Australian Industry Group

# Application to vary the *Meat Industry Award 2020*

## Reply Submission

(AM2021/57)

**4 July 2024**

# AM2021/57

# APPLICATION TO VARY THE *MEAT INDUSTRY AWARD 2020*

# 1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) relates to an application made by the Australian Meat Industry Employees' Union (**Union**) on 20 April 2021 (**Application**) in the Fair Work Commission (**Commission**). The Application seeks a raft of variations to the classification structure in Schedule A to the *Meat Industry Award 2020* (**Meat Award** or **Award**).

2. Our submission is filed in accordance with directions issued by the Commission on 4 December 2023, as subsequently amended on 28 June 2024.

3. For the reasons outlined in this submission, Ai Group opposes all substantive variations sought in the Application, on the basis that they are not:

   (a) Necessary to meet the modern awards objective (**MAO**);

   (b) Necessary to meet the minimum wages objective (**MWO**); and / or

   (c) Justified by work value reasons.

4. The Commission should not make any of the proposed variations we oppose.

## 2. THE UNION'S APPLICATION

5. On 2 May 2023, Justice Hatcher directed the Union to file a draft determination setting out its proposed variations to the Award. In response, on 28 July 2023, the Union filed a table containing its proposed classification structure.

6. Subsequently, the Union filed a document titled '*Outline of Argument*' on 1 March 2024 (**March 2024 Submission**) along with four witness statements.[1] Attached to the March 2024 Submission is a similar table to that filed on 28 July 2023, save for an additional column headed '*Expert Evidence and Final Submissions'*. To the extent that this document modifies the Union's position regarding the variations it proposes, we have assumed that it sets out the Union's final position.

7. In the March 2024 Submission, the Union states that it seeks variations to the classification structure in Schedule A to the Award:

   (a) '*[F]or non-compliance with the modern awards objective pursuant to s.134 and for work value reasons pursuant to s.157'*[2] of the *Fair Work Act 2009* (Cth) (**Act**); (**First Limb**) and

   (b) On the basis of ambiguity, uncertainty or an error, pursuant to s.160 of the Act (**Second Limb**).

8. The specific bases for each variation sought is set out in the table attached to the March 2024 Submission.

9. It appears that the First Limb of the Application is, in large part, directed towards the value of work performed in relation to small stock (sheep, pigs and goats) *vis-à-vis* work performed on large stock (cattle); because, in the Union's submission, *'small stock workers are paid less for the same job on a different animal'*.[3] In this respect, the Union seeks variations to the Award that would, in effect, result in the minimum wages payable for work on small stock being

[1] Being a witness statement of Gary Rolten, dated 19 February 2024; Witness statement of Patrick O'Leary dated 20 February 2024; Witness statement of Stephen Leight dated 26 February 2024; and witness statement of Graham Smith dated 20 February 2024.

[2] March 2024 Submission at [1].

[3] March 2024 Submission at [6].

equivalent to the minimum wages payable for work on large stock (**Work Value Claim**).

10. The First Limb of the Application is also premised on the basis that certain tasks identified in the classification structure *'fall into ambiguous territory'*[4] and should be amended for that reason.

11. The Second Limb of the Application is advanced on the basis that the Award *'is significantly outdated in its terminology, lacks clarity and is ambiguous'*.[5] These variations are pursued by reference to s.160 of the Act.

12. The vast majority of the variations proposed by the Union are of significant import. They would, in effect, result in a material uplift in the minimum rates payable for work in various scenarios and by extension, result in the potential imposition of significant additional employment costs on employers. Plainly, in the absence of cogent reasons and probative material before the Commission in support of such changes, they should not be adopted.

13. In relation to the Union's Work Value Claim, the Union clearly seeks an increase to the minimum rates payable for the performance of various types of work. However, it must be noted that whilst some other proposals are described as seeking to address purported ambiguities, they would in fact do so in a way that substantively increases the minimum wages payable to employees for various categories of work and would, by extension, also enliven considerations associated with work value.

