

Modern Award Review: Apprentices, Trainees and Juniors Joint Submissions in Reply

Matter Number: AM2012/18 and Others

28 February 2013

Joint Submissions in Reply made by:

- Chamber of Commerce and Industry of Western Australia Inc;
- Chamber of Commerce and Industry Queensland;
- South Australian Employers' Chamber of Commerce and Industry Inc; and
- Victorian Employers' Chamber of Commerce and Industry.



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Introduction

1. The following Joint Submissions in Reply have been prepared by the Chamber of Commerce and Industry of Western Australia (**CCIWA**), the Chamber of Commerce and Industry Queensland (**CCIQ**), the South Australian Employers' Chamber of Commerce and Industry Inc trading as Business SA (**Business SA**) and the Victorian Employers' Chamber of Commerce and Industry (**VECCI**) (collectively, the **Chambers**).
2. We have provided information about the respective Chambers at **Attachment A** of this Submission.
3. The Chambers welcome the opportunity to make these Submissions to the Fair Work Commission (**FWC**) in relation to the applications made by various parties to amend the apprentice, trainee and junior provisions within various modern awards.
4. Pursuant to the orders made the FWC Full Bench on 10 December 2012, the Australian Council of Trade Unions (**ACTU**) filed a table of common claims on 17 December 2012 (**Table of Common Claims**) which set out the common matters to be addressed at the first instance hearing.
5. In reliance on the Table of Common Claims, the Chambers provide the following Joint Submissions and Evidence in Reply.
6. The Chambers reserve their rights to provide further Submissions in relation to any matters arising at the first instance hearing, and thereafter, which were not referred to in the Table of Common Claims.

Substantive Submissions

1.0 General Jurisdictional Issues

Scope of the 2 year Review

Summary

- 1.1 The Chambers submit that the review of apprentice and trainee wages, conditions, relativities to adult wages and the 'supplementation' of the National Employment Standards (**NES**) as sought by the various Applicants in this proceeding is outside the function, intention and scope of the 2-year review of modern awards (**2-year review**) required by Item 6 of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) (**TPCA Act**).

Background

- 1.2 Amongst the Applicants, the ACTU has submitted that the 2-year review is an ‘appropriate vehicle’ for a broad review of apprentice wages and conditions. The Commonwealth Government holds a similar view. Outlined in the ACTU submissions,¹ is the purported history behind its current application.
- 1.3 The ACTU submits that various parties in a variety of forums have called for a ‘review’ of apprentice and trainee wages and conditions, including the Commonwealth Government and the Apprenticeship Expert Panel.
- 1.4 Nonetheless, questions associated with the mechanism, scope, procedure and appropriate body to be charged with such a review have remained unanswered.
- 1.5 Relevantly, as outlined in the ACTU’s submissions,² the Full Bench of the Australian Industrial Relations Commission noted in its award modernisation decision of 19 December 2008³ when considering the Catering, Liquor & Accommodation and Restaurant industries at paragraph [134] that:
- “the diversity in apprenticeship rates is indicative of broader issues which need to be addressed, in relation to apprentice and other training arrangements across the country [but] We do not think that the award modernisation process provides a proper opportunity to address those issues...”*
- 1.6 The fact that the terms and conditions relating to apprenticeships and traineeships were not fulsomely reviewed during the award modernisation process is not contested by the Chambers.
- 1.7 It is not in dispute that the Commonwealth Government desired a broad review of apprentice and trainee wages and conditions and that the then Fair Work Australia (**FWA**) sought views from interested parties in relation to the possible scope, procedures and timing of such a review, and who should conduct it.⁴
- 1.8 Ultimately, the then President of FWA issued a statement in January 2011 (**Broad Review Statement**) indicating that he did not believe it was practical to initiate a broad review of apprentice and trainee wage and conditions at that time because the Commonwealth Government had not yet had the opportunity to review the Expert Panel’s report on the Australian Apprenticeship system⁵ (**Expert Panel’s Report**) and because of the requirement to complete the 2010/11 Annual Wage review. Relevantly, the President also expressed the view:
- “[5] Any review of modern award wages and conditions for employees to whom training arrangements apply should take into account the other elements of the relevant regulatory framework.”⁶*
- 1.9 In the Expert Panel’s Report,⁷ it was subsequently recommended that a review of apprenticeship and trainee provisions, wages and conditions be conducted by the then FWA.

¹ Refer to ACTU Submission regarding Apprenticeship Wage Review dated January 2013 at [72] to [86] inclusive

² Refer to ACTU Submission regarding Apprenticeship Wage Review dated January 2013 at [75]

³ [2008] AIRCFB 1000, 19 December 2008

⁴ [2010] FWA 4492, 17 June 2010

⁵ Refer to *A Shared Responsibility: Apprenticeships for the 21st Century* (2011)

⁶ [2011] FWA 619, 31 January 2011

- 1.10 On 17 November 2011 the then FWA announced that it would conduct the 2-year review via a Statement.⁸
- 1.11 It is now submitted by the ACTU with support from the Commonwealth Government that the 2-year review is the appropriate vehicle through which to conduct a broad review of apprenticeships and traineeships.
- 1.12 However, the Chambers submit that it is fundamental that the 2-year review be conducted pursuant to the terms outlined in Item 6 of Schedule 5 of the TPCA Act which we set out below:

6 Review of all modern awards (other than modern enterprise awards and State reference public sector modern awards) after first 2 years

- (1) *As soon as practicable after the second anniversary of the FW (safety net provisions) commencement day, FWA must conduct a review of all modern awards, other than modern enterprise awards and State reference public sector modern awards.*

Note: The review required by this item is in addition to the annual wage reviews and 4 yearly reviews of modern awards that FWA is required to conduct under the FW Act.

- (2) **In the review, FWA must consider whether the modern awards:**
 (a) **achieve the modern awards objective; and**
 (b) **are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.**

- (2A) *The review must be such that each modern award is reviewed in its own right. However, this does not prevent FWA from reviewing 2 or more modern awards at the same time.*

- (3) *FWA may make a determination varying any of the modern awards in any way that FWA considers appropriate to remedy any issues identified in the review.*

Note: Any variation of a modern award must comply with the requirements of the FW Act relating to the content of modern awards (see Subdivision A of Division 3 of Part 2-3 of the FW Act).

