

**IN THE FAIR WORK COMMISSION**

**SUBMISSIONS**

**REVIEW OF CERTAIN C14 RATES IN MODERN AWARDS  
(C2019/5259)**

**FILED ON BEHALF OF:  
AUSTRALIAN BUSINESS INDUSTRIAL  
NSW BUSINESS CHAMBER (BNSW)**

**3 NOVEMBER 2023**

## INTRODUCTION

1. These submissions are filed on behalf of Australian Business Industrial (**ABI**) and the New South Wales Business Chamber Ltd (**BNSW**).
2. ABI is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth) and BNSW is a recognised State registered association pursuant to Schedule 2 of the *Fair Work (Registered Organisation) Act 2009* (Cth).
3. The affected modern awards in which our clients have a material interest are set out in the Schedule to this submission.

## RELEVANT BACKGROUND

4. In the 2018-19 Annual Wage Review, the Expert Panel identified that there were a small number of modern awards which have classification rates at the C14 level which are either not transitional rates or where the transition period applicable to the classification is not specified.<sup>1</sup> The Expert Panel observed that “This is an issue which should be the subject of further examination in the current 4 yearly Review of modern awards”.<sup>2</sup>
5. By a Statement issued on 28 August 2019, Justice Ross expressed the provisional view that 14 awards (those which were not explicitly expressed as being transitional in nature) should be referred to a Full Bench for review.<sup>3</sup> The review was instituted on the Commission’s own motion pursuant to ss. 157(3) of the Act.
6. Part-way through that review process, the 2022-23 Annual Wage Review Decision was handed down (**2023 AWR Decision**).<sup>4</sup> In the 2023 AWR decision, the Expert Panel decided to end the alignment between the National Minimum Wage (**NMW**) and the C14 classification rate. This alignment was said to have been in place since 1997.<sup>5</sup> In that decision, the Expert Panel:
  - (a) observed that the alignment between the NMW and the C14 classification rate was ‘continued’ during the 2010 Annual Wage Review decision (the first annual wage review to have occurred under the *Fair Work Act 2009* (Cth)) which effectively adopted the approach that had been taken under the predecessor *Workplace Relations Act 1996* (Cth);<sup>6</sup>

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<sup>1</sup> [2019] FWCFB 3500 at [337]-[340].

<sup>2</sup> [2019] FWCFB 3500 at [340].

<sup>3</sup> [2019] FWC 5863 at [5].

<sup>4</sup> [2023] FWCFB 3500.

<sup>5</sup> [2023] FWCFB 3500 at [8] and [106]-[107].

<sup>6</sup> [2023] FWCFB 3500 at [105].

- (b) observed that the C14 rate 'was only ever intended to constitute a transitional entry rate for new employees';<sup>7</sup> and
- (c) held (for the reason outlined in (b) above) that the C14 rate did 'not constitute a proper minimum wage safety net for award/agreement free employees in ongoing employment.'<sup>8</sup>

7. The Expert Panel held at [108]:

We do not consider that the position whereby the NMW is simply set by reference to the C14 rate should continue. This is particularly the case when almost all modern awards which contain a classification with a C14 rate prescribe a limit on the period employees can be classified and paid at that level, after which employees move automatically to a higher classification and pay rate. Further, an employee classified at the C14 rate under a modern award may be entitled to a range of additional earnings-enhancing benefits such as weekend penalty rates, overtime penalty rates, shift loadings and allowances to which an employee on the NMW will not be entitled. A comprehensive review of the NMW should be undertaken by reference to the budget standards research and other relevant material to arrive at a NMW amount which is set having proper regard to the needs of the low paid and the other considerations in s 284. That is beyond the scope of the current Review, but we discuss later the interim measure we intend to take in this Review having regard to all the mandatory considerations in the minimum wages objective.

8. The Expert Panel then held at [173]:

A wider review of the NMW in light of the budget standards research, the finalisation of the C14 review (which we anticipate will be completed later this year and will result in all C14 award classifications becoming genuinely transitional in nature) and other relevant matters (including the research being conducted as to gender segregation and undervaluation) is required. That wider review cannot be undertaken within the timeframe of the current Review. It is necessary therefore to identify an interim step that can be taken in this Review which gives appropriate weight to the needs of the low paid (s 284(1)(c)) but also balances this with the other mandatory considerations in the minimum wages objective. The step we will take is to align the NMW with the current C13 rate, which is the lowest award rate which, apart from exceptions in a small number of awards, may apply to employees in respect of ongoing employment.

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<sup>7</sup> [2023] FWCFB 3500 at [8].

