Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Reply Submission

Matter no. AM2015/9

Electrical Licence Allowance

2 October 2015

4 YEARLY REVIEW OF MODERN AWARDS

AM2015/9 – ELECTRICAL LICENCE ALLOWANCE

1. INTRODUCTION

1. The Australian Industry Group (Ai Group) makes this reply submission in response to the application and submissions filed by the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**CEPU**) seeking the insertion of an 'electrical licence allowance' in the *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**) and the *Electrical Power Industry Award 2010* (**Electrical Power Award**).

2. The application by the CEPU is made under the auspices of the 4 Yearly Review of Modern Awards pursuant to s.156 of the *Fair Work Act 2009* (**Act**).

3. This submission is made in accordance with Directions issued by the Commission on 24 September 2015.

4. Ai Group strongly opposes the CEPU's claims to insert an 'electrical licence allowance' into the Manufacturing Award and Electrical Power Award.

5. The claims should be seen for what they are – yet another attempt by the CEPU, in a long line of unsuccessful attempts over many decades, to achieve higher remuneration for electricians than the remuneration that applies to other equivalent classifications such as fitters, boilermakers, etc.

6. The allowance, if granted, would have the following negative effects:

    - It would disturb a series of consent outcomes reached between Ai Group and the Metal Trades Federation of Unions (MTFU) from 1989 and reconfirmed on a number of occasions since this time. The MTFU comprises the AMWU, AWU, CEPU, CFMEU, NUW and United Voice.

- It would result in ‘double dipping’ by electricians because licenced electricians would be entitled to a double payment for the skills and knowledge which have already been taken into account within the C10 wage rate.

- It would disturb the relationship amongst remuneration rates for tradespersons classified at the C10 level. If the CEPU’s claim is granted, the minimum remuneration for an electrician with a licence would be higher than the C9 rate;

- It would result in electricians being paid more than fitters, boilermakers and other tradespersons – a position that the CEPU has long argued for in the Metal Industry Award / Manufacturing Award, but never succeeded with, despite several attempts over the past 80 years.

- Licences and other certifications are required, or commonly held, by employees in a large number of classifications under the Manufacturing Award and/or Electrical Power Award including, for example, electricians, welders, maintenance plumbers, forklift drivers and crane drivers. Accordingly, if the allowance is granted:

    - The relationship between numerous classifications at numerous levels within the classification structure, including classifications below, at, and above C10 would be disturbed; and

    - There would most likely be a raft of subsequent applications for licence allowances for numerous other classifications. This is perhaps why the AMWU has expressed support for this application despite it conflicting with longstanding agreements reached between Ai Group and the MTFU.

7. The CEPU’s claim is inconsistent with the principles and approach established by the Commission for the 4 Yearly Review.

8. The claim is inconsistent with the modern awards objective.

9. The variation is not necessary to achieve the modern awards objective and hence offends s.138 of the Act.

10. The above matters are dealt with in the sections which follow.

11. Ai Group also relies on the attached witness statements of Mr Richard Jenkins and Mr David Tiller.

2. THE COMMISSION'S GENERAL APPROACH TO THE REVIEW

2.1 The Statutory Framework

12. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that the relevant award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

13. The modern awards objective is set out at s.134(1) of the Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (**NES**), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors, listed at s.134(1)(a) – (h). The modern awards objective applies to any exercise of the Commission's powers under Part 2-3 of the Act, which includes s.156.

2.2 The Commission's Approach to the Review

14. At the commencement of the Review, a Full Bench dealt with various preliminary issues that arise in the context of this Review. The Commission's *Preliminary Jurisdictional Issues Decision* [1] provides the framework within which the Review is to proceed.

15. The Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence (emphasis added):

[1] [2014] FWCFB 1788.

> "[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation."

16. The Commission indicated that the Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made (emphasis added):

> "[24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made."

17. The Commission has decided that previous Full Bench decisions that are relevant to a contested issue should generally be followed unless there are cogent reasons not to do so (emphasis added):

> "[25] Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:
>
> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see *Queensland v The Commonwealth* (1977) 139 CLR 585 per Aickin J at 620 et seq."
>
> [26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian

Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin)*:

> "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."

[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so."

18. In addressing the modern awards objective, the Commission recognised that each of the matters identified at s.134(1)(a) – (h) are to be treated "as a matter of significance" and that "no particular primacy is attached to any of the s.134 considerations". The Commission identified its task as needing to "balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net".

19. Section 138 of the Act imposes a significant hurdle for any party seeking an award variation. This was recognised by the Full Bench in the following terms (emphasis added):

> "[36] … Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective."

20. The frequently cited passage from Justice Tracey's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* was adopted by the Full Bench. It was thus accepted that:

> "… a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action."

21. Accordingly, the *Preliminary Jurisdictional Issues Decision* establishes the following key threshold principles:

- A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of the claim;

- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;

- An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable – it must be necessary; and

- Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

22. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010*, the Commission made the following comments (emphasis added):

> "[8] While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.[2]"

[2] [2015] FWCFB 620

23. For the reasons out lined in the following sections, the CEPU's claims conflict with the principles in the Preliminary Jurisdictional Issues Decision and accordingly the claims should be rejected.

3. CEPU'S MANUFACTURING AWARD CLAIM

3.1 64 years of unsuccessful attempts by the CEPU to achieve additional remuneration for electricians who hold a licence

24. The wages and conditions in the Manufacturing Award are based upon the wages and conditions in the *Metal, Engineering and Associated Industries Award 1998.* Therefore, the history of unsuccessful attempts by the CEPU to achieve an electrical licence allowance in the Metal Industry Award are directly relevant, particularly the reasons why the Commission and its predecessors have consistently rejected the CEPU's claims.

25. Ai Group has traced the history back as far as 1937 although no doubt the issue could be traced back even further. The *Consolidated Metals Trades Award 1937*[3] included an electrical division within its classification structure, which incorporated the classifications of electrical fitter and electrical mechanic (among others).

26. In 1951, in the proceedings relating to the making of the *Metal Trades Award 1952*, the Electrical Trades Union (**ETU**) sought a new classification for an electrical fitter and mechanic employed on the installation, maintenance and repair of lifts and elevators with a wage rate significantly higher than that for an ordinary electrical fitter and electrical mechanic.[4] The basis of the ETU's argument was that, while all electrical mechanics working in Victoria were required by the State Electricity Commission to hold an electrical licence, an electrician servicing and maintaining lifts was required to hold an additional permit issued by the State Labor Department.