- (4) *The modern awards objective applies to FWA making a variation under this item, and the minimum wages objective also applies if the variation relates to modern award minimum wages.*

- (5) *FWA may advise persons or bodies about the review in any way FWA considers appropriate.*

- (6) *Section 625 of the FW Act (which deals with delegation by the President of functions and powers of FWA) has effect as if subsection (2) of that section included a reference to FWA's powers under subitem (5).*

[Emphasis added]

- 1.13 The then FWA considered there to be a 'preliminary issue' relating to the scope of the 2-year review and subsequently issued a decision⁹ regarding it on 29 June 2012 (**Landmark Decision**). In addressing the 'scope' of the 2-year review, the Full Bench relevantly stated:

⁷ *A Shared Responsibility: Apprenticeships for the 21st Century* (2011), Recommendation 14, p 15

⁸ [2011] FWA 7975 – refer to **attached** link - [17 November 2011 Statement](#)

⁹ [2012] FWA 5600 – refer to **attached** link - [29 June 2012](#)

[91] **It is important to recognise that we are dealing with a system in transition.** Item 6 of Schedule 5 forms part of transitional legislation which is intended to facilitate the movement from the WR Act to the FW Act. The Review is a “one off” process required by the transitional provisions and is being conducted a relatively short time after the completion of the award modernisation process. The transitional arrangements in modern awards continue to operate until 1 July 2014. The fact that the transition to modern awards is still occurring militates against the adoption of broad changes to modern awards as part of the Review. Such changes are more appropriately dealt with in the 4 year review, after the transition process has completed. In this context it is particularly relevant to note that s.134(1)(g) of the modern awards objective requires the Tribunal to take into account:

“the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia . . .”

[92] Two other textual considerations are also relevant. The first is that subitem 6(2)(b) of Schedule 5 directs specific attention to whether modern awards “are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process”. No such legislative direction is reflected in the provisions which deal with the 4 yearly review of modern awards (s.156 of the FW Act).

[93] The second textual consideration is that, as we have noted previously, Item 6 does not prescribe how the Tribunal is to be constituted for the purpose of conducting the Review. This may be contrasted with the 4 yearly reviews provided in s.156 and the award modernisation process under Part 10A of the WR Act, both of which are to be conducted by a Full Bench. The fact that the Review of a modern award may be conducted by a single member also suggests that the legislature contemplated that the Review would be more confined in scope than the 4 yearly reviews in s.156.

[94] **The above considerations have led us to conclude that the Review is intended to have a narrower scope than the 4 yearly reviews provided in the FW Act. This conclusion is also supported by the relevant extrinsic material.**

[95] The Australian Government submitted that the intent of the Review was made clear in the second reading speech to the Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 when the Hon. Julia Gillard said:

“the bill provides for Fair Work Australia to conduct a bedding-down review of modern awards after two years of their operation (that is, from 1 January 2012) ahead of the regular four-yearly review cycle. This will allow any necessary refinements to modern awards to be made to ensure they are meeting the modern award objectives and are operating effectively without anomalies or technical problems.

This transitional review will complement the four-yearly reviews of modern awards set out in the substantive Fair Work legislation and will allow any operational difficulties to be identified and remedied swiftly.”

[96] Clauses 213 and 214 of the revised supplementary explanatory memorandum relevant to Item 6, as set out earlier in our decision at paragraph [74], are particularly relevant:

“213. In considering whether modern awards are achieving the modern awards objective, FWA would consider a range of issues, including, for example, the need to encourage collective bargaining and the principle of equal remuneration for work of equal or comparable value.

214. The interim review will enable FWA to examine individual flexibility clauses in modern awards to ensure they are being used for the purpose intended and not to alter industry standards on hours and shift patterns.”

[97] It seems to us that these parts of the explanatory memorandum are somewhat ambivalent about the scope of the Review. On the one hand clause 213 speaks of the Tribunal considering a “range of issues” including the need to encourage collective bargaining and the principle of equal remuneration for work of equal or comparable value. This was relied upon by the AFEI in support of the proposition that a broad review was envisaged. Yet, clause 213 does nothing more than refer to two of the matters identified in the modern awards objective at s.134(1)(b) and (e)

of the FW Act. **It is also pertinent to note that clause 214 describes the Review as “[t]he interim review”.**

[98] For completeness we note that the Australian Government also relied on a speech made by the then Minister for Employment and Workplace Relations to the National Press Club. ⁴³ In our view reference to material of this type is of no real assistance in arriving at the proper construction of the relevant provisions. The language of the provision and its context are much surer guides to its proper construction.

[99] To summarise, we reject the proposition that the Review involves a fresh assessment of modern awards unencumbered by previous Tribunal authority. **It seems to us that the Review is intended to be narrower in scope than the 4 yearly reviews provided in s.156 of the FW Act.** In the context of this Review the Tribunal is unlikely to revisit issues considered as part of the Part 10A award modernisation process unless there are cogent reasons for doing so, such as a significant change in circumstances which warrants a different outcome. Having said that we do not propose to adopt a “high threshold” for the making of variation determinations in the Review, as proposed by the Australian Government and others.

[100] The adoption of expressions such as a “high threshold” or “a heavy onus” do not assist to illuminate the Review process. In the Review we must review each modern award in its own right and give consideration to the matters set out in subitem 6(2). In considering those matters we will deal with the submissions and evidence on their merits, subject to the constraints identified in paragraph [99] above.