14. For example, item 26 in the table attached to the March 2024 Submission seeks the deletion of the task of *'cashier'* from the Meat Industry Level 4 (**MI4**) classification level on the basis that it is the same as a *'salesperson'* at the Meat Industry Level 5 classification level. The Union contends that this creates an ambiguity or uncertainty and that this should be rectified by deleting the reference to *'cashier'* in the MI4 classification level.

[4] March 2024 Submission at [8].

[5] March 2024 Submission at [19].

15. Whilst we do not accept that *'cashiers'* are in fact *'salespersons'*; if that contention were adopted, the impact of the Union's proposal would be to increase the minimum rate of pay for employees currently working as cashiers.[6]

16. The same can be said of the Union's proposal to dramatically reduce the period of time for which an employee can be classified at Meat Industry Level 1, at item 1 of the aforementioned table. We also observe that no evidence has been led in *this* proceeding in support of that claim.

[6] See also, for example, items 8, 16 and 22 of the table attached to the March 2024 Submission.

## 3. THE LEGISLATIVE FRAMEWORK

17. In this section of our submission, we set out the relevant legislative provisions that apply to the Union's Application.

### The First Limb of the Application

18. Section 157 of the Act is relevant to the First Limb of the Application. It provides as follows: (emphasis added)

> **157 FWC may vary etc. modern awards if necessary to achieve the modern awards objective**
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> (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
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> (b) make a modern award; or
>
> (c) make a determination revoking a modern award;
>
> if the FWC is satisfied that making the determination or modern award is necessary to achieve the modern awards objective.
>
> Note 1: Generally, the FWC must be constituted by a Full Bench to make, vary or revoke a modern award. However, the President may direct a single FWC Member to make a variation (see section 616).
>
> Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).
>
> Note 3: If the FWC is setting modern award minimum wages, the minimum wages objective also applies (see section 284).
>
> (2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:
>
> (a) the variation of modern award minimum wages is justified by work value reasons; and
>
> (b) making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective.
>
> Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).

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

(a) the nature of the work;

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

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

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

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

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

19. In addition, s.138 of the Act states:

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

20. Both the MAO and the MWO are relevant to the Union's Application.

21. Section 134 contains the MAO, which applies to the performance or exercise of the Commission's powers pursuant to Part 2-3 of the Act:[7]

**134 The modern awards objective**

*What is the modern awards objective?*

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(aa) the need to improve access to secure work across the economy; and

(ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

[7] Section 134(2)(a) of the Act.

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective***.

22. The MWO relevantly provides as follows:

**284 The minimum wages objective**

*What is the minimum wages objective?*

(1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:

(a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and

(aa) the need to achieve gender equality, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps; and

(b) promoting social inclusion through increased workforce participation; and

(c) relative living standards and the needs of the low paid; and

(e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

This is the ***minimum wages objective***.

*When does the minimum wages objective apply?*

(2) The minimum wages objective applies to the performance or exercise of:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-3, so far as they relate to setting, varying or revoking modern award minimum wages.

23. In addition, s.135 of the Act provides as follows:

**135 Special provisions relating to modern award minimum wages**

(1) Modern award minimum wages cannot be varied under this Part except as follows:

(a) modern award minimum wages can be varied if the FWC is satisfied that the variation is justified by work value reasons (see subsection 157(2));

(b) modern award minimum wages can be varied under section 160 (which deals with variation to remove ambiguities or correct errors) or section 161 (which deals with variation on referral by the Australian Human Rights Commission).

Note 1: The main power to vary modern award minimum wages is in annual wage reviews under Part 2-6. Modern award minimum wages can also be set or revoked in annual wage reviews.

Note 2: For the meanings of ***modern award minimum wages***, and ***setting*** and ***varying*** such wages, see section 284.

(2) In exercising its powers under this Part to set, vary or revoke modern award minimum wages, the FWC must take into account the rate of the national minimum wage as currently set in a national minimum wage order.

