DECISION

Fair Work Act 2009
s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

Variation of *Professional Employees Award 2020* on Commission's own motion

(AM2022/7)

Scientific services

ACTING PRESIDENT HATCHER
DEPUTY PRESIDENT SAUNDERS
COMMISSIONER P RYAN SYDNEY, 20 JANUARY 2023

Professional Employees Award 2020 – Commission acting on its own motion – hours of employment and overtime – coverage.

Introduction and background

[1] This matter has been created on the Commission's own motion to deal with two issues in respect of the *Professional Employees Award 2020* (Award). The first concerns hours of employment and overtime, and arises from a Full Bench decision issued on 22 April 2020 as part of the 4 yearly review of modern awards[1] (*April 2020 decision*). The second concerns the coverage of the Award and was identified in a separate Full Bench decision in *Zheng v Poten & Partners*[2] (*Zheng*). The background to these issues is set out below.

Hours of employment and overtime

[2] As part of the 4 yearly review of modern awards, a Full Bench was constituted to deal with substantive matters in relation to the Award (matter AM2019/5). In the *April 2020 decision*, the Full Bench agreed with submissions made by the Association of Professional Engineers, Scientists and Managers, Australia (APESMA) that clause 13 (previously clause 18) of the Award, which deals with hours of employment and overtime, does not achieve the modern awards objective.[3] The Full Bench said:

> "[59] In its Outline of Submission APESMA identified several deficiencies with the current provision which it submits, fails to meet the modern awards objective. The key concerns are summarised as follows:
>
> - Averaging of 38 Hours Over a Cycle – no definition of a cycle and the consequential issues of lack of prescribed compensation in Hours of Work clause for the working of additional hours.

- No enforceable minimum standard for working additional/unsociable hours – including no provision for record keeping/reconciliation.

- Employees covered by the award are disadvantaged when compared to other modern awards with more advantageous provisions, including modern awards covering professional/managerial employees and non-professional employees performing similar work alongside professional employees in a similar environment.

[60] APESMA submits that the current provision is unenforceable and fails to meet the modern awards objective in that it fails to provide a fair and relevant safety net and, accordingly, changes are 'necessary' to achieve the modern awards objective.

[61] We agree with APESMA's assessment. In its current form clause 18 does not achieve the modern awards objective." [footnotes omitted]

[3] The Full Bench went on to reject a package of amendments advanced as a consent position by the APESMA and the Australian Industry Group (Ai Group) on the basis the proposal lacked merit, and the parties were invited to file further submissions.[4] While the majority of the 4 yearly review is now concluded,[5] this matter remains outstanding.

Coverage

[4] Separately, the Full Bench in *Zheng* identified concerns with the way in which the coverage of the Award is described, noting there has been excessive litigation as to whether unfair dismissal applicants are covered by the Award.[6] The Full Bench made the following observations:

"[45] It is to be noted that the 'principal purpose' test was utilised in *Carpenter* to determine whether the employee in question fell within the incidence of the relevant award, which was described in terms of the specific work function of the employee, and not to determine whether the employee fell within a particular classification in the award. It appears to us, however, that the 'principal purpose' test is singularly ill-suited to determine whether a person falls within one of the classifications in the PE Award (or indeed the IT Award). That is because the classifications, including but not limited to the Level 3 classification considered in Ms Zheng's case, are expressed in highly generic terms and do not describe with any specificity the job functions required to be performed at each level. It appears to us that the classification descriptors have been drafted primarily in order to determine, by reference to the degree of skill and responsibility being exercised, in which classification a person otherwise covered by the award will fall, rather than to identify whether a person is covered by the award at all. In respect of Level 3, for example, the classification descriptor begins by referring to 'An employee at this level…', and the subsequent criteria do not describe any function particular to the job of an engineer, IT specialist or scientist but merely uses broad expressions such as 'mature professional knowledge', 'scope for individual accomplishment', 'coordination of more difficult assignments' and 'modify established guides and devise new approaches'. The only language which appears to attach to work

which might be performed by an engineer, IT specialist or scientist are the words 'professional' and 'technical', but these are used only in the most general way. We consider that the main function of the Level 3 descriptor is to distinguish that classification from the other classifications above and below it. Identifying the 'principal purpose' of an employee's employment and then attempting to determine whether that purpose fits within such a generically defined classification descriptor seems to us to be an inchoate task likely to produce difficulty in rendering a clear answer."

[5] The Full Bench noted that interested parties may wish to consider whether the coverage provisions of the Award should be reviewed so that the scope of its coverage is expressed with greater certainty and so questions about whether it covers particular employees can be determined more readily and with greater consistency.[7]

[6] The procedural history of this matter is as follows:

- A directions hearing was held on 16 March 2022. Following this, the parties were directed to confer in relation to the hours of employment and overtime and coverage issues and report back to the Commission on 2 May 2022.

- The report-back was held on 27 May 2022 at which the parties agreed to continue their discussions in relation to two issues. A conference was held on 29 June 2022.

- A further report-back was held on 3 August 2022, at which the parties advised the Commission that they had been unable to reach agreement on a resolution to the issues. On 4 August 2022 directions were issued setting out a timetable for interested parties to file evidence, submissions and reply material before a final hearing on 28 October 2022.

- On 15 September 2022 the timeframes for filing material were extended.

- On 10 October 2022 the filing timeframes were further extended and the hearing was rescheduled to 23 and 25 November 2022 at the parties' request.

- The hearing ultimately took place on 23 November 2022 only.

[7] The following initial submissions, evidence and draft determinations were filed:

- The Ai Group filed written submissions and a draft determination setting out its proposed variations to the Award on 19 September 2022;[8]

- Australian Business Industrial and the NSW Business Chamber (ABI and NSWBC) filed written submissions on 19 September 2022;[9] and

- The APESMA filed written submissions, witness statements made by Jacki Baulch, Mateja Simovic and Alex Crowther as well as a draft determination setting out its proposed variations to the Award on 19 September 2022;[10]

[8] The following parties filed submissions in reply:

- ABI and NSWBC on 9 November 2022;[11] and
- the Ai Group on 9 November 2022.[12]

[9] The APESMA filed supplementary submissions on 22 November 2022.[13]

[10] We deal with the hours of employment/overtime issue and the coverage issue separately below.

Hours of employment and overtime

APESMA

[11] The APESMA filed a draft determination which set out its proposal for variations to the Award to resolve the issues concerning hours of employment and overtime. In summary, its draft determination involves the following variations:

(1) A variation to clause 13.2 to require that ordinary hours be averaged over a regular cycle of 6 months.

(2) A new clause 13.3 establishing a span of ordinary hours from 6.00 am to 6.00 pm Monday to Friday.

(3) A new clause 13.4 establishing the spread of ordinary hours by reference to any different award which covers other employees in the workplace who work in association with professional employees covered by the Award.

(4) A new clause 13.5 enabling the working of rostered afternoon and night shifts.

(5) A new clause 13A, *Overtime*, which provides for:

- overtime rates of pay of time and a half for the first three hours and double time thereafter, calculated daily;
- a minimum payment of three hours' pay on Saturdays and Sundays;
- rest breaks during and after overtime;
- call-back prescriptions;
- minimum overtime payments for remote service/support;
- a 20% stand-by allowance;
- a requirement for overtime hours to be reasonable; and

- the model time off in lieu of payment for overtime (TOIL) clause.

(6) A new clause 13B which provides for penalty rates of 115% for afternoon shifts, 130% for night shifts, 150% for Saturday work, 200% for Sunday work and 250% for public holiday work.

(7) A new clause 13C, being a model annualised wage arrangements clause.

[12] In support of its proposal for variation of the Award, the APESMA submitted that the existing provisions in respect of overtime, call-backs, remote support and working shifts in clause 13 of the Award are vague, uncertain and (consequently) unenforceable. It submitted that the existing Award rates are minimum rates for 38 ordinary hours which do not compensate for additional hours or alternative work patterns and, in order to meet the modern awards objective, it is necessary that the Award include enforceable obligations to make additional payments for work outside ordinary hours, as well as the other terms identified by the Full Bench at [81]-[85] of the *April 2020 decision*.

[13] The APESMA identified that the terms of its draft determination are derived from the following sources:

- The proposed clause permitting the span of ordinary hours to be taken from a different award in certain circumstances derives from clause 13.5 of the *Clerks—Private Sector Award 2020* which, it submitted, is relevantly a modern award that is occupation-based instead of the more typical industry-based nature of most modern awards.