[Emphasis added]

- 1.14 The 2-year review is predicated upon terms of modern awards having been in operation since the “FW (safety net provisions) commencement day”. The terms outlined in Item 6 of Schedule 5 of the TPCA Act also assume that terms have been dealt with during the award modernisation process.
- 1.15 The Chambers submit that it cannot be said that terms and conditions relating to apprenticeships and traineeships were substantively dealt with or reviewed during award modernisation. They have not been previously evaluated against the modern awards objective. They have not been “modernised”, albeit the rates of pay have been subject to the annual minimum wage decisions.
- 1.16 As a result, the Chambers submit that it is not possible for the FWC to review the relevant modern award terms within the scope of the 2-year review because many have not previously been dealt with as part of the award modernisation process. It logically follows that there can be no evaluation at this time as to whether or not the relevant modern award terms are operating effectively or are with or without anomalies or technical problems as a result of award modernisation.
- 1.17 The Chambers are fortified in this view by further statements of the Full Bench in the Landmark Decision:

[39] Section 159 deals with the variation of a modern award to update or omit the name of an employer, an organisation or an outworker entity. Section 160 provides that the Tribunal may vary a modern award to “remove an ambiguity or uncertainty or to correct an error”. The powers in ss.159 and 160 are exercisable on application or on the Tribunal’s own initiative.

[40] There is a degree of overlap between the matters to which ss.159 and 160 are directed and what might be regarded as “anomalies or technical problems” within the meaning of subitem 6(2)(b) of Schedule 5. But in some respects the terms of subitem 6(2)(b) are more limited in that it directs attention to whether modern awards “are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation”

process". [emphasis added] Hence the "anomalies or technical problems" referred to are those which have arisen from the Part 10A process. Sections 159 and 160 of the FW Act are not so confined.

[41] In the event that the Review of a modern award identifies an ambiguity or uncertainty or an error, or there is a need to update or omit the name of an entity mentioned in the award, and there is some doubt as to whether the matter falls within the scope of subitem 6(2)(b), then the Tribunal may exercise its powers under ss.159 or 160, on its own initiative. Of course interested parties should be provided with an opportunity to comment on any such proposed variation.

- 1.18 These statements support the proposition that the matters sought to be reviewed as part of the 2-year review must have been dealt with during the award modernisation process. Secondly, they confirm that far from being broad ranging, the 2-year review it is to be of a limited nature. They also make the point that the extent of the FWC's powers under sections 159 and 160 of the FW Act to vary an award on its own initiative is also limited to ambiguity, uncertainty and error as opposed to conferring discretion to review at large.
- 1.19 Further, as outlined in paragraph 1.5 above, a Full Bench has previously, and in the Chambers' opinion correctly, indicated that the award modernisation process is not the appropriate process in which to consider broad issues pertaining to apprentices and other training arrangements across the country.
- 1.20 If, however, the FWC considers that the scope of the 2-year review is such that it covers terms and conditions relating to apprenticeships and traineeships, it must have regard to the proper characterisation of the intended scope articulated by the Full Bench in paragraphs [91]-[100] of the Landmark Decision as set out at paragraph 1.13 above.
- 1.21 It is clear that Parliament's intention, articulated in the legislation and associated explanatory materials was that the 2-year review be:
- 1.21.1 A 'bedding-down review';
 - 1.21.2 A review to assess "operational difficulties" and for these to be "identified and remedied swiftly"; and
 - 1.21.3 An "interim review", narrower in scope than the more comprehensive 4 yearly reviews required by section 156 of the *Fair Work Act 2009 (FW Act)*.
- 1.22 Clearly, the ACTU, Commonwealth Government and other Applicants desire a comprehensive review of apprenticeships and traineeships and there may be a way for the FWC to assist in this. However, the Chambers submit that the 2-year review process cannot be the forum and was not intended to be the forum for this review.

The Role of the States and Territories

- 1.23 Should the FWC form the view that the 2-year review process was intended to encapsulate the broad review sought by the ACTU and other Applicants together

with the Commonwealth Government, further general jurisdictional considerations arise.

- 1.24 The Chambers submit that it is uncontroversial that the FW Act was intended to establish a national workplace relations system but not to the total exclusion of certain laws of the States and Territories.
- 1.25 Division 2 of Part 1-3 of the FW Act and specifically, sections 26 to 29 of the FW Act, outline how the FW Act is designed to interact with certain State and Territory laws, and resolve issues of inconsistency of laws under section 109 of the Constitution.
- 1.26 The operation of Division 2 of the FW Act is complex and must be reconciled with Division 3 of Part 2.3 of the FW Act with care.
- 1.27 Division 3 of Part 2-3 of the FW Act and specifically, section 139 of the FW Act deals with terms that may be included in modern awards.
- 1.28 The Full Bench in the case of *Master Builders Australia Limited* has previously considered sections 26-29 of the FW Act and provided that:

*“It is clear that Division 2 of Part 1-3 of the Act does not deal with the lawfulness of the content in modern awards or any other instruments made under the Act. Its purpose is to provide interaction rules to operate in conjunction with ss.109 and 122 of The Constitution, with s.26 providing an express statement of an intention to cover a field and s.27 setting out the exceptions to that exclusivity set out in s.26. Sections 26 to 30 are not directed to nor have the effect of enlarging or confining the matters which may lawfully be contained in a modern award. They are concerned with resolving issues relating to inconsistency of laws under s.109 of The Constitution and have nothing to do with the lawfulness or otherwise of what may be contained in a modern award”.*¹⁰

- 1.29 In response to this, the ACTU submits that *“the position is simply that the terms of a modern award concerning training arrangements prevail over and are not subject to State or Territory laws dealing with training arrangements, provided that the terms in that modern award are terms that are properly capable of inclusion in a modern award”.*¹¹ The Chambers submit that this analysis appears to suggest that what can be included in a modern award starts and ends with consideration of section 136 of the FW Act.
- 1.30 While section 26 of the FW Act confirms the FW Act is to operate to the exclusion of State or Territory industrial laws that might otherwise apply to employers and employees covered by the national system, section 27 of the FW Act provides a number of specific exclusions, including:
 - 1.30.1 various anti-discrimination laws set out in section 27(1A) of the FW Act;
 - 1.30.2 laws prescribed by the *Fair Work Regulations 2009* (Cth) (**Regulations**) as set out in section 27(1)(b) of the FW Act; and
 - 1.30.3 laws dealing with “non-excluded” matters which are set out in sections 27(1)(c) and 27(2) of the FW Act and notably the exclusion outlined in section 27(2)(f) of the FW Act which provides that:

¹⁰ [2012] FWA FB 10080, at [56]

