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

REVIEW OF CERTAIN C14 RATES IN MODERN AWARDS

AUSTRALIAN BUSINESS INDUSTRIAL

and -

THE NSW BUSINESS CHAMBER LTD

SUBMISSIONS IN REPLY

26 OCTOBER 2022

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 affirmed in Statement dated 6 October 2022. Those Directions invited parties to file submissions in reply to the proposals filed by relevant parties on 19 October 2022 and the Background Paper (including any corrections to the Background Paper).
- 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. AWARDS IN WHICH OUR CLIENTS HAVE AN INTEREST

- 2.1 Subject to the confirmation of the provisional views set out in the Statement dated 6 October 2022, the Commission has identified at paragraph [30] a list of seven modern awards which remain to be considered as part of the review.
- 2.2 Of the awards listed at paragraph [30] of the Statement, ABI and the NSWBC has an interest in the following awards:
- (a) *Concrete Products Award 2020*;
 - (b) *Meat Industry Award 2020*;
 - (c) *Dry Cleaning and Laundry Industry Award 2020*;
 - (d) *Funeral Industry Award 2020*; and
 - (e) *Sugar Industry Award 2020*.

3. GENERAL SUBMISSIONS

- 3.1 As outlined in the Background Paper published on 4 October 2022, these proceedings have their genesis in the 2018-19 Annual Wage Review¹.
- 3.2 In the 2018-19 Annual Wage Review, the Expert Panel made some brief observations about C14 rates in modern awards. Those observations were made in the context of a proposal that had been advanced by the ACTU and ACBC and which was ultimately rejected.

¹ [2019] FWCFB 3500.

3.3 In their decision, the Expert Panel noted that:

- (a) The C14 rate features in 45 modern awards; and
- (b) In many cases the C14 classification level is (or appears to be) a transitional classification from which employees progress, either after a specified period of time or at some other unspecified point.²

3.4 The Expert Panel then made the following observation at [340]:

In the remaining 6 modern awards containing a C14 (or NMW) rate, the related 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.

3.5 That observation has led to the current proceedings. In a Statement dated 28 August 2019, the President expressed a provisional view that 14 awards should be referred to a Full Bench for review and for a consideration as to whether the C14 classifications in each of those awards provides a fair and relevant safety net of terms and conditions.³

3.6 In our submission filed on 27 September 2019, we raised a number of issues that go to C14 rates / levels generally as well as how any review of C14-equivalent levels should be conducted.

3.7 By way of summary, we made the following submissions:

- (a) First, the Commission should not proceed on an assumption that the C14 rate in modern awards can only ever be a 'temporary' rate.
- (b) Second, the Commission must place primacy on the work actually being performed, and the value of that work properly determined.
- (c) Third, where a classification structure is truly competency based, it is important that the Commission avoid placing an artificial temporal constraint on that structure.
- (d) Fourth, any consideration of C14 rates in awards should only proceed where a party or the Commission has concerns that the rate does not properly reflect the value of work being performed.

² At [337]-[338].

³ [2019] FWC 5863.

- (e) Fifth, an award should only be varied where the Commission is satisfied that the rate set for a particular level does not reflect the value of the work performed.
- (f) Sixth, it follows that awards must be considered on an individual basis having regard to the actual work being performed (and the value of that work), and any transitional timeframe must be set having regard to the peculiarities of both the industry and the individual employee rather than imposing some arbitrary or uniform timeframe for transition. This is so because different industries will have different requirements for how (and how long it takes for) employees become competent in a particular role.

3.8 Ultimately, the critical issue for determination is whether the current rate of pay in these awards reflects the value of the work performed.

4. PRELIMINARY RESPONSE TO VARIOUS UNION PROPOSALS

4.1 Our clients will wish to consult with relevant stakeholders and their respective memberships on each of the specific proposals that have been filed with the Commission prior to formalising its position in relation to the claims. However, for present purposes (and having regard to the above), our clients do not currently support any of the union proposals.

