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

## **UNDERGRADUATE QUALIFICATIONS REVIEW**

**AUSTRALIAN BUSINESS INDUSTRIAL**

**and -**

**THE NSW BUSINESS CHAMBER LTD**

**19 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 27 August 2019 (**August Statement**) which invited parties to file submissions regarding four questions asked by the Commission by 4.00pm 20 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. APESMA WORK VALUE CLAIM

2.1 The August Statement dealt with a question that had arisen from Commission proceedings<sup>2</sup> regarding an application by the Association of Professional Engineers, Scientists and Managers, Australia (**APESMA**) for increases to minimum rates of pay for pharmacists in the *Pharmacy Industry Award 2010* (**Pharmacy Award**) for work value reasons (**APESMA Work Value Claim**).

2.2 APESMA advocated in their claim that there had been an increase in the various educational, training and registration requirements for pharmacists, which it submitted was indicative of the increase in the skills, knowledge and responsibility required to perform the role of a pharmacist and such the value of the work increased and in-turn so too should pharmacist's pay.

### 14 December 2018 Decision

2.3 The Full Bench of the Commission handed down its decision regarding the APESMA Work Value Claim on 14 December 2018<sup>3</sup> (**December 2018 Decision**) which found that although APESMA's Work Value Claim regarding a 25%

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<sup>1</sup> [2019] FWC 5934

<sup>2</sup> AM2016/28 - APESMA Work Value Claim

<sup>3</sup> [2018] FWCFB 7621

increase to all wage rates in the *Pharmacy Award* was rejected, there was further consideration to be had regarding the issue of pharmacists' relativities with the C10 rate, and other rates, in the *Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award)*.

2.4 The Full Bench set out the relativities between *Pharmacy Award* rates and *Manufacturing Award* rates which clearly demonstrated that there was a perceived disjoint between the relatives of both awards (footnotes removed):

***“Relativity between Pharmacist Rates and Manufacturing Award Rates***

**[194]** *The following table sets out the relative position concerning rates of pay, original relativity with C10 and qualifications as between relevant classification in the Manufacturing Award and the Pharmacy Award (noting that completion of a four-year undergraduate degree and a one-year internship is necessary to qualify for the base Pharmacist grade in the Pharmacy Award):*

| <b>Manufacturing Award classification</b> | <b>Minimum qualification</b>                         | <b>Original relativity to C10</b> | <b>Current Wage Rate</b> | <b>Pharmacy Award classification</b> | <b>Original relativity to C10</b> | <b>Current Wage Rate</b> |
|---|--|-----------------------------------|--------------------------|--------------------------------------|-----------------------------------|--------------------------|
| C1  | Degree   | 180/210%                          | -                        | Pharmacist manager                   | 190%                              | 1290.90                  |
| C2(b)                                     | Advanced Diploma or equivalent + additional training | 160%                              | 1132.40                  | Pharmacist in charge                 | 160%                              | 1158.40                  |
|   |  |                                   |                          | Experienced pharmacist               |                                   | 1131.80                  |
| C2(a)                                     | Advanced Diploma or equivalent + additional training | 150%                              | 1085.00                  |                                      |                                   |                          |
| C3  | Advanced Diploma                                     | 145%                              | 1058.60                  |                                      |                                   |                          |
|   |  |                                   |                          | Pharmacist                           | 140%                              | 1033.40                  |
| C4  | 80% towards an Advanced Diploma                      | 135%                              | 1005.90                  |                                      |                                   |                          |
| C5  | Diploma or equivalent                                | 130%                              | 979.60                   |                                      |                                   |                          |

|    |   |      |        |  |  |        |
|----|---|------|--------|--|--|--------|
| C6 | C10 (Trade certificate III) + 80% towards Diploma OR 50% towards Advanced Diploma | 125% | 960.00 |  |  |        |
| C7 | Certificate IV or 60% towards Diploma   | 115% | 913.70 | Pharmacy Intern – 2 <sup>nd</sup> half of training |  | 913.50 |
| C8 | C10 (Trade certificate III) + 40% towards Diploma                                 | 110% | 889.90 |  |  |        |
|    |   |      |        | Pharmacy Intern – 1 <sup>st</sup> half of training |  | 883.40 |

**[195]** *The above relativities do not align for equivalent qualifications, reflecting the difficulty arising from the original use of professional scientists as a reference point. Nor do they consistently relate to the Australian Qualifications Framework (AQF), which ranks educational qualifications above the completion of the Senior Secondary Certificate of Education in ten levels as follows:*

*Level 1 – Certificate I*

*Level 2 – Certificate II*

*Level 3 – Certificate III*

*Level 4 – Certificate IV*

*Level 5 – Diploma*

*Level 6 – Advanced Diploma, Associate Degree*

*Level 7 – Bachelor Degree*

*Level 8 – Bachelor Honours Degree, Graduate Certificate, Graduate Diploma*

*Level 9 – Masters Degree*

*Level 10 – Doctoral Degree”*

2.5 In the December 2018 Decision, the Full Bench invited further submissions from interested parties regarding these concerns. The Full Bench suggested that one option to deal with this disjoint might be that this aspect of the review might need to be referred to the President of the Commission for consideration as it may raise

implications for other awards.