¹¹ Refer to the ACTU’s *Submission regarding Apprenticeship Wage Review dated January 2013* at [63]

“(f) *training arrangements, except in relation to terms and conditions of employment to the extent those terms and conditions are provided for by the National Employment Standards or may be included in a modern award;*”

- 1.31 What constitutes ‘training arrangements’ is defined in section 12 of the FW Act as:
- “a combination of work and training that is subject to a training agreement, or a training contract, that takes effect under a law of a State or Territory relating to the training of employees”.*
- 1.32 The Chambers submit that the exclusion in section 27(2)(f) of the FW Act means that the FW Act does not cover the field in relation to training arrangements, but can exclusively regulate the terms and conditions of employment of apprentices and trainees to the extent such terms are already covered in the NES or is capable of being regulated by modern awards.
- 1.33 The Chambers also submit that the exclusion in section 27 of the FW Act and notably section 27(2)(f) of the FW Act are subject to the operation of sections 28 and 29 of the FW Act and the interaction with the Regulations.
- 1.34 Under section 28 of the FW Act, the Regulations may prescribe additional State and Territory laws, which will not operate in relation to national system employers and employees.
- 1.35 Section 29 of the FW Act operates to resolve any conflict between a modern award or enterprise agreement and a law of a State or Territory. Further section 29(1) of the FW Act operates to give primacy to a modern award or enterprise agreement over a State or Territory law.
- 1.36 However, sections 29(2) and 29(3) of the FW Act provides that a term of a modern award or enterprise agreement does not prevail where the term relates to any State or Territory laws preserved by section 27 of the FW Act (i.e. non-excluded matters) or the Regulations .
- 1.37 This essentially means in circumstances where a State or Territory law conflicts with a modern award, section 29(1) of the FW Act provides that a modern award prevails to the extent of any inconsistency. However, modern awards are subject to any State or Territory law saved by section 27 of the FW Act and/or prescribed by the Regulations, such as the laws preserved as set out at paragraph 4.1.3 below.
- 1.38 Regulations 1.13 to 1.15 are relevant for the purposes of interpreting sections 27 to 29 of the FW Act.
- 1.39 In particular, Regulation 1.14(b) is relevant to these proceedings which provides that with respect to section 28(1) of the FW Act, the following laws of a State and Territory are prescribed:
- “a law relating to training arrangements, to the extent to which it deals with terms and conditions of employment that are provided for by the National Employment Standards, or may be included in a modern award or may be included in an enterprise agreement under section 55.”*

- 1.40 Accordingly, State and Territory training and apprentice laws continue to operate where they are not dealing with terms and conditions provided for by the NES or are terms that may validly be included in modern awards under section 139 of the FW Act. Further, these laws continue to operate where dealing with the suspension, cancellation or termination of a training contract or a period of probation or an employee that is part of a training arrangement.

Permissible content in modern awards

- 1.41 Division 3, Part 2-3 of the FW Act regulates the content of modern awards. Section 136 of the FW Act (in Subdivision A) identifies the allowable content of modern awards by reference to Subdivisions B, C and D:

“136 What can be included in modern awards

Terms that may or must be included

- (1) *A modern award must only include terms that are permitted or required by:*
- (a) *Subdivision B (which deals with terms that may be included in modern awards); or*
 - (b) *Subdivision C (which deals with terms that must be included in modern awards); or*
 - (c) *section 55 (which deals with interaction between the National Employment Standards and a modern award or enterprise agreement); or*
 - (d) *Part 2-2 (which deals with the National Employment Standards).*

Terms that must not be included

- (2) *A modern award must not include terms that contravene:*
- (a) *Subdivision D (which deals with terms that must not be included in modern awards); or*
 - (b) *section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement).”*

- 1.42 Section 137 of the FW Act further provides that a term of a modern award is of no effect to the extent that it contravenes section 136 of the FW Act.

- 1.43 The FWC’s power is further conditioned by section 138 of the FW Act which provides:

“138 Achieving the modern awards objective

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.”

- 1.44 However, section 138 of the FW Act qualifies that the matters permitted to be included, must be included only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective. Hence, it is not sufficient to include a term simply because a party may find it desirable. Rather, the inclusion of a term must be demonstrated to be necessary to achieve the modern awards objective in section 134(1) of the FW Act or where applicable the Minimum Wages objective in section 284 of the FW Act.

1.45 This was also discussed in the Landmark Decision referred to above in which with the ACTU made submissions that the then FWA must be satisfied that a variation is “necessary and not merely “desirable”. The ACTU drew the attention to the observations of Tracey J in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)*. The Full Bench responded that:

“[33] We are satisfied that s.138 is relevant to the Review. The section deals with the content of modern awards and for the reasons given at paragraph [25] of our decision it is a factor to be considered in any variation to a modern award arising from the Review. **We also accept that the observations of Tracey J in SDAEA v NRA (No.2), as to the distinction between that which is “necessary” and that which is merely desirable, albeit in a different context, are apposite to any consideration of s.138.**”

[Emphasis added]

1.46 Section 139(1) of the FW Act lists the matters capable of being regulated by modern awards.

1.47 Sections 140 to 142 of the FW Act supplement section 139 of the FW Act by setting out other allowable matters described as outworker terms, industry-specific redundancy schemes and incidental and machinery provisions.

1.48 Subdivision C, which includes sections 143 to 149 of the FW Act, sets out terms that must be included in the modern awards. These terms relate to coverage, flexibility, dispute resolution, ordinary hours of work, piece rates and variation of allowances.

1.49 Finally, Subdivision D prohibits the inclusion of various terms in modern awards on the basis that they are objectionable, discriminatory, relate to right of entry or long service leave, or discriminate between states.

1.50 In addition to the matters above, section 55 of the FW Act stipulates further rules which apply in relation to the interaction between the NES and modern awards.

Threshold for bringing claim

1.51 In hearing an application to vary a modern award under the 2-year review, the FWC must in accordance with Schedule 5, item 6(2) of the TPCA Act consider whether the modern awards:

- (a) *achieve the modern awards objective; and*
- (b) *are operating effectively without anomalies or technical problems arising from the Part 10A award modernisation process.*

1.52 Therefore an applicant seeking to vary a modern award under the 2- year review process must demonstrate that the variation is necessary to achieve the modern awards objective and/or to remove an anomaly or technical error.

