

FAIR WORK COMMISSION

AM 305 of 2014

**FOUR YEARLY REVIEW OF MODERN AWARDS
PENALTY RATES**

**SUBMISSION OF AUSTRALIAN INDUSTRY GROUP
ON OBJECTIONS TO EVIDENCE OF PROFESSOR QUIGGIN (CALLED BY UNITED VOICE)**

1. On 25 September 2015, the Full Bench invited the Australian Industry Group (“**Ai Group**”) to prepare a written submission relating to its objections to the report of Professor Quiggin dated 4 September 2015, a report sought to be tendered by United Voice. This submission responds to the invitation.
2. Following the exchange of objections and responses to objections between the parties, the position of the parties is:
 - (a) The Ai Group objects to specified sentences (set out in the attachment to this submission) in the report of Professor Quiggin (and submits that those sentences are inadmissible) on the ground that the “basis of opinion” in those sentences is not recorded;
 - (b) The Ai Group also objects to the same specified sentences in the report of Professor Quiggin on the ground that, on the face of the report, it is not clear that the opinions in those sentences are based on the expertise of Professor Quiggin (and submits that those sentences should not be admitted if they are “not based on the expertise” of Professor Quiggin);
 - (c) United Voice contends that the specified sentences are the reasons of Professor Quiggin for his general opinion expressed in the report (a contention that does not address in substance the “basis of opinion” objection);
 - (d) United Voice asserts (without pointing to any link between the sentences and the skills, training or experience of Professor Quiggin as an economist) that the specified sentences reflect opinions based on the expertise of Professor Quiggin as an economist (an assertion which seeks to address, albeit insufficiently, the “not based on the expertise” objection; and

- (e) United Voice points to the report in reply of Professor Lewis as responding to some of the opinions set out by Professor Quiggin.
3. In order to appreciate the import of the objections, it is necessary to consider the “basis of opinion” or the “statement of reasoning” rule for expert evidence. The rule is set out in *Dasreef Pty Limited v Hawchar* [2011] HCA 21; (2011) 243 CLR 588 (“*Dasreef*”) at [91]-[94] per Heydon J:

“The statement of reasoning rule at common law

[91] *The authorities.* At common law there is no doubt that an expert opinion is inadmissible unless the expert states in chief the reasoning by which the expert conclusion arrived at flows from the facts proved or assumed by the expert so as to reveal that the opinion is based on the expert's expertise. The court does not have to be satisfied that the reasoning is correct: ‘the giving of correct expert evidence cannot be treated as a qualification necessary for giving expert evidence.’ But the reasoning must be stated. The opposing party is not to be left to find out about the expert's thinking for the first time in cross-examination.

[92] Sir Owen Dixon, speaking extra judicially, said: ‘courts cannot be expected to act upon opinions the basis of which is unexplained.’ In *R v Jenkins; Ex parte Morrison* Fullagar J quoted that statement with approval, and added that expert scientific witnesses should be asked to ‘explain the basis of theory or experience’ on which their conclusions rest. On appeal Rich and Dixon JJ approved what Fullagar J had said. The witness must explain the basis of theory or experience because the court is not limited to examining the conclusion or the expertise of the expert witness: it must look to the ‘substance of the opinion expressed.’ Since choosing between conflicting experts depends in part on ‘impressiveness and cogency of reasoning’ their ‘processes of reasoning’ must be identified. In short, as the Victorian Court of Appeal (Winneke P, Charles and Chernov JJA) said in *R v Juric*:

‘[T]he jury must be able to evaluate the strength of [expert opinion] evidence by reference to its factual or scientific basis. Whether it can properly do so is a matter initially for the judge in determining whether that evidence is admissible. ... [T]he admissibility of [expert opinion] evidence must depend upon the judge's satisfaction that the jury can, on the basis of material put before them, properly and reasonably evaluate the differing opinions expressed and make a responsible determination as to which of them is to be preferred.’

[93] *Function of the statement of reasoning rule.* The rule protects cross-examiners by enabling them to go straight to the heart of any difference between the parties without the delay of preliminary reconnoitring. It also aids the court in a non-jury trial, because at the end of the trial it is the duty of the court to give reasons for its conclusions. And it aids jurors, because at the end of the trial they have the duty of assessing the rational force of expert evidence. If there is not some exposition of the expert's reasoning it will be impossible for the court to compose a judgment stating, and for the jurors to assemble, reasons for accepting or rejecting or qualifying the expert's conclusion. ‘The process of inference that leads to the [expert's] conclusions must be stated or revealed in a way that enables the conclusions to be tested and a judgment made about the reliability of them.’ As Lord Cooper, the Lord President, said in *Davie v Magistrates of*

Edinburgh:

'The value of [expert opinion] evidence depends ... above all upon the extent to which [the expert's] evidence carries conviction ... [T]he defenders went so far as to maintain that we were bound to accept the conclusions of [an expert witness]. This view I must firmly reject as contrary to the principles in accordance with which expert opinion evidence is *admitted*. ... [The] duty [of expert witnesses] is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. ... [T]he bare ipse dixit of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert.'

