From: Julian Arndt [mailto:Julian.Arndt@ablawyers.com.au]
Sent: Monday, 4 March 2019 3:50 PM
To: Chambers - Hatcher VP
Cc: AMOD; Nigel Ward
Subject: AM2016/28 - Work Value Claim: Pharmacy Industry Award 2010 [ABLAW-ImanageDocs.FID135675]

Dear Associate

AM2016/28 - Work Value Claim: Pharmacy Industry Award 2010

Please find attached submissions of NSW Business Chamber and Australian Business Industrial in the above matter.

We appreciate the Commission's accommodation of our extension requests.

Yours faithfully

Julian Arndt
Associate Director
Australian Business Lawyers & Advisors

140 Arthur Street North Sydney NSW 2060
Dir: +612 9458 7565 | Fax: +612 9954 5029 | Mob: 0408 848 163
Tel: +612 9458 7005 | Web: www.ablawyers.com.au | LinkedIn

AUSTRALIAN BUSINESS
Lawyers & Advisors

Fair Work Commission: 4 yearly review of modern awards

AM2016/28 – PHARMACY INDUSTRY AWARD 2010 – APESMA WORK VALUE CLAIM

SUBMISSION IN RESPONSE TO [2018] FWCFB 7621

AUSTRALIAN BUSINESS INDUSTRIAL

- and -

THE NSW BUSINESS CHAMBER LTD

4 MARCH 2019

1. BACKGROUND

1.1 This submission is made on behalf of Australian Business Industrial ("**ABI"**) and the New South Wales Business Chamber Ltd ("**NSWBC**"). ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009*. NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisations) Act 2009*.

1.2 In Decision [2018] FWCFB 762 dated 14 December 2018, after making various findings concerning work value claims advanced by the Association of Professional Engineers, Scientists and Managers, Australia (**APESMA**) the Full Bench made the following concluding observations:

> ***Relativity between Pharmacist Rates and Manufacturing Award Rates***
>
> ***[194]*** *The following table sets out the relative position concerning rates of pay, original relativity with C10 and qualifications as between relevant classification in the Manufacturing Award and the Pharmacy Award (noting that completion of a four-year undergraduate degree and a one-year internship is necessary to qualify for the base Pharmacist grade in the Pharmacy Award):*
>
> [Table Omitted]
>
> ***[195]*** *The above relativities do not align for equivalent qualifications, reflecting the difficulty arising from the original use of professional scientists as a reference point. Nor do they consistently relate to the Australian Qualifications Framework (AQF), which ranks educational qualifications above the completion of the Senior Secondary Certificate of Education in ten levels as follows:*
>
> *Level 1 – Certificate I*
>
> *Level 2 – Certificate II*
>
> *Level 3 – Certificate III*
>
> *Level 4 – Certificate IV*
>
> *Level 5 – Diploma*
>
> *Level 6 – Advanced Diploma, Associate Degree*
>
> *Level 7 – Bachelor Degree*
>
> *Level 8 – Bachelor Honours Degree, Graduate Certificate, Graduate Diploma*
>
> *Level 9 – Masters Degree*
>
> *Level 10 – Doctoral Degree*
>
> ***[196]*** *It can be seen, for example, that the rate of pay for a Pharmacy Intern, First half of training, who must possess a bachelor degree and is thus at Level 7 of the AQF, is lower than that of classification C8 in the Manufacturing Award, who is at Level 3 in the AQF. Similarly the base grade Pharmacist, who is at Level 7 in the AQF, is paid less than the C3, who is at Level 6 in the AQF.*
>
> ***[197]*** *This outcome appears to be inconsistent with the principles stated and the approach taken concerning the proper fixation of award minimum rates in the ACT Child Care Decision, to which we have earlier made reference. However we note that the ACT Child Care Decision was made under a different statutory regime and pursuant to wage-fixing principles which no longer exist.*

[198] This matter may potentially constitute a work value consideration relevant to the 4 yearly review of the Pharmacy Award. In the conduct of the review, the Commission is required to discharge its functions under s 156(2) and is not confined to matters raised by interested parties. We will as a first step invite further submissions from interested parties concerning this matter. We will then consider what course, if any, should be taken. One possibility is that this aspect of the review may need to be referred back to the President of the Commission for consideration as to the procedural course to be taken pursuant to s 582, since the matter raised may have implications for other awards of the Commission, including but not limited to the Professional Employees Award 2010.