Conclusions regarding General Jurisdictional Issues

- 1.53 For reasons outlined above, the Chambers submit that the 2-year review cannot be the forum and was not intended to be the forum for the comprehensive review of apprenticeships and traineeships that is sought.
- 1.54 If this is not accepted, the FWC should proceed with caution when dealing with each of the common claims. The provisions of the FW Act outline exclusions from what would otherwise be an outcome where the Commonwealth covers the field as far as workplace relations are concerned but also provide for exceptions to those exclusions through a complex web of qualifications and limitations. The FWC should therefore proceed with caution and carefully assess whether each claim is capable of inclusion in a modern award, having regard to the operation of both Division 2 of Part 1-3 and Division 3 of Part 2-3 of the FW Act.
- 1.55 Equally, the Chambers submit that the FWC should not interpret the provisions of Division 2 of Part 1-3 of the FW Act and accompanying Regulations as an invitation to manufacture inconsistencies between modern awards and State or Territory laws where States or Territories have legitimately made laws in relation to excluded areas.
- 1.56 Finally, the Chambers submit that the proposed variations included amongst the common matters propose a substantial overhaul of the apprenticeship and traineeship system in Australia, with significant consequences across many facets of industry without what would appear to be an appropriate level of consultation or engagement with various key stakeholders, such as State and Territory Governments, vocational training authorities and other key training organisations.
- 1.57 This lends weight to the contention that the 2-year review is not the appropriate vehicle for the broad review sought by stakeholders over many years and it behoves the FWC to deal with the issues relating to apprenticeships and traineeships in a comprehensive manner separate to the 2-year review and in-turn the award modernisation process.

2.0 Wage rates (Junior apprentices and Adult apprentices) – Schedules 1 & 2 of Table of Common Claims

- 2.1 The Chambers refer to, and support, the wage rates issues discussed in the Australian Chamber of Commerce and Industry's Submissions in Reply dated 28 February 2013 which were filed in relation to these proceedings.

3.0 Competency Based Progression – Schedule 3 of Table of Common Claims

Proposed amendments

- 3.1 Schedule 3 of the Table of Common Claims indicates that the Construction, Forestry, Mining and Energy Union (Construction and General Division) (**CFMEU**) and the Australian Manufacturing Workers Union (**AMWU**) are seeking the following amendments to various modern awards:¹²
- 3.1.1 imposing conditions for progression to each stage of the apprenticeship which are based on the:
- i. attainment of a specified percentage of total competency points/competencies for the relevant AQF Certificate III qualification or AQF Certificate IV qualification (as appropriate) specified in the training plan; or
 - ii. completion of a period of 12 months service after commencing the apprenticeship or commencing the preceding stage of the apprenticeship,
- whichever is earlier;
- 3.1.2 imposing minimum competencies for progression through each stage of the apprenticeship as follows:
- i. stage 2 of the apprenticeship requires 25% of total competency points/competencies;
 - ii. stage 3 of the apprenticeship requires 50% of total competency points/competencies;¹³
 - iii. stage 4 of the apprenticeship requires 75% of total competency points/competencies;¹⁴ and
 - iv. stage 5 of the apprenticeship requires 100% of total competency points/competencies;¹⁵
- 3.1.3 in particular, the AMWU seek to amend the *Airline Operations – Ground Staff Award 2010* (**Airline Award**) and the *Sugar Industry Award 2010* (**Sugar Award**) to introduce a number of clauses which would facilitate

¹² CFMEU – *Joinery and Building Trades Award 2010* and *Building and Construction General On-Site Award 2010*. AMWU – *Airline Operations - Ground Staff Award 2010* and *Sugar Industry Award 2010*

¹³ The AMWU's claim with respect to the *Sugar Industry Award 2010* also proposes that apprentices be permitted to exit the apprenticeship at stage 3 of the apprenticeship upon attainment of 75% of total competency points for Certificate III with the relevant AQF Certificate qualification

¹⁴ The AMWU's claim with respect to the *Airline Operations – Ground Staff Award 2010* and *Sugar Industry Award 2010* only goes up to stage 4

¹⁵ The AMWU's claim with respect to the *Airline Operations- Ground Staff Award 2010* and *Sugar Industry Award 2010* also proposes that upon completion of 100% of the total competency for the relevant AQF Certificate III or IV, an apprentice will exit with the relevant AQF Certificate qualification

competency based wage progression (**CBWP**) (i.e. nominal periods etc);¹⁶
and

3.1.4 in particular, the CFMEU seek to exclude apprentices who undertake training for a qualification from the Electrotechnology Training Package from the operation of the proposed CBWP provisions in the *Building and Construction General On-Site Award 2010 (BCGOS Award)*.¹⁷

3.2 Although not stated in the Table of Common Claims, the AMWU also seek to amend the *Graphic Arts, Printing and Publishing Award 2010 (Graphics Award)* to include a more specific table of progression between stages of the apprenticeship which aligns with the amendments being sought at paragraphs 3.1.1 and 3.1.2 above.¹⁸

3.3 The Chambers do not oppose the concept of CBWP in theory. However, the Chambers assert that merely introducing the abovementioned CBWP provisions into further awards will not resolve the fundamental problems encountered with CBWP in practice.

