

Australian Industry Group

SUBMISSION

Review of Certain C14 Rates in
Modern Awards
(C2019/5259)

11 November 2019

Ai
GROUP

REVIEW OF CERTAIN C14 RATES IN MODERN AWARDS

C2019 / 5259

1. Introduction

1. These submissions are made by the Australian Industry Group (**Ai Group**) in response to the direction in paragraph [8] of the 17 October 2019 Statement¹ of President Ross in C2019/5259 for Ai Group to file a further submission concerning the jurisdictional basis upon which the Fair Work Commission (**Commission**) may initiate a review about whether the C14 classifications in 14 awards provide a fair and relevant safety net of terms and conditions.
2. The following extract from the Statement is relevant:

[6] Ai Group submits that the proposed review should not be conducted at this time and, further, that:

‘On one view, s.157 does not expressly grant the Commission power to conduct a wide-ranging review of the classifications in modern awards covering 14 diverse industries on its own motion.

...

Whilst s.157(3)(a) grants the Commission power to make a *determination* on its own motion, it is perhaps less clear whether the Commission has power to institute proceedings of the nature here contemplated on its own motion, given that no posited variation has been identified in any of the awards.

In light of our primary proposition regarding the timing of any proposed proceedings, we do not here seek to deal with the issue in further detail. We may, however, seek to be heard further in this regard in due course.’

[7] At the conference on 8 October 2019 Ai Group indicated that in its written submission it was simply seeking to flag a potential jurisdictional issue but were not pressing the point at this stage. Ai Group indicated that in the time available it had been unable to reach a considered view on the issue.

[8] As discussed at the conference on 8 October 2019, Ai Group is to file a further submission addressing the issues raised at the conference...”

¹ [2019] FWC 7182.

3. In summary, in Ai Group's view:
 - a. Section 157 of the *Fair Work Act 2009* (**FW Act**) does not give the Commission the power to conduct a wide-ranging review on its own motion into broad topic areas regulated by awards;
 - b. Section 157 requires that the subject matter of the proposed variation to each relevant award be identified with some precision at the time when the proceedings are initiated, even though the specific award amendments are able to be refined during the course of the proceedings; and
 - c. Ai Group is satisfied that there is jurisdiction for the current proceedings to take place given that the subject matter of the proceedings has been identified upfront and is relatively discrete.

2. Powers of the Commission

4. The Commission is a statutory body established under the FW Act. The Commission has the power to do those things that the FW Act and other relevant legislation authorise it to do. In addition, the Commission has the powers that are "necessary" for, "incidental" to or "consequential" upon the exercise of the powers set out in the statute.²

3. Section 157 of the FW Act

5. Subsection 157(1) of the Act states:
 - (1) The FWC may:
 - (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or
 - (b) make a modern award; or
 - (c) make a determination revoking a modern award;

² *Transport Workers' Union of NSW v Australian Industrial Relations Commission* [2008] FCAFC 26, 37.

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

6. The Explanatory Memorandum (**EM**) for the *Fair Work Bill 2008* makes the following relevant comments about s.157 and related provisions: (emphasis added)

r.105. FWA will be guided by criteria which take into account public, social interest and economic aspects when considering whether and how to vary the content of modern awards. Outside of the four yearly review, FWA will have limited power to vary awards. FWA will be able to vary an award to remove ambiguity, uncertainty and discriminatory terms. To ensure awards provide a fair minimum safety net for employees, anyone covered by an award will be able to apply to have the award varied in exceptional circumstances. FWA will be able to adjust awards for 'work value' reasons.

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609. Division 5 sets out limited circumstances in which modern awards may be made, varied or revoked outside the system of annual wage and 4 yearly modern award reviews.

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610. Clause 157 provides FWA with the power to vary modern awards outside the system of 4 yearly reviews in limited circumstances.