<sup>8</sup> [2023] FWCFB 3500 at [8].

9. The 2023 AWR Decision, and in particular the conclusions outlined above, have then prompted a proposed broadening of the current review of C14 rates across the modern awards system.

## THE STATEMENT AND THE PROVISIONAL VIEWS

10. In its Statement of 22 September 2023<sup>9</sup> (**Statement**), a Full Bench of the Commission has proposed to broaden the scope of the review of C14 rates in modern awards from the 14 modern awards initially within the scope of the review to a much larger number of awards.<sup>10</sup>

11. The Full Bench observed at [8] that:

The Expert Panel's conclusions in the AWR 2023 decision have necessarily required a refocussing of the objective of this review. Consistency with the propositions stated in that decision would suggest that, where a modern award contains a C14 rate (currently \$22.61 per hour), it should only operate for a defined transitional period, and the lowest rate applicable in any modern award to ongoing employment should be at least the C13 rate (currently \$23.23 per hour).

12. The Statement then sets out a *provisional view* that the following principles should guide the completion of this review:

- (a) The lowest classification rate in any modern award applicable to ongoing employment should be at least the C13 rate (**Provisional View One**).
- (b) Any classification rate in a modern award which is below the C13 rate (including but not limited to the C14 rate) must be an entry-level rate which operates only for a limited period and provides a clear transition to the next classification rate in the award (which must not be less than the C13 rate) (**Provisional View Two**).
- (c) The transition period for the purpose of (b) should not exceed six months (**Provisional View Three**).

13. The Statement identifies that the expanded scope of the review will involve:

- (a) A review of all award classifications at the C14 level to ensure they are genuinely transitional in nature; and
- (b) A review of all classification rates in modern awards that fall below the C13 level but are higher than the C14 rate; and

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<sup>9</sup> [2023] FWCFB 168.

<sup>10</sup> [2023] FWCFB 168 at [1].

- (c) A review of modern enterprise awards and State reference public sector modern awards.

## **GENERAL SUBMISSIONS IN RELATION TO THE CONDUCT OF THIS REVIEW**

14. It was open to the Expert Panel, in conducting the 2023 annual wage review, to adjust the NMW (which applies to award/agreement free employees) and to move away from linking the NMW to the C14 rate of pay. However, we do not accept, as a general proposition, that the 2023 AWR Decision has ‘necessarily required a refocussing of the objective of this review’.
15. That said, it is of course open to the Commission to conduct a review, on its own motion, of certain classifications and rates of pay within modern awards.
16. The current review is being conducted under s. 157 of the FW Act.
17. Section 157 relevantly provides:

(1) *The FWC may:*

- (a) *make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or*
- (b) *make a modern award; or*
- (c) *make a determination revoking a modern award;*

*if the FWC is satisfied that making the determination or modern award is necessary to achieve the modern awards objective.*

*Note 1: Generally, the FWC must be constituted by a Full Bench to make, vary or revoke a modern award. However, the President may direct a single FWC Member to make a variation (see section 616).*

*Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).*

*Note 3: If the FWC is setting modern award minimum wages, the minimum wages objective also applies (see section 284).*

(2) *The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:*

(a) *the variation of modern award minimum wages is justified by work value reasons; and*

(b) *making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective.*

*Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).*

(2A) **Work value reasons** *are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:*

(a) *the nature of the work;*

(b) *the level of skill or responsibility involved in doing the work;*

(c) *the conditions under which the work is done.*

(2B) *The FWC's consideration of work value reasons must:*

(a) *be free of assumptions based on gender; and*

(b) *include consideration of whether historically the work has been undervalued because of assumptions based on gender.*

18. Work value considerations arise where the Commission proposes to vary:

(a) existing rates of pay contained within modern awards; or

(b) classification definitions / descriptors where the effect of such a variation is to alter the minimum wages applying to particular employees (e.g. where certain employees who fell within a particular classification no longer fall within that level and instead fall into another classification).

19. In our submission filed on 27 September 2019 in this matter, we raised a number of issues that we consider relevant to any review of classification levels or rates of pay. We restate and reiterate those submissions as follows:

(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.
  - (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 to become competent in a particular role.
20. Ultimately, the critical issue for determination is whether a particular rate of pay in a modern award properly reflects the value of the work performed by employees falling into that classification.
21. While we acknowledge the conclusions reached in the 2023 AWR Decision, those conclusions do not alter our view as to the principles to be applied in this review process.

## **OUR POSITION IN RESPECT OF THE PROVISIONAL VIEWS**

22. For the reasons outlined in this submission, we do not agree that the principles outlined in paragraph [8] of the Statement 'should guide the completion of this review'.

