

Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Review of Certain C14 Rates in
Modern Awards
(C2019/5259)

27 September 2019

Ai
GROUP

C2019/5259 – REVIEW OF CERTAIN C14 RATES IN MODERN AWARDS

1. INTRODUCTION

1. This submission is made by Australian Industry Group (**Ai Group**) in response to the Statement issued by the Fair Work Commission (**Commission**) on 28 August 2019 (**the August Statement**)¹.
2. The August Statement referred to an extract from the decision of the Expert Panel in the context of the Annual Wage Review 2018/19 concerning submissions which had been made in the context of that Review by the Australian Council of Trade Unions (**ACTU**) and the Australian Catholic Bishops Conference (**ACBC**) that the C14 rate should be set at a level which would lift certain household types above the 60 per cent poverty line.²
3. The Expert Panel rejected the ACTU and ACBC proposal, noting that:

‘the magnitude of the increase required in this Review to lift these household types above the relative poverty line would run a significant risk of disemployment effects and adversely affecting the employment opportunities of low-skilled and young workers.’
4. However, the Expert Panel identified an issue with six modern awards that it decided should be the subject of further examination during the 4 yearly Review of modern awards. The Panel said:

[340] In the remaining 6 modern awards containing a C14 (or NMW) rate, the related classification is not a transitional level. It is not clear why these 6 modern awards prescribe a rate at this level, which is not a transitional rate. This is an issue which should be the subject of further examination in the current 4 yearly Review of modern awards.
5. The Commission has proposed, at paragraph [5] of the Statement, a review of modern awards which contain classification rates at the C14 level that are either not transitional or which do not specify a transition period.

¹ [2019] FWC 5863.

² [2019] FWC 5863, [2].

6. Of the eight modern awards which the Commission has identified as containing transitional classifications where the base rate is the C14 rate but where no particular transition period is specified (Category (iv)), Ai Group has an interest in the following:
 - *Cement and Lime Industry Award 2010*
 - *Concrete Products Award 2010*
 - *Meat Industry Award 2010*
 - *Oil Refining and Manufacturing Award 2010*
 - *Quarrying Award 2010*
 - *Rail Industry Award 2010*
7. Of the 6 modern awards which the Commission has identified as containing non-transitional classifications where the C14 rate is the base rate (Category (v)), Ai Group has an interest in the following:
 - *Air Pilots Award 2010*; and
 - *Sugar Industry Award 2010*.
8. In the Statement, President Ross expressed the *provisional* view that the awards in these categories should be referred for review by a Full Bench which would consider whether the C14 classifications in each of these awards provides a fair and relevant safety net of terms and conditions.
9. The Statement indicates that this review is to be undertaken on the Commission's own motion under s.157 of the *Fair Work Act 2009* (Cth) (**FW Act**).
10. Parties have been asked to comment on:
 - The *provisional* view expressed in the Statement;

- Whether the list of modern awards subject to the proposed review is accurate;
- For those awards which contain a classification for which the C14 rate is not the base rate but it is unclear what the transitional period is, what transition period would be appropriate;
- For those awards which contain a non-transitional classification for which the C14 rate is the base rate, whether the C14 classification levels in these awards provide a fair and relevant safety net and whether there has been any work value determination of these classifications.

2. Ai GROUP'S POSITION ON THE *PROVISIONAL VIEW* EXPRESSED IN THE STATEMENT

11. There are two important preliminary questions that arise regarding the *provisional* view expressed in the Statement:
- Should the Commission conduct a review of the nature proposed?
 - If so, should the proposed review be conducted at this time?
12. It is convenient to deal with these questions in reverse order.

Should the proposed review be conducted at this time?

13. Ai Group submits that the review should not be conducted at this time.
14. The Commission's 4 Yearly Review of Awards is continuing to place a serious strain on Ai Group's resources and, we anticipate, the resources other industrial parties. We are concerned that as a result, we are presently unable to devote sufficient resources to a review of the nature contemplated by the Commission and that by extension, our interests will be prejudiced.
15. The C14 classifications in the awards identified in the Statement are directly linked to the wage rates. Therefore, the outcome of the proposed review could impose substantial cost increases upon some employers.

16. In light of the potential significance of the outcome of these proceedings, the review should not be undertaken until interested parties, including Ai Group, are in a position to properly resource a review of this nature.