24. The meaning of setting and varying modern award minimum wages is contained in s.284(4) of the Act:

*Meaning of **setting** and **varying** modern award minimum wages*

(4) ***Setting*** modern award minimum wages is the initial setting of one or more new modern award minimum wages in a modern award, either in the award as originally made or by a later variation of the award. ***Varying*** modern award minimum wages is varying the current rate of one or more modern award minimum wages.

25. Whilst we acknowledge that the variations advanced as part of the First Limb of the Union's Application do not, *directly*, seek to increase minimum wages payable for extant classification levels; the net effect of many of the variations proposed is to increase the minimum wages payable to employees for performing various tasks. These changes would be brought about through the

reclassification of certain work to higher levels, for which a higher minimum wage is required to be paid.

26. In the circumstances, the considerations articulated by s.157(2A) should be taken into account. Moreover, the Commission should not exercise its discretion to grant the variations proposed by the Union unless it is satisfied that the higher minimum wages that would be payable are justified by work value reasons. The Union appears to accept that that is so.

27. On the basis of the material before it, in our submission, the Commission cannot reach that requisite state of satisfaction. It follows that the Union's claims should be dismissed.

28. In a recent decision issued by a Full Bench of the Commission concerning proposals to increase minimum rates of pay applying to employees in the aged care sector,[8] the Commission set out some key propositions for determining the meaning of '*work value reasons*' in s.157(2A) of the Act. Relevantly, it said as follows:[9] (emphasis added)

> ***Section 157(2A)***
>
> 1. Section 157(2A) can be said to exhaustively define '*work value reasons*' in the sense that there are no other express provisions in the FW Act which inform the meaning of s.157(2A), although the objects of the FW Act will inform the interpretation and application of the concepts within s.157(2A).
>
> 2. The reasons which justify the amount employees should be paid for doing a particular kind of work must be '*related to*' any one or more of the 3 matters in s.157(2A)(a) to (c). There is nothing in the statutory context to suggest that the expression '*related to*' in s.157(2A) was not intended to have a wide operation or that an indirect, but relevant, connection would not be a sufficient relationship for present purposes. The expression '*related to*' is one of broad import that requires a sufficient connection or association between the 2 subject matters; the connection must be relevant and not remote or accidental.
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> 3. Section 157(2A) does not contain any requirement that the '*work value reasons*' consist of identified changes in work value measured from a fixed datum point. But, in order to ensure there is no '*double counting'*, it is likely the Commission would adopt an appropriate datum point from which to measure work value change, where the work has previously been properly valued. The datum point

[8] *Aged Care Award 2010, Nurses Award 2020, Social, Community, Home Care and Disability Services Industry Award 2010* [2022] FWCFB 200 (***Aged Care Stage 1 decision***).

[9] *Aged Care Stage 1 decision* [2022] FWCFB 200 at [293].

would generally be the last occasion on which work value considerations have been taken into account in a proper way, that is, in a way which, according to the current assessment of the Commission, correctly valued the work. A past assessment which was not free of gender-based undervaluation or other improper considerations would not constitute a proper assessment for these purposes.

4. Where the wage rates in a modern award have not previously been the subject of a proper work value consideration, there can be no implicit assumption that at the time the award was made its wage rates were consistent with the modern awards objective or that they were properly fixed.

5. Section 157(2A) does not incorporate the test which operated under wage fixing principles of the past that the change in the nature of work should constitute '*such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification*.' There is simply no basis for introducing such an additional requirement to the exercise of the discretion in s.157(2), which might have been, but which has not been, enacted.

6. In the Pharmacy Decision, the Full Bench described in detail the development by the AIRC of an approach whereby the proper fixation of award minimum rates of pay required an alignment between key classifications in the relevant award and classifications with equivalent qualification and skill levels in the Metal Industry classification structure.