- The proposed annualised salary clause is based on the Model 1 proposal for those who work a consistent pattern of hours in the *4 yearly review of modern awards – Annualised Wage Arrangements* decision.[14] The proposed draft clause includes shift work, because shift work is included in the exposure draft of the determination proposed for the *Health Professionals and Support Services Award 2020*.

- The proposed TOIL provision is based on the model clause set out in the *4 yearly review of modern awards—Common issue—Award Flexibility* decision.[15]

- The remainder of the clauses in the draft determination, with the exception of the remote work provision, are based on the wording of relevant provisions from the *Clerks—Private Sector Award 2020*.

[14] The APESMA relied upon witness statements made by Ms Jacki Baulch, Mr Mateja Simovic and Mr Alex Crowther (summarised below) to support their position. Citing the evidence of Ms Baulch and Mr Simovic, the APESMA submitted that employees whose contract rate of pay is at or close to the Award minimum rate for 38 hours end up being paid less than the Award minimum rate per hour when they work more than 38 hours in a week, with no legal capacity to enforce a right to remuneration for those additional hours. It submitted that the vast majority of modern awards which apply to professional employees provide for overtime payments and TOIL arrangements, citing the evidence of Ms Baulch, which reviews 30 modern

awards applying to professional employees and notes that 26 of the awards contain overtime provisions and 24 include TOIL provisions. It also relied on Ms Baulch's evidence as demonstrating that professional employees are required to work additional hours, particularly younger workers and graduates, and pointed to Mr Crowther's evidence about the 2022 Professional Engineers Remuneration Survey which identifies that there are professional engineers and scientists who are being paid less per hour worked than the award rate when all hours worked are taken into account. Accordingly, the APESMA submitted, the Commission should vary the Award pursuant to s 157(3) to meet the modern awards objective in the terms of its draft determination.

Evidence of Mr Crowther

[15] Mr Alex Crowther holds the position of Surveys Manager at the APESMA. In his witness statement, Mr Crowther described the conduct and outcomes of a series of surveys of professional engineers and scientists. The outcomes relevantly included:

- The mean of the average number of hours worked per week by professional engineers in the private sector was 43.3 in 2022 and 44 in 2021.

- In 2022, 2.3% of Level 1 professional engineers, 6.6% of Level 2 professional engineers, 1.0% of Level 3 professional engineers and 1.7% of Level 4 professional engineers reported rates below the Award rate of pay if the Award rate is to be paid for all hours worked. In 2021, the percentages were 23.1% of Level 1 professional engineers, 14.8% of Level 2 professional engineers, 5.3% of Level 3 professional engineers and 2.2% of Level 4 professional engineers, and in 2018 they were 28% of Level 1 professional engineers and 19.4% of Level 2 professional engineers. There would be a significantly higher incidence of below-award hourly rates if payment at the rate of time and a half were required for hours worked in excess of 38 a week under the Award.

- The median base hourly rates of pay for professional engineers likely to be covered by the Award in 2022 were $35.82 for Level 1, $46.91 for Level 2, $58.52 for Level 3 and $71.49 for Level 4 (based on either a 38-hour working week, or a shorter working week where indicated on an individual basis).

- The mean of the average number of hours worked per week by professional scientists in the private sector was 44.8 in 2021.

- In 2021, 24.2% of Level 1 professional scientists, 11.8% of Level 2 professional scientists, 3.5% of Level 3 professional scientists and 3.5% of Level 4 professional scientists reported below-Award rates where all self-reported hours are accounted for. If a 50% loading were applied to hours in excess of 38 hours per week (that is, payment at the rate of time and a half), the incidence of payment below Award rates becomes 24.2% of Level 1 respondents, 18.3% of Level 2 respondents, 11.0% of Level 3 respondents and 6.5% of Level 4 respondents.

- The median base hourly rates of pay for professional scientists likely to be covered by the Award had a median base hourly rate of pay of $34.81 for Level 1, $42.88

for Level 2, $52.97 for Level 3 and $69.06 for Level 4 (based on either a 38-hour working week, or a shorter working week where indicated on an individual basis).

[16] In relation to the methodology used in undertaking the surveys, Mr Crowther acknowledged the following limitations:

- Members of the APESMA represented a larger proportion of the overall respondents than the proportion of the overall number of professional engineers, scientists and information communication technology professionals working in Australia that are APESMA members.

- Survey respondents self-reported their pay, regular hours of work and their classification.

- To maximise responses, all available contacts believed to be employed in the surveyed profession were invited to participate and all responses were included if sufficient information had been provided, and no additional attempts were taken to make the survey sample more closely resemble the broader profession.

[17] In cross-examination, Mr Crowther further conceded that, as the 2018 survey included introductory paragraphs stating that the APESMA was seeking variations to the Award, it is possible that an employee concerned about this issue would be more likely to respond to the survey than an employee who was not.[16] He also accepted that some forms of employee benefits such as the value of an employer-provided vehicle had not been included in calculations of employee earnings,[17] and he clarified that the base hourly rates recorded do not include any separate amounts such as overtime payments and allowances, that survey respondents were instructed to exclude superannuation allowances from their base rate and that it represented an amount before any salary sacrifice.[18]

Witness Statement of Ms Jacki Baulch

[18] Ms Baulch is the Principal Industrial Officer in the Federal Office of the APESMA. In her witness statement, Ms Baulch addressed the typical patterns of work for engineers and scientists and their terms of employment. Ms Baulch stated that the most common issues raised with her by members covered by the Award related to their proposed employment contracts, unfair dismissals, underpayment issues associated with them being paid an annual salary, and working excessive hours for which there was not considered to be adequate compensation.

[19] Ms Baulch's statement annexed a table setting out extracts of the hours, overtime and penalty provisions applying in the predecessor awards to the *Professional Employees Award 2010* (2010 Award). Ms Baulch said that it appeared that overtime penalties, TOIL arrangements, specified spans of hours, weekend and public holiday penalties, detailed recall to work/callout/standby provisions and detailed shiftwork provisions applied to some pre-reform awards and NAPSAs covering roles performed by workers under the current Award. She also identified other awards resembling the current Award which, while not specifying penalty payments for overtime, working unsociable hours, weekends or detailed arrangements for TOIL, did refer to the need for providing additional recognition when additional hours are worked and for taking account of what would apply to others working in the same industry.

[20] Ms Baulch's statement was also accompanied by a review she conducted of overtime and TOIL provisions of the modern awards that cover graduates and professionals. Her review indicated that the majority of modern awards covering graduates and professionals provide for overtime to be paid at time and a half for the first few hours of overtime worked and double time thereafter, and that most graduates and professionals covered by these awards have access to TOIL at either overtime penalties or at time-for-time.

[21] As to the hours worked by employees under the Award, Ms Baulch stated that:

- Engineers within the construction industry had told her that they regularly work in excess of 45 hours per week, are paid an annual salary and do not get paid overtime or access to TOIL.

- The APESMA's research and anecdotal information received from graduate engineers working in the construction industry suggested that it is likely that some of them are not paid the minimum Award rates if the hours they worked were included in their total remuneration.

- Many consulting industry engineers have told her that it is common for them to work 60 to 70 hours a week, seven days a week, when they have a project in operation or are preparing a bid. Depending on the industry in which the engineer consults, they may or may not be able to take a break after the project is completed.

- In her experience it is usual for consulting engineers' employment contracts to provide an annual salary in exchange for the employee working all the hours required to do the job. Such contracts do not stipulate or acknowledge a set number of hours to be worked in a week.

- Consulting industry engineers have informed her that there are very rarely any assessments made to determine if the pay they receive adequately compensates them for the hours they work.

- Some engineers working in the manufacturing industry are covered by enterprise agreements that tend to provide overtime payments and TOIL. Based on her interactions with them, engineers employed in manufacturing have generally indicated that they are paid annual salaries, their contracts require them to work all the hours required to do the job, they do not receive additional overtime payments (but sometimes get to take some TOIL) and they generally work between 45 and 50 hours per week.

- In her experience engineers in the defence contracting industry are more likely to work 12-hour shift arrangements than others covered by the Award. Such engineers have advised her that they are not being treated as shift workers and are not receiving the employment benefits generally available to shift workers such as access to five weeks' annual leave.