3.4 The Chambers provide the following Submissions in support of this position.

Benefits of CBWP

3.5 An effective CBWP system is undoubtedly beneficial for both employees and employers, and the Australian economy.

3.6 A number of parties have filed Submissions in these proceedings which address the perceived benefits of CBWP. Some of the benefits mentioned include:

3.6.1 allowing employers to acquire higher skilled workers more quickly;¹⁹

3.6.2 enabling apprentices to earn their qualification at the time when they are deemed fully competent;²⁰

3.6.3 attracting more experienced and mature workers to an apprenticeship or traineeship due to the potential for a shorter training period and reduced opportunity costs to themselves and their families;²¹

¹⁶ Refer to the AMWU's *Further Revised Application to vary the Airline Operations – Ground Staff Award 2010* dated 31 January 2013, p4; and Schedule A of the AMWU's *Further Revised Application to vary the Sugar Industry Award 2010* dated 31 January 2013

¹⁷ Refer to Table of Common Claims, p 40 and note this amendment is not reflected in the CFMEU's *Application to Vary the Building and Construction General On-Site Award 2010* dated 8 March 2012. This claim is also supported by the CEPU, refer to the CEPU's *Submissions: Applications to Vary Multiple Awards re Apprentices* dated 31 January 2013, at [2]

¹⁸ Refer to *Attachment A of the Further Revised Application to Vary the Graphic Arts, Printing and Publishing Award 2010* and the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, at [48]

¹⁹ Refer to the *Government of Western Australia's Submission to the Fair Work Commission Modern Award Review on Matters Concerning Apprentices, Trainees and Juniors* dated 29 January 2013, at [38]; the *Australian Government's Submission in relation to Common Matters for Modern Award Review 2012 Apprentice, Trainee and Juniors* dated 1 February 2013, p 9; and the Expert Panel's Report, *A Shared Responsibility: Apprenticeships for the 21st Century* (2011), p 92

²⁰ Refer to the *Government of Western Australia's Submission to the Fair Work Commission Modern Award Review on Matters Concerning Apprentices, Trainees and Juniors* dated 29 January 2013, at [38]

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- 3.6.4 support for apprentices or trainees who need additional time to attain competency;²² and
- 3.6.5 building a more productive future for Australia and increasing the availability of skilled workers to assist in easing skills shortages in critical industries.²³
- 3.7 The Chambers agree that an effective CBWP system would likely achieve the abovementioned benefits. However, as we discuss below, the establishment of an effective CBWP system requires more than the mere introduction of standardised CBWP provisions into modern awards.

Problems associated with not having CBWP provisions in modern awards

- 3.8 By reviewing the various Submissions filed in these proceedings, there appear to be 2 key factors motivating parties to seek the introduction of CBWP provisions into further modern awards.

Factor 1 – Apprentices unfairly held back from progression

- 3.9 A number of parties to these proceedings have raised concerns that apprentices are unfairly held back from progressing through their apprenticeship in the absence of any CBWP provisions in modern awards.²⁴

Factor 2 – Modern awards are a structural barrier to CBWP

- 3.10 Recommendation 14 of the Expert Panel’s Report was for the FWC to undertake a review of apprenticeship and traineeship provisions, wages and conditions considering, amongst other matters, the removal of barriers to CBWP in modern awards.²⁵
- 3.11 A number of parties to these proceedings have implicitly or explicitly endorsed this recommendation by asserting that the terms of modern awards provide a structural barrier to the implementation of CBWP.²⁶

²¹ Refer to the *Australian Government’s Submission in relation to Common Matters for Modern Award Review 2012 Apprentice, Trainee and Juniors* dated 1 February 2013, p 9; and the Expert Panel’s Report, *A Shared Responsibility: Apprenticeships for the 21st Century* (2011), p 92

²² Refer to the *Australian Government’s Submission in relation to Common Matters for Modern Award Review 2012 Apprentice, Trainee and Juniors* dated 1 February 2013, p 9

²³ Refer to the *Government of Western Australia’s Submission to the Fair Work Commission Modern Award Review on Matters Concerning Apprentices, Trainees and Juniors* dated 29 January 2013, at [38]; and the *Australian Government’s Submission in relation to Common Matters for Modern Award Review 2012 Apprentice, Trainee and Juniors* dated 1 February 2013, p 9

²⁴ Refer to the *AMWU’s Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, at [2.82] and the *Schedule of Witnesses, Witness Statement of Ian Curry*, at [181]; the *Government of Western Australia’s Submission to the Fair Work Commission Modern Award Review on Matters Concerning Apprentices, Trainees and Juniors* dated 29 January 2013, at [40]; and the *CFMEU’s Submission regarding the Modern Awards Review - Apprentices, Trainees and Juniors* dated 31 January 2013, at [4.8]

²⁵ Refer to p 15 of the Expert Panel’s Report

²⁶ Refer to the *Australian Government’s Submission in relation to Common Matters for Modern Award Review 2012 Apprentice, Trainee and Juniors* dated 1 February 2013, pp 4 and 9; and the *New South Wales Government: Education and Communities Office of Education’s Submission* dated 29 January 2013

3.12 In addition, some parties²⁷ have also asserted that the terms of modern awards prohibit their ability to fully implement the Council of Australian Governments (COAG) agenda for states and territories (i.e. to shorten the duration of apprenticeships where competencies are demonstrated and facilitate CBWP arrangements etc). For example, these parties assert that a number of states and territories have implemented policies or introduced changes to legislation to facilitate CBWP in accordance with the COAG agenda, however these changes are not supported by the modern award terms.²⁸

Problems associated with CBWP provisions in modern awards

3.13 A number of modern awards already contain CBWP provisions including the *Manufacturing and Associated Industries and Occupations Award 2010 (Manufacturing Award)*, the *Food, Beverage and Tobacco Manufacturing Award 2010*, the *Vehicle Manufacturing, Repair, Services and Retail Award 2010 (Vehicle Award)*, the *Graphics Award* and the *Racing Industry Ground Maintenance Award 2010*.

3.14 Notably, a number of the Submissions and associated materials filed in these proceedings demonstrate that there are significant problems with the existing CBWP schemes in modern awards.