7. Having regard to relativities within and between awards remains an appropriate and relevant exercise in performing the Commission's statutory task in s.157(2). Aligning rates of pay in one modern award with classifications in other modern awards with similar qualification requirements supports a system of fairness, certainty and stability. The C10 Metals Framework Alignment Approach and the AQF are useful tools in this regard. However, such an approach has its limitations, in particular:

    - alignment with external relativities is not determinative of work value

    - while qualifications provide an indicator of the level of skill involved in particular work, factors other than qualifications have a bearing on the level of skill involved in doing the work, including 'invisible skills' as discussed in Chapter 7.2.6

    - the expert evidence supports the proposition that the alignment of feminised work against masculinised benchmarks (such as in the C10 Metals Framework Alignment Approach) is a barrier to the proper assessment of work value in female-dominated industries and occupations (see Chapter 7.2.5), and

    - alignment with external relativities is not a substitute for the Commission's statutory task of determining whether a variation of the relevant modern award rates of pay is justified by 'work value reasons' (being reasons related to the nature of the work, the level of skill and responsibility involved and the conditions under which the work is done).

8. In exercising the powers to vary modern award minimum wages, the Full Bench must take into account the rate of the national minimum wage as currently set in a national minimum wage order (s.135(2)).

9. Statements of principle from work value cases decided under different statutory regimes and pursuant to wage fixing principles which no longer exist are likely to be of only limited assistance in the Commission's statutory task under s.157(2). Some of those statements of principle have no relevance at all, given they are grounded in wage fixing principles which required a change in work value to constitute a significant net addition to work requirements. The adoption of the observations such as those at [190] in the ACT Child Care Decision runs the risk of obfuscating the Commission's statutory task of determining whether a variation of modern award minimum wages is justified by work value reasons, being reasons related to the matters in s.157(2A)(a)–(c). To adopt such an approach may also be said to be adding to the text of s.157(2A) in circumstances where it is not necessary to do so in order to achieve the legislative purpose, and may also be an unwarranted fetter on the exercise of what the legislature clearly intended would be a discretionary decision.

10. It is not helpful or appropriate to seek to delineate the metes and bounds of what constitutes 'work value reasons' divorced from a particular context. In our view the meaning of 'work value reasons' should focus on the text of s.157(2A). Any elaboration will develop over time, on a case-by-case basis as the Commission determines particular issues as and when they arise.

## The Second Limb of the Application

29. The Second Limb of the Application is advanced pursuant to s.160 of the Act, which is in the following terms:

> **160 Variation of modern award to remove ambiguity or uncertainty or correct error**
>
> (1) The FWC may make a determination varying a modern award to remove an ambiguity or uncertainty or to correct an error.
>
> (2) The FWC may make the determination:
>
> (a) on its own initiative; or
>
> (b) on application by an employer, employee, organisation or outworker entity that is covered by the modern award; or
>
> (c) on application by an organisation that is entitled to represent the industrial interests of one or more employers or employees that are covered by the modern award; or
>
> (d) if the modern award includes outworker terms--on application by an organisation that is entitled to represent the industrial interests of one or more outworkers to whom the outworker terms relate.

30. The principles associated with the interpretation and application of s.160 of the Act were recently summarised by a Full Bench of the Commission in the context of a review of superannuation provisions in modern awards, as follows: (emphasis added)

> **[51]** The principles applicable to the interpretation and application of s 160 are well established. It is first necessary to determine if the award provisions under consideration are ambiguous, uncertain or attended by error. To find ambiguity in respect of an award provision, there must usually be rival contentions as to the proper meaning of the provision which are reasonably arguable. The words 'ambiguous' and 'uncertain' are not synonyms, and uncertainty may be established even if the provision at issue has a clear meaning and is not ambiguous, since uncertainty may arise from the application of unambiguous terms to a given set of circumstances or if the provision is doubtful, vague or indistinct in its expression. Error will be demonstrated if some sort of mistake is shown, in that a provision of the award was made in a form which did not reflect the tribunal's intention. It is only if ambiguity, uncertainty or error is found that a variation to remedy this may be considered.
>
> **[52]** The Commission has a discretion as to the terms of the variation to be made, subject to the variation determined having the purpose and effect of removing the identified ambiguity or uncertainty or correcting the identified error.[10]