- Mining engineers generally work in a manner similar to other construction industry workers, and their employment contracts are generally more financially rewarding than for other engineers. However, she had been informed that their hours of work are generally in excess of 50 a week and in some instances between 60 and 70 hours a week for long periods of time. They are also often subject to FIFO arrangements, 12-hour shifts without the benefit of the shift penalties, and do not receive overtime payments or TOIL. In her experience, their employment contracts provide an annual salary and require employees to work the hours required to do the job without specifying any standard hours.

- Scientists working in the food production industry tend to be poorly paid in comparison to engineers, but tend to not have the same work/life balance problems. However, medical research scientists report a lack of job security and tend to work excessive hours because the funding and project timelines set to complete research projects is often insufficient.

- Ms Baulch stated that in her experience information technology professionals frequently work long hours because they are often required to work outside of ordinary business hours so that their activity does not disrupt their clients' businesses, in addition working during normal business hours. She said that the employment contracts she has seen generally indicate that no overtime payments or TOIL arrangements are available and pay an annual salary in compensation for all the hours required to be worked.

[22] Ms Baulch said that she believed that the awards system that applied prior to the making of the 2010 Award generally worked for employees covered by it, but that changes in the nature of work such as the current ubiquity of emails and mobile phones, and the lack of overtime and TOIL provisions, together with the removal of the "market rates" component of the predecessor awards, has left people covered by the Award with industrial regulation that now does not meet their needs.

[23] Ms Baulch was not cross-examined by any party.

Witness Statement of Mr Simovic

[24] Mr Simovic is an Organiser for the APESMA. In his witness statement, Mr Simovic described the structure of the games sector of the IT industry, the types of work performed and worker demographics. He said that:

- to his knowledge no enterprise agreements have been made within the sector;

- in his experience around 60% of the sector consists of contractors, freelancers and casual employees, and the remaining 40% are permanent full-time or part-time employees;

- IT-qualified employees and professional engineers covered by the Award typically work as software engineers, programmers or systems managers; and

- on the basis of the results of a survey conducted by Game Workers Unite Australia (annexed to Mr Simovic's statement), and consistent with his experience, the games sector is not characterised by high incomes.

[25] In relation to hours of work and remuneration, Mr Simovic said that in periods before the release of a game or immediately after a game's release, technical teams are often required to work significant additional hours and that it was not unusual for teams to work 60 hours per week for two months straight. He said that game workers who are employees are most commonly engaged on annual salary arrangements. He was not aware of any contracts providing for overtime payments, and has reviewed contracts providing for below-Award rates of remuneration. He also said that the funding model applied to the development and production of games leads to employers in the sector expecting periods of intense work hours, which in some cases could be detrimental to employees' health, and that some employees are encouraged to work longer hours through the provision of paid meals. Mr Simovic stated that in his view protections are required to discourage employers from imposing excessive work hours on young and Award-reliant employees for no additional remuneration and would lead to companies improving their planning and budgeting.

Ai Group

[26] The Ai Group's draft determination proposes:

(1) A new clause 13.2 allowing for the averaging of ordinary hours over a period of up to 12 months.

(2) The deletion of existing clauses 13.3-13.6.

(3) A new clause 14.3, applicable to Level 1 employees only, which would require compensation in the form of payment at the applicable minimum hourly rate, or TOIL, for overtime, call-backs, remote service/support, or time worked on afternoon, night or weekend shifts. Any additional payments could be absorbed into over-award remuneration.

(4) A new clause 14.4, applicable to Level 2-5 employees, which essentially repeats existing clauses 13.3-13.6, with the addition of requirements that the form and level of compensation provided to an employee pursuant to clause 14.4 must be agreed between an employer and employee at or prior to the commencement of the employee's employment, and that the employer must inform the employee in writing of the categories of work being compensated for and the form of the compensation.

(5) The addition of the model TOIL clause as clause 14.5.

[27] The Ai Group submitted that it would not be appropriate for the Award to contain prescriptive provisions concerning hours of work and the basis upon which those hours are remunerated because employees covered by the Award are highly-skilled and qualified, are often required to deliver specific outcomes rather than perform discrete tasks, are prescribed minimum rates that are among the highest across the modern awards system, and often have

discretion as to how, when and where they perform their work. It further submitted that the Commission should be cautious in varying the Award's longstanding hours of work and remuneration scheme, noting any variation that would impose greater costs or inflexibilities needs to be supported by probative and cogent evidence. The Ai Group nonetheless acknowledged that the Commission had found that clause 13 of the Award does not achieve the modern awards objective, and stated that it has proposed the changes set out above to address key criticisms of the current provisions.

[28] In relation to the existing Award provisions, the Ai Group submitted that:

- Clause 13.3 requires an employer to compensate an employee for time worked in specific circumstances, an important protection compelling an employer to provide some form of additional compensation for the work specified and drawing parties' attention to the need for additional compensation to be provided in those circumstances.

- Clause 13 is not as prescriptive as the hours of work and penalty rate regimes contained in many other awards, which is reflective of the nature of work covered by the Award. The Award appears to have been deliberately designed to enable employers and employees to come to arrangements that suit their interests, as was the case in the relevant pre-modern awards that previously covered such employees and employers, and should not lightly be disturbed.

- Clause 13.3(a), which requires employers to compensate employees for time worked "*regularly*" in excess of ordinary hours, is a textual indicator for the proposition that the minimum rates prescribed by the Award are intended to compensate employees for the performance of at least some overtime without additional remuneration.

- If the Commission proposes to introduce an obligation to pay overtime rates for all additional hours it would not be appropriate for employees to, in effect, be compensated twice for such work and further consideration would need to be given to how annual salaries were set.

- Part-time and casual employees are entitled to the minimum hourly rate prescribed by clause 14.1 for all hours of work consistent with its proposed variations.

- The current terms of the Award reflect an assumption that employees are to be paid an annual salary that is not directly referable to the performance of a specific quantum of work in any given pay period.

[29] In relation to the variations proposed in its draft determination, the Ai Group firstly submitted that its proposed clause 13.2 ensures an outer limit of 12 months is placed on the period over which ordinary hours may be averaged, makes clear that the provision operates by agreement, enables the continuation of above-award salary arrangements that compensate employees for all hours of work, and strikes a balance between ensuring the Award clearly provides for a maximum period over which ordinary hours can be averaged and ensuring such prescription is sufficiently flexible. As to its proposed clause 14.3, the Ai Group submitted that

it would introduce significant new entitlements for Level 1 employees, and was advanced on the basis that Level 1 employees may have less scope or capacity to negotiate fair and reasonable arrangements with their employer or may be more susceptible to being required to perform additional overtime without sufficient compensation. Proposed clause 14.3(d) would permit the proposed new monetary obligations to be absorbed into over-award payments, which would allow Award-derived obligations to be offset against salaries paid to employees through contractual arrangements, which has not previously been necessary due to the absence of an obligation to pay specific amounts for working in the circumstances contemplated by existing clause 13.3.

[30] In relation to Level 2-5 employees, the Ai Group submitted that these are highly-qualified professionals, with considerable discretion over how and when they work, and therefore it is not necessary or appropriate to vary the Award to require payment of specific amounts. Proposed clause 14.4 nonetheless provides additional protections to these employees by:

- making clear that an employer must take into account the terms and conditions that apply to the majority of employees employed in the relevant establishment;
- requiring agreement between an employer and employee as to the form and level of compensation provided at or prior to the commencement of employment;
- requiring an employer to inform employees of the form of compensation they will receive and the categories of work it covers, to ensure employees are better placed to understand the basis upon which they are being compensated and to enable productive discussions;
- requiring an employer to advise an employee of any change to the form or level of compensation they are receiving; and
- compelling the employer to adjust the compensation if they determine it was not set at an appropriate level, in addition to annually reviewing the compensation payable.

[31] The Ai Group opposes the variations sought by the APESMA, contending that they:

- reflect a fundamental and historic shift in the way in which the Award regulates the hours of work and remuneration of professional employees, in circumstances where a case has not been made out for these changes;
- would have significant adverse impact on employers and likely also some employees, reducing the flexibility available to them;
- lack adequate consideration of how and when professional employees covered by the Award in fact perform work, the nature of the work they perform and the characteristics that distinguish them from employees covered by other awards; and

- are not necessary to ensure the Award achieves the modern awards objective.