4.2 That said, we look forward to the opportunity to consult with relative stakeholders and with the union parties, with a view to either reaching a consent position or at least narrowing the issues in dispute.

4.3 Our clients do however wish to make the following short (and preliminary) observations in relation to each of the union proposals.

Proposal in relation to the Dry Cleaning and Laundry Industry Award

4.4 The UWU and CFMMEU - Manufacturing Division have both proposed that the existing 'Dry cleaning employee Level 1' classification be varied to:

- (a) Re-badge it from "Level 1" to "Introductory Level";
- (b) Limit the existing Level 1 classification to "new entrants" to the dry cleaning industry;
- (c) Introduce a 3-month transition period;
- (d) Impose an obligation on employers to provide training "to enable them" to achieve the level of competence to move up to Level 2; and

- (e) Introduce new classification descriptors relating to working under “totally defined procedures and methods”, “constant direct supervision”, “constant direct training”, and “progressive assessment and feedback”.
- 4.5 Implicit within the union party submissions is an assumption that the Level 1 classification should operate only on a transitional basis. However, the reasons for this are not expanded upon in either of the written submissions.
- 4.6 The union party submissions do not address work value considerations or engage with the historical development of the Award. They also do not provide any explanation for why 3 months has been selected as the appropriate transition period.
- 4.7 Lastly, our clients have some initial apprehension about elements of the drafting proposed by the unions, including (but not limited to) the phrases “so as to enable them to”, “totally defined procedures”, “constant direct supervision”, “constant direct training” and progressive assessment and feedback”.

Proposal in relation to the Funeral Industry Award

- 4.8 The UWU have proposed that the Award be varied by:
- (a) Amending the existing classification structure to create a new “Introductory Level” into the classification structure, to be paid the national minimum wage; and
 - (b) Increasing the rate of pay for Grade 1 employees.
- 4.9 These proposed variations appear to be advanced on the basis that:
- (a) The existing Grade 1 does not provide a “clear opportunity for transition to a higher classification” and employees classified at that level may remain there indefinitely;
 - (b) The UWU “considers it appropriate” that a time-based transition be incorporated into Grade 1; and
 - (c) It would not be appropriate to subsume the existing Grade 1 into Grade 2, as the work performed under each of those Grades is different (and presumably of a different value).
- 4.10 Our clients have some initial apprehension about elements of the drafting proposed by the UWU, including (but not limited to) the phrases “to enable them to”, “totally defined procedures”, “constant direct supervision”, constant direct training” and progressive assessment and feedback”.

- 4.11 Further, noting the somewhat complex historical development of the Award during Award Modernisation (as indicated by the Background Paper), our clients would value the opportunity to consult with industry to enable us to provide a more considered response to the proposal.

Proposal in relation to the Concrete Products Award

- 4.12 The AWU have proposed a variation to the Level 1 classification descriptor at Schedule A.1 through the inclusion of a new provision as follows:

An employee in this classification must be undertaking training that will enable them to progress to a higher classification level within three months.

- 4.13 No justification for this variation is advanced beyond a mere explanation that the wording would ensure the Level 1 classification would operate “on a transitional basis”.
- 4.14 Implicit within the AWU submission is an assumption that the Level 1 classification should operate only on a transitional basis. However, this is not expanded upon in the written submission.
- 4.15 Further, the AWU submission does not provide any explanation for why 3 months has been selected as the appropriate transition period. Other issues include:
- (a) Potential ambiguity or problems with the proposed wording (for example, the wording refers to training that “will enable” the employee to progress within three months; what happens if the employee is not capable of progressing, despite significant training?).
 - (b) How the proposed new clause A.1.2.1 would sit alongside the existing A.1.1 (for example, A.1.1 refers to employees “undertaking the employer’s induction programme”, whereas the proposed A1.2.1 refers to employees “undertaking training”).
- 4.16 Lastly, the AWU submission identifies an apparent error in the classification descriptors contained in Schedules A.1.3 and A.3.4 of the Award. Our clients would appreciate an opportunity to consider this issue further and consult with both the AWU and industry.