31. Deputy President Saunders also summarised the various principles in the context of an application made to vary the *Road Transport and Distribution Award 2020* pursuant to s.160 of the Act, as follows: (emphasis added)

> **[10]** The Commission may exercise the power of variation granted by s 160 only for the purpose of removing "an ambiguity or uncertainty". The existence of an ambiguity or uncertainty is a necessary statutory prerequisite to any variation being made. If there is such an ambiguity or uncertainty, the Commission has a discretionary power vested by s 160 which it may exercise to remove the ambiguity or uncertainty.
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> **[11]** Ambiguity exists when a provision in an award is capable of more than one meaning. The ambiguity may be apparent on the face of the award or may become apparent only when extrinsic evidence is adduced.
>
> **[12]** The terms "ambiguity" and "uncertainty" are not synonyms. The ordinary meaning of "ambiguity" is "1. doubtfulness or uncertainty of meaning, 2. an equivocal or ambiguous word or expression". The ordinary meaning of "uncertainty" is "1. not definitely or surely known; doubtful. 2. not confident, assured or decided. 3. not fixed or determined. 4. doubtful; vague; distinct". Uncertainty may arise from the application of an unambiguous term to a particular set of circumstances. The distinction between patent ambiguity (linguistic ambiguity) and latent ambiguity (ambiguity in application) provides an illustration by analogy.

[10] *Variation on the Commission's own motion – Modern award superannuation clause review* [2023] FWCFB 264 at [51] – [52].

**[13]** Determining whether a provision in an award is ambiguous or uncertain is distinct from the task of identifying the true meaning of the provision. When an instrument such as an award is properly construed, there is only one correct meaning, notwithstanding that there may be ambiguity in the provision. It follows that it is not necessary for the Commission to interpret the award in order to reach a conclusion concerning the presence of ambiguity or uncertainty.

**[14]** If ambiguity or uncertainty is found in an award, the Commission may have regard to a range of factors in determining whether to exercise its discretion to vary the award in order to remove the ambiguity or uncertainty. There is no need for the Commission to feel constrained in the matters to which it may have regard in the exercise of its discretionary power under s 160 of the Act by the principles developed for the interpretation of awards. For example, the Commission may have regard to "industrial principles and general industrial merit considerations". Other relevant matters may include the actual intention of the maker of the instrument (or of the interested parties) and the history of the provision as part of the "equity, good conscience and the merits" of the matter. This may be contrasted with the process of construing an award where the actual subjective intent of the makers of the instrument is irrelevant. That is because the process of interpretation is directed to the proper construction of what the instrument says, not what it was meant to say.[11]

32. In another decision concerning the *Horticulture Award 2020,*[12] the Commission dealt with the meaning of '*uncertainty*' for the purposes of s.160 as follows: (emphasis added)

**[152]** The decision of Senior Deputy President Polites in *Re. Public Service (Non Executive Staff – Victoria) (Section 170MX) Award 2000* provides further clarity on the meaning of 'uncertainty'. In this case, an award clause was varied on the basis that the clause was uncertain. In doing so, His Honour adopted the following definition of 'uncertainty':

> 'In that respect I respectfully adopt the submission made by the State of Victoria that the term "uncertainty" means the quality of being uncertain in respect of duration, continuance, occurrence, liability to chance or accident or the state of not being definitely known or perfectly clear, doubtfulness or vagueness. Those are extracts for the Concise Oxford Dictionary adopted by Commissioner Whelan in *Re: Shop Distributive and Allied Employees Association v. Coles Myer* [Print R0368]. In my view, as I have indicated, this provision clearly falls within that definition.'[13]

33. During the 4 yearly review of the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*, the Shop Distributive and Allied Employees' Association proposed a variation to the award pursuant to s.160 of the Act on the basis that it contained an *'error'* as to the manner in which certain rates had been

[11] *Application by Toll Transport Pty Ltd t/a Toll Transport* [2022] FWC 3346 at [10] – [14].