[32] The Ai Group submitted that it is critical that the Commission consider the specific conditions and circumstances of employees covered by the Award, including the following:

- employees covered by the Award are highly-skilled, tertiary-qualified professional employees capable of negotiating fair and appropriate terms and conditions with their employers;

- such employees are sought after and highly-paid, and the desire to employ competent and capable employees delivering high quality work necessarily drives many employers to offer terms and conditions that considerably outstrip the minimum Award conditions;

- this is demonstrated by the average weekly earnings of full-time employees in "*professional, scientific and technical services*" which according to the Australian Bureau of Statistics (ABS) were $2108.70, and the median base salaries of the employees that participated in the APESMA's own remuneration surveys; and

- employees covered by the Award are not accustomed to "clocking on" and "clocking off", enjoy the autonomy and flexibility that setting their own start and finish times affords, and are assessed by reference to the quality of the work they undertake rather than the hours worked.

[33] The Ai Group submitted that the above features of professional employees and the manner in which they perform work requires a different approach to that found in most other modern awards. The Ai Group further submitted that various elements of the APESMA's proposed variations lack specific justification and should therefore be dismissed, including:

- limiting the span of ordinary hours to 6.00 am - 6.00 pm;

- limiting the performance of ordinary hours to weekdays, to the exclusion of weekends;

- the definitions of "*afternoon shift*" and "*night shift*";

- the shiftwork parameters in proposed clauses 13.5(c)-13.5(g);

- the imposition of a minimum payment period in respect of overtime performed on weekends;

- the proposed entitlement to a rest break during overtime;

- the terms of the provisions proposed in respect of rest breaks, rest periods, call-backs, remote service or support, stand-by and TOIL; and

- the rate at which employees are to be paid for overtime, shiftwork, ordinary hours worked on weekends and on public holidays.

[34] The Ai Group submitted that the APESMA's material does not deal with critical issues, including when employees covered by the Award typically perform ordinary hours, the extent to which they perform ordinary hours outside the proposed span of hours, and the extent to which they are required to perform ordinary hours or overtime on the weekends. The Ai Group submitted that as the proponent of these variations, the onus of establishing that they are necessary to achieve the modern awards objective rests with the APESMA.

ABI and NSWBC

[35] ABI and the NSWBC submitted that, given the Full Bench's view in the *April 2020 decision* that clause 13 of the Award does not meet the modern awards objective, it cannot be retained in its current form. They broadly supported the Ai Group's proposed variations. They opposed the draft determination filed by the APESMA on the basis that it "*extends well beyond a reasonable attempt to remedy the issues identified by the Full Bench*" and submitted that:

- the majority of employees covered by the Award work without direct supervision;
- other comparable professional roles and occupations are award-free; and
- remuneration on an "hours worked" basis is simply not a feature of the industries in which employees covered by this Award work.

[36] Although ABI and the NSWBC acknowledged that defining a period over which hours may be averaged is necessary, they submitted that the APESMA's proposed six-month averaging period (proposed clause 13.2) is unnecessarily limiting and would not allow for the peaks and troughs which may characterise work in the industries in which employers and employees covered by this Award operate, and would require reconsideration of existing remuneration structures.

[37] ABI and the NSWBC expressed concern about the APESMA's proposed clause 13.5(c), which provides that ordinary hours of work which constitute shiftwork in accordance with the proposed definitions can only be averaged over a roster cycle of up to 12 weeks, except where extended by agreement with a majority of affected employees. They submitted that requiring employees covered by the Award to work in accordance with a roster is inconsistent with its fundamental design and purpose, and that this anomaly is amplified by the requirement that an averaging period can only be extended by agreement with a majority of those concerned. ABI and the NSWBC also submitted that the APESMA's proposed span of hours provisions (proposed clauses 13.3 and 13.5) would restrict employers and employees' ability to determine when work is performed in accordance with their respective needs and desires and lead to a situation where employees must either work within a narrow span of time or receive overtime payments. This, they submitted, went far beyond remediation of the Full Bench's concerns identified in the *April 2020 decision* and does not provide an outer limit on things such as overtime, weekend or unsociable hours which have been factored into above-Award remuneration.

[38] ABI and the NSWBC opposed the APESMA's proposed regime of overtime payments (proposed clause 13A) being introduced as a blanket entitlement for all employees, especially

in conjunction with the proposed narrow span of ordinary hours. They also characterised the proposed additional provisions for rest breaks, 10 hour break after overtime and the resumption of work the next day, call-back arrangements, remote service/support work and a stand-by allowance as "*burdensome additional arrangements*". ABI and the NSWBC submitted that these arrangements would impose additional costs on employers and inappropriately limit both employers' and employees' ability to set flexible patterns of work. They submitted that the APESMA had not advanced a merit case supported by probative evidence to support these proposed changes.

[39] In relation to the APESMA's proposed shift work provisions (proposed clause 13B), ABI and the NSWBC submitted that current clause 13.3 already provides for employees to be compensated for work on afternoon, night or weekend shifts. This could include non-monetary benefits such as additional leave or flexi-time to which the employer and employee have agreed, and this already constituted an appropriate safety net to ensure employees are not regularly required to work unsociable hours without recognition, while maintaining employees' and employers' capacity to arrive at a remuneration package which meets their needs. In respect of public holidays, they submitted that this is dealt with by the National Employment Standards (NES). Finally, the ABI and the NSWBC opposed the annualised wage arrangements provision proposed by the APESMA (proposed clause 13C).

Consideration

[40] The evidence before us is confined to that adduced by the APESMA. We have no direct evidence from any employer or employee to whom the Award applies. The APESMA's evidence was limited, in the cases of Ms Baulch and Mr Simovic, to information gleaned from their experience in dealing with professionals in various industry sectors covered by the Award. The survey evidence provided by Mr Crowther, as he readily accepted, had a number of limitations, including that the survey respondents substantially consisted of APESMA members, respondents were self-selecting and this likely created a bias towards those who were concerned about the issues being surveyed, and the data provided by respondents was not verified. Thus, the survey results cannot be said to be based on a randomly-selected representative sample of professional employees to whom the Award applies.

[41] However, this does not mean that the APESMA's evidence is to be disregarded or assigned no weight. Evidence such as that given by Ms Baulch and Mr Simovic, albeit it is hearsay, is commonly taken into account and given weight in award cases. Although evidence of this nature may not meet the requirements for expert evidence, properly speaking, nonetheless the Commission may rely upon the evidence of persons who have long experience and established expertise in dealing with employment issues in a particular industry or occupation. That is particularly so when the evidence, as here, is entirely unchallenged. In respect of Mr Crowther's survey evidence, the assessment of such evidence is not a binary task whereby it is simply accepted or rejected. As was stated in the *Penalty Rates Decision*, most survey evidence has methodological limitations, whether in relation to the sample, the nature of the questions put or the response rate, and the central issue is the extent to which the various limitations impact on the reliability of the results and the weight to be attributed to the survey data.[19] Even flawed surveys may provide data that can at least be treated as "suggestive or anecdotal".[20]

[42] Having regard to these matters, we make the following findings on the basis of the APESMA's evidence:

(1) Full-time professional employees covered by the Award, including engineers in the construction industry, consulting engineers, engineers in manufacturing, mining engineers, scientists, IT professionals, and professional employees in the gaming sector, frequently work hours well in excess of 38 per week, either on a regular basis or during peak work periods. Mean working hours for professional engineers and scientists are significantly in excess of 38 per week.

(2) Such employees are usually paid an annual salary which is intended to cover all hours worked and often do not have any fixed hours of work. They are usually not paid any overtime payments for hours worked in excess of 38 hours per week and are only rarely granted TOIL for additional or excessive hours.

(3) A large majority of professional engineers and scientists are paid significantly in excess of the minimum annual wages prescribed by the Award, and the median base hourly rates of pay for such employees are above the minimum Award rates with the extent of the difference becoming more significant at higher classification levels.

(4) Notwithstanding finding (3), there is a minority of professional engineers and scientists who earn less than the amount they would earn if they were entitled to be paid the hourly rates prescribed in clause 14 of the Award for all hours worked.