[3] (1937) 38 CAR 875 at 879

[4] (1951-52) 73 CAR 324 at 378-379.

27. The Commonwealth Court of Conciliation and Arbitration did not grant the ETU's application. Relevantly, the Court said:

> "It seems to me that to single out one special feature of a calling for special consideration may lead to all sorts of extensions to other divisions of the industry; for instance, mechanical fitters and other tradesmen are subject to the same conditions when engaged on lift erection, but no claim has been made on their behalf that such work should be more highly valued than when engaged on other mechanical apparatus, as found in the Metal Trades industry."[5]

28. The above case highlights three factors of relevance to the CEPU's current claim:

- First, as far back as 1951, it was common for electrical tradespersons to hold an electrical licence issued by a regulator. The situation has not changed to this day.

- Second, as far back as 1951, the possession of a licence by an electrical tradesperson was held to not increase the value of the work performed. Again, this situation has not changed to this day.

- Third, the work performed by an electrical tradesperson should not be more highly valued than the work of other tradespersons working in the metals and engineering industry. Under the *Metal Trades Award 1952,* a fitter,[6] a first class welder,[7] an electrical fitter[8] and an electrical mechanic[9] were all entitled to the same margin of 52 shillings, in addition to the basic wage.

29. While the CEPU is framing its latest attempt to achieve higher remuneration for electricians in terms of a 'licence allowance', the effect of the claim would be to substantially increase remuneration for a large proportion of electricians.

[5] 73 CAR 379.

[6] Classification No. 5, 73 CAR 324 at 418

[7] Classification No. 233, 73 CAR 324 at 424

[8] Classification No. 87, 73 CAR 324 at 420

[9] Classification No. 90, 73 CAR 324 at 420

30. A number of other attempts by the ETU to impose an electrical licence allowance on employers have been rejected by the Australian Industrial Relations Commission (**AIRC**) over the years.

31. For example, the ETU attempted to achieve an electrical licence allowance for electrical mechanics employed by the Ford Motor Co. of Australia.[10] In this case a Five Member Full Bench of the AIRC rejected the ETU's claim on the basis that the AIRC:

- Could not be satisfied that there would be no prospect of flow on to similarly qualified personnel whose conditions of employment were regulated by other awards, for example the *Metal Industry Award 1971*.

- The requirement by the regulator for an electrician to be licenced did not change the actual work done by the employees.

32. The Full Bench in the above case referred to an earlier matter involving the Nissan Motor Manufacturing Company. The ETU had sought a licence allowance for electrical tradespersons working on electrical installations. In rejecting the ETU's claim, Commissioner Paine held:

> "…In this matter the reliance on changes said to have occurred is upon those consequent upon the making of the State Electricity Commission (Licensing of Electrical Mechanics) regulations 1974. The factual situation upon having regard to all the material presented is that in no material way have those regulations led to a change in responsibility or accountability for electricians, holders of "A" Grade licenses in the employ of the Company, which has resulted in a significant net addition to work requirements or changed the conditions under which the work is performed.
>
> The claim for a licence allowance in respect to electrical tradesmen who possess 'A" grade licences in the circumstances of this matter therefore does not satisfy the requirements of Principal 7(a) of the Wage Fixation Principles and is rejected accordingly."[11]

33. The Commissioner's decision was later affirmed by a Full Bench of the AIRC, which made the following relevant statements:

[10] [1989] AIRC 497

[11] (1979) 217 CAR 9

> "…The matter on which reliance is claimed, namely responsibility or accountability to a third party, is not a new requirement, and has been associated with the work covered by the award, for some years…"[12]
>
> - - -
>
> "In the present case it is conceded that the responsibility and accountability to the licensing authority is not new. We agree with the Commissioner that in no material way have the new regulations led to change in responsibility or accountability and consider that neither principles 8(b)(iv) nor 9 have any application."[13]

34. Eight years later (in 1989), the ETU sought an electrical licensing allowance for electricians working at Kooragang Coal Loader Limited and Groote Eylandt Mining Company. The ETU argued that an allowance was justified on the basis of changes made to the licencing arrangements by the regulator. The claim was rejected by Commissioner Sweeney of the AIRC. Relevantly, the Commissioner said "(*t)here is absolutely no question of inequity involved by the payment of the present rates*".[14]

35. A further eight years later (in 1997), a similar reason was given by Commissioner Palmer in rejecting an application by the CEPU for a plumbers' licencing allowance for plumbers employed by the Federal Airports Corporation. The Commissioner said:

> "I have carefully considered all that has been said and put by the parties and have reached the following conclusion:
>
> > *"Plumbing Trades persons who are classified as Technical Services Officers level 3B and who are from time to time called upon to act upon their plumbers licence are adequately remunerated by the rate for the classification without further payment."*
>
> - - -
>
> "- To continue the licence payment on top of the TSO 3B classification would be tantamount to double dipping and be unfair to others in similar classifications.
>
> - To approve the payment of an allowance for acting on the licence would almost certainly lead to demands for flow on by others who hold licences not just for skill but for added responsibilities."[15]

[12] (1979) 221 CAR 567 at 568.

[13] (1979) 221 CAR 567 at 569.

[14] [1987] AIRC 150 (Print G7621)

[15] Print N9429

36. None of the various versions of the Metal Industry Award / Manufacturing Award have included electrical licensing allowances including:

- The *Consolidated Metals Trades Award 1937*;
- The *Metal Trades Award 1952*;
- The *Metal Trades Award 1971*;
- The *Metal Industry Award 1984*;
- The *Metal, Engineering and Associated Industries Award 1998*; and
- The *Manufacturing and Associated Industries and Occupations Award 2010*.

37. Each of the above awards applied to a very large number of electricians who held an electrical licence, as required by the regulator.

3.2 Relevant developments during the implementation of the structural efficiency principle

38. It is clear that immediately prior to the structural efficiency principle being implemented within the *Metal Industry Award 1984* from March 1989, the following state of affairs existed:

- The wage rates for fitters (classification 6), boilermakers (classification 49, electrical fitters (classification 106), electrical mechanics (classification 109) and many other trade classifications were identical. Each tradesperson was entitled to the wage rate of Wage Group G10.

- Electrical mechanics, plumbers and many other tradespersons under the Award had licences and none were entitled to a licence allowance because the licence was part and parcel of the job that they were remunerated for within the minimum wage rate.

- On a number of occasions, the AIRC and its predecessors had rejected ETU attempts to achieve a licence allowance on the basis that this would amount to double dipping and would lead to inequities.

