into account equity, good conscience and the merits of the matter. This requires adherence to general requirements of procedural fairness, including that the Commission disclose its posited variation, to enable parties to understand and respond to any potential adverse impact to its interests.

### **Australian Federation of Employers and Industries**

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<sup>11</sup> Part 2-6, Division 3 of the Act

<sup>12</sup> In the now repealed s156 of the Act

<sup>13</sup> Although this power is derived from Schedule 5, Part 2, Item 6 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009