[43] It may be added that there is no evidence before us of employees being provided with additional monetary compensation in accordance with the mechanisms provided for in current clauses 13.3, 13.4 or 13.5 of the Award, or having their annual remuneration reviewed in accordance with clause 13.6.

[44] It may be accepted, at a high level of generality, that it is not industrially appropriate for an award applying to highly-paid professional salaried employees to provide for a prescriptive regime of overtime and weekend penalty rates and shift allowances. To a certain extent, the combination of the concept of a profession consisting of persons with specialised knowledge and skills in a recognised body of learning derived from research, education and training at a high level and held accountable to ethical and performance standards, and the payment of an annual salary intended to remunerate all aspects of the employment relationship, requires professional employees to work flexibly as required to meet the demands of their employment.

[45] However, that principle cannot fully be applied to professional employees who are, in respect of this Award, "award-reliant" - that is, afforded only the minimum rates and conditions for which the Award provides - or paid only slightly above the Award minimum rates. The evidence suggests that, although this is only the case for a minority of employees, it is of most significance in relation to persons classified at the lower classification levels of the Award. The minimum annual wages for which the Award provides cannot be regarded as high enough to compensate any employee, even a professional employee, for all the incidents of their employment, and were never intended to do so. This may be demonstrated in three ways.

[46] *First*, the rates of pay in the Award appear not to be properly-fixed minimum rates of pay for professional employees, for the same reasons as stated by the Full Bench in *4 yearly review of modern awards – Pharmacy Industry Award 2010*[21] at paragraphs [194]-[198]. For this purpose, it is useful to compare the rates in the Award to those in the *Educational Services (Teachers) Award 2020* (EST Award), which have recently been the subject of a full work value consideration, with a new classification structure and properly-fixed minimum rates of pay.[22] The key classification in the EST Award is a Level 2 Teacher with proficient accreditation which, for long day care centres which operate throughout the year, has a minimum annual salary of $72,572. The equivalent classifications in the Award here would appear to be Level 1, Pay Points 1.2, 1.3 and 1.4 — that is, a four-year qualified professional in their second to fourth years of employment. The minimum annual wage rates in the Award for these classifications are $58,586, $61,026 and $64,117 respectively — and thus range from 11.7% to 19.3% beneath the equivalent EST Award classification.

[47] *Second*, far from providing for high salaries, the lower-level salary rates in the Award may actually render an employee in the category of "low paid" if they work significant additional hours. The benchmark utilised for the identification of a low-paid employee is either earnings below $22.20 per hour using ABS data for 2021 or $22.56 per hour using HILDA data.[23] For example, a four-year qualified graduate professional at Level 1, pay point 1.1 will, on the Award annual wage of $57,619, only earn $22.16 per hour if they work 50 hours in any week.

[48] *Third,* although the provisions of clauses 13.2-13.6 of the Award are, as found in the *April 2020 decision*,[24] unenforceable and fail to provide a fair and relevant safety net, they nonetheless indicate that the minimum salaries prescribed by the Award were never intended to constitute the full measure of remuneration for hours worked in excess of 38 per week, or for unsociable hours.

[49] It may also be noted that there is a major disparity in treatment in the Award as between full-time employees on the one hand and part-time and casual employees on the other. Clause 10.2 of the Award provides that part-time employees must be paid the appropriate minimum hourly rate for their classification as prescribed in clause 14 - that is, the hourly rate is payable for every hour worked. Similarly, clause 11.1 provides that casual employees are to be paid the minimum hourly rate prescribed by clause 14, plus the casual loading of 25%, "*per hour worked*". In both cases, if the employee works in excess of 38 hours in a week, they will continue to be paid their hourly rate. However, full-time employees have no prescribed rate of pay for additional hours worked beyond the inchoate entitlement to "*compensation*" in clauses 13.3-13.6.

[50] We consider that it is necessary, therefore, that clause 13 should prescribe additional rates of compensation for additional and unsociable hours for full-time employees in order for the Award to meet the modern awards objective of establishing a fair and relevant safety net. It is in this context that we consider the alternative proposals advanced by the Ai Group and the APESMA.

[51] The Ai Group proposal involves, in substance:

(1) The capacity to average ordinary hours over a 12-month period.

(2) A requirement to pay Level 1 employees the applicable minimum hourly rate for all hours worked in excess of or outside ordinary hours, or on call-backs, or on afternoon, night or weekend shifts or, alternatively, provide TOIL.

(3) A continuation of the existing arrangements for Level 2-5 employees, subject to new requirements for the formalisation of compensation arrangements prior to the commencement of employment.

[52] We do not consider that this proposal would establish a fair and relevant safety net. It makes no provision for any additional remuneration for employees working ordinary hours during unsociable periods. Further, in respect of employees in Levels 2-5, it proposes in substance the continuation of the existing arrangements which have already been found not to meet the modern awards objective. For employees at these levels, it remains the case under the Ai Group proposal that there is no *entitlement* as such to additional remuneration or TOIL for hours worked in excess of 38 per week, notwithstanding the proposed new requirement for the formalisation of compensation arrangements. The form of any additional "*compensation*" is not the subject of any minimum prescription, and the mechanism for the review of annual compensation remains unenforceable. The Ai Group proposal is therefore rejected.

[53] The APESMA proposal contains the following elements:

(1) The capacity to average ordinary hours over a six-month period.

(2) The establishment of a span of ordinary hours of 6.00 am to 6.00 pm, Monday to Friday (or as prescribed by the award applicable to the majority of employees at the workplace).

(3) The establishment of a shift work regime, with shift rates of 115% for afternoon shifts and 130% for night shifts.

(4) The establishment of penalty rates for Saturday work (150%), Sunday work (200%) and public holidays (250%).

(5) The addition of a new overtime clause which would provide for penalty rates of time and a half for the first three hours of overtime and double time thereafter, computed on the basis that each day's work will stand alone, and which would also provide for rest breaks during overtime and rest periods after overtime. The clause would also make specific provision for the circumstances of call backs and remote service/support.

(6) The addition of the standard provision for TOIL.

(7) The addition of a standard annualised wage arrangements provision.

[54] The APESMA seeks to justify this proposal by reference to the analysis in Ms Baulch's witness statement concerning provisions in some pre-modernisation State and federal awards applicable to professional engineers and scientists for a specified span of hours, penalty

payments for working on weekends and public holidays and overtime, TOIL, call-back, remote work and stand-by arrangements, as well as detailed shift work provisions. However, we do not think much purpose is served by revisiting pre-modernisation award provisions which have not been in effect for well over a decade. The Full Bench of the Australian Industrial Relations Commission which conducted the award modernisation exercise drafted the 2010 Award as an amalgamation of three awards proposed by the parties[25] and in doing so determined to include an hours provision which "is not prescriptive but nonetheless alerts employees to the need to take into consideration the demands placed upon professional employees when fixing remuneration".[26] This occurred without apparent opposition from the APESMA. Our task in the current proceeding is not to re-undertake the award modernisation exercise by selectively picking provisions from pre-modernisation for inclusion in the Award, but rather to assess what is necessary to achieve the modern awards objective by reference to the currently prevailing circumstances. These circumstances include that prescriptive provisions concerning a span of ordinary hours of work, overtime, shift work, weekend work and the like have not applied to employers and employees covered by the Award since it commenced operation in 2010.

[55] We consider that the APESMA's proposal is overly prescriptive having regard to the very limited nature of the evidence before us. The evidence adduced by the APESMA simply does not address most of the major elements of its proposals: there is no evidence before us, for example, of the circumstances pertaining to the performance of shift work by professional employees (beyond the mere assertion that they sometimes perform it), only very limited evidence concerning the times at which professional employees typically start work, and no evidence at all concerning call-backs, remote work, and work on Sundays and public holidays. Accordingly, we cannot be satisfied that the provisions proposed by the APESMA would be appropriate for the employment relationships covered by the Award. To the contrary, it is likely that they would have a significantly disruptive effect given the current lack of prescription in these areas and introduce unnecessary complexity and prescription into the sphere of professional salaried employment. For these reasons, we also reject the APESMA proposal.

[56] The approach we prefer is a minimalist one which establishes, for employees paid at or close to the minimum salary rates in the Award, an enforceable entitlement to remuneration, or TOIL, for hours worked in excess of 38 per week and a baseline entitlement to additional remuneration for unsociable hours, but which otherwise maintains the degree of flexibility appropriate for professional salaried employment. Such an approach would involve amending the Award to include provisions to the following effect:

(1) Ordinary hours of work, for which the minimum annual wages prescribed in clause 14 are payable, are 38 per week. There is no need for a provision allowing averaging of ordinary hours because of the minimalist approach we intend to adopt.