Should the Commission conduct a wide review of the nature proposed?

17. The Commission proposes to conduct the review on its own motion under s.157 of the FW Act, as identified in paragraph [8] of the Statement: (our emphasis)

[8] While the 4 yearly reviews of the awards listed in [5] above have not yet been completed, there may be a question as to whether new issues can be dealt with in a continuing review under the transitional arrangements. Whether or not these issues can be dealt with under the transitional arrangements, it seems clear that they can be dealt with in award variation proceedings under s.157 of the Act. Proceedings under s.157 may be brought on the Commission's initiative.

[16] ... Proceedings under s.157 may be brought on the Commission's initiative.

18. Subsection 157(1) of the Act states:

(1) The FWC may:

- (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or
- (b) make a modern award; or
- (c) make a determination revoking a modern award;

if the FWC is satisfied that making the determination or modern award is necessary to achieve the modern awards objective.

19. Subsection 157(3) states:

(3) The FWC may make a determination varying a modern award under this section:

- (a) on its own initiative; or
- (b) on application under section 158.

20. The Explanatory Memorandum (**EM**) for the *Fair Work Bill 2008* makes the following relevant comments about s.157 and related provisions: (emphasis added)

r.105. FWA will be guided by criteria which take into account public, social interest and economic aspects when considering whether and how to vary the content of modern

awards. Outside of the four yearly review, FWA will have limited power to vary awards. FWA will be able to vary an award to remove ambiguity, uncertainty and discriminatory terms. To ensure awards provide a fair minimum safety net for employees, anyone covered by an award will be able to apply to have the award varied in exceptional circumstances. FWA will be able to adjust awards for 'work value' reasons.

...

609. Division 5 sets out limited circumstances in which modern awards may be made, varied or revoked outside the system of annual wage and 4 yearly modern award reviews.

...

610. Clause 157 provides FWA with the power to vary modern awards outside the system of 4 yearly reviews in limited circumstances.

21. On one view, s.157 does not expressly grant the Commission power to conduct a wide-ranging review of the classifications in modern awards covering 14 diverse industries on its own motion. Even though the proposed review relates to the C14 classification, the issues that are likely to require detailed consideration are:

- The history of the C14 level within the award system;
- The alignment between the C14 level and the National Minimum Wage, and what considerations flow from this;
- The history of the classification structures in the relevant awards;
- Work-value considerations in each of the 14 industries (and whatever other industries may be added);
- The impacts on other wage rates and allowances in the relevant awards that are based on a percentage of the C14 rate;
- The implications of the Commission's decision in these proceedings on other awards;
- The cost impacts upon employers in the 14 industries;
- The impacts on employees of disturbing the current classifications structures and wage rates in the 14 industries, e.g. reduced job security, reduced employment opportunities, etc;

- Any impacts on the link between the classification structures in the awards and relevant qualifications linked to the classification structures; and
 - Many other relevant issues.
22. Whilst s.157(3)(a) grants the Commission power to make a *determination* on its own motion, it is perhaps less clear whether the Commission has power to institute proceedings of the nature here contemplated on its own motion, given that no posited variation has been identified in any of the awards.
23. We note that in *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123, Allsop CJ, North and O’Callaghan JJ made the following comments about the different statutory task under s.157, as compared to s.156:³

The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157 (1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 — terms may and must be included only to the extent necessary to achieve such an objective.

24. In light of our primary proposition regarding the timing of any proposed proceedings, we do not here seek to deal with the issue in further detail. We may, however, seek to be heard further in this regard in due course.

3. THE OTHER ISSUES IDENTIFIED IN THE STATEMENT

25. Beyond inviting submissions on the *provisional* view, the Statement invited submissions on the following matters:
- Whether the list of modern awards subject to the proposed review is accurate;

³ *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123, [25].

- For those awards which contain a classification for which the C14 rate is not the base rate but it is unclear what the transitional period is, what transition period would be appropriate;
 - For those awards which contain a non-transitional classification for which the C14 rate is the base rate, whether the C14 classification levels in these awards provide a fair and relevant safety net and whether there has been any work value determination of these classifications.
26. The above issues would require careful and detailed consideration if the proposed review is to proceed.
27. In the limited time afforded to parties to respond to the Statement, Ai Group has not had an opportunity to give sufficient consideration to the above issues, to express a view.