3.15 We list below some of the problems encountered with the existing CBWP schemes in modern awards.

Perceived reluctance to sign-off on competency

3.16 A number of modern awards which already contain CBWP provisions²⁹ and the proposed amendments set out at paragraphs 3.1.1 and 3.1.2 of this Submission, provide for an apprentice to progress through an apprenticeship based on:

3.16.1 their attainment of a specified level of competency points/competencies as specified in their training plan; or

²⁷ Refer to *Australian Government's Submission in relation to Common Matters for Modern Award Review 2012 Apprentice, Trainee and Juniors* dated 1 February 2013, p 10; the *New South Wales Government: Education and Communities Office of Education's Submission* dated 29 January 2013; and the *Government of Western Australia's Submission to the Fair Work Commission Modern Award Review on Matters Concerning Apprentices, Trainees and Juniors* dated 29 January 2013, at [9] and [41]

²⁸ Refer to the *New South Wales Government: Education and Communities Office of Education's Submission* dated 29 January 2013, p 2; the *Government of Western Australia's Submission to the Fair Work Commission Modern Award Review on Matters Concerning Apprentices, Trainees and Juniors* dated 29 January 2013, at [13]; and the *Australian Government's Submission in relation to Common Matters for Modern Award Review 2012 Apprentice, Trainee and Juniors* dated 1 February 2013, p 10

²⁹ Refer to clause 25.6 of the *Manufacturing and Associated Industries and Occupations Award 2010* and clause 35.1 of the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*

3.16.2 the completion of a period of 12 months service after commencing the apprenticeship or commencing the preceding stage of the apprenticeship, whichever is earlier.

3.17 Notably, some of the materials filed in these proceedings have identified that even when CBWP provisions are within modern awards, there is an alleged reluctance by employers to assess the apprentice as competent and in-turn allow for progression through the apprenticeship.

3.18 For example:

3.18.1 the AMWU have provided the witness statement of Phillip Reid which states that:

“Competency based wage progression has been available in the award [i.e. the Manufacturing and Associated Industries and Occupations 2010 and its predecessors] since around 2006. It seems employers are reluctant to progress apprentices no matter how quick or competent they are. My experience is that employers, particularly in the private sector will pay lower wages for as long as possible, as a result most apprentices are still working on the time based system even if they are competent to move to the next stage. I have had a number of complaints over the years from apprentices who can not get sign off.”³⁰

3.18.2 the AMWU have also provided the witness statement of Kate Luke which states that:

“Many apprentices do not have wage increases when they are competent as employers either just ignore competency based progression in favour of time based progression or they hold off on signing off on competencies... I have been contacted on many occasions by apprentices asking how they get their employer to sign them off as many employers hold back on signing until each 12 month period has passed. Unfortunately this is a difficult process and also extremely difficult to prove as employers simply say that the apprentice is not competent yet.”³¹

3.18.3 the AMWU have also provided the witness statement of Alex Seal which states that:

“...some employers if you finish all your trade school they will still make you stay as an apprentice for the whole time because they are well within their rights to do that.”³²

³⁰ Refer to the AMWU’s *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, *Schedule of Witnesses, Witness Statement of Phillip Reid* at [11] and [12]

³¹ Refer to the AMWU’s *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, *Schedule of Witnesses, Witness Statement of Kate Luke* at [21] and [23]

³² Refer to the AMWU’s *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, *Schedule of Witnesses, Witness Statement of Alex Seal* at [8]

- 3.19 The evidence outlined above, indicates that even when CBWP provisions are contained within modern awards, there are still problems with apprentices progressing through the system based on their competency.
- 3.20 In addition, as outlined at paragraph 3.9 above, it appears that one of the key factors motivating the implementation of CBWP provisions into further awards was to counteract the perceived notions that apprentices are unfairly held back from progressing through their apprenticeship in the absence of such modern award provisions. The Chambers submit that based on the evidence referred to above, if the proposed CBWP amendments are implemented into further modern awards, it is likely that apprentices will still encounter the same problems with progressing through their apprenticeships.
- 3.21 The Chambers further submit that whilst the implementation of the proposed amendments to CBWP in modern awards will remove some of the barriers to accessing state/territory legislation that facilitates CBWP (as set out at paragraphs 3.10 to 3.12 of our above submissions), the same problems regarding progression may still be encountered.
- 3.22 Based on the above, the Chambers submit that the mere introduction of the proposed CBWP amendments in the relevant modern awards will not in itself create an effective CBWP scheme for the relevant industries.

Assessment of competency

- 3.23 Some of the Submissions and associated materials filed in these proceedings have identified that the current mechanisms for assessing competency are problematic as these mechanisms are often poorly understood and do not facilitate the consistent assessment of competency.
- 3.24 As a consequence, both employers and apprentices alike often have difficulty confidently identifying when an apprentice has achieved the requisite competency levels to progress to the next stage of the apprenticeship.
- 3.25 For example, the AMWU have provided the witness statement of Kate Luke which states that:
- "I have had a number of experiences with employers who do not understand competency based wage progression".³³*
- 3.26 In addition, the ACTU's evidence refers to a recent study undertaken by the FWC into CBWP (2011:140). This study illustrated that employers and Registered Training

³³ Refer to the AMWU's Submission to the 2012 Review of Modern Awards: Apprentices dated 31 January 2013, Schedule of Witnesses, Witness Statement of Kate Luke at [21]

Organisations (**RTO**) often have divergent views regarding the assessment of competency.³⁴ In particular the following is stated:

"...employer participants felt that the practical skill level and level of productivity demonstrated by apprentices in the workplace who were signed off by the RTO was below their expectations for competency".³⁵

3.27 In response to Recommendation 12 of the Expert Panel's Report,³⁶ the Australian Government undertook consultations with relevant stakeholders and ultimately developed the CBWP Principles.³⁷ The following CBWP Principles are of particular relevance:

3.27.1 *CBWP Principle Four* which provides that each stage of the apprenticeship should identify competency requirements which, once accomplished, allow the apprentice to progress to the next stage of the apprenticeship and next wage level provided that the apprentice, employer and RTO agree that the apprentice possesses the necessary competency requirements covered by the training agreement and relevant industry training package; and

3.27.2 *CBWP Principle Five* which provides that competency assessment is a three way process between the employer, apprentice and RTO and that each party must agree that the apprentice has the necessary skills, knowledge and practical experience to consistently demonstrate the required competencies in a variety of work contexts and consistent with the training package requirements.

3.28 The Australian Government submits that the CBWP Principles were designed to assist parties when considering proposing CBWP amendments to awards.³⁸

3.29 The Chambers submit that CBWP Principles Four and Five would at the very least be useful by requiring transparency with respect to competency requirements and requiring collaboration between RTOs and employers about the assessment of competency. However, notably no amendments of this nature have been proposed in the 2-year review process.