(2) An employer may, in accordance with s 62 of the *Fair Work Act 2009* (Cth) (FW Act), request or require that a full-time employee work overtime (that is, in excess of 38 hours per week) provided that the additional hours are reasonable.

(3) The employee shall, subject to (4), (5), and (6) below (and unless (8) below applies), be paid the appropriate hourly rate in clause 14 for all hours worked in excess of 38 in a week in addition to the minimum annual wages in clause 14.

This shall include work on or in connection with call-backs and work performed on electronic devices or otherwise remotely.

(4) A provision in the terms of the model clause in respect of TOIL.[27]

(5) A penalty rate of 125% shall be payable for all hours worked (whether ordinary or overtime hours) before 6.00 am or after 10.00 pm on any day Monday to Saturday. For casual employees, this is in addition to their casual loading.

(6) A penalty rate of 150% shall be payable for rostered hours (whether ordinary or overtime hours) worked on a Sunday or public holiday. Again, for casual employees, this is in addition to their casual loading.

(7) The employer shall keep records of all hours worked by an employee in excess of 38 per week, or worked before 6.00 am or after 10.00 pm on any day Monday to Saturday, or worked at any time on a Sunday or public holiday, for the purpose of compliance with the requirements of (3), (4), (5) and (6) above. We note that this is necessary because the requirement in reg 3.34 of the *Fair Work Regulations 2009* (Cth) to keep records of overtime records only applies "*if a penalty rate or loading (however described) must be paid for overtime hours actually worked by an employee*", and we do not intend to require that a penalty or loaded rate be paid in respect of overtime except where the requirement in either (5) or (6) applies.[28]

(8) The requirements in (3), (4), (5), (6) and (7) above will not apply in respect of employees covered by the Award who have a contractual entitlement to an annual salary that is 25% or more in excess of the minimum annual wage for the appropriate classification in clause 14.

[57] We consider that such an approach is appropriate in the context of the current annual wages for which the Award provides. It may require reconsideration in the event that an application is made to vary the Award to provide for properly-fixed minimum annual wage rates.[29]

[58] The variations we intend to make are, we consider, necessary to ensure that the Award achieves the modern awards objective in accordance with the requirement in s 138 of the FW Act. In respect of the mandatory considerations in s 134(1), we have taken these matters into account in the following way (using the paragraph designations in the subsection):

(a) In the way earlier explained, the lack of any additional entitlement to remuneration for hours worked in excess of 38 per week for full-time employees may lead to award-reliant employees at the lower classification levels to be notionally "low paid" where they work significant additional hours. This will be remedied under the approach we intend to take, and this weighs in favour of the variations.

(aa) The variations do not have any implications for access to secure work across the economy, and there we consider this to be a neutral consideration.

(ab) The variations, by allowing for proper remuneration of overtime and work performed during unsocial hours, on Sundays and public holidays, and on night shifts (except where the employee is paid 25% or more in excess of the minimum annual wage rates), may conceivably constitute workplace conditions that facilitate women's full economic participation. This weighs in favour of the variations to a minor degree.

(b) We do not consider that the variations will encourage or discourage collective bargaining. We therefore consider this to be a neutral consideration.

(c) It is possible, although we cannot put it any higher than this, that the enhanced entitlements we intend to provide will increase workforce participation. This weighs to a minor degree in favour of the variations.

(d) We do not consider that the variations will impede flexible modern work practices and the efficient and productive performance of work, and may indeed promote it by appropriately remunerating the flexible performance of work outside of ordinary hours. We consider this to be a neutral consideration.

(da) The variations will provide an entitlement to additional remuneration for employees working overtime, unsocial hours, on Sundays and public holidays, and on night shifts (except where the employee is paid 25% or more in excess of the minimum annual wage rates) in circumstances where no such entitlement has previously existed. This weighs to a significant degree in favour of the variations.

(f) In respect of employees who are paid less than the 25% exemption rate which will be established, it is likely that the variations will increase employment costs, and also the regulatory burden (by requiring that records of hours worked be kept). The cost effect, however, arises to a large degree because the evidence suggests that the existing provisions of clause 13 requiring compensation for working additional or unsocial hours are not complied with. For employees who are paid at or above the exemption rate, the variations will have no relevant effect. Overall, this consideration weighs against the variations.

(g) This consideration is of limited relevance to the variations and has neutral weight.

(h) We do not consider that the variations will have any implications for or discernible effect upon the national economy, and this is accordingly a neutral consideration.

[59] The above considerations, overall, weigh in favour of the variations being made. These variations will ensure that the safety net provided by the Award is *fair*, by ensuring that work performed in excess of ordinary hours or at unsocial times is appropriately remunerated, and is also *relevant* in that it establishes a scheme of entitlements that is certain and enforceable.

Coverage

APESMA

[60] The APESMA made two submissions in relation to the issue of award coverage. In its initial submission of 19 September 2022 (September submission), it proposed that the following note be included in Schedule A—*Classification Structure and Definitions* to the Award, immediately below the heading, to ensure that an employee who performs professional engineering or scientist duties would be covered even if their duties do not fall squarely into one of the existing classification descriptors:

> "Note: Other than where, pursuant to clause 4.7, there is an award classification in another award that is more appropriate, an employee performing professional engineering or professional scientific duties has to be placed into one of [the] following classifications, being the classification which is the most appropriate.
>
> For clarity, this applies equally to employees who have managerial responsibilities unless those managerial duties are the principal purpose of the position and those managerial duties do not involve the employee performing any professional engineering or professional scientific duties."

[61] The APESMA submitted that professional engineers and professional scientists are engaged in a wide range of disparate jobs with multiple duties, which can include supervision or management of other workers. The definitions of engineering and scientific duties in clause 2 of the Award to mean duties carried out by a person in any particular employment, "*the adequate discharge of any portion*" of which duties requires qualifications of the employee as a professional engineer/scientist, have deliberately and historically been used to reflect the difficulties that would otherwise arise from attempting to define in a more precise manner the nature of the roles. An important aspect of these definitions, it submitted, is that coverage is not to be determined based on the "principal purpose" test, since it applies where *any* portion of the employee's duties have the requisite character.[30]

[62] The APESMA referred to s 163 of the FW Act, under which the Commission is not permitted to reduce the coverage of a modern award unless it is satisfied there is another award other than the *Miscellaneous Award* that would appropriately cover those who are excluded. It submitted that the Commission should only be concerned with making changes to the classification definitions in Schedule A to remove ambiguity in a manner that does not reduce existing coverage, and should therefore reject the proposals made by the Ai Group. Citing *Zheng*, the APESMA submitted that the proper effect of the existing coverage clause is that a person who is performing professional engineering or professional scientific duties will fall within one of the classifications in Schedule A of the Award. The APESMA acknowledged that the application of the "principal purpose" test to determine if the duties of the employee fall within the classification descriptors has not always been straightforward, given the classification descriptors in Schedule A are cast in generic terms, consistent with the broad coverage of the Award. However, it submitted, the solution should not be to attempt the "*mammoth task*" of rewriting the classification descriptors, as this runs a risk of reducing coverage and is not necessary in light of *Zheng*.

[63] The APESMA submitted that *Zheng* has reconfirmed that the "principal purpose" test is not to be applied to the question of whether the employee has professional engineering or professional scientific duties. The true intent of the classification clause is to place those who fall within the coverage of the Award into one of the classifications. Accordingly, the APESMA

submitted, there is no need to do more than include a note that confirms that is the case. This would not reduce existing coverage, since the Award would continue to apply to employees who have managerial responsibilities if the employee performs professional engineering or professional scientific duties as defined. It also submitted that a further note could be included stating that the Award does not apply to those who are principally employed to be a manager or senior manager if their managerial duties do not involve the employee performing any professional engineering or scientific duties.

[64] In its supplementary submission dated 22 November 2022 (November submission), the APESMA detailed the history of the coverage clauses for engineers and scientists in the various predecessors to the Award. The APESMA relied on this history to support the contention that no changes to the Award are necessary if the correct approach is followed to determine coverage.