2.6 ABI and NSWBC filed submissions<sup>4</sup> on 4 March 2019 in response to this invitation. We submitted the following:

- (a) this aspect of the review should be referred to the President for further consideration;
- (b) the Full Bench's comments in the December 2018 Decision potentially raised considerations of a broad application to the operation of modern awards generally;
- (c) the modern award system was not the subject of extensive arbitral testing but was largely an administrative exercise;
- (d) many modern awards have some nexus to the structure in the Manufacturing Award and C10 did not come about through a substantial work value case; and
- (e) it is reasonably open to the Commission to question how "comfortably" Manufacturing Award classification structure and the C10 sat with contemporary work value assessment that was contemplated in the s. 156(4) and also ss.134 and 135 of the *Fair Work Act 2009 (Cth)* (**FW Act**).

### **13 June 2019 Decision**

2.7 On 13 June 2019, the Full Bench published a decision<sup>5</sup> (**June 2019 Decision**) which considered the submissions received regarding the conclusion (which was then named the third conclusion) reached in the December 2018 Decision. This conclusion was summarised as follows:

*"(3) There was a lack of alignment in pay rates and relativities as between pharmacists (who require a four-year undergraduate degree) under the Pharmacy Award and those for*

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<sup>4</sup> ABI and NSWBC [submissions](#) dated 4 March 2019

<sup>5</sup> [2019] FWCFB 3949

*classifications requiring equivalent qualifications under the Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award), as well as a lack of a consistent relationship with the Australian Qualifications Framework (AQF). We considered that this might potentially constitute a work value consideration relevant to the 4 yearly review of the Pharmacy Award. We invited further submissions as to this matter, and foreshadowed the possibility that this aspect of the review might need to be referred back to the President of the Commission for consideration as to the procedural course to be taken pursuant to s 582 of the Fair Work Act 2009 (FW Act) since it might have implications for other awards of the Commission (third conclusion).”*

2.8 The Full Bench concluded the following regarding the third conclusion (footnotes omitted):

*“[15] We are persuaded by ABI’s submission that the issue identified in the third conclusion should be referred to the President of the Commission for consideration as to the procedural course to be taken pursuant to s 582 of the FW Act. As we identified in the December decision, the issue has ramifications for other awards which contain classifications applying to employees who are required to hold undergraduate qualifications including, but not limited to, the Professional Employees Award 2010. As such, a broader review of the issue across a number of awards may be called for. We also note that a similar issue has been raised in connection with proceedings currently on foot concerning the Educational Services (Teachers) Award 2010.”*

### **3. AUGUST STATEMENT**

3.1 Following the June 2019 Decision, the President published the August Statement. The August Statement indicated that there were 29 awards that included classifications applying to employees who hold undergraduate qualifications and listed them in an attachment (Attachment A)

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

- “• *the provisional view set out at [13] above;*
- *the accuracy of the list of awards at Attachment A and whether they have an interest in other awards that should be part of this list*
- *whether the Full Bench should consider additional awards as part of the priority*

group.<sup>6</sup>

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

##### Question One - the provisional view set out in paragraph [13]

4.1 Paragraph [13] in the August Statement proposed several different views which are as follows:

- (a) the 29 modern awards with classifications requiring undergraduate degrees should be referred to a separate Full Bench for review **(Undergraduate Review Proceedings)**;
- (b) the Undergraduate Review Proceedings Full Bench will commence its review with a priority group of awards for efficiency purposes which are the top four modern awards with the highest levels of award reliance which are:
  - (i) *Children's Services Award 2010*;
  - (ii) *Social, Community, Home Care and Disability Services Industry Award 2010*;
  - (iii) *Health Professionals and Support Services Award 2010*; and
  - (iv) *Nurses Award 2010* and;
- (c) the Undergraduate Review Proceedings Full Bench would not commence hearing the matter until the IEU's application to vary the *Educational Services (Teachers) Award 2010 (Teachers Award)* is handed down **(IEU's Work Value Case)**.

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<sup>6</sup> [2019] FWC 5934 at [17]

### Constitution of Full Bench

- 4.2 We agree with the proposition put forth in paragraph [13] of the August Statement that the Commission should constitute a Full Bench to deal with the 29 modern awards with classifications requiring undergraduate degrees. This is consistent with our submissions<sup>7</sup> in response to the June 2019 Decision.

