



REPORT TO THE FULL BENCH

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)

COMMISSIONER HAMPTON

ADELAIDE, 5 SEPTEMBER 2022

Review of the classification rates at the C14 rate in modern awards – introductory rates – conference conducted – Report to the Full Bench.

1. Background

[1] This Report concerns the review of modern awards which have classification rates at the C14 rate which are either not expressly stated as transitional rates or where the transition period is not specified. The C14 rate is equivalent to the National Minimum Wage (NMW) rate.

[2] The further background to this matter is set out in 3 Statements issued by the President.

[3] A Statement issued on 28 August 2019¹ (the **August 2019 Statement**). The August 2019 Statement referred to an extract from the 2018-19 AWR decision² which noted that 45 modern awards included a rate of pay at the C14 rate. The August 2019 Statement also divided the 45 modern awards into 5 categories including:

- those in which the C14 classification appeared to be transitional, but no particular transition period was specified (**category iv**); and
- those in which the C14 classification level was not a transitional level (**category v**).

[4] In the August 2019 Statement the President also expressed the provisional view that the modern awards in categories (iv) and (v) be referred to a Full Bench for review. 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. Parties were invited to comment on the provisional view and the accuracy of the list of awards.

¹ [\[2019\] FWC 5863](#)

² [\[2019\] FWCFB 3500](#)

[5] The relevant modern awards considered in the August 2019 Statement were as follows:

Category (iv)

- *Cement, Lime and Quarrying Award 2020*³
- *Concrete Products Award 2020*
- *Meat Industry Award 2020*
- *Oil Refining and Manufacturing Award 2020*
- *Port Authorities Award 2020*
- *Rail Industry Award 2020*
- *Stevedoring Industry Award 2020*

Category (v)

- *Air Pilots Award 2020*
- *Broadcasting, Recorded Entertainment and Cinemas Award 2020*
- *Dry Cleaning and Laundry Industry Award 2020*
- *Funeral Industry Award 2020*
- *Sugar Industry Award 2020*
- *Travelling Shows Award 2020*

[6] Several organisations responded to the August 2019 Statement and some unions indicated a desire to seek variations to a number of the modern awards concerned.

[7] A Statement was subsequently issued by the President on 2 December 2019⁴ (the **December 2019 Statement**) noted an invitation for the unions to make applications to vary the remaining awards in the manner they proposed and confirmed that no applications or requests for assistance were received by the Commission. The December 2019 Statement also noted an Australian Council of Trade Unions (**ACTU**) proposal for the Commission to obtain certain statistical information from the Australian Bureau of Statistics (**ABS**) Survey of Employee Earnings and Hours (**EEH**) as to the number of award reliant employees in receipt of C14 level wages in the modern awards which may be subject of the union applications.

[8] The December 2019 Statement indicated that the ABS did not consider that the EEH date available at that time was suitable for release and the Commission did not presently intend to take any further steps in relation to the issue of the stated C14 (or NMW) rates on its own initiative, but the offer of assistance to facilitate discussions remained open.

[9] On 27 July 2022, the President issued a further Statement⁵ (the **July 2022 Statement**) which noted that the 4 yearly review of modern awards had been largely completed and that the C14 rates in the following awards will be reviewed on the Commission's own motion:

³ The *Cement and Lime Award 2010* has been amalgamated with the *Quarrying Award 2010* to become the *Cement, Lime and Quarrying Award 2020*.

⁴ [\[2019\] FWC 8159](#)

⁵ [\[2022\] FWC 1989](#)

- *Cement, Lime and Quarrying Award 2020*
- *Concrete Products Award 2020*
- *Meat Industry Award 2020*
- *Oil Refining and Manufacturing Award 2020*
- *Rail Industry Award 2020*
- *Air Pilots Award 2020*
- *Dry Cleaning and Laundry Industry Award 2020*
- *Funeral Industry Award 2020*
- *Sugar Industry Award 2020*
- *Travelling Shows Award 2020*

[10] The July 2022 Statement also expressed some provisional views about 3 modern awards and indicated that a conference would be convened by the Commission as presently constituted to discuss the:

- the programming of the review, and
- the provisional views expressed by the President.

[11] That conference was convened on 23 August 2022. A copy of the transcript of the conference is available on the Commission’s website.⁶ This Report summarises the views of those attending and makes some observations for the benefit of the Full Bench that will deal with this matter.

2. The provisional views

[12] It is convenient to commence with the response to the provisional views of the President set out in the July 2022 Statement as these inform the scope of the Review to some extent.

[13] In the July 2022 Statement that President stated as follows:

“[8] The MEAA indicated it would not be seeking to vary the *Broadcasting, Recorded Entertainment and Cinemas Award 2010* on the basis that the award did not have employee classifications at the Grade 1 (C14) level. In these circumstances, it is my provisional view that the references to the Grade 1 classification in the Broadcasting Award are obsolete and should be deleted. It is my provisional view that the removal of the references to the Grade 1 classification is necessary to meet the modern awards objective.”

[14] In the immediate lead up to the Conference it was brought to my attention that although there are no classifications allocated to Grade 1 in the salary structure of clause 13.2(a) of the Broadcasting Award, the Grade 1 rate is used as the applicable minimum rate for 1st year and 2nd year Adult Cadets in Journalism at clause 13.7. As a result, the removal of the Grade 1 rate could have unintended consequences.

[15] I observe that amongst other options, a light touch approach would be to retain the Grade 1 only for the limited purpose stated above with a note to that end.