39. The implementation of the structural efficiency principle within the *Metal Industry Award 1984* did not disturb the above state of affairs. In fact the above principles were reinforced within the skills-based classification structure inserted into the Award by consent between the Metal Trades Industry Association of Australia (**MTIA** – a predecessor of Ai Group), the Australian Chamber of Manufactures (**ACM** – a predecessor of Ai Group) and the MTFU. in March 1989.

40. From March 1989, classifications 1 to 349 in the *Metal Industry Award 1984 – Part 1* were replaced with a new skills-based classification structure. An *Award Restructuring Implementation Manual – Metal and Engineering Industry* (**Award Restructuring Implementation Manual**) was jointly published by MTIA, ACM and the MTFU (**Attachment A**). Every word in the Manual was agreed upon between the parties.

41. On pages 79 to 87 of the Award Restructuring Implementation Manual the agreed alignment between old and new classifications is set out. Around the same time as the Manual was published, the agreed alignment was inserted into the *Metal Industry Award 1984 – Part 1* as Appendix H. It can be seen that the old classifications of "Fitter" (classification 6), Boilermaker (classification 49), Electrical Fitter (classification 106) and Electrical Mechanic (classification 109) were aligned to Wage Level C10, as well as many other trade classifications.

42. Important principles which underpinned the new classification structure included:

- Existing employees were transferred to the new classification structure on the basis of the agreed alignment between the old and new classifications;

- Existing employees could be reclassified to a higher level in the classification structure if they met the requirements specified in the classification structure for a higher level;

- New employees were employed under the new classification structure according to:
    - Any formal qualification (as specified within the minimum training requirements in the classification definitions) an employee held, that was relevant to his or her job; and
    - the skills and knowledge applied by the employee on the job.
- Under the new classification structure, an employer was able to direct an employee to carry out such duties as were within the limits of the employee's skills, competence and training consistent with the classification structure provided that such duties were not designed to promote deskilling. (This requirement was inserted into the *Metal Industry Award 1984 – Part I* at subclause 6(k) on 12 April 1990, Print J2043).

43. Over the years that followed the initial introduction of the skills-based classification structure, a set of National Metal and Engineering Competency Standards were developed. The Competency Standards were assigned points for weighting purposes, and rules were established linking the Standards to the classifications in the Award.

44. The *Metal Industry Award 1984 – Part I* was varied in 1995 (Print M3565) and further varied in 1996 (Print N1674) and 1997 (Print N8636) to insert provisions linking the classification structure in the Award with the Metal and Engineering Competency Standards. After the variations, the Award contained the following relevant provisions (emphasis added):

> **"6E CLASSIFICATION / RECLASSIFICATION**
>
> - - -
>
> **(c) Classifying employees using the Competency Standards**
>
> (i) It shall be a term of this award that <u>where there is agreement to implement the standards at the enterprise, or in the event that the classification of an employee is called into question</u>, the issue shall be settled by the application of competency standards in accordance with this clause and the Guide for Implementing Competency Standards in the Metal and Engineering Industry or by reference to

the minimum training requirement in the relevant classification definition, except as provided in paragraphs (i), (iii) and (iv) below. This shall take effect from 18 March 1996. The Guide shall constitute an appendix to this award.

(ii) Where the employee has the relevant qualification recognised as a minimum training requirement for the level at which the employee seeks to be classified and he/she is exercising or will be required to exercise the skills and knowledge gained from that qualification necessary for that level of work the employee shall be classified appropriately.

(iii) Where skill standards have not been finalised in respect of any classes of work, and this is necessary for determining an employee's classification, employees performing such work shall not be reclassified until such standards are available except as provided for in paragraphs (ii) and (iv) of this subclause.

(iv) Where the situation described in paragraph (iii) above applies, but not under any other circumstances, an employee may be reclassified on the basis that the employee meets the requirements of the classification definitions prescribed in Appendices G and H of the award (the old classification definitions) or on the basis of the relevant provisions of the Award Restructuring Manual sections 6.2 and 10.

(v) All employees engaged under the award at the relevant classification levels shall be subject to the metal and engineering industry competency standards.

- - -

(f) Points

The points to be assigned to the classifications under the award shall be:

Award Classification Level	Recommended Points
C14	-
C13	-
C12	32
C11	64
C10	96
C9	12 additional points above C10
C8	24 additional points above C10
C7	36 additional points above C10
C6	48 additional points above C10
C5	60 additional points above C10
C4	Standards and points to be finalised
C3	Standards and points to be finalised
C2a	Standards and points to be finalised
C2b	Standards and points to be finalised
C1a	Standards and points to be finalised
C1b	Standards and points to be finalised

45. It can be seen that it was not an award requirement for every employer to implement the competency standards for every employee. Rather, an employer was only required to implement the competency standards "where the classification of an employee was called into question" and the employee did not have the relevant qualification recognised as a minimum training requirement in the classification structure (e.g. a Trade Certificate as an Engineering Tradesperson – Electrical / Electronic).

46. It can also been seen that the *Guide for Implementing Competency Standards in the Metal and Engineering Industry* (**Competency Standards Implementation Guide**), which had been jointly developed by MTIA, ACM and the MTFU, constituted an Appendix to the Award.

47. Licences and other certifications are required, or commonly held, by employees in a large number of classifications under the Manufacturing Award and/or Electrical Power Award including, for example, electricians, welders, maintenance plumbers, forklift drivers and crane drivers. The licences possessed by employees were taken into account in assessing skills and knowledge for the purposes of determining the relevant Wage Group and classification within the skills-based classification structure in the Award. For example, a driver of a mobile crane with lifting capacity of between 20 and 40 tonnes would of course need to have a licence issued by the relevant regulator. This job was assigned to C10 on the basis of the total basket of skills and knowledge required (see page 88 of the Award Restructuring Implementation Manual).

48. Since 1989, a vast amount of work has been done in achieving consistency and equity in the classifications and wage rates within and across awards. While the outcome is not perfect, the granting of new allowances for the possession of licences which have already been taken into account in determining the skills and knowledge of employees for classification purposes would distort and destablise the award safety net. It would create inequities and lead to a raft of flow-on claims.