Next step

[199] Interested parties may file further written submissions pursuant to paragraphs [187], [189] and [198] within 28 days of the date of this decision.

2. SUBMISSION

2.1 ABI and NSWBC support the referral of '*this aspect of the review*' to the President for further consideration.

2.2 The application of section 156 (2) as it concerns work value has been the subject of spartan consideration by the Fair Work Commission, which the concept of 'work value' being addressed (to varying degrees) in:

(a) *4 yearly review of modern awards - Pharmacy Industry Award 2010* [2018] FWCFB 7621 (14 December 2018)

(b) *4 yearly review of modern awards--Education Group* [2019] FWCFB 488 (30 January 2019);

(c) *4 yearly review of modern awards - Real Estate Industry Award 2010* [2017] FWCFB 3543 (6 July 2017);

(d) *Four yearly review of modern awards* [2015] FWCFB 8810 (24 December 2015), [2016] FWCFB 4393 (8 July 2016) (Pastoral Award);

(e) *Four yearly review of modern awards* [2017] FWCFB 1138 (27 February 2017); and

(f) *Application by United Voice & Australian Education Union* [2015] FWCFB 8200 (30 November 2015); and

(g) *Application by United Voice, Australian Education Union and Independent Education Union of Australia for an Equal Remuneration Order* [2017] FWCFB 2690 (6 July 2017).

2.3 The Full Bench's comments at [194]-[198] of [2018] FWCFB 762 potentially raise considerations of broad application to the operation of modern awards generally.

3. WORK VALUE IN THE MODERN AWARD SYSTEM

3.1 On 1 January 2010 something historically unique occurred. On that day a new national system of industrial award regulation was set down which in many respects reset the 'industrial clock'.

3.2 It is pertinent to note that these modern awards were not the subject of extensive arbitral testing but largely an administrative exercise where consensus played a major part.

3.3 The scheme contemplated by the *Fair Work Act 2009* (Cth) (**FW Act**) for the making and varying of modern awards has a character to itself.

3.4 The operation of section 134 and section 284 of the FW Act while holding some similarities to past statutory schemes in respect of minimum award conditions is distinct both procedurally and substantively.

3.5 Compliance with section 134 was the subject of exhaustive review through the 2012 Transitional review as was required by the *Fair Work (Transitional and Consequential Amendments) Act 2009*.

3.6 Many modern awards have some nexus to the structure of classifications set out in the *Metal, Engineering and Associated Industries Award 1998* and now contained in the *Manufacturing and Associated Industries and Occupations Award 2010*.

3.7 As can be seen from the Full Bench comments referenced in [1.2] above, the Commission has started to explore the relevance of the 'manufacturing formulation' in the Fair Work system post 2010.

3.8 A number of observations should be made about this that may have broad consequence.

3.9 Firstly, the original 'manufacturing formulation' and the C10 'reference point' was not itself the subject of arbitral consideration.

3.10 As we submitted in *C2013/5139 s.302 - Application for an equal remuneration order*[1] the Full Bench should be cautious not to identify the C10 classification and the 'manufacturing formulation' as an unalterable or unquestionable reference point. Indeed, it was a construct for a purpose.

3.11 Relevant background was identified in the Australian Industrial Relations Commission Full Bench Decision of 13 January 2005 (PR954938) at [142] to [154].

3.12 As we have previously submitted in *C2013/5139 s.302 - Application for an equal remuneration order*[2], in addition to this background, a number of other historical developments are relevant to this issue.

