



STATEMENT

Fair Work Act 2009

s.157 – FWC may vary etc modern awards if necessary to achieve modern awards objective

Review of certain C14 rates in modern awards

(C2019/5259)

JUSTICE ROSS, PRESIDENT

MELBOURNE, 25 NOVEMBER 2019

Review of the rates at the C14 rate in modern awards – introductory rates – referral to a Full Bench.

[1] This statement concerns the review of modern awards which have classification rates at the C14 level which are either not transitional rates or where the transition period is not specified. The background to this issue is set out in a Statement¹ dated 28 August 2019 (the *August 2019 Statement*).

[2] The *August 2019 Statement* referred to an extract from the 2018-19 AWR decision² which noted that some 45 modern awards include a rate of pay at the C14 rate (currently \$740.80 per week). In the *August 2019 Statement* these 45 modern awards were divided into 5 categories and I expressed the *provisional* view that the 14 awards in two of those categories ((iv) and (v)) be referred to a Full Bench for review. A list of the 14 modern awards proposed for review is set out at **Attachment 1**. In such a review the Full Bench would consider whether the C14 classifications in each of these awards provides a fair and relevant safety net of terms and conditions.

[3] Interested parties were invited to comment on the following matters:

1. The *provisional* view at [5] of the *August 2019 Statement*.
2. Whether the list of awards identified in categories (iv) and (v) above (at [5] of the *August 2019 Statement*) is an accurate list of the modern awards in each of these categories.
3. In relation to the 8 modern awards listed in category (iv) – i.e. those which do not appear to specify a particular transition period – what transition period

does the interested party propose?

4. In relation to the 6 modern awards listed in category (v) – i.e. those in which the C14 classification level is not a transitional level – do the C14 classification levels in these awards provide a fair and relevant safety net? Has there been any work value determination of these classifications?

[4] The following submissions were filed:

- [United Voice](#) – 26 September 2019
- [Australian Federation of Air Pilots](#) – 27 September 2019
- [ABI and NSWBC](#) – 27 September 2019
- [Australasian Meat Industry Employees Union](#) – 27 September 2019
- [The Australian Workers' Union](#) – 27 September 2019
- [CFMMEU](#) – Manufacturing Division – 27 September 2019
- [Australian Industry Group](#) – 27 September 2019
- [Australian Manufacturing Workers' Union](#) – 3 October 2019

[5] This matter was the subject of a conference on 8 October 2019. A link to the transcript of the conference is [here](#).

[6] 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. Further, at the conference Ai Group indicated that in its written submission it was simply seeking to flag a potential jurisdictional issue but were not pressing the point at this stage. Ai Group indicated that in the time available it had been unable to reach a considered view on the issue.

[7] The following submissions were filed in response following a Statement³ issued on 17 October 2019 (the *October 2019 Statement*):

- [Ai Group](#) – 11 November 2019
- [AFEI](#) – 18 November 2019
- [ABI](#) – 19 November 2019

[8] In summary, Ai Group submits:

- Section 157 of the *Fair Work Act 2009* (Cth) (the FW Act) does not give the Commission the power to conduct a wide-ranging review on its own motion into broad topic areas regulated by awards;

- Section 157 requires that the subject matter of the proposed variation to each relevant award be identified with some precision at the time when the proceedings are initiated, even though the specific award amendments are able to be refined during the course of the proceedings; and
- Ai Group is satisfied that there is jurisdiction for the current proceedings to take place given that the subject matter of the proceedings has been identified upfront and is relatively discrete.

[9] In its submission AFEI identifies an interest in the following awards:

- *Concrete Products Award 2010*
- *Meat Industry Award 2010*
- *Quarrying Award 2010*
- *Broadcasting, Recorded Entertainment and Cinemas Award 2010*
- *Dry Cleaning and Laundry Industry Award 2010*
- *Funeral Industry Award 2010*
- *Travelling Shows Award 2010*

[10] At [9] of its submission AFEI contends that ‘the Commission’s power under s 157(3) to ‘make a determination’ under s 157(3) ‘on its own initiative’ is a power that may only be exercised in relation to a particular ascertainable variation.’ It is AFEI’s position that:

- Section 157(3) does not empower the Commission to initiative proceedings which are a broad ‘review’; and
- Section 157 requires that the nature and details of the proposed variation be known to the potential interested parties, at the time of when proceedings are initiated and certainly before they proceed to any hearing; and
- Finally, the Commission’s power to make a determination on its own initiative pursuant to s 157(3) must be exercised consistent with the safeguards and controls in s 577 and s 578, 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.

[11] At [17] and [21] of its submission AFEI states:

‘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.

...

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.’

[12] In its submission ABI notes that as Ai Group now concedes that the Commission has jurisdiction to conduct the proceedings in the manner proposed it only proposes to make a short submission to assert the Commission generally. In the course of its submission ABI advances the following points:

- Section 157(3) of the FW Act expressly empowers the Commission to act on its own initiative (or otherwise on application) which the Commission in these proceedings is doing.
- Both section 156 (now repealed) and 157 should be understood in the context of what modern awards are under the FW Act.
- Modern awards are “regulatory instruments” setting minimum standards and the Commission has an overarching duty to ensure that they meet the modern awards objective. In this context, it should not be seen as controversial that section 157 provides for the Commission to act on its own initiative. Previously outside of the 4 Yearly Review process but now at large, the Commission may seek to inquire into whether a modern award is meeting the modern awards objective rather than simply stand by awaiting a ‘party’ to apply to agitate such a case if at all.
- Nothing in the Act prevents the Commission hearing matters concurrently or from joining matters being dealt with pursuant to section 157 of the FW Act.
- Nothing in the Act prevents the Commission from dealing with more than one modern award in a matter being dealt with pursuant to section 157 of the FW Act.