Proposal in relation to the Sugar Industry Award

- 4.17 The AWU have proposed variations to the classification descriptors of the following three classification levels:
- (a) B.1.1 Milling general operator—level 2 (C14).
 - (b) B.2.1 Distilling and services operator—level 2 (C14).
 - (c) B.3.1 Refinery operator—level 2 (C14).
- 4.18 Beyond simply providing the text of the proposed variation, no other information or explanation is provided in support of the variations.
- 4.19 Without wanting to be critical, it appears the AWU proposal involves simply inserting their preferred wording into the existing classification descriptors, without any real consideration as to how the proposed new wording would sit against the existing wording (or indeed, whether it is consistent with the existing wording, or whether some of the existing wording might need to be varied to accommodate their proposed insertion).
- 4.20 The AWU submission does not address work value considerations or engage with the historical development of the Award. In particular, we note that the rates of pay in the Sugar Industry Award appear to have been properly set during the Award Modernisation process having regard to wage fixation principles.

Proposal in relation to the Meat Industry Award

- 4.21 The AMIEU have proposed that the 'Meat Industry Level 1' classification be deleted altogether from the Award or, in the alternative, that the classification be amended so that it contains a "maximum duration for the classification before transition occurs to the usual classifications".
- 4.22 The proposal appears to be advanced on the following bases:
- (a) Firstly, the text of the classification descriptor is unclear, ambiguous or open to more than one interpretation;⁴
 - (b) Secondly, the AMIEU does not believe that employers in the industry provide training to employees over a three-month period;⁵ and

⁴ AMIEU submission at [6].

⁵ AMIEU submission at [7]-[9].

(c) Thirdly, the AMIEU appear to hold concerns that employers might be misusing the classification, or mis-classifying employees into the level when they should in fact be classified into a higher level.⁶

4.23 The point raised in (a) above is worthy of consideration and can likely be resolved by a drafting amendment to ensure the classification descriptor is clear and reflects the intended meaning of the framers of the document.

4.24 The points raised in (b) and (c) above will be matters for evidence.

4.25 The point raised in (c) above appears to be a separate concern and not relevant to the question of whether C14 rates are properly set.

4.26 The AMIEU submission does not appear to address work value considerations or engage with the historical development of the Award. Nor does the submission assert that the existing rate for the 'Meat Industry Level 1' classification has not been properly set based on work value reasons. Indeed, the Background Paper seems to indicate that the rates in the Meat Industry Award were set according to work value reasons in around 2000 or 2001.

5. PRELIMINARY RESPONSE TO THE BACKGROUND PAPER

5.1 The Background Paper is a helpful starting point in understanding the historical development of the wage rates and classification structures in the relevant awards.

5.2 However, to date, our clients have not been able to undertake a detailed review of the Background Paper to assess its accuracy or to identify any errors or omissions.

5.3 Our clients would appreciate a further period of time to consider the Background Paper and assess its accuracy.

6. NEXT STEPS

6.1 In our submission, it would be appropriate for any programming of this matter to include:

(a) Providing the various interested parties with a reasonable period of time in which to consult with their respective stakeholders on the various proposals;

⁶ AMIEU submission at [8].

- (b) A Conferencing process be conducted by the Commission to allow the various interested parties to discuss the proposals with a view to reaching agreement or narrowing the issues in dispute;
- (c) Exploration of what, if any, additional research or information might assist the Commission in dealing with the various proposals (which might include subsequent or more detailed Background Paper/s); and
- (d) Directions then be set down for the filing of submissions and evidence, and response / reply materials, in advance of a Full Bench hearing to determine the matter.

6.2 It may also be necessary at a later stage of these proceedings for individual proposals to be the subject of separate directions or hearings.

Filed on behalf of ABI and NSWBC by:



Nigel Ward
CEO + Director
Australian Business Lawyers & Advisors



Kyle Scott
Director
Australian Business Lawyers & Advisors

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