[65] The APESMA submitted that when the *Professional Engineers Award 1961* was made, it contained a definition of "*professional engineering duties*" which was functionally identical to the definition in the Award. Before this, the definitions of "*professional scientific duties*" and "*professional engineering duties*" in the *Metal Trades (Consolidated) Award 1952*[31] (1952 Consolidated Award) were also functionally identical to the definitions found in the Award, with neither of the 1952 Consolidated Award definitions containing indicative duties. In 1971, the 1952 Consolidated Award was separated into the *Professional Scientists Metal Industry (Interim) Award 1971—Part IV*[32] and the *Professional Engineers Metal Industry (Interim) Award 1971—Part III*.[33] The first award retained the same definition-based classification structure as the 1952 Consolidated Award, including the lack of task descriptions. The second introduced a new salary structure. The APESMA submitted that this new salary structure was the genesis of what is now found at Schedule A to the Award.

[66] The APESMA's submission noted that both the above awards were later subsumed into the *Metal, Engineering and Associated Industries (Professional Engineers and Scientists) Award 1998* (1998 Award), the immediate pre-modernisation predecessor to the current Award. The 1998 Award contained a 4-stage classification structure for engineers and scientists, which was linked to the C10 structure of the *Metal Industry Award 1998*. The APESMA submitted that, during the award modernisation process, only three substantial changes occurred:

1. The classification structure for engineers and scientists was consolidated, and information technology employees added;

2. Time/competency-based progressions for graduate engineers were introduced; and

3. The concept of a qualified engineer, by that point lacking utility, was removed.

[67] The APESMA submitted that what did not change was the underlying purpose of the classification structure, namely to provide an (effectively) competency-based career path for persons engaged in a particular occupation — that of professional engineer or scientist, as they pursue that unitary occupation over the course of their career. The APESMA distinguished this from classification structures in awards that define a wide range of disparate occupations (e.g. the *Animal Care and Veterinary Services Award 2020*) or setting various pay levels in a variety

of roles for a particular industry rather than occupation (e.g. the C10 scale in the *Manufacturing and Associated Industries and Occupations Award 2010*), and submitted that the classification structure at Schedule A of the Award does not in any way describe classifications or occupations. It rather describes levels at which the relevant occupation — professional engineer, scientist or information technology employee — can be performed by reference to seniority, skill and autonomy. Once a person is a professional engineer or scientist and is performing professional engineering or scientist duties, they are covered by the Award, and their classification level becomes a secondary consideration.

[68] The APESMA concluded that this analysis explains and resolves the difficulty identified in *Zheng*, and that coverage under the Award is determined by a three-step test:

(1) Is the employee, as part of their role, required to perform professional engineering, scientific or information technology duties?

(2) Does a classification in another award more appropriately apply as per clause 4.7, with reference to the principal purpose test?

(3) Which classification properly applies to the employee, with reference to the seniority, complexity and autonomy of the duties provided?

[69] It submitted that the above approach obviates the need for any change to the Award. In the alternative, it relied on its September submission in respect of the proposed note.

Ai Group

[70] The Ai Group opposed the insertion of the note proposed by the APESMA, submitting that it does not deal with the key concerns raised by the Commission about the Award's coverage, and would expand the coverage of the Award by mandating that any employee performing "*professional engineering*" or "*professional scientific*" duties, as defined, must be classified in accordance with Schedule A. It submitted that the APESMA's September submission, which stated that the true intent of the classification clauses is to place those who would otherwise fall outside the coverage of the Award into one of the classifications, suggests that the second step articulated by the Full Bench in *Zheng* is an artificial step that does not in fact present a barrier to the coverage of an employee under the Award. The Ai Group contends that this mischaracterises *Zheng*, noting that whilst the Commission commented on the difficulties associated with applying the "principal purpose" test to the classification structure, it did not conclude that the second step is redundant or that any employee who satisfies the first limb must, or will, always satisfy the second limb.

[71] The Ai Group further submitted that the proposed note would contradict clause 4.1(a) of the Award, which provides that the Award covers employers throughout Australia with respect to employees performing professional engineering and scientific duties "*who are covered by the classifications in Schedule A*" and those employees. Whilst the clause describes the coverage of the classification structure as a contingency, the proposed note purports to overcome this by mandating that all employees who pass the first hurdle must be classified at the most appropriate level. The Ai Group submitted it would also purport to override the "principal purpose test", which requires a consideration of whether an employee's principal

purpose falls within the scope of any of the descriptors and if so, which one. It also submitted that the note proposed also failed to address the concerns of the Commission stated in *Zheng*, and was also confusing because it stipulates that an employee whose managerial duties are the principal purpose of their role are not required to be classified in accordance with Schedule A when the Award would nonetheless leave open the prospect that such employees may be classified under Schedule A because it would not expressly state that such employees are not covered by the Award or the classification structure.

[72] The Ai Group agreed with the APESMA that the solution to the matters raised is not to attempt a wholesale re-write of classification descriptions, submitting that given the breadth of the Award's coverage and the number of industries and sectors in which it applies, such a task would require a wide-ranging assessment of the entire range of employees covered by the Award, the duties that they are required to undertake and the level of responsibility that they are required to discharge, which is not practicable in these proceedings. The Ai Group submitted that varying the Award to address the Commission's concern about the manner in which the classification structure is drafted, without inadvertently altering the coverage of the Award, is not clearly available. Consequently, the Commission should not make any changes to the coverage of the Award in the context of these proceedings.

[73] In further submissions addressing the APESMA's November submission, the Ai Group opposed the APESMA's position as to the approach that ought to be followed to determine coverage under the Award, contending that:

- the approach is inconsistent with the language used in clause 4.1(a), which states that the Award covers employers with respect to employees performing professional engineering and scientific duties "*who are covered by the classifications in Schedule A*" and those employees. It is clear from the terms of the Award that not all employees performing professional engineering or scientific duties are covered by it; rather, clause 4.1(a) expressly limits the scope of the Award to those performing these duties who are also covered by the classifications;

- in *Zheng*, the Commission expressly decided not to depart from a long line of authorities that support the application of the "principal purpose" test to the second step, stating it would "destabilise the operation of the [Award] if we enunciated a different approach now", and any variation to the Award requiring a departure from the two-step approach enunciated in *Zheng* and other authorities would be inconsistent with the need to ensure a stable modern awards system; and

- a variation to the Award purporting to remove the application of the "principal purpose" test would, in effect, broaden the coverage of the Award to encompass managerial employees whose principal purpose is not encapsulated by the classification descriptions in the Award.

ABI and NSWBC

[74] ABI and the NSWBC submitted that, whilst they appreciated the position advanced by the Full Bench in *Zheng* with respect to the importance of ensuring that users have clarity in

terms of the coverage of the Award, they considered it equally important that these proceedings not result in any substantive change to the coverage of the Award. Accordingly, they submitted, only a minor alteration to the classifications at Schedule A, such as by the insertion of a note stating that classification definitions do not apply to employees who are wholly or mainly engaged in managerial positions, would be sufficient to remedy any confusion that might exist without altering the existing coverage of the Award. ABI and the NSWBC expressed concern that the APESMA's proposed note could potentially result in an extension of coverage by default in that the proposed note would operate so that, unless an employee is covered by another modern award, then an employee performing professional engineering or scientific duties would be covered by this Award, whether or not that is currently the case. This would not be remedied by the inclusion of a further note as proposed by the APESMA, which by endeavouring to limit the generality of the foregoing note by way of exception, would only serve to further complicate the issue of coverage under the Award.

Consideration

[75] Clause 4.1 of the Award provides that an employee may fall within the coverage of the Award in one of three ways:

> (1) Employees who perform professional engineering or professional scientific duties (as defined in clause 2) who are covered by the classifications in Schedule A.
>
> (2) Employees who are employed by employers principally engaged in the information technology industry, the quality auditing industry or the telecommunications services industry (as defined in clause 2) and who are covered by the classifications in Schedule A.
>
> (3) Employees who are employed by employers principally engaged as medical research institutes, who perform professional medical research duties, and who are covered by the classifications in Schedule B.