[12] *4 yearly review of modern awards – Horticulture Award 2010* [2017] FWCFB 6037.

[13] *4 yearly review of modern awards – Horticulture Award 2010* [2017] FWCFB 6037 at [152].

calculated. In its decision[14], a Full Bench of the Commission dealt with the relevant aspect of the unions' submissions as follows: (emphasis added)

> **[73]** With respect to the SDA, this is not demonstrative of any error. It only demonstrates that a methodology was used which the SDA, with the benefit of hindsight, would prefer not to have been used. Nothing was placed before us to suggest that the AIRC did not intend to use that methodology, or that some mathematical error was made in calculating the rates in accordance with that methodology. We do not accept that disagreement - even a well-founded disagreement - with a previous decision concerning an award is sufficient to establish an error for the purpose of s.160. What is necessary is to show that some sort of mistake occurred, in that a provision of the award was made in a form which did not reflect the tribunal's intention. There is nothing to suggest that this occurred here. Accordingly the SDA's application under s.160 must be dismissed.[15]

34. In our submission, the MAO also applies to the exercise of the Commission's powers to vary an award pursuant to s.160.[16]

[14] *4 yearly review of modern awards – Vehicle Manufacturing, Repair Services and Retail Award 2010* [2016] FWCFB 4418.

[15] *4 yearly review of modern awards – Vehicle Manufacturing, Repair Services and Retail Award 2010* [2016] FWCFB 4418 at [73].

[16] Section 134(2)(a) of the Act.

## 4. THE UNION'S EVIDENCE

35. Each of the four witness statements filed by the Union include an *'expert report'*, as follows:

    (a) Expert Report of Gary Rolten, dated 14 February 2024;

    (b) Expert Report of Patrick O'Leary, dated 9 August 2023;

    (c) Expert Report of Stephen Leight, dated 8 August 2023; and

    (d) Expert Report of Graham Smith, dated 19 February 2024.

36. The evidence of Mr Rolten, Mr Leight and Mr Smith relates to the classification structure in the Award, while the evidence of Mr O'Leary relates to the history of the Award and the meat industry in Australia more broadly.

37. In this part of our submission, we make various observations about the evidence led by the Union.

38. In *Construction, Forestry, Maritime, Mining and Energy Union v Matthew Howard and Mt Arthur Coal Pty Ltd t/a Mt Arthur Coal*, a Full Bench of the Commission considered various issues relating to expert evidence. Relevantly, it said as follows: (emphasis added)

> **[35]** While the Commission is not bound by the rules of evidence, those rules, including the rules relating to expert evidence, are not irrelevant and they provide general guidance as to the manner in which the Commission chooses to inform itself. Further, it is uncontroversial that we are not bound to accept expert evidence even if there is no contrary expert evidence.
>
> …
>
> **[38]** The *Evidence Act 1995* (Cth) (**Evidence Act**) provides that opinion evidence tendered to prove the existence of a fact is not admissible, although there are exceptions. Section 79 provides that a person's opinion evidence is admissible if the person has specialised knowledge (based on their training, study or experience), and their opinion is wholly or substantially based on that knowledge.
>
> …
>
> **[43]** There is no rule of law that an expert's opinion evidence is automatically inadmissible because they are an employee of a party or otherwise have an interest in

the outcome of a case. In our view, such matters go to the weight to be given to the expert's evidence, as May LJ observed in *Field v Leeds City Council*:

> '…there is no overriding objection to a properly qualified person giving opinion evidence because he is employed by one of the parties. The fact of his employment may affect its weight but that is another matter.'

…

**[53]** In a recent decision, a Full Bench attached little weight to particular opinions in an expert report where the basis of the opinion was not expressed, noting that:

> 'A bare expression of opinion, absent any sufficient explanation of the basis of that opinion, is normally given little weight. As observed in *Davie v The Lord Provost, Magistrates and Councillors of the City of Edinburgh*:
>
> > 'the bare *ipse dixit* of a scientist, however eminent, upon the issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert.'