### Provisional View One

23. It is uncontroversial that the C14 classification in the *Metal Industry Award 1984* (and which has been continued into the current *Manufacturing and Associated Industries and Occupations Award 2020*) was intended as an entry level classification and was not designed to apply on an ongoing basis to an employee's employment.
24. However, this is not necessarily the case in respect of all C14 classifications across the awards system. Rather, some awards have developed over time to contain C14 classifications which are quite clearly not transitional.<sup>11</sup>
25. As a statement of general principle, we do not necessarily agree with the provisional view that 'The lowest classification rate in any modern award applicable to ongoing employment

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<sup>11</sup> See, for example, Cotton ginning employee level 1 (CG1) in the *Cotton Ginning Award 2020*.

- should be at least the C13 rate'. Rather, minimum wages in modern awards should reflect the value of work undertaken by the relevant employees. In a limited number of cases, it might be appropriate for a modern award to contain a classification and associated rate of pay that is below the C13 rate and which is capable of applying on an ongoing basis.
26. That said, we acknowledge that such a scenario may be rare and would need to be justified by work value reasons.
27. It is apparent that the genesis of Provisional View One comes from the 2023 AWR Decision. However, while that decision made a range of observations about the C14 classification, it contained very little consideration of the C13 classification or its role or purpose in classification structures or its historical development. The 2023 AWR Decision contains references in paragraphs [8] and [173] to the C13 classification wage rate as follows:
- (a) "in nearly all relevant awards [it] is the lowest modern award classification rate applicable to ongoing employment" (at [8]); and
  - (b) "[it is] the lowest award rate which, apart from exceptions in a small number of awards, may apply to employees in respect of ongoing employment" (at [173]).
28. Other than those observations, the 2023 AWR Decision does not contain any substantive consideration of the C13 classification level.
29. To the extent that Provisional View One has been formed on the basis of the notion that, because the C13 classification is the lowest classification applicable to ongoing employment in the majority of current modern awards, that should be the case for all modern awards, we would resist that line of thinking.
30. As stated above, we do not consider there to be anything inherently improper or problematic with certain classifications applying to employment on an ongoing basis and providing rates of pay below the C13 rate, so long as the rate of pay properly reflects the value of the work actually performed.
31. In the 2023 AWR Decision, the Expert Panel noted at [172] that:
- 'there is no requirement in the FW Act for the NMW to align with the lowest modern award adult rate, nor does the NMW operate as a floor to modern award minimum wage rates'. [emphasis added]
32. It is uncontroversial that modern awards can continue to contain classifications and associated rates of pay that sit below the NMW/C13 rate of pay. Further, it might be appropriate that such classifications / rates of pay not be transitional and continue to apply to ongoing employment. The assessment as to whether or not this is the case must be made on an award-by-award basis having regard to a range of considerations such as the



actual work performed by the employees falling into those classifications, the value of that work, and how that classification interacts with the wider classification structure in the award.

#### Provisional View Two

33. For the reasons outlined above, we also resist the proposition (as a general statement of principle) that any classification rate in a modern award which is below the C13 rate must be an entry-level rate which operates only for a limited period and provides a clear transition to the next classification rate.
34. While it might be that the C14 classification in the *Metal Industry Award 1984* was not designed to apply to ongoing employment, it does not necessarily follow that any classification that contains a rate below C13 must be transitional.

#### Provisional View Three

35. It is unclear how the Full Bench has arrived at its provisional view that the relevant transition period for any classification containing a rate less than the C13 rate should be no more than six months. We are unclear as to the rationale for six months being the proposed maximum transition period.
36. Any time period that might apply in respect of an employee progressing from one classification to another within a classification structure is an issue that is inherently connected to the nature of the industry or occupation that is regulated by the relevant award. Any such time period might naturally depend on the induction / training / qualification requirements of the relevant industry / occupation and so should be considered having regard to the unique features of that particular industry or occupation.
37. Where a classification structure is competency-based, the Commission should avoid placing an artificial temporal constraint on classification structures. This is because the time period that it may take an employee to obtain the competencies necessary to progress throughout the classification structure is not temporal based but rather based on the individual.

#### **FURTHER OBSERVATIONS**

38. The table at Attachment D to the Statement identifies award classifications that fall into a few different categories.
39. Firstly, some of the award classifications in the table contain rates below the C13 level, however, are transitional in nature and provide for a transition to a higher classification

within a period which is less than 6 months.<sup>12</sup> Those award classifications do not appear to be inconsistent with the provisional views expressed in the Statement. Accordingly, absent some specific application or proposal advanced by a party, it would seem that those awards could be removed from the scope of the review.