⁶ [Transcript 23 August 2022](#)

[16] This was raised by the Commission in the course of the Conference; however given the absence of prior notice it is important to provide an opportunity for the relevant parties to respond to this aspect. On that basis, the Broadcasting Award should be included as part of the Review and this aspect ultimately determined by the Full Bench.

[17] The second provisional view in the July 2022 Statement was as follows:

“[9] The CFMMEU – MUA Division indicated that it would not be seeking to vary the *Port Authorities Award 2010* or the *Stevedoring Industry Award 2010* on the basis that the awards were ‘in sufficient terms.’ It is my provisional view that these 2 awards will not be reviewed further as part of this matter.”

[18] The CFMMEU – MUA Division confirmed the above during the Conference and indicated that it was not seeking that the 2 awards concerned be reviewed on this aspect. No party participating in the Conference indicated a different view.

[19] It appears that the *Port Authorities Award 2020* or the *Stevedoring Industry Award 2020* operate, in effect, as introductory classifications and can be excluded from the review as proposed.

3. Those modern awards where there is no agitation for change

[20] During the Conference, the relevant unions indicated, in effect, that they did not consider that the following modern awards were problematic and did not require review as part of the present exercise:

- *Cement, Lime and Quarrying Award 2020* – AWU⁷
- *Oil Refining and Manufacturing Award 2020* – AWU and UWU⁸
- *Air Pilots Award 2020* – AFAP⁹

[21] No other party participating the Conference contended otherwise.

[22] Subject to the Full Bench being satisfied that the terms of the relevant classification are appropriately expressed, the above awards could be confirmed at an early stage in the Review.

[23] I observe that it appears that the remainder of the modern awards outlined for further consideration in the July 2020 Statement,¹⁰ along with the Broadcasting Award, should continue to be subject to this Review.

⁷ On the basis that the relevant classification in this award properly operated as an introductory rate for employees completing basic competency training.

⁸ On the basis that the relevant classifications in this award operated in the context of a 35-hour week and as a result the effective hourly rates of pay were in excess of the NMW.

⁹ On the basis that other payments applied in addition to the stated salary rates and as a result the effective hourly rates of pay were in excess of the NMW.

¹⁰ July 2020 Statement at [20].

4. The programming of the Review

[24] The Australian Industry Group (AiG) proposed that:

- The review should potentially proceed on an award-by award basis;
- Interested parties should be required to file draft determinations, or some other process adopted to ensure that proposed variations were understood, prior to requiring the filing of materials; and
- It would be useful for some discussions between the parties to take place as proposed by the ACTU (below) to focus the issues in dispute.

[25] This approach was generally supported by Australian Business Industrial & the NSW Business Chamber.

[26] The ACTU proposed the following:

- Seek to explore whether data from the recently modified EEH survey could be made utilised to ascertain the extent to which the C14 classifications (rates) were being applied in practice;
- The Commission to issue a background paper;
- Have the interested parties meet to consider the relevant award provisions with a view to agreeing outcomes or narrowing the issues; and
- Have the employer organisations confirm which particular modern awards they had an interest in.

[27] The above approach was generally supported by those unions participating in the conference. Further, some of the unions¹¹ indicated that they may, subject to further consultation with members, be able to advance proposals to vary the relevant modern awards.

[28] The ACTU subsequently provided a specific proposal for the EEH data¹² and this has now been made available to the other parties. In general terms, the proposal was to seek information from the ABS using the 2021 EEH data about the number of employees (full-time, part-time and casual) paid on the C14 rate under the award codes of the relevant modern awards under review.

[29] No responses to, or concerns about, the ACTU's EEH data proposal have been provided to the Commission.

¹¹ Including the AMIEU and RTBU.

¹² [ACTU proposal](#).

[30] Material of that kind, if available, would be relevant to the C14 Review. However, based upon the Commission's preliminary assessment it is likely that there will be insufficient statistically reliable data given the limited number of relevant modern awards and the scope of the EEH survey.

[31] As a result, the following approach may be considered by the Commission/Full Bench:

1. Publish this Report and invite further submissions on the issues and the proposed approach. Parties should specifically identify which modern awards they have an interest in.
2. Explore with the ABS whether the ACTU's revised proposal to use the more recent EEH data can be accommodated and publish the response/results.
3. Publish a background paper on the history of the relevant modern award provisions and set out the issues that might arise for determination by the Full Bench.
4. Invite proposals from parties concerning the relevant awards being reviewed and encourage those with an interest to discuss their respective positions with a view to narrowing or clarifying the issues. The Commission could assist by convening one or more conferences if sought by the parties.
5. Conduct an initial Full Bench hearing in October 2022 to:
 - Consider submissions made in response to the background paper and any proposals advanced by interested parties.
 - Determine the final scope of the Review and finalise those modern awards where there is a consensus as to whether the award should/should not be varied and the form of any agreed variations.
 - Consider and issue directions for the provision of evidence and submissions from parties to enable the Review to be completed in respect of the remaining relevant modern awards.



COMMISSIONER

Appearances:

R Bhatt of The Australian Industry Group.

T Clark of the Australian Council of Trade Unions.

N Keats for the Construction, Forestry, Maritime, Mining and Energy Union – MUA Division.

C Buckley of the The Australasian Meat Industry Employees Union.

V Wiles of the Construction, Forestry, Maritime, Mining and Energy Union – Manufacturing Division.

C Gray-Starcevic of the United Workers' Union.

M Davis of the Australian Rail, Tram and Bus Industry Union.

S Crawford of the The Australian Workers' Union.

K Scott for Australian Business Industrial and The NSW Business Chamber Ltd.

J Mattner of the Australian Federation of Air Pilots.

Conference details:

2022

August 23

MS Teams Video.

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