49. The *1991 National Wage Case Decision* (Print J7400) provides the following account of the lack of fairness which existed in award classification structures and wage rates prior to 1989 and the problems which such inequity caused. The extract also explains the structural efficiency exercise which was embarked upon from 1989 to address the problems (emphasis added):

> "The result is there exist in federal awards widespread examples of the prescription of different rates of pay for employees performing the same work but this is only part of the problem. For too long there have existed inequitable relationships among various classifications of employees. That this situation exists can be traced to features of the industrial relations system such as different attitudes adopted in relation to the adjustment of minimum rates and paid rates awards; different attitudes taken to the inclusion of overaward elements in awards, be they minimum rates or paid rates awards; the inclusion of supplementary payments in some awards and not others; and the different attitudes taken to consent arrangements and arbitrated awards.
>
> There is a further dimension to the problem. Employers have introduced and will continue to introduce wage relativities both as between employees employed under the same award and employees covered by other awards in a particular establishment. These relativities can vary from workplace to workplace and may bear no resemblance to the relativities set in the award or awards concerned."
>
> The Commission noted that this situation had inevitably caused feelings of injustice leading to industrial disputation and "flow-on" settlements and:
>
> ". . . has also led to economically unsustainable general wage increases, particularly when attempts have been made to move away from a highly centralised system, which have severely affected the state of the national economy."
>
> The Commission concluded that this situation had to be corrected; otherwise continuing instability within and between awards would seriously reduce the effect of moves to modernise those awards. Consequently it determined that:
>
> ". . . minimum rates awards will be reviewed to ensure that classification rates and supplementary payments in an award bear a proper relationship to classification rates and supplementary payments in other minimum rates awards".

50. The outcomes of the structural efficiency exercise are embedded in the wage rates and classification structures in modern awards. To a large extent modern award wage and classification structures still bear a relationship to the wage rates and classification structure in the *Metal Industry Award 1984* (now the Manufacturing Modern Award).

3.3 Award simplification

51. During the award simplification process between 1996 and 1998, the content of the *Metal Industry Award 1984* was simplified and the title of the award was varied to the *Metal, Engineering and Associated Industries Award 1998*.

52. During the extensive award simplification negotiations between Ai Group and the MTFU, the parties agreed, and jointly submitted to Senior Deputy President Marsh, that:

- The previous skills based classification structure should remain in the Award;
- The Metal and Engineering Industry Competency Standards should remain linked to the Award in the same manner as provided for in Clause 6E – Classifications / Reclassification of the *Metal Industry Award 1984 – Part I*; and
- The Competency Standards Implementation Guide should continue to be referred to in the Award.

53. Marsh SDP accepted the submissions of Ai Group and the MTFU as highlighted in the following extract from the *Metal Industry Award Simplification Decision* (Print P9311) (emphasis added):

> **"5.1.2 Classification Definitions and Skill Based Career Paths**
>
> These clauses are allowable under s.89A(2)(a) and (c) or s.89A(6) and are consistent with the hospitality decision and will be inserted into the award.
>
> **5.1.3 Procedure for Classifying Employees**
>
> **5.1.3(a), (b), (c), (d), (e) and (f)**
>
> This clause has been amended in light of the hospitality decision to delete former clause 5.1.3(g) (exhibit B1) which fell into the category of an objective or philosophy rather than establishing an entitlement (see hospitality decision p.8). <u>The parties have also agreed to delete Schedule G (Implementation Guide for Competency Standards in the Metal and Engineering Industry) as forming part of the award.</u>
>
> <u>It is the parties' contention however, that a reference to this guide should be allowed to form part of the award given the guide's central importance to the operation of the classification structure.</u>

The new clause 5.1.3 must be considered against the background of deleting the schedule as an award provision. The parties contend that the reformatted clause 5.1.3 is consistent with the thrust of clause 3.8.2(a) and (b) of the Hospitality Award which refer to similar external processes under the direction of an industry training advisory board and the impact on the classification structure.

The Commonwealth and ACCI oppose the insertion of 5.1.3 into the award because it deals with non allowable matters and is inconsistent with Item 49(7). The Commonwealth stated in exhibit C1:

"If the Commission is persuaded to continue the clause (or parts thereof), in the Commonwealth's view it would be essential to identify what is uniquely different about the Metal Industry Award (or the present circumstances affecting the award) to justify its inclusion, either on a temporary or ongoing basis."

I have formed the view that the parties have met this requirement as demonstrated through the evolution of the clause and the work the clause is required to do in providing a link between competency standards and their implementation consistent with the Guide. I also accept that the intent of clause 5.1.3 is not inconsistent with the intent of clauses 3.8.2(a) and (b) in the Hospitality Award which the Full Bench has found is allowable. I have also taken into account the finding of Commissioner Simmonds in Print N8926:

"In their submissions the parties agreed the application dealt with an allowable matter pursuant to s.89A(2) or was incidental to such a matter and necessary for the effective operation of the award pursuant to s.89A(6). The particular allowable award matter was that specified in s.89A(2)(a), namely the provision of classifications of employees and skill-based career paths." (p.8)

Nothing in subsequent decisions including the hospitality decision challenge this finding."

54. The wording from subclauses 6E(c) and (f) of the *Metal Industry Award 1984 – Part I* (as reproduced above) were adopted within the *Metal, Engineering and Associated Industries Award 1998* as paragraphs 5.1.3(c) and (f). Given the agreement of Ai Group and the MTFU not to include the Competency Standards Implementation Guide as an Appendix to the award, but to still refer to it in the award, the wording in paragraph 6E(c)(i) was amended as follows. The underlined wording was removed:

Provision in the *Metal Industry Award 1984*:

"6E(c)(i) It shall be a term of this award that where there is agreement to implement the standards at the enterprise, or in the event that the classification of an employee is called into question, the issue shall be settled by the application of competency standards in accordance with this clause and the Guide for Implementing Competency Standards in the Metal and Engineering Industry or by reference to the minimum training requirement in the relevant classification definition, except as provided in paragraphs (ii), (iii) and (iv) below. This shall take effect from 18 March 1996. The Guide shall constitute an appendix to this award."

Provision in the *Metal, Engineering and Associated Industries Award 1998*:

> **"5.1.3(c)**(i) It shall be a term of the award that where there is agreement to implement the standards at the enterprise, or in the event that the classification of an employee is called into question, the issue shall be settled by the application of competency standards in accordance with this clause and the National Metal and Engineering Competency Standards Implementation Guide or by reference to the minimum training requirement in the relevant classification definition, except as provided in paragraphs (ii) (iii) and (iv) below."