### Priority Awards

- 4.3 We agree with the Commission's rationale to create a priority group for efficiency purposes. We also agree that this priority group should be made up of the modern awards with the highest levels of award reliance. However, we have a concern regarding the inclusion of the *Children's Services Award 2010* (**Children's Award**) while the 4 yearly review into modern awards individual proceedings (AM2018/18 & AM2018/20) in this matter are still underfoot as one of the IEU claims directly relates to (teaching) degree qualified directors of Childcare Centres.
- 4.4 The Children's Award proceedings were heard alongside the Teachers Award 4 yearly review into modern awards proceedings in the individual claims proceedings. The IEU have lodged a claim to vary the definition of "teacher", to clarify the coverage of employees in early childcare centres who have (teaching) degree qualifications and are engaged as directors.
- 4.5 The final hearing was on 9 August 2019 and the decision was reserved.
- 4.6 We hold a concern that the above claim will affect the proposed proceedings regarding employee's (including directors) with undergraduate degrees who can (currently) be covered by both the Children's Award and/or the Teachers Award.
- 4.7 We submit that while that decision is reserved and as one of the claims has direct bearing on the matters to be considered by this newly constituted Full Bench, the

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<sup>7</sup> ABI and NSWBC [submissions](#) dated 4 March 2019



Commission should either do one of the following:

- (a) remove Children's Award from the priority list; or
- (b) wait for the handing down of the Full Bench in the combined Children's Award and Teachers Award modernisation proceedings (AM2018/18 & AM2018/20) before commencing the Undergraduate Review Proceedings.

4.8 We are in the Commission's hands as to which option it should take but do advocate for the Children's Award and Teachers Award to be heard together for reasons below at 4.17.

#### Commence Proceedings Following IEU Work Value Case

4.9 We agree with the August Statement which suggests that the newly constituted Full Bench, should commence after the determination of the IEU's application to vary the Teachers Award is handed down in the IEU Work Value Case.

4.10 Although we appreciate that a similar issue has been raised in the IEU's Work Value Case, we believe that the newly constituted Full Bench could benefit from the outcome of the IEU's Work Value Case.

4.11 The IEU's Work Value Case has now largely concluded with closing submissions last heard on 4 and 5 September 2019. Other than a few final directions<sup>8</sup>, the matter has mostly been reserved for a decision.

4.12 The Full Bench in the IEU's Work Value Case has been presented with submissions and a great deal of evidence over many years and to delay the handing down of this decision would be undesirable.

4.13 The Undergraduate Review Proceedings Full Bench would need to be informed of the outcome of the IEU's Work Value Claim because:

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<sup>8</sup> An agreed statement of facts and brief reply submissions from the parties is outstanding.

- (a) any increase awarded in those proceedings can be accommodated or considered in these proceedings; and
- (b) should the Commission in that case was minded to make an increase to the Teachers Award on work value grounds, there would naturally flow a hearing regarding transitional arrangements in those proceedings.

4.14 If the outcome of the IEU's Work Value Claim is as above in 4.13, the Undergraduate Review Proceedings Full Bench would need to consider the above.

**Question Two - list in Attachment A**

4.15 To the best of our efforts, we have undertaken to review all 122 modern awards and the list that the Commission provided in the August Statement is correct.

**Question Three - additional awards in priority group**

4.16 As previously stated in our answer to Question One, we submit that while a decision has not been handed down in the 4 yearly review into modern awards Teachers Award and Children's Award (AM2018/18 and AM2018/20), it may be more efficient for the Children's Award to be removed from the priority group and heard at a later date.

4.17 If the Commission is minded to keep the Children's Award in the priority list, then we submit that the Children's Award and Teacher's Award should be heard at the same time as:

- (a) Childcare Centres use both awards to cover the full range of staff that can be employed;
- (b) there is significant cross-over (and confusion) around award coverage for employee's with teaching degrees;

- (c) teaching degrees are the most common, but other degree qualified professionals are still employed under the Children's Award; and
- (d) registration of teaching degrees (and recognition by the relevant authority) is a key indicator of award coverage.

4.18 The reasons to hear Children's Award and Teachers Award together (whether part of the priority group or not) regarding employees who hold undergraduate qualifications are as follows:

- (a) Childcare services in NSW use both the Children's Award and the Teachers Award together on a daily basis;
- (b) Historically there has been debate over award coverage regarding teachers working in early childcare centres;
- (c) the same evidence about the industry is likely to be presented which avoids the duplication of the cross-examination of witnesses who would otherwise be required to appear in two hearings.

## **5. CONCLUSION AND PRINCIPLE PROPOSITIONS**

5.1 As these proceedings develop, we would ask the Commission to be mindful of the following matters:

- (a) Formal educational qualifications should not become a simplistic proxy for work value.
- (b) Undergraduate degrees are not necessarily the same in terms of entrance requirements, duration, intensity and complexity.
- (c) Some undergraduate degrees have clearer vocational applications than others relevant to work performance.

5.2 As we stated in our submissions on 4 March 2019, the original "manufacturing formulation" and the C10 "reference point" was not itself the subject or arbitral

consideration.<sup>9</sup>

- 5.3 It is therefore important that the Commission does not commence on the premise that the C10 “reference point” was an unalterable or unquestionable reference point and was constructed for a particular purpose at a transient time in industrial relations.

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

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<sup>9</sup> ABI and NSWBC [submissions](#) dated 4 March 2019 at 3.0.