3.30 The Chambers submit that unsurprisingly, one of the key components underlying the efficacy of CBWP is the ability to accurately assess competency. Therefore, any

³⁴ Refer to the ACTU's Submission regarding Apprenticeship Wage Review dated January 2013, Attachment 2 to the Witness Statement of Phil Toner, p 17

³⁵ Refer to the ACTU's Submission regarding Apprenticeship Wage Review dated January 2013, Attachment 2 to the Witness Statement of Phil Toner, p 17 (footnote 4)

³⁶ Recommendation provided that a culture of competency based progression in apprenticeships and traineeships should be promoted, in consultation with industry bodies and employers

³⁷ Refer to Attachment 1 of Scoping Paper for Fair Work Australia on Decision Points for Review of Apprentice and Trainee Wages and Conditions dated 23 May 2012

³⁸ Refer to the Australian Government's Submission in relation to Common Matters for Modern Award Review 2012 Apprentice, Trainee and Juniors dated 1 February 2013, p 12

perceived difficulties with assessing competency are illustrative of a fundamental flaw in the CBWP system.

- 3.31 The Chambers also submit that it is conceivable that the difficulties associated with assessing competency (as set at paragraphs 3.16 to 3.22 of our above submissions) would inevitably have some impact on an employers' ability to sign off on an apprentice's competency.
- 3.32 The Chambers further submit that whilst the implementation of the proposed amendments to CBWP in modern awards will remove some of the barriers to accessing state/territory legislation that facilitate CBWP (as set out at paragraphs 3.10 to 3.12 of our above submissions), essentially the relevant industries will likely be confronted with the same problems regarding the assessment of competency.
- 3.33 Based on the above, the Chambers submit that the mere introduction of the proposed CBWP amendments in the relevant modern awards will not in itself create an effective CBWP scheme for the relevant industries. Rather, a robust and effective system for assessing competency based progression which builds on *CBWP Principles Four and Five* needs to be developed in consultation with industry.

Further consultation/initiatives

- 3.34 The Submissions and associated materials filed in these proceedings indicate that whilst a framework might be put in place to facilitate CBWP, further consultation with government and/or government initiatives are often required for CBWP to actually work in practice.
- 3.35 For example, the New South Wales Government made the following comments with respect to consultation regarding CBWP:

"Competency-based progression and completion arrangements have recently been introduced in the printing and graphic arts trades and the Commissioner is currently in consultation with industry to establish competency based progression and completion provisions for apprenticeships in the automotive trades. He will in the future be discussing these options with other industries where current awards contain provisions for competency based progression and completion".³⁹

- 3.36 Similarly, the Western Australian Government made reference to its active involvement in a number of national initiatives which seek to promote access to CBWP.⁴⁰ In particular, the Western Australian Government made reference to its involvement in the Australian Industry Group's *Competency Based Progression and Completion for Engineering Trades Project (AIG Project)*.

³⁹ Refer to the *New South Wales Government: Education and Communities Office of Education's Submission* dated 29 January 2013, p 4

⁴⁰ Refer to the *Government of Western Australia's Submission to the Fair Work Commission Modern Award Review on Matters Concerning Apprentices, Trainees and Juniors* dated 29 January 2013, at [11]

- 3.37 The AIG Project is a Commonwealth Government funded project which seeks to introduce widespread systemic reforms for engineering trades apprentices to generate completions and pay progressions which are genuinely based on the achievement of competency.⁴¹ Notably, even though the relevant award changes which allowed for CBWP were made in 2006, the AIG Project commenced on 1 July 2012 as further initiatives were required to facilitate CBWP in practice.
- 3.38 Finally, we note that the AMWU have provided the witness statement of Kate Luke. Notably, Ms Luke explains that she is on the Queensland Engineering Excellence Implementation Group which she states is:
- “...is a body formed by a Federal Government grant to promote further education and understanding of competency based training.”⁴²*
- 3.39 Based on the above, it appears that it is not uncommon for consultation to occur with government and/or government initiatives to be implemented to facilitate the efficacy of CBWP. As a result, the Chambers submit that consultation with government and/or the implementation of government initiatives may be required to effectively implement CBWP and therefore, the mere introduction of the proposed CBWP amendments in the relevant modern awards will not in itself create an effective CBWP scheme for the relevant industries.
- 3.40 The Chambers also repeat paragraphs 1.22, 1.56 and 1.57 of our submissions above.

Other problems with CBWP

- 3.41 The Chambers submit that there are also a number of other problems with the proposed amendments as set out at paragraph 3.1.1 and 3.1.2 of this submission and some of the CBWP provisions currently contained within modern awards.⁴³
- 3.42 Firstly, whilst these existing and proposed CBWP provisions allow for an apprentice to expedite their apprenticeship, they do not make provisions for an apprentice who is struggling with their apprenticeship (as opposed to absent) to slow down the progression process. Notably, these apprentices will essentially progress through the apprenticeship based upon time progression (i.e. the completion of the relevant 12 month periods) even though they do not possess the requisite competency levels for progression.
- 3.43 Secondly, although provision for part time employment is made in the FW Act and in some modern awards, very few modern awards make provision for part-time

⁴¹ Refer to the *Australian Industry Group Magazine*, Edition 58, pp 23- 24

⁴² Refer to the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, *Schedule of Witnesses, Witness Statement of Kate Luke* at [21]

⁴³ Refer to clause 25.6 of the *Manufacturing and Associated Industries and Occupations Award 2010* and clause 35.1 of the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*

apprenticeships.⁴⁴ We submit that the facilitation of part time apprenticeships is an important step forward in allowing the attainment of trade qualifications for those persons not able to participate in the full time workforce.

3.44 Whilst the traineeship system provides for flexible work options such as part time and school based traineeships, award provisions relating to apprentices continue to be premised on the basis of full time arrangements only.

3.45 However, we note that the absence of provisions in modern awards which facilitate part time apprenticeships could be due to the fact that such provisions do not appear to be, strictly speaking, permissible terms within section 139(1) of the FW Act.

3.46 Based on our above Submissions which demonstrate the problems associated with CBWP provisions in modern