55. The effect of the above, for the purposes of the CEPU's current application is that, as agreed between Ai Group and the MTFU, and as endorsed by the AIRC:

- The skills based classification structure which was inserted into the *Metal Industry Award 1984* remained in the *Metal, Engineering and Associated Industries Award 1998*;
- The Metal and Engineering Industry Competency Standards remained directly linked to the Award, as applied under the *Metal Industry Award 1984 – Part I*; and
- The understandings and principles that applied to the skills based classification structure and competency standards under the *Metal Industry Award 1984* continued to apply under the *Metal, Engineering and Associated Industries Award 1998.*

3.4 Evidence of Mr Richard Jenkins

56. A witness statement of Mr Richard Jenkins of Ai Group is attached.

57. From 1988/89, Mr Jenkins was very heavily involved in the development of the skills-based classification structure in the Metal Industry Award / Manufacturing Award, the Metal and Engineering Industry Competency Standards, and the linkages between the classification structure and the Standards. Between 1988 and 1991, Mr Jenkins worked for both the MTIA and the MTFU. He received instructions from the parties to implement outcomes agreed to in negotiations between the parties and from AIRC

proceedings. In 1991, Mr Jenkins began working for MTIA and from that time became directly involved in the negotiations between the parties and in the AIRC proceedings.

58. Since 1988/89, Mr Jenkins has remained heavily involved in these issues in various roles.

59. The evidence of Mr Jenkins demonstrates that:

- The requirement of regulators for certain electricians to have licences has been taken into account within the classification structure and Wage Group C10 within the Manufacturing Award.

- The requirement of regulators for certain electricians to have licences was taken into account within the Metal and Engineering Industry Training Package and Metal and Engineering Industry Competency Standards which are linked to classification structure in the Manufacturing Award.

- At no stage from 1988, until the CEPU filed its current claim, has the CEPU sought that a separate licence allowance be paid to electricians.

- There are several areas of work where various forms of licences and regulatory tickets are required for the performance of work. Examples are licences for electrical mechanics, licences for forklift driving, licences for users and operators of high risk equipment such as crane drivers, riggers, dogmen etc.

- In all cases the industrial parties have agreed that the gaining of a licence is to be included as part of the metal and engineering competency standards as either a part of an existing unit of competency or through insertion of a new unit of competency, not through the payment of a licence allowance.

3.5 Evidence of Mr David Tiller

60. A witness statement of Mr David Tiller of Ai Group is attached.

61. Since 1995 Mr Tiller has been very heavily involved in the negotiations between Ai Group and the MTFU and in the implementation and development of the skills-based classification structure in the Metal Industry Award / Manufacturing Award, the Metal and Engineering Industry Training Package and the Metal and Engineering Industry Competency Standards.

62. Between 1995 and 2012, Mr Tiller was heavily involved in these issues in various roles.

63. Mr Tiller is still heavily involved in classification structure issues in his current role.

64. The evidence of Mr Tiller demonstrates that:

- The requirement of regulators for certain electricians to possess a licence has been taken into account within the minimum training requirements in the Manufacturing Award classification structure.
- Licences required by a third party are commonly held by employees covered by the Manufacturing Award. These licences/certifications are taken into account under the competency standards for the manufacturing industry. These include:
    - Fork lift;
    - Elevated Work Platform;
    - Dogging;
    - Rigging;
    - Refrigeration;
    - Welding Certification;
    - Restricted electrical licence;

- Electrical licence;
- High Voltage Switching; and
- Non Destructive Testing Certification.

- If a licence, or an approval, by a third party is required to carry out the work or task in which an employee is competent, the relevant unit of competency from the Metal and Engineering Training Package is likely to make reference to the requirements of the third party regulator/body.

- Various competency standards that apply to electricians refer to licencing requirements.

- Units of competency are not developed in isolation of licensing requirements of third parties – these requirements are actually imbedded within the units of competency.

- Clause 3.4 of the National Metal and Engineering Competency Standards Implementation Guide, states

> "….. Where an additional payment has already been made to an employee in recognition of skill and knowledge acquired and utilised by such an employee, the implementation of the competency standards shall not lead to double counting".

- The above clause explains that if an allowance is being paid for a specific competency or competencies there is to be no 'double dipping' or 'double payment' with respect to that competency or competencies.

- The practical effect of providing a tradesperson covered by the Manufacturing Award, such as an electrician, with an additional payment because he/she holds a licence required by a third party would amount to a 'double dip' or 'double payment' because the relevant knowledge and skill required has already been taken into account within the relevant competency and therefore compensated for accordingly by the classification structure and corresponding wage levels within the award.

- The inclusion of an allowance for a particular job or task simply because a third party requires the employee performing that job or task to hold such a licence would result in the loss of parity between electricians and other tradespersons covered by the Manufacturing Award, for example mechanical and fabrication tradespersons.

3.6 Award modernisation

65. The Manufacturing Award was derived from the award modernisation exercise undertaken by the AIRC in 2008 and 2009.

66. The Manufacturing Award was made by the AIRC following extensive negotiations between Ai Group and the MTFU and extensive consultations conducted by the AIRC.

67. The Manufacturing Award replaced more than 160 pre-modern awards and NAPSAs. Ai Group and the MTFU agreed that the modern award should be based on the wages and conditions in the *Metal, Engineering and Associated Industries Award 1998* and this approach was endorsed by the AIRC.

68. In the *Award Modernisation Statement for the Priority Stage* [2008] AIRCFB 717, the Full Bench relevantly said:

> "[57] The draft manufacturing award substantially reflects the draft award prepared by the Australian Industry Group (Ai Group) and the union parties to the current Metal Industry Award. However, the opportunity has been taken to amalgamate the various parts of the draft award prepared by those parties, so that there are not separate parts for different occupations. Further, differing terms and conditions of employment between occupations have been rationalised as much as possible. An annualised salary arrangement clause has also been included for some supervisors with a view to clarifying the arrangements that can currently apply to such employees."

69. In the *Award Modernisation Decision for the Priority Stage* [2008] AIRCFB 1000, the Full Bench stated:

> "[177] The terms of the modern Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing award) are largely those agreed between AiGroup and the Metal Trades Federation of Unions (MTFU). The Manufacturing award, however, is one which is likely to be subject to

considerable variation as award modernisation progresses and consideration is given to it including other relevant industries and occupations."

70. As agreed between Ai Group and the MTFU, and as jointly submitted to the AIRC:

- The skills based classification structure in the Manufacturing Award should be based on the structure in the *Metal, Engineering and Associated Industries Award 1998*;

- The Metal and Engineering Industry Competency Standards should remain linked to the Award in the same manner as provided for in the *Metal, Engineering and Associated Industries Award 1998*; and

- The Competency Standards Implementation Guide should continue to be referred to in the Award.