7. There is nothing in the wording of s.157 which suggests that this section empowers the Commission to conduct a wide-ranging review on its own motion into broad topic areas regulated by awards. In fact, the EM provides persuasive support for the argument that the Commission does not have the power to conduct such a wide-ranging review.
8. With regard to award variations, s.157 envisages a determination being made by reference to an ascertainable proposed variation. This is clear from the following wording in s.157(1): (emphasis added)

(1) The FWC may:

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

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

9. The conduct of a wide-ranging review into broad topic areas regulated by awards would extend the scope of s.157 well beyond what is envisaged by the ordinary meaning of the words of the provision, and well beyond the Parliamentary intent, as expressed in the EM.
10. In *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123, the Full Court of the Federal Court made the following comments concerning the distinction between the Commission's task under s.157, compared with the former s.156 which required the Commission to conduct 4 Yearly Reviews:³ (emphasis added)

The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 — terms may and must be included only to the extent necessary to achieve such an objective.

11. Parties making an application to vary an award under s.157 are routinely requested by the Commission to define any determination which is sought with some degree of specificity.⁴
12. When the Commission proposed, on its own motion, a variation to insert a 'consultation provision' in all modern awards pursuant to the requirement introduced under s.145A by the *Fair Work Amendment Act 2013*, the Commission appropriately proposed wording for such a clause annexed to its Statement initiating the matter.⁵
13. A party seeking to vary a modern award under s.157 of the Act, is required to complete and file an application in accordance with Form F46. This form requires the applicant to identify the details of the application and the grounds relied upon. We envisage that if a party filed a Form F46 asking the Commission

³ *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* [2017] FCAFC 123, [25].

⁴ See, for example: AM2018/6, AM2019/11, AM2018/27, AM2014/51, AM2013/30, AM2013/26

⁵ [2013] FWCFB 8728.

to conduct a wide-ranging review of a broad subject matter regulated by modern awards that the Commission would require the party to identify the specific award variations that it proposes and the grounds upon which it proposes them.

14. The identification of these matters at an early stage is essential in order for a party to be able to adequately respond to the proposed variations, for example, by filing evidence and submissions.
15. As stated by Brennan J in *Kioa v West*.⁶

When the legislature creates certain powers, the courts presume that the legislature intends the principles of natural justice to be observed in their exercise in the absence of a clear contrary intention.

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A person whose interests are likely to be affected by an exercise of power must be given an opportunity to deal with relevant matters adverse to his interests which the repository of the power proposes to take into account in deciding upon its exercise.

16. Until recently, the FW Act included a requirement for the Commission to undertake a 4 Yearly Review of Modern Awards. This requirement was removed from the Act through the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018*.
17. The Explanatory Memorandum for the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017* states: (emphasis added)

Recommendation 8.1 of the PC Report is, in part, to repeal the requirement for the FWC to conduct 4 yearly reviews. The PC Report notes that in practice the 4 yearly review placed substantial demands on parties and the process does not meet the Act's objective to create a simple, easy to understand, sustainable award system. The 4 yearly review mechanism is too resource intensive for both the FWC as well as employer and employee organisations taking part in the review. The PC Report notes that while the FWC is streamlining the review process, reform is required.

...

After the repeal of the requirement to conduct 4 yearly reviews, the framework that remains for making, varying and revoking modern awards under Division 5 of Part 2-3 of the Act will continue to require that the FWC is satisfied that making a determination is necessary to achieve the modern awards objective. This allows the FWC to make a determination where emerging social and economic matters demonstrate that change is necessary. For example, in exercising its functions

⁶ *Kioa v West* (1985) 159 CLR 550 at 609, 628.

under Part 2-3, the FWC is required to take into account a range of criteria, such as the need to promote social inclusion through increased workforce participation. This requires the FWC to consider the changing labour market and the manner in which work is evolving. It must also promote flexible modern work practices and the efficient and productive performance of work, which again requires the FWC to look beyond the way work has been performed historically and to make sure the safety net of terms and conditions continues to meet community expectations.

