

Australian Industry Group

SUBMISSION

Undergraduate Qualifications Review
(C2019/5255)

20 September 2019

The logo for the Australian Industry Group, featuring the letters 'Ai' in a stylized, bold font above the word 'GROUP' in a smaller, all-caps font.

Ai
GROUP

C2019/5255 – UNDERGRADUATE QUALIFICATIONS REVIEW

1. Introduction

1. These submissions are made by the Australian Industry Group (**Ai Group**) in response to the invitation in paragraph [17] of the Statement¹ (**Statement**) issued by the Full Bench in C2019/5255 regarding a proposed Undergraduate Qualifications Review.
2. Parties have been invited to comment on:
 - The *provisional view* set out in paragraph [13] of the Statement;
 - The accuracy of the list of Awards at Attachment A and whether they have an interest in other awards that should be part of the list; and
 - Whether the Full Bench should consider additional awards as part of the priority group.
3. Paragraph [13] of the Statement expresses the following *provisional view*:

[13] My *provisional view* is that the 29 awards with classifications requiring undergraduate degrees should be referred to a separate Full Bench for review and that the Full Bench commence its review with the four awards listed at [10] for efficiency purposes (priority group). However it will be necessary for this Full Bench to take into account the outcome of the IEU's work value application in respect of the Teachers Award. Accordingly the review of modern awards listed in Attachment A will commence after the determination of the IEU's application to vary the Teacher's Award. The review of these awards will be conducted on the Commissioner's own motion pursuant to s. 157 of the Act.
4. There are two important preliminary questions that arise regarding this matter:
 - Should the Commission conduct a wide review of the nature proposed?
 - If so, should the proposed review be conducted at this time?
5. It is convenient to deal with these questions in reverse order.

¹ [2019] FWC 5934

Should the proposed review be conducted at this time?

6. Ai Group submits that the review should not be conducted at this time for two reasons.
7. **First**, 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.
8. The undergraduate classifications in the 29 awards in Attachment A to the Statement are directly linked to the wage rates. Therefore, the outcome of the proposed review could impose major cost increases upon employers.
9. 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.
10. **Second**, a major review, initiated by the Australian Government, is currently being undertaken into the AQF framework.
11. The [Review of the Australian Qualifications Framework](#) commenced in 2018 and is due to be completed this month, in September 2019.
12. A Review Panel was appointed in 2018. The Panel is chaired by Professor Peter Noonan, and one of the seven Panel members is Megan Lilly, Ai Group's Head of Workforce Development.
13. 134 submissions have been made to the Review.
14. The Review Panel held consultations with numerous parties in February and March 2019. In addition, the Department of Education commissioned a number of research projects to support the Review.

15. The [terms of reference](#) and the [discussion paper](#) for the Review highlight that some major changes to the AQF framework may result from the Review, which could have a significant impact upon the alignment between award classification levels and AQF levels.
16. It would not be in the public interest for the Commission to embark upon a major review of the alignment between award classifications and AQF levels at a time when a major review is underway into the AQF framework and changes are likely.
17. For these reasons, Ai Group submits that the Commission's proposed review of undergraduate qualifications, if it is to proceed, should not proceed at this time.

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

18. These proceedings have been initiated at the Commission's own motion under s.157 of the Fair Work Act 2009 (**FW Act**). The Statement says as follows in this regard, with reference to s.157(3)(a): (our emphasis)

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

19. 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.

20. 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.

21. 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.

22. On one view, s.157 does not expressly grant the Commission power to conduct a wide-ranging review of the classifications in a number of modern awards on its own motion.

23. 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.

24. 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.156:²

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.

25. 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.

² *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123, [25].