71. The Award Modernisation Full Bench accepted the submissions of Ai Group and the MTFU. The wording from paragraphs 5.1.3(c) and (f) of the *Metal, Engineering and Associated Industries Award 1998* was reflected in paragraphs 24.3(b) (ii), (iii) and (v) of the Manufacturing Award.

72. The effect of the above, for the purposes of the CEPU's current application, is that, as agreed between Ai Group and the MTFU, and as endorsed by the AIRC:

- The skills based classification structure which was inserted into the *Metal, Engineering and Associated Industries Award 1998* remained in the Manufacturing Award;

- The Metal and Engineering Industry Competency Standards remained directly linked to the Manufacturing Award, in the same manner as applied under the *Metal, Engineering and Associated Industries Award 1998*; and

- The understandings and principles that applied to the skills based classification structure and competency standards under the *Metal,*

Engineering and Associated Industries Award 1998, remained under the Manufacturing Award, including the understandings and principle referred to in the Witness Statements of Mr Jenkins and Mr Tiller (see sections 3.3 and 3.4 above.

3.7 The CEPU should not be allowed to disturb longstanding consent positions reflected in the Manufacturing Award

73. It is clear from the above that the CEPU's claim is inconsistent with longstanding consent positions reached between Ai Group and the MTFU. The consent positions have been reconfirmed on a number of occasions over the years. The CEPU is part of the MTFU.

74. The Commission should not permit a party to depart from a consent position which it has reached, other than where there are very strong cogent reasons, because to do so would significantly reduce the changes of consent being reached in the future.

75. If substantial resources are devoted by industrial parties to award negotiations and the Commission allows one of the parties to walk away from a negotiated outcome a few years later, why would the other party be prepared to devote such resources again?

76. This view was expressed by Senior Deputy President Kaufman in his decision to refuse an application by the ASU to vary the *Contract Call Centre Award 2010* during the 2012 Modern Awards Review.[16] In his decision, the Senior Deputy President said:

> "[40] It is manifestly undesirable that an Award that resulted from the agreed adoption of the Contract Call Centres Award 2003, which itself was made by consent after lengthy negotiations involving not only the ASU and AiG, but with other unions as well as the ACTU, should not be disturbed in the 2012 Review without, Fair Work Australia being provided with very strong cogent reasons for so doing. This, the ASU has failed to do.
>
> [41] Not only was the Award based on the Contract Call Centre's consent award, but that award largely replicated another consent award to which the ASU was

[16] [2012] FWA 9025

also a party - the Telecommunications Services Industry Award 2002."[17]

3.8 Work value

77. In 1989, when the structural efficiency principle was being implemented within awards, the following Allowances Principle applied within the National Wage Fixation Principles:

> **"ALLOWANCES**
>
> **(a) Existing Allowances**
>
> (i) Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of such expenses.
>
> (ii) Existing allowances which relate to work or conditions which have not changed may be adjusted from time to time to reflect national wage increases, except where a flat money amount has been awarded, provided that shift allowances expressed in awards as money amounts may be adjusted for flat money amount national wage increases.
>
> (iii) Existing allowances for which an increase is claimed because of changes in the work or conditions will be determined in accordance with the relevant provisions of the work value changes principle.
>
> **(b) New Allowances**
>
> (i) New allowances to compensate for the reimbursement of expenses incurred may be awarded where appropriate having regard to such expenses.
>
> (ii) No new allowances shall be created unless changes in work have occurred or new work or conditions have arisen: where changes have occurred or new work and conditions have arisen, the question of a new allowance, if any, shall be determined in accordance with the relevant principle.
>
> The relevant principle in this context may be work value changes or first awards and extensions to existing awards principle."

78. The above Principle reinforces the importance of new allowances not being granted for existing work, unless there have been changes in work value.

79. Under the FW Act, the importance of remuneration not being increased unless there is a change in work value is reflected in s.156(3) and (4). These provisions only enable the Commission to vary modern award minimum wages if it is satisfied that the variation is justified by work value reasons. Work value

[17] [2012] FWA 9025

reasons are defined in s.156(4) with reference to the nature of work, the level of skill or responsibility, and the conditions under which work is done.

80. While the prohibition in s.156(3) and (4) relates to minimum wages, we submit that the Commission should see the application for what it is – yet another attempt by the CEPU, in a long line of unsuccessful attempts over many decades, to achieve higher remuneration for electricians than the remuneration that applies to other equivalent classifications such as fitters, boilermakers, etc.

81. The Commission should take account of the fact that the CEPU's application is pursued in the complete absence of any change in work value.

82. If the CEPU's claim is granted, the minimum remuneration for an electrician with a licence would be higher than the C9 rate.

3.9 Pre-reform instruments relied upon by the CEPU

83. The Manufacturing Award replaced more than 160 pre-modern awards and NAPSAs. Nearly all of these awards did not include an electrical licensing allowance, including the *Metal and Engineering and Associated Industries Award 1998* – the award which Ai Group and the MTFU agreed should be the basis for the wages and conditions in the Manufacturing Award.

84. In agreeing that the *Metal and Engineering and Associated Industries Award 1998* would be the basis for the wages and conditions in the Manufacturing Award, all parties (including the CEPU) recognised that there would be 'swings and roundabouts'.

85. This was highlighted in Commissioner's Cargill's decision ([2012] FWA 9661) in the Modern Awards Review 2012 to reject an NUW claim for paid rest break entitlements to be included in the Manufacturing Award on the basis that the entitlements were included in the *Rubber, Plastic and Cablemaking Industry – General Award 1998* – a major award replaced by the Manufacturing Award. In rejecting the claim, Commissioner Cargill said (emphasis added):

> "[61] AIG submits that, during subsequent negotiations, the parties, including the NUW, agreed that the Metals Award would provide the base for the new modem award. That agreement recognised that there would be "swings and roundabouts" for those covered by the award. It submits that the NUW is now "cherry picking" to regain old provisions.
>
> - - -
>
> [71] Further, it is the responsibility of those who seek to have the variations made to satisfy me of the need for them, not for those opposing the application to justify the present clause. I am not satisfied that the NUW has made out its case. Neither am I satisfied that the alternative proposition advanced by the AMWU should be accepted. The graphic arts and manufacturing industries are different and the respective industrial instruments have many divergent aspects. A more substantive case would be required to justify the AMWU's proposal.
>
> [72] I dismiss this application."

86. The CEPU has identified only one pre-reform federal award and three NAPSAs (two in WA and one in NSW) amongst the 160 awards and NAPSAs replaced by the Manufacturing Award, that include an electrical licence allowance.