40. Secondly, some of the award classifications contain rates that are supplemented by industry allowances which, when factored in, provide for wages that are in excess of the C13 rate.<sup>13</sup> Those industry allowances are payable for all purposes and thereby have the effect of establishing new and higher base rates of pay for those employees. Further, those industry allowances are in place in recognition of the nature of the work being performed and/or the conditions under which the work is done (i.e. they are designed to ensure that the rates of pay are referable to the value of the work). Accordingly, absent some specific application or proposal advanced by a party (or a concern that the rates of pay do not reflect the value of the work), it would seem that these awards could also be removed from the scope of the review.
41. Thirdly, it might be the case that the review process will identify a small number of awards for which the classification descriptors (and, specifically, the way in which the transition from one classification to another is intended to operate) are imprecise or could benefit from some drafting modification to more clearly articulate how employees are to progress through the classification structure.
42. Notwithstanding the views expressed above in respect of what might be considered issues of principle, we acknowledge that it may be appropriate for some of the awards referred to in Attachment D to the Statement to be varied.
43. However, this should occur following a consideration of each individual award (having regard to the issues/features specific to that industry/occupation and the actual work performed). Further, the legislative framework may require an examination of the historical development of the award, and/or a consideration as to whether the rates of pay in the award in question have ever been subject to a work value assessment and, if so, the details of that assessment.

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<sup>12</sup> See, for example, the Amusement, Events and Recreation Award 2020; Asphalt Industry Award 2020; Food, Beverage and Tobacco Manufacturing Award 2020; Gardening and Landscaping Services Award 2020; Graphic Arts, Printing and Publishing Award 2020; Hospitality Industry (General) Award 2020; Manufacturing and Associated Industries and Occupations Award 2020; Miscellaneous Award 2020; Nursery Award 2020; Pastoral Award 2020; Premixed Concrete Award 2020; Registered and Licensed Clubs Award 2020; Restaurant Industry Award 2020; Supported Employment Services Award 2020; Timber Industry Award 2020; Vehicle Repair, Services and Retail Award 2020.

<sup>13</sup> See, for example, the Cement, Lime and Quarrying Award 2020; Concrete Products Award 2020; Cotton Ginning Award 2020; Electrical, Electronic and Communications Contracting Award 2020; Joinery and Building Trades Award 2020.

44. In some cases, there may also need to be some evidence before the Commission as to the nature of the work performed by employees falling into the relevant classifications under examination. Of course, the extent of evidence that might be required will vary depending on the specific variation sought/proposed and the significance of the proposed variation.
45. In some cases, it may be that the relevant interested parties are able to confer and reach agreement on appropriate variations to individual awards that meet the applicable legislative requirements.

## **Schedule 1 - Awards in which our clients have an interest**

Our clients have an interest in the following awards that may fall within the scope of this review:

1. Amusement, Events and Recreation Award 2020
2. Asphalt Industry Award 2020
3. Cement, Lime and Quarrying Award 2020
4. Cemetery Industry Award 2020
5. Fitness Industry Award 2020
6. Food, Beverage and Tobacco Manufacturing Award 2020
7. Gardening and Landscaping Services Award 2020
8. Graphic Arts, Printing and Publishing Award 2020
9. Horticulture Award 2020
10. Hospitality Industry (General) Award 2020
11. Joinery and Building Trades Award 2020
12. Live Performance Award 2020
13. Manufacturing and Associated Industries and Occupations Award 2020
14. Marine Tourism and Charter Vessels Award 2020
15. Miscellaneous Award 2020
16. Nursery Award 2020
17. Pastoral Award 2020
18. Registered and Licensed Clubs Award 2020
19. Restaurant Industry Award 2020
20. Seafood Processing Award 2020
21. Supported Employment Services Award 2020
22. Textile, Clothing, Footwear and Associated Industries Award 2020
23. Timber Industry Award 2020
24. Vehicle Repair, Services and Retail Award 2020
25. Concrete Products Award 2020
26. Dry Cleaning and Laundry Industry Award 2020
27. Funeral Industry Award 2020
28. Sugar Industry Award 2020
29. Meat Industry Award 2020
30. Rail Industry Award 2020
31. Business Equipment Award 2020
32. Children's Services Award 2010

33. Cotton Ginning Award 2020
34. Electrical, Electronic and Communications Contracting Award 2020
35. Nurses Award 2020
36. Premixed Concrete Award 2020
37. Wine Industry Award 2020
38. Wool Storage, Sampling and Testing Award 2020