Importantly, the Bill retains the review mechanism for the FWC to vary modern awards under section 161 of the Act. Under this section, the FWC may vary a modern award on referral by the Australian Human Rights Commission under section 46PW of the *Australian Human Rights Commission Act 1986* (dealing with discriminatory industrial instruments). If the FWC is satisfied that a modern award reviewed requires a person to do an act that would be unlawful under Part 4 of the *Age Discrimination Act 2004*, Part 2 of the *Disability Discrimination Act 1992*, or Part II of the *Sex Discrimination Act 1984*; the FWC must make a determination to vary the modern award to remove the discriminatory term.

Finally, in effect, the Bill reduces the regulatory burden for the FWC, as well as employer and employee organisations, as there will no longer be a requirement for regular, systematic and prolonged reviews. The residual framework for the making, varying and revoking of modern award will not reduce the requirements for modern awards to provide a sensible, fair and relevant safety net.

18. The legislative amendments made by the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* did not extend the scope of s.157.
19. There is nothing in the explanation in the EM that indicates that any change to the interpretation of s.157 of the Act was intended.
20. If s.157 is interpreted as providing the Commission with the power to conduct wide-ranging reviews on its own motion into broad topic areas regulated by awards, this could remove much of the benefit of the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018*.
21. Over the years, the Commission's predecessors have been very reluctant to embark upon broad reviews into awards, other than where required to do so by the relevant statute (e.g. the 4 Yearly Review of Awards and the Modern Awards Review 2012).
22. Test cases in the Australian Industrial Relations Commission were conducted in the context of defined claims made by particular parties to vary a discrete number of identified awards.

23. In Ai Group's view, s.157 does not give the Commission the power to conduct a wide-ranging review on its own motion into broad topic areas regulated by awards.
24. In our view, s.157 requires that the subject matter of the proposed variation to each relevant award be identified with some precision at the time when the proceedings are initiated, even though the specific award amendments are able to be refined during the course of the proceedings.

4. Incidental powers of the Commission

25. In addition to the powers afforded to statutory bodies under relevant legislation, such bodies are afforded certain 'incidental' powers.
26. As the Majority stated in *Transport Workers' Union of New South Wales v Australian Industrial Relations Commission*:⁷ (emphasis added)

37....There is an ancient legal maxim, the Latin expression of which was *Quando lex aliquid alicui concedit, concedere videtur id. sine quo res ipsa esse non potest*. This is translated in Wharton's Legal Maxims (3rd ed, 'Law Times' Office, 1903) at p 141 as "When the law gives anything to any one, it gives also all those things without which the thing itself would be unavailable." This principle has long been recognised as applicable to the exercise of powers conferred by statute. The conferral of such powers is said to carry with it powers that are "necessary" for, "incidental" to or "consequential" upon the exercise of the power granted.

...

38. The ancient maxim and its more modern formulations, although they vary, convey the notion that what is done in the exercise of a statutory power is confined to that which is of the essence of its exercise. The judges formulating the principle have not tended to use words like "ancillary", "convenient" or "reasonable"....

27. The consideration of whether an incidental power may be implied into the FW Act which would enable to Commission to conduct broad reviews of the modern award system, requires an inquiry as to whether initiating such reviews is "necessary" for, "incidental" to or "consequential" upon one of the functions bestowed on the Commission under the Act.

⁷ *Transport Workers' Union of New South Wales v Australian Industrial Relations Commission* [2008] FCAFC 26.

28. Ai Group submits that the conduct of a wide-ranging review on the Commission's own motion, into broad topic areas regulated by awards, could not be legitimately regarded as being necessary, incidental or consequential to the Commission's powers under s.157 of the FW Act or any other relevant provision of the Act.

4. Is the proposed review of C14 rates in 14 awards within the FWC's powers under s.157?

29. With regard to the above question, Ai Group is satisfied that there is jurisdiction for the current proceedings to take place given that the subject matter of the proceedings has been identified by the Commission upfront and is relatively discrete.