87. The *Metal Trades (Australian Capital Territory) Award 2000* ($29.60 per week) is not a major award in the metal industry, let alone the broader manufacturing industry. There is relatively little metal trades work or manufacturing work carried out in the ACT.

88. Further, the electrician's licence allowance in the *Metal Trades (Australian Capital Territory) Award 2000* refers to the allowance in the Electrician's State Award in NSW and sets the quantum as being the same as the State Award from time to time.

89. Accordingly, the CEPU's claim is based upon provisions in three NAPSAs that applied in only two States (and one minor federal award that imported a provision from a NAPSA), amongst 160 pre-reform awards and NAPSAs.

90. The CEPU's attempt to rely upon these pre-reform instruments as a basis for its claim has no merit.

3.10 Enterprise agreement provisions relied upon by the CEPU

91. The CEPU is attempting to rely upon the inclusion of electrical licensing allowances in a number of enterprise agreements, as a basis for its claim for an award variation.

92. Enterprise bargaining claims of the CEPU are notoriously excessive and often reflected in pattern agreements. The fact that some employers have been coerced into agreeing to a particular CEPU bargaining claim is not a valid reason to incorporate such claims into the award safety net.

93. Awards are intended to provide a safety net only. It is an object of modern awards that enterprise bargaining be encouraged (s.134(1)(c)). The absence of an electrical licence allowance in the Award appears to have been encouraging the CEPU to pursue the matter during bargaining which is not inconsistent with s.134(1)(c).

3.11 Modern awards objective and section 138

94. As highlighted above, the *Preliminary Jurisdictional Issues Decision* establishes the following key threshold principles, each of which the CEPU has failed to meet:

- A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of the claim;

- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;

- An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable – it must be necessary; and

- Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

95. It is for the CEPU to establish that the variation proposed is necessary, in the sense contemplated by s.138 of the Act, to achieve the modern awards objective. The CEPU submissions fail to address this requirement.

96. The proposed allowance is contrary to the modern awards objective when regard is had to the following matters:

- The need to encourage collective bargaining;
- The need to promote flexible modern work practices and the efficient and productive performance of work;
- The likely impact on business including on productivity, employment costs and the regulatory burden; and
- The need to ensure a simple, easy to understand, stable and sustainable modern award system; and
- The likely impact on employment growth, inflation and the sustainability and competitiveness of the national economy.

97. The CEPU has underestimated the number of electrical fitters and electrical mechanics working in the metal and engineering industry. The CEPU has characterised the ABS data within catalogue 6306 in a manner which suggests that workers performing the task of electrical fitters and electrical mechanics are captured by the 'electricity, gas, water and waste services industry' within the data. [18] This characterisation confuses the data's breakdown by industry with the breakdown by occupation, which is a separate data set (which uses the Australian and New Zealand Standard Classification of Occupations (ANZSCO)), to the 'industry data set' (which uses the

[18] See CEPU Submission page 18.

Australian and New Zealand Standard Industrial Classification (ANZSIC)), also included within catalogue 6306.

98. A description of the manufacturing industry for the purpose of ANZSIC includes:

> *"*Units in the Manufacturing Division are often described as plants, factories or mills and characteristically use power-driven machines and other materials-handling equipment. However, units that transform materials, substances or components into new products by hand, or in the unit's home, are also included. Activities undertaken by units incidental to their manufacturing activity, such as selling directly to the consumer products manufactured on the same premises from which they are sold, such as bakeries and custom tailors, are also included in the division. If, in addition to self-produced products, other products that are not manufactured by the same unit are also sold, the rules for the treatment of mixed activities have to be applied and units classified according to their predominant activity.
>
> Assembly of the component parts of manufactured products, either self-produced or purchased from other units, is considered manufacturing. For example, assembly of self-manufactured prefabricated components at a construction site is considered manufacturing, as the assembly is incidental to the manufacturing activity. Conversely, when undertaken as a primary activity, the on-site assembly of components manufactured by others is considered to be construction."[19]

99. A description of the electricity, gas, water and waste services industry for the purpose of ANZSIC excludes electrical work performed in the manufacturing industry:

> "Units mainly engaged in the construction of water, gas, sewerage or stormwater drains or mains, electricity or other transmission lines or towers, pipelines, or any other civil engineering projects are included in Division E Construction. Units engaged in trade services such as the installation of electrical wiring or fittings in buildings or other construction projects, or plumbing services are included in Group 323 Building Installation Services. Also excluded from this division are units mainly engaged in the manufacture of new materials or products from refined waste and scrap which are included in Division C Manufacturing. Units providing waste management consultancy services are included in Division M Professional, Scientific and Technical Services"[20]

[19] See http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/D9AB3BD5751C3C52CA257B9500133B9D?opendocument

[20] http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/73F4863F0CDC7D4CCA257B9500133B80?opendocument

100. It is clear that employees performing the work of an electrical fitter and electrical mechanic within the manufacturing industry would be captured by the data relevant to the manufacturing industry and not the electricity, gas, water and waste services industry as asserted by the CEPU.

101. The most recent data within ABS catalogue 6306 for the occupation of technician and trade worker, in accordance with ANZSCO, shows that 21.8 per cent are award reliant.[21] This percentage represents one fifth of all technicians and trade workers.[22] When this percentage is considered together with the percentage of award reliance within the manufacturing industry, which has been estimated by the ABS data to be 15.7 percent[23], we would argue that the percentage of award reliance, particularly among tradespersons within the manufacturing industry is significant.

102. This must be considered in the current business climate for manufacturers in Australia. The manufacturing industry in Australia is highly trade exposed, with Australian manufacturers required to complete globally with other, and generally cheaper, manufacturing countries. Australian manufacturers are increasingly becoming more and more sensitive to cost increases, including increases in labour costs, given the global competitive environment in which they operate.

103. Furthermore, any increase to the minimum safety net would often flow on to those employers who do not have award reliant employees.