3.13 The *National Wage Case March 1987* [1987] 17 IR 65 introduced the two tier wage fixation system. It introduced the notion of the restructure and efficiency principle and it also introduced the notion of supplementary payments through the supplementary payments principle. In large measure supplementary payments were effectively a payment separate to the minimum rate reflecting the existence of over-award payments in an industry. At 82, under the heading "Supplementary Payments" the Commission stated:

> *In the decision of 23 December 1986 the Commission said it was prepared to consider a principle providing for the inclusion of supplementary payments in the minimum rates awards as part of a carefully controlled process to address the*

[1] See PN 208

[2] See from PN 208

> *position of lower paid workers in the current economic circumstances and to assist in moving towards consistency between minimum rates and paid rates awards.*

3.14 The Commission at 84 A to F articulated that principle, at A noting:

> *The prime consideration will be the level of actual payments to the employees covered by the award under review. Where relevant the level of supplementary payments made to similar classifications of employees in other minimum rates awards may also be taken into account.*

3.15 While at C, the Commission stated:

> *There must be a clear understanding and acceptance by the unions concerned in the award that the introduction or adjustment of supplementary payments may alter relativities of actual rates within the award and other awards.*

3.16 These comments represent initial indications in the Federal Commission about relativities and demonstrate some concern about the disturbance of relativities.

3.17 *In National Wage Case August 1988* [1988] 25 IR 170, the National Wage decision replaced the restructuring and efficiency principle with the structural efficiency process. At 174-175 of the 1988 decision, the Commission states:

> *We have decided therefore to provide a structural efficiency principle which will be the key element in a new system of wage fixation. That new principle will provide an incentive and scope within the wage fixation system for parties to examine their awards with a view to:*
>
> - *establishing skill related career paths which provide an incentive for work to continue to participate in skill formation;*
> - *eliminating impediments to multi-skilling and broadening the range of tasks that the worker may be required to perform*
>
> *...*
>
> *We expect that any resulting restructure will be done primarily by consultation and at minimum cost. However we are not prepared to allow the restructuring of some awards without regard to the relationship of restructured awards one to another and the overall cost impact.*

3.18 Again, these comments represent a reiteration of a growing concern about the relativity question and the potential for 'leapfrogging' claims.

3.19 In *National Wage Case February* 1989 [1989] 27 IR 196 at 197, the Commission (referring to the progress of structural efficiency) states:

> *In addition to making reports on progress in various areas, the Australian Council of Trade Unions (ACTU) also produced a "blueprint" for award restructuring which it considered would "facilitate major and substantial award reform on a general basis, with a clear understanding of award relationships one to another and with the necessary level of control by this Commission".*

3.20 In the same case at 200-201, the Commission states in conclusion:

The result is there exist in federal awards widespread examples of the prescription of different rates of pay for employees performing the same work but this is only part of the problem. For too long there have existed inequitable relationships amongst various classifications of employees. That this situation exists can be traced to features of the industrial relations system such as different attitudes adopted in relation to the adjustment of minimum rates and paid rates awards; different attitudes taken to the inclusion of overaward elements in awards, be they minimum rates or paid rates awards; the inclusion of supplementary payments in some awards and not others; and the different attitudes taken to consent arrangements and arbitrated awards.

There is a further dimension to the problem. Employers have introduced and will continue to introduce wage relativities both as between employees employed under the same award and employees covered by other awards in a particular establishment. These relativities can vary from workplace to workplace and may bear no resemblance to the relativities set in the award or awards concerned.

In turn, this has inevitably caused feelings of injustice leading to industrial disruption, unwarranted "flow-on" settlements and leap-frogging in particular cases. This has seriously handicapped the Commission in its efforts to achieve the objects of the Act. It has also led to economically unsustainable general wage increases, particularly when attempts have been made to move away from a highly centralised system, which have severely affected the state of the national economy.

The situation we have described has been tolerated for too long and it is appropriate that it be corrected at this time. The fundamental purpose of the structural efficiency principle is to modernise awards in the interests of both employees and employers and in the interests of the Australian community: such modernisation without steps being taken to ensure stability as between those awards and their relevance to industry would, on past experience, seriously reduce the effectiveness of that modernisation.