[94] It is sometimes said that these words deal with weight only, not admissibility. But this is contradicted by the Lord President's use of the word '*admitted*.' (footnotes omitted)

4. Ai Group submits that, in respect of each of the specified sentences the subject of objection:
 - (a) Professor Quiggin does not state in his report "the reasoning" (or the basis) for the opinions that he expresses in the specified sentences (see *Dasreef* at [91]);
 - (b) the basis of the opinions of Professor Quiggin are "unexplained" (see *Dasreef* at [92]);
 - (c) the "basis of theory" on which the opinions are based are not explained (see *Dasreef* at [92]);
 - (d) the Full Bench should not limit its examination to the conclusion of Professor Quiggin but "look to the substance" of the opinion expressed (see *Dasreef* at [92]);
 - (e) the Full Bench must be in a position to "properly and reasonably evaluate the differing opinions" between Professor Quiggin and Professor Lewis (see *Dasreef* at [92]; see also at [93]) so that the opinions may be "tested and a judgment made about the reliability of them" (see *Dasreef* at [93]);
 - (f) Ai Group should not be required to ascertain "the reasoning" for the first time in cross-examination (see *Dasreef* at [91]; see also at [93]);

- (g) each of the opinions is inadmissible, as opposed to being admissible and discounted for weight (see *Dasreef* at [91], [94]).
5. Whilst the Ai Group appreciates that the rules of evidence do not bind the Commission (see section 591 of the *Fair Work Act 2009* (Cth)), the rules of evidence provide general guidance on the manner by which the Commission chooses to inform itself of a factual matter (see, for example, *Hail Creek Pty Limited v CFMEU* (2004) 143 IR 354 at [50] per Ross VP, Duncan SDP, Bacon C; *AMIEU v Dardanup Butchering Co Pty Limited* [2011] FWA 3847; (2011) 209 IR 1 at [28] per Lawler VP, Hamberger SDP, Gay C) and reflect a common sense approach to determining a factual matter (see, for example, *Hail Creek Pty Limited v CFMEU* (2004) 143 IR 354 at [49] per Ross VP, Duncan SDP, Bacon C).
 6. Additionally, Ai Group submits that it is not immediately apparent how the opinion concerning the opening hours of businesses on a Monday (see Quiggin Report, par 20(iv), last sentence) or the type of employment that is likely to attract penalty rates (see Quiggin Report, Appendix A, par 9) is based on the expertise of Professor Quiggin.
 7. Finally, Ai Group submits that the fact that a subsequent expert report addresses the same subject matter as an objected portion of an earlier expert report does not render the objected portion (which is otherwise inadmissible) admissible.
 8. The Ai Group is content for the Full Bench to rule on the objections “on the papers” without a further hearing (albeit after affording the United Voice an opportunity to respond to this submission).

H J Dixon SC

A B Gotting

Counsel for Ai Group

28 September 2015

ATTACHMENT

Extract from *United Voice response to objections* to the report of Professor John Quiggin filed on 23 September 2015

Paragraph	Basis of Objection	Responses
Par 20 (iii) second sentence	No basis for opinion Opinion not based on expertise	These sub-paragraphs are Professor Quiggin's reasons for his opinion at paragraph 20.
Par 20(iv) second sentence	No basis for opinion Opinion not based on expertise	The opinions are within Professor Quiggin's expertise as an economist. The opinion in these sub-paragraphs utilises established economic concepts.
Par 20(iv) last sentence	No basis for opinion Opinion not based on expertise	See also Professor Lewis' reply report to 20(iii) and 20(iv) which utilises and/or responds to these concepts.
24 last sentence	No basis for opinion Opinion not based on expertise	Refer to and repeat the response to paragraph 20 above. The concept of substitution is an established economic concept. See also Professor Lewis' reply report to 24 which utilises and/or responds to this concept.
25	No basis for opinion Opinion not based on expertise	Refer to and repeat the response to paragraphs 20 and 24 above. Offsetting factors form part of the established principles of economics and are within Professor Quiggin's expertise. Professor Quiggin is giving evidence about offsetting factors if penalty rates are reduced. See also Professor Lewis' reply report to 25.
27 last sentence	No basis for opinion Opinion not based on expertise	Refer to and repeat the response to paragraphs 20, 24, and 25 above. See also Professor Lewis' reply report to 27.
Appendix A Par 9 last sentence	No basis for opinion Opinion not based on expertise	Basis of objection is unclear given the context of the entire paragraph.