---

[21] Australian Bureau of Statistics, Employee Earnings and Hours, Australia, May 2015, Catalogue No. 6306.0 DO002_201405, Table 3, http://www.abs.gov.au/ausstats/subscriber.nsf/log?openagent&63060do003_201405.xls&6306.0&Data%20Cubes&A94A6EF55992AD1ECA257DD400758EE3&0&May%202014&22.01.2015&Latest

[22] Australian Bureau of Statistics, Employee Earnings and Hours, Australia, May 2015, Catalogue No. 6306.0 DO002_201405, Table 3, http://www.abs.gov.au/ausstats/subscriber.nsf/log?openagent&63060do003_201405.xls&6306.0&Data%20Cubes&A94A6EF55992AD1ECA257DD400758EE3&0&May%202014&22.01.2015&Latest

[23] Australian Bureau of Statistics, Employee Earnings and Hours, Australia, May 2015, Catalogue No. 6306.0 DO002_201405, Table 4, http://www.abs.gov.au/ausstats/subscriber.nsf/log?openagent&63060do003_201405.xls&6306.0&Data%20Cubes&A94A6EF55992AD1ECA257DD400758EE3&0&May%202014&22.01.2015&Latest

104. The variation to the Manufacturing Award is merely desired by the CEPU. The variation is not necessary to meet the modern awards objective, and is in fact contrary to the modern awards objective.

4. VARIATION TO THE ELECTRICAL POWER AWARD

105. Ai Group opposes the CEPU's application to insert an 'electrical licence allowance' into the Electrical Power Award.

106. We rely on the arguments submitted above with respect to the Manufacturing Award, where relevant to the Electrical Power Award, in addition to the following submissions.

4.1 Relevant award modernisation developments

107. The background to the development of the Electrical Power Award is explained in the *Stage 3 Award Modernisation Decision* [2009] AIRCFB 826:

> "[63] The fact that electrical power generation was once exclusively a public sector activity in each of the States and the Northern Territory, together with the trend to privatisation of power generation in recent decades, has led to a somewhat unusual situation in relation to state and federal awards. In particular, many if not most of the major employers in the industry are covered by enterprise awards or NAPSAs. There is no federal award that has application outside a single state or territory. There are only two federal awards, both in Victoria, that apply to more than one employer (albeit that all such employers are successors of the state electricity generator). There are industry NAPSAs in South Australia and Queensland. New South Wales is characterised by state enterprise NAPSAs (or, more accurately given the effect of state legislation passed in response to the WorkChoices legislation, preserved state agreements) although the number is small and, again, each of the main generators in New South Wales are successors of the state-owned generator. The particular history to which we have adverted has resulted in awards and NAPSAs with disparate terms and conditions. Although we have relied upon the non-enterprise Victorian awards, particularly the Power and Energy Industry Electrical, Electronic & Engineering Employees Award 1998 (QuadE Award), this is an industry where the particular circumstances make it appropriate to also have regard to the terms of enterprise awards and NAPSAs.
>
> - - -
>
> [67] The employer group and combined unions engaged in constructive negotiations with a view to reaching agreement on minimum wages and an appropriate classification structure. Agreement was achieved and we have adopted the agreed provisions.
>
> - - -

> [71] We have included a tool allowance although at a rate less than that sought by the unions. We have rejected a union suggestion for an electrical license allowance on the basis that such an allowance is not a common feature of the underlying awards and NAPSAs.
>
> [89] We have accepted union proposals for the inclusion of dispute resolution procedure training leave on the basis that a significant proportion of employees in the industry presently have access to such leave."[24]

108. As outlined above, during the award modernisation process the AIRC was required to consider a number of pre-reform awards with quite different terms and conditions, particularly with respect to allowances.

109. In their submissions, the National Employer Group, jointly represented by Ai Group and Blake Dawson, opposed the inclusion of an electrical licence allowance in the Award.[25]

110. The Electrical Power Unions identified in a submission dated 23 July 2009 that the National Employer Group had agreed to a number of allowances, but had not agreed to an electrical licence allowance.[26]

111. Despite the opposition of the National Employer Group and Ai Group to an electrical licence allowance, the Electrical Power Unions continued to press the AIRC to include such an allowance in the Electrical Power Award.[27]

112. This record clearly shows that the electrical licence allowance was the subject of submissions by the parties and considerations by the Award Modernisation Full Bench when the Electrical Power Award was made.

113. The Full Bench decided:

> [71] … We have rejected a union suggestion for an electrical license allowance on the basis that such an allowance is not a common feature of the underlying awards and NAPSAs.

---

[24] [2009] AIRCFB 826, http://www.airc.gov.au/awardmod/databases/electrical/Decisions/2009aircfb826.htm.

[25] http://www.airc.gov.au/awardmod/databases/electrical/Submissions/Nationalemployergroup_elec.pdf.

[26] http://www.airc.gov.au/awardmod/databases/electrical/Submissions/EPIU_elect_further.pdf.

[27] http://www.airc.gov.au/awardmod/databases/electrical/Submissions/EPIU_elect_further.pdf.

114. As stated by the Commission in its *Preliminary Jurisdictional Issues Decision*, previous Full Bench decisions should generally be followed, in absence of cogent reasons for not doing so (emphasis added):

> "[25] Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:
>
> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see *Queensland v The Commonwealth* (1977) 139 CLR 585 per Aickin J at 620 et seq."
>
> [26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin)*:
>
> > "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."
>
> [27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so."

115. There are no cogent reasons for departing from the decision of the Award Modernisation Full Bench. Accordingly, the CEPU's claim should be rejected.

4.2 Modern awards objective and section 138

116. As highlighted above, the *Preliminary Jurisdictional Issues Decision* establishes the following key threshold principles, each of which the CEPU has failed to meet:

- A proposal to significantly vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence demonstrating any factual propositions advanced in support of the claim;

- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;

- An award must only include terms to the extent necessary to achieve the modern awards objective. A variation sought must not be one that is merely desirable – it must be necessary; and

- Each of the matters identified under s.134(1) are to be treated as a matter of significance and no particular primacy is attached to any of the considerations arising from it.

117. It is for the CEPU to establish that the variation proposed is necessary, in the sense contemplated by s.138 of the Act, to achieve the modern awards objective. The CEPU submissions fail to address this requirement.

118. The proposed allowance is contrary to the modern awards objective when regard is had to the following matters:

    - The need to encourage collective bargaining;

    - The need to promote flexible modern work practices and the efficient and productive performance of work;

    - The likely impact on business including on productivity, employment costs and the regulatory burden; and

    - The need to ensure a simple, easy to understand, stable and sustainable modern award system; and

    - The likely impact on employment growth, inflation and the sustainability and competitiveness of the national economy.

119. The variation to the Electrical Power Award is merely desired by the CEPU. The variation is not necessary to meet the modern awards objective, and is in fact contrary to the modern awards objective.

5. CONCLUSION

120. The CEPU's claims are inconsistent with the principles established by the Commission for variations arising from the 4 Yearly Review of Awards.

121. The claims have no merit and should be rejected by the Commission.