Consequently, we endorse in principle the approach proposed by the ACTU though not necessarily the particular award relationships submitted in this case. That is a matter which we expect to be the subject of further debate in the forthcoming proceedings.

3.21 This developing idea crystallises in *National Wage Case August 1989* [1989] 30 IR 81 where at 92-93 the Commission found:

In these proceedings, the ACTU sought specific endorsement of the following classification rates and supplementary payments:

Classification		***Minimum classification rate***	***Supplementary rate***
		$	*$*
Building industry tradesperson		*356.30*	*50.70*
Metal industry tradesperson		*356.30*	*50.70*

Classification		*Minimum classification rate*	*Supplementary rate*
Metal industry worker, grade 4		*341.90*	*48.80*
Metal industry worker, grade 3		*320.50*	*45.80*
Metal industry worker, grade 2		*302.90*	*43.10*
Metal industry worker, grade 1		*285.00*	*40.60*
Storeperson		*325.50*	*46.50*
Driver, 3-6 tonnes		*325.50*	*46.50*
Filing clerk	*— 1st year*	*337.00*	*28.00*
	— 2nd year	*337.00*	*38.00*
	— 3rd year	*337.00*	*48.00*
General clerk	*— 1st year*	*354.40*	*30.60*
	— 2nd year	*354.40*	*40.60*
	— 3rd year	*354.40*	*50.60*

The Commission was informed that these rates and the relationships they bear to each other had been endorsed collectively by the trade union movement after long deliberation; they were also supported by the agreement made by the ACTU and the Commonwealth. It was argued that they would provide a firm base for sustainable relationships across federal awards and thus provide a stable base for wage fixation.

3.22 Ultimately in that decision, the Commission only endorsed the building industry tradesperson and metal industry tradesperson rates. Of these classifications, the metal industry tradesperson is the genesis of what would become C10 under the *Manufacturing and Associated Industries and Occupations Award 2010*.

3.23 Finally, in *National Wage Case April 1991* (1991) 36 IR 120, the Metal Trades Industry Association as it then was and the Metal Trades Federation of Unions agree to a consent position giving rise to the C10 arrangement.

3.24 This background is raised to identify that C10 did not come about through a substantial work value case. Indeed, C10 was a construct advanced with the agreement of the union movement accepted by the Commission for a purpose, and its purpose that it was accepted for wasn't that it reflected work value, its purpose was accepted because it would then create a framework that would create stability.

3.25 It reasonably open to question how comfortably C10 and the ‘manufacturing formulation’ sits with a contemporary work value assessment as contemplated by s 156(4) and also ss 134, 135 of the FW Act. This is particularly the case given the nature of how modern award were formulated through the award modernisation process and to date the Fair Work Commission has not been required to revisit this issue in any material way.

3.26 Importantly as well it appears that in some measure many modern awards have simplistically (and perhaps slavishly) referenced to the 'manufacturing formulation' by reference to the Australian Quality Framework (AQF) only.

3.27 It is highly questionable whether the AQF alone is a satisfactory proxy for determining work value. In fact a cursory consideration of section 156(4) would suggest otherwise.

3.28 This said section 134(1)(g) emphasises the regard for a '*stable and sustainable modern award system*'.

3.29 Further section 284 plays a part in both the setting and varying of modern award minimum wages.

3.30 To the extent that the Full Bench has raised notions of '*relativity*' across modern awards in the Decision [2018] FWCFB 762 this matter should be the subject of further consideration by the President as it is relevant to the jurisdiction as a whole and likely all or a substantial number of modern awards.

Nigel Ward
CEO + Director
Australian Business Lawyers & Advisors Pty Ltd
(02) 9458 7286
nigel.ward@ablawyers.com.au

Julian Arndt
Senior Associate
Australian Business Lawyers & Advisors Pty Ltd
(02) 9458 7565
julian.arndt@ablawyers.com.au

On behalf of Australian Business Industrial and the NSW Business Chamber Ltd

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