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**Fair Work Commission: s.157 FWC may vary modern awards if necessary to achieve the modern awards objective**

## **REVIEW OF CERTAIN C14 RATES**

**AUSTRALIAN BUSINESS INDUSTRIAL**

**and -**

**THE NSW BUSINESS CHAMBER LTD**

**27 SEPTEMBER 2019**

## 1. INTRODUCTION

1.1 These submissions are filed on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**NSWBC**) in accordance with the directions issued in a statement<sup>1</sup> published on 28 August 2019 (**August Statement**) which invited parties to file submissions regarding four questions by 4.00pm 27 September 2019.

1.2 ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and the NSWBC is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth).

## 2. 2018-19 ANNUAL WAGE REVIEW PROCEEDINGS

2.1 The consideration of what are described as C14 rates has arisen from the 2018-19 Annual Wage Review proceedings. In those proceedings, the Australian Catholic Bishops Conference (**ACBC**) and Australian Council of Trade Unions (**ACTU**) submitted that the Expert Panel should reset the C14 rate (being the Engineering/Manufacturing Employee Level 1 in the *Manufacturing and Associated Industries Award 2010*) otherwise known as the National Minimum Wage (**NMW**).<sup>2</sup>

2.2 Although the Expert Panel rejected the ACTU and ACBC claim in the Annual Wage Review 2018-2019 decision published on 30 May 2019 (**2018-19 AWR Decision**)<sup>3</sup>, the Expert Panel observed as follows (footnotes omitted, underlying added):

*[339] It follows that, for a proportion of the employees in the households which are the focus of the ACTU and ACBC submissions, the wage earner is likely to be transitioning through the C14 wage rate into a higher classification level.*

*[340] In the remaining 6 modern awards containing a C14 (or NMW) rate, the related*

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<sup>1</sup> [2019] FWC 5863

<sup>2</sup> [2019] FWCFB 3500

<sup>3</sup> [2019] FWCFB 3500

*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.*

*[341] We would also observe that the remaining 77 modern awards only provide for wage rates above the C14 or NMW rate.*

*[342] These things matter, because it is important to identify with some precision the number of employees who are sought to be the beneficiaries of a particular policy. If it turns out that the number of employees in the household types below the relative poverty line is very small or that they are transitioning to higher-paid jobs then it raises a real question about whether the minimum wage system is the appropriate instrument to address these pockets of disadvantage. As the Panel has observed in the past, 'increases in minimum wages are a blunt instrument for addressing the needs of the low paid ... [and] the tax-transfer system can provide more targeted assistance to low-income households and is a more efficient means of addressing poverty'."<sup>4</sup>*

2.3 In addition to this, the 2018-19 AWR Decision remarked that:

- (a) approximately 180,200 employees are paid the adult C14 rate which represents 1.7 per cent of all employees;
- (b) almost two-thirds of workers who enter low paid employment leave within one year and move into higher paid work;
- (c) the C14 rate was featured in 45 of 122 modern awards;
- (d) 39 of those modern awards were transitional after a period;
- (e) Of those:
  - (i) 8 awards transition to a higher rate after 38 hours;
  - (ii) 18 awards transition to a higher rate after 3 months;
  - (iii) 13 transition either other periods specified or no particular time period specified; and

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<sup>4</sup> [2019] FWCFB 3500 at [339]-[342].

- (f) the remaining 6 awards not being transitional which the Expert Panel observed was not clear why they were not transitional.<sup>5</sup>

### 3. AUGUST STATEMENT

3.1 Following the 2018-19 AWR Decision, the President published the August Statement.

3.2 The August Statement expressed a provisional view that of the 45 modern awards that contained the C14 rate, some 14 awards should be referred to a newly constituted Full Bench for review.

3.3 In expressing this provisional view, the August Statement focussed on the 14 modern awards which have classification rates at the C14 level which are described as either:

- (a) not transitional rates (6 modern awards); or
- (b) where a transition period is not specified (8 awards).

3.4 The Full Bench indicated that it did not intend to look at the other 38 modern awards with C14 rates.

3.5 The August Statement invited parties to comment on the following matters:

*“1. The provisional view at [5] above.*

*2. Whether the list of awards identified in categories (iv) and (v) above (at [5]) 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*

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<sup>5</sup> [2019] FWCFB 3500 at [337] - [341]

*determination of these classifications?*<sup>6</sup>

#### **4. ABI/NSWBC AUGUST STATEMENT RESPONSES**

4.1 It is important that the Commission place primacy on the work actually being performed and the value of that work properly determined rather than surrendering to a notion that the C14 rate can only be a temporary rate.

4.2 It is also important for the Commission to avoid placing an artificial temporal constraint on classification structures where the structure is truly competency based.

##### **Question One**

4.3 We agree that a Full Bench should be constituted to deal with a review of classifications adopting the C14 rate should the Commission or any party have concerns that the rate does not properly reflect the value of work being performed.

4.4 This may require to extend its consideration more broadly to include some or all of the 45 modern awards with C14 rates.

##### **Question Two**

4.5 Based on our analysis of the 122 modern awards the August Statement is correct.

##### **Question Three**

4.6 If the modern award under consideration is truly competency based then no artificial time period should be imposed on it and the answer should be none.

4.7 If the modern award under consideration is not competency based then the question is simply whether or not the rate set reflects the value of the work performed.