[13] ABI also notes that in exercising its powers under s 157 the Commission must have regard to:

- Chapter 5 Part 5-1, Division 3 of the FW Act;
- Sections 577 and 578; and
- The objects of the Act (s 3).

[14] In exercising its powers under s 157 the Commission is required to have regard to s 577. In this regard ABI submits:

‘ ... Commission will need to conduct itself with care to ensure that the process adopted accords with section 577.

In a context where the Commission is acting of its own initiative this may require a more involved and iterative process than might otherwise be the case when the jurisdiction is enlivened by way of application.’⁴

[15] A further conference will be held at **9:30am on Friday 29 November 2019**. Interested parties are encouraged to have further discussions in respect of the issues raised in particular awards.

Issues to be discussed at the conference

[16] The following issues will be discussed at the conference:

1. I note that Ai Group no longer contends that the Commission does not have jurisdiction to conduct the proceedings in the manner proposed. AFEI's position is less clear. At the conference on Friday 29 November 2019 AFEI will be asked to clarify its position in this regard.
2. It appears to be uncontentious that in acting on its own notion under s 157 the Commission is required to accord procedural fairness to parties who may be affected by any determination. Further, as ABI submits, such a context 'may require a more involved and iterative process than might otherwise be the case when the jurisdiction is advanced by way of application.' Does any party have a different view?
3. Is the list of awards identified in categories (iv) and (v) above (at [5] of the *August 2019 Statement*) and in Attachment 1 an accurate list of the modern awards in each of these categories?
4. In relation to the 8 modern awards listed in category (iv) – i.e. those which do not appear to specify a particular transition period – what transition period does the interested party propose?
5. In relation to the 6 modern awards listed in category (v) – i.e. those in which the C14 classification level is not a transitional level – do the C14 classification levels in these awards provide a fair and relevant safety net? Has there been any work value determination of these classifications?
6. What are the next steps in this process?

PRESIDENT

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Attachment 1

Category (iv)

8 modern awards in which the C14 classification appears to be transitional but no particular transition period is specified.

- *Cement and Lime Award 2010* (A level 1 employee is paid at the NMW (cl. 14.1) Schedule B.1 describes a level 1 employee as ‘entry level’ and ‘undertaking basic competency training’);
- *Concrete Products Award 2010* (A level 1 employee is paid at the NMW (cl. 15.1). Schedule B.1.1 refers to undertaking the employers induction program refers to the ‘employer’s induction program’);
- *Meat Industry Award 2010* (An MI1 employee is paid at the NMW (cl. 19.1). Schedule B.3.1 refers to an employee at this level ‘undergoing on-the-job training for an initial period of at least three months’);
- *Oil Refining and Manufacturing Award 2010* (A Lubricants/bitumen plants and terminals trainee (level 1) is paid at the NMW (cl. 14.1) Schedule B.1.4 describes this as an employee undergoing the necessary orientation and training to enable safe and efficient performance as an operator);
- *Port Authorities Award 2010* (A level 1 employee is paid at the NMW (cl. 13.1). Schedule B.1 describes an employee at this level as having ‘completed induction’);
- *Quarrying Award 2010* (A grade 1 employee is paid at the NMW (cl 17.) Schedule B describes an employee ‘undertaking training to become competent’);
- *Rail Industry Award 2010* (An Operations level 1 employee is paid at the NMW (cl. 14.1) Schedule A says that employees at this level ‘undertake and successfully complete standard induction training’) and
- *Stevedoring Industry Award 2010* (A Grade 1 employee is paid at the NMW (cl. 13.1). Schedule B describes an employee at this level as someone ‘who is undergoing induction and initial training prior to appointment as a stevedoring employee Grade 2’).

Category (v)

6 modern awards in which the C14 classification level is not a transitional level.

- *Air Pilots Award 2010* (First officers and second pilots of Single engine UTBNI 1360 kg and Single engine 1360 kg-3359 kg are paid at the NMW (Schedule B.1.1). An aerial Application Pilot with less than 1000 hours of flying experience is also paid at the NMW (Schedule D.9.1). It is noted that there additions to salary in B.1.3, B.1.4 and D.9.5 which may mean that employees receive an amount greater than the NMW);
- *Broadcasting, Recorded Entertainment and Cinemas Award 2010* (A Grade 1 employee is paid at the NMW (cl. 14.3). Clause 14.2(a) suggests that there may not be any employees paid at this rate under the award);
- *Dry Cleaning and Laundry Industry Award 2010* (A Dry cleaning employee level 1 is paid at the NMW level (cl. 14.1(a));

- *Funeral Industry Award 2010* (A grade 1 employee is paid at the NMW level (cl. 14.1);
- *Sugar Industry Award 2010* (The C14/L2-milling general operator is paid at the NMW level (cl. 40.1). The BT1 rate (cl. 42.1) applies to ‘new starters’ who undertake a 3 month probation period) and
- *Travelling Shows Award 2010* (A Grade 1 employee is paid at the NMW).

¹ [\[2019\] FWC 5863](#)

² [\[2019\] FWCFB 3500](#) at [335] – [342]

³ [\[2019\] FWC 7182](#)

⁴ [ABI submission](#) 19 November 2019 at 3.16 and 3.17