[76] The difficulty identified in *Zheng* does not apply to the third category. The definitions of "*medical research institute*" and "*professional medical research duties*" in clause 2, and the classifications in Schedule B which are directly referable to medical research employees, allow for the application of the "principal purpose" test in the conventional way. However, the classifications in Schedule A are drafted in a mostly generic way to apply to all employees in the first two categories. Levels 1 and 2 use job description terms in their heading titles which are defined in clause 2 and thus might at first blush be understood as identifying what the principal purpose of these classifications is. For example, clause A.1.1 of Schedule 1 has the heading "*Level 1—Graduate professional includes: Graduate engineer, Graduate information technology employee and Qualified scientist*", and the terms used are all defined in clause 2 by reference to minimum academic and professional qualifications.

[77] However, on closer analysis, that proves not to be the case. The first sentence in Schedule A, immediately underneath the heading, states that the classifications apply "*[f]or employment involving the performance of professional duties except medical research duties*". The definitions of the relevant classes of professional duties in clause 2, namely "*professional engineering duties*", "*Professional information technology duties*" and "*Professional scientific*

duties" make clear that they refer to employment duties the adequate discharge of any part of which requires the employee to hold the academic and professional qualifications contained (in respect of Level 1) in the definitions of "*Graduate engineer*", "*Graduate information technology employee*" and "*Qualified scientist*". These definitions have a long history in the industrial regulation of professional employees.[34] Thus, when read with the relevant definitions, being a "*Graduate engineer*", "*Graduate information technology employee*" and "*Qualified scientist*" does not need to be the *principal* purpose of an employee's employment in order for the employee to fall within Level 1. Rather, it appears to be sufficient that this is *a* purpose, or *part of* the purpose of the employment. Beyond this point, it is difficult to identify from the text of the classification definitions for Levels 1 and 2 what the principal purpose for employment in these classifications must be.

[78] As for Levels 3 and 4, Schedule A defines them, except in relation to a senior (lead) auditor at Level 3, in entirely generic terms in a way which makes it virtually impossible to identify the principal purpose which can be assigned to these classifications.

[79] As explained in paragraph [46] of *Zheng*, it is well-established that the "principal purpose" test is used to determine the application of the classifications in Schedule A of the Award. However, for the reasons stated above, we agree with the conclusion in paragraph [45] that this test is "singularly ill-suited" to determine the application of those classifications, and the uncertainty this has caused has led to excessive litigation about the coverage of the Award in individual cases. We therefore consider that some modification to Schedule A is required in order to more clearly elucidate the circumstances in which an employee will be covered by any of the classifications without either expanding or contracting the coverage of the Award. This conclusion necessarily involves a rejection of the Ai Group's submission that we should, in effect, do nothing.

[80] Subject to one important limitation, it appears to us that the classifications in Schedule A are drafted on the basis of an assumption that, once a person is engaged to perform duties of the requisite nature, they will fall within one of the classifications. That is, the classifications have the function of determining in what grade an employee covered by the Award will fall rather than whether an employee is covered by the Award in the first place. The limitation is that the classifications do not extend to positions which are principally managerial in nature. Level 4, the highest classification, covers a person performing professional work at a senior or leading level. However, there is no indication that this is intended to cover a managerial position. Clause A.1.11(d), which refers to a Level 4 employee being assigned duties "*only in terms of broad objective*" which are "*reviewed for policy, soundness of approach, accomplishment and general effectiveness*", makes it apparent that a Level 4 employee remains subject to higher managerial control. Further, clause A.1.11(e) provides:

> **(e)** The employee supervises a group or groups including professionals and other staff, or exercises authority and technical control over a group of professional staff. In both instances, the employee is engaged in complex professional engineering or professional scientific/information technology applications.

[81] This provision identifies that the Level 4 employee exercises only supervisory authority and control in respect of professional/technical matters. In short, a Level 4 employee is not a

manager, even if the role of manager might in some respects require engineering, scientific, or information technology qualifications.

[82] No party suggested that, in order to resolve the difficulty we have identified, we should review and recast the classification definitions in Schedule A. We agree that this would be a major undertaking extending beyond the scope of the current proceedings. We think that a better approach would be to add a provision to Schedule A which makes it clear that the classifications will apply in the way identified above — that is, that they apply to all employees who perform professional engineering duties, professional scientific duties, professional information technology duties or quality auditing unless the person holds a position which is principally managerial in nature. Such an approach involves a combination of the approaches advanced by the APESMA and ABI and the NSWBC.

[83] We conclude therefore that Schedule A of the Award should be varied by deleting the sentence appearing immediately under the heading and inserting in lieu thereof the following provision:

> An employee performing professional engineering duties, professional scientific duties, professional information technology duties or quality auditing must be classified in one of the following classifications provided that the employee is not employed in a wholly or principally managerial position.

[84] The effect of the above variation will be to remove the need to apply the "principal purpose" test and thus resolve the difficulty identified in *Zheng*. For the reasons earlier outlined, and contrary to the submissions of the APESMA, we do not consider that the express exclusion of managerial employees will narrow the coverage of the Award and thus engage s 163(1) because no classification in Schedule A currently applies to a manager. Nor do we consider that the variation will expand the coverage of the Award, since its purpose is clarificatory and consistent with the current classification definitions. The variation is necessary, we consider, to achieve the modern awards objective in s 134(1) of the FW Act. In reaching this conclusion, we regard the consideration in s 134(1)(g) as having determinative weight, with the other identified considerations being neutral.

Next step

[85] A draft determination to give effect to this decision is published concurrently with this decision. Parties may file submissions in response to the draft determination by **4:00 pm (AEDT) on Friday, 10 February 2023**.

ACTING PRESIDENT

Appearances:

L Saunders of counsel for the Association of Professional Engineers, Scientists and Managers, Australia.

R Bhatt for the Australian Industry Group.

K Thomson for Australian Business Industrial and the NSW Business Chamber.

Hearing details:

2022.

Sydney:
23 November.

Printed by authority of the Commonwealth Government Printer

<PR749865>

---

[1] [2020] FWCFB 2057

[2] [2021] FWCFB 3478 at [45]-[46] and [58]

[3] [2020] FWCFB 2057 at [60]-[61]

[4] [2020] FWCFB 2057 at [70]-[87]

[5] [2022] FWCFB 189

[6] [2021] FWCFB 3478 at [45]-[46] and [58]

[7] [2021] FWCFB 3478 at [58]

[8] Ai Group – Submission and draft determination

[9] ABI and NSWBC – Submission

[10] APESMA – Submission, witness statements and draft determination

[11] ABI and NSWBC – Submission in reply

[12] Ai Group – Submission in reply

[13] APESMA – Supplementary submissions

[14] [2019] FWCFB 1289 at [53]

[15] [2015] FWCFB 4466 at [267]

[16] Transcript, 23 November 2022 PNs 388-396

[17] Ibid PN 432.

[18] Ibid PNs 442-443.

[19] [2017] FWCFB 1001, 265 IR 1 at [1097]

[20] Ibid at [1098]

[21] [2018] FWCFB 7621

[22] [2021] FWCFB 2051 at [653]-[664]; [2021] FWCFB 6021 at [84]

[23] *Annual Wage Review 2021-22* [2022] FWCFB 3500 at [106]

[24] [2020] FWCFB 2057 at [60]-[61]

[25] [2009] AIRCFB 450 at [196]

[26] [2009] AIRCFB 826 at [236]

[27] See [2016] FWCFB 4258

[28] See *Real Estate Industry Award* [2019] FWCFB 2634 at [36], *Annualised Wage Arrangements* [2018] FWCFB 154 at [124]

[29] See *President's Statement – Occupational segregation and gender undervaluation*, 4 November 2022 at [33]

[30] *Halasagi v George Weston Foods Ltd* [2010] FWA 6503 at [23]; *Zheng v Poten & Partners (Zheng)* [2021] FWCFB 3478 at [36]-[37] and [45]*; Bateman v Communications Design & Management* [2014] FWCFB 8768 at [22]-[23]; *Zheng v Poten & Partners* [2021] FWCFB 6041 at [15].

[31] *Metal Trades (Consolidated) Award 1952* (1968) 125 CAR 281

[32] The Part number remaining referable to the overarching metal industry award: *Professional Scientists Metal Industry (Interim) Award 1971 – Part IV* (1971) 140 CAR 429

[33] *Professional Engineers Metal Industry (Interim) Award 1971 – Part III* (1971) 140 CAR 859.

[34] See e.g. *Re Professional Engineers' Association* [1959] HCA 47, 107 CLR 208