**[54]** We propose to adopt the same course in these proceedings. We will give little weight to opinions expressed in Professor McLaws' witness statement where the basis of the opinion is not expressed. [17]

39. The Union describes all of its evidence as *'expert'* evidence and appears to seek to rely upon the opinions expressed by the witnesses to establish the existence of various facts. In our submission, little if any weight can be attributed to this evidence, for the reasons that follow.

40. *First,* neither Mr Rolten, Mr Smith nor Mr Leight possess *specialised* knowledge, based on training, study or experience, in the relevant sense. The fact that Mr Rolten and Mr Leight have performed various roles in the meat industry over a number of years does not, of itself, render their opinion evidence admissible for the purpose sought by the Union.

41. *Second*, in various respects, the evidence does not disclose the basis for the opinions expressed.

[17] *CFMMEU v Mt Arthur Coal* [2021] FWCFB 6059 at [35] – [54].

42. For example, in response to question 22, Mr Rolten purports to give evidence as to the practice of *'clipping weasands'* in *'most plants'*.[18] Similarly, in response to question 23, he gives evidence as to what a *'hide puller'* does.[19] At question 27, he states that the task of *'dropping rectum'* is the same as *'cleaning and dropping rectum, gut and bungs'*.[20]

43. His statement does not disclose any basis for this evidence. For example, there is no evidence that Mr Rolten has undertaken an examination or analysis of the relevant practices across the sector. Indeed, the evidence does not even disclose the extent to which he has undertaken and / or observed the specific activities mentioned in the course of his employment – if at all.

44. *Third*, some of the evidence given by the witnesses appears to fall beyond the scope of their expertise entirely. For example, evidence regarding the question of whether the Union's proposed changes to the classification structure *'should be adopted in full'*,[21] or whether particular tasks from one level of the classification structure would better fit within a higher classification level, does not appear to fall within the relevant witnesses' expertise.[22] Certainly, neither Mr Rolten nor Mr Leight give evidence of having applied or interpreted the classification structure in the Award in any detail. The evidence they give of this kind does not rise beyond mere assertions or self-serving submissions.

45. *Fourth,* Mr Smith's former association with the Union and his direct involvement in the preparation of the Union's case in this matter is a factor that potentially undermines the weight that can be attributed to his evidence. Further, although Mr Smith notes in his report that he is now retired, he also states that at the time of preparing his expert report, he was undertaking some consulting work for the Newcastle branch of the Union.[23] Mr Smith even goes so far as to characterise

[18] Witness statement of Gary Rolten dated 19 February 2024 at page 15.

[19] Witness statement of Gary Rolten dated 19 February 2024 at page 15.

[20] Witness statement of Gary Rolten dated 19 February 2024 at page 15.

[21] For example, question 7. Witness statement of Gary Rolten dated 19 February 2024 at page 5; Witness statement of Stephen Leight dated 26 February 2024 at page 5.

[22] For example, question 18. Witness statement of Gary Rolten dated 19 February 2024 at page 5; Witness statement of Stephen Leight dated 26 February 2024 at page 5.

[23] Witness statement of Graham Smith dated 20 February 2024 at page 10.

his previous involvement in the Application as a reason for why the matters canvassed in the Union's questions are within his expertise.[24]

46. He is by no means an independent expert.

47. Moreover, as a result of both the nature and limited volume of evidence filed by the Union; various critical factual propositions are not made out in the material before the Commission. Most importantly; the evidentiary case lacks the kind of material necessary to enable the Commission to make a proper assessment of the value of the various types of work relevant to the Union's claims. That is, there is a clear absence of first-hand evidence from witnesses who perform the relevant activities in a range of contemporary contexts, such that the Commission could evaluate the nature of the work being performed, the environment in which it is performed, the skills required in order for the employee to perform the relevant work etc; and draw comparisons with other comparable (or arguably comparable) work, for the purposes of considering internal or external wage relativities.