4.8 The table below demonstrates that all 8 category (iv) Awards are competency based.

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<sup>6</sup> [2019] FWC 5863 at [10]

| <b>Category (iv) Awards</b> |  |   |
|-----------------------------|--|---|
|                             | <b>Modern Award</b>                              | <b>Competency Based?</b>  |
| 1.                          | <i>Cement and Lime Award 2010</i>                | Yes - "entry level" and "undertaking basic competency training"   |
| 2.                          | <i>Concrete Products Award 2010</i>              | Yes - "undertaking employer's induction programme"  |
| 3.                          | <i>Meat Industry Award 2010</i>                  | Yes - "no experience" and "undergoing on-the-job training for an initial period of at least three months" |
| 4.                          | <i>Oil Refining and Manufacturing Award 2010</i> | Yes - "undergoing the necessary orientation and training to enable safe and efficient performance"        |
| 5.                          | <i>Port Authorities Award 2010</i>               | Yes - "completed induction" "works under detailed instruction" "basic...work"                             |
| 6.                          | <i>Quarrying Award 2010</i>                      | Yes - "undertaking training to become competent"  |
| 7.                          | <i>Rail Industry Award 2010</i>                  | Yes - "undertake and successfully complete standard induction training"                                   |
| 8.                          | <i>Stevedoring Industry Award 2010</i>           | Yes - "undergoing induction and training prior to appointment as a stevedoring employee Grade 2"          |

4.9 By way of example, in the *Quarrying Award 2010* (**Quarrying Award**) as the August Statement indicated<sup>7</sup>, a grade 1 employee is paid at the C14 rate.

4.10 In Schedule B - Classification Descriptors a grade 1 employee in the Quarrying Award is:

*"an employee who is undertaking training to become competent in Basic Quarry competency"*

4.11 A grade 2 employee is then:

*"A Grade 2 employee:*

- (a) *is an employee who is competent in the Basic Quarry competency;*
- (b) *performs general labouring duties; and*

<sup>7</sup> [2019] FWC 5863 at [5]

- (c) *is undertaking training to be assessed as competent in one or more core competencies in accordance with clause C.1.*

4.12 “Basic Quarry Competency” in the Quarrying Award is defined as follows:

*“Basic Quarry Competency*

*An employee must be competent in the following elements:*

- (a) *Work safely & follow OHS policies and procedures;*
- (b) *Conduct local risk control;*
- (c) *Communicate in the workplace;*
- (d) *Contribute to quality work outcomes; and*
- (e) *Operate light vehicles.*

4.13 Clause C.1. in effect reflects the competency packages under the AQF.

4.14 An employee at grade 1 is, in effect, not competent to perform any productive work in a quarry at all; not even basic labouring.

4.15 How long it takes an employee to obtain basic quarry competencies is not temporal based but rather based on the individual. An experienced quarry worker would not enter a quarry at grade 1 at all but enter based on their level of competency at Grade 3 or above. A person coming fresh ‘off the street’ with no quarry or similar experience would start at Grade1 and would need to achieve the Basic Quarry Competency before they undertook any productive work. This might take a few days or a few weeks depending on the individual.

4.16 Placing an artificial temporal barrier on this is misplaced. If it is too short for the employee the employer must artificially classify the employee to Grade 2 or higher even if they are not capable of doing the work in the Grade. As the employee cannot do any productive work in Grade 1 the employer is not going to artificially ‘hold’ the employee in this Grade.

4.17 Therefore, as soon as an employee is competent in the above Basic

Competencies, starts undertaking training in accordance with C.1 and moves onto actually doing labouring duties, there is a clear transition in the Quarrying Award.

4.18 The rationale for the transition was demonstrated in the Award Modernisation Full Bench Decision.

4.19 The Decision stated as follows:

*"[186] We have included a new classification structure based on competencies acquired and exercised rather than on function groups. We have deleted the provision for additional payments for employees trained and accredited in more than two function groups, since progression through the structure will be based on competencies rather than function groups."<sup>8</sup>*

4.20 We consider this to be sound reasoning for a classification structure based on competency, rather than by time.

4.21 At this stage of the proceedings there is no evidence before the Commission to suggest that these modern awards are not working as intended and properly.

#### **Question Four**

4.22 The question for these 6 awards is simply whether the rate applied reflects the value of the work performed.

4.23 The relevant classifications in these 6 awards appear largely to concern lower skilled work (by comparison to the rest of the work being classified under the award) or what historically was a 'not elsewhere included' classification to ensure some rate applies to all work performed under the award. By way of example in the *Funeral Industry Award 2010*, a Grade 1 classified employee is a funeral director's assistant, coffin draper and/or an adult employee not mentioned in any of the Grades 2 to 6.

4.24 Since 2010 there have been very few work value cases and none that relate these

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<sup>8</sup> 2009 [AIRC FB] 345 at [186].



6 awards.

4.25 We have not completed an in-depth historical analysis of all 6 modern awards listed.

4.26 If the Commission or any party held a concern that the rates did not reflect the value of the work performed in the relevant classification the Commission should undertake a work value review.

4.27 If the Commission was minded to explore a work value determination, it would be prudent consider:

- (a) What pre-modern award was the modern award based on?
- (b) Whether the structure of that pre-modern award reflects that in the modern award?
- (c) Whether there was any recent work value assessment done for that pre-modern award?

**Filed on behalf of ABI and NSWBC by:**

**Nigel Ward**  
CEO + Director  
Australian Business Lawyers & Advisors

**Helen Hamberger**  
Associate  
Australian Business Lawyers & Advisors

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