48. At its highest, the evidence amounts to no more than bare assertions from a small number of witnesses, in circumstances where a proper basis for their evidence is not made out and / or their evidence amounts, in effect, to submissions.

49. We also observe that in relation to some issues, the witnesses expressly acknowledge that their evidence is limited to the scope of matters within their knowledge – for example, in response to questions concerning the ongoing utilisation of certain terminology or whether employees are in fact still required to perform certain tasks (or, whether they have now become obsolete).[25] Plainly, the evidence of a small number of witnesses about such matters is not representative of the practices implemented across the sector and they should not be extrapolated as such. They are, as a result, of limited utility.

[24] Witness statement of Graham Smith dated 20 February 2024 at page 10.

[25] For example, the proposals at items 3, 4 and 5 of the table attached to the March 2024 Submission.

## 5. RESPONSE TO THE UNION'S CLAIMS

50. The material before the Commission falls well short of establishing that any of the substantive proposals advanced by the Union should be granted. In its written submissions, the Union has made scant effort to articulate why the proposals should be granted or how they accord with the relevant statutory criteria.

51. More specifically, the Union has not clearly articulated why any of its proposed variations are necessary to meet the MAO, much less grappled with the mandatory considerations listed at s.134(1) of the Act. In our submission:

    (a) The material does not establish the extent to which the proposed variations would impact the *'needs of the low paid'*.[26] Indeed the extent to which any of the affected employees are *'low paid'* (in the relevant sense) is not clear.

    (b) The proposed variations would not improve access to secure work.[27]

    (c) Considerations associated with gender equality are not relevant to this matter.[28]

    (d) There is no evidence that the proposed variations would encourage collective bargaining. To the extent that the proposed variations would result in a material increase in employment costs, the changes sought are more likely to in fact *discourage* enterprise bargaining.[29]

    (e) There is no evidence that the proposed variations would increase workforce participation.[30]

    (f) The proposed variations would not promote flexible modern work practices, efficiency or productivity.[31]

[26] Section 134(1)(a) of the Act.
[27] Section 134(1)(aa) of the Act.
[28] Section 134(1)(ab) of the Act.
[29] Section 134(1)(b) of the Act.
[30] Section 134(1)(c) of the Act.
[31] Section 134(1)(d) of the Act.

(g) Considerations associated with the need to provide additional remuneration for work performed at certain times are not relevant to this matter.[32]

(h) The proposed variations are contrary to the interests of business and would likely have a negative impact on employers insofar as they would result in higher employment costs.[33]

(i) The proposed variations are inconsistent with the need to maintain a stable system.[34] This is particularly so given the paucity of material before the Commission and the absence of a sound basis for making the changes sought. Further, the material does not enable a proper assessment of the impact that the variations would have on internal or external wage relativities. Ill-considered changes that disturb such relativities may serve to significantly undermine the stability of the system.

52. Similar observations can be made about the MWO and the application of work value principles. In particular, the Union has failed to cogently articulate how any of the reasons articulated in s.157(2A) of the Act support its proposed variations.

53. As to the variations the Union seeks on the basis of s.160 of the Act, it has largely failed to clearly demonstrate that relevant ambiguities, uncertainties and/or errors exist. In fact, it has barely made a serious attempt to establish the existence of an error, ambiguity or uncertainty in the relevant sense.

54. In the circumstances, the Commission could not be satisfied that any ambiguity, uncertainty or error exists. Further, for the reasons articulated above, even if the Commission were to find as such, the material does not establish that the proposed variations are appropriate. Accordingly, the Commission should not adopt them.

[32] Section 134(1)(da) of the Act.

[33] Section 134(1)(f) of the Act.

[34] Section 134(1)(g) of the Act.

55. There is one category of exception to this position; that is, the variations sought to address typographical errors.[35] We do not oppose those claims.

[35] See, for example, March 2024 Submission at page 38, item 44 insofar as it relates to typographical error; page 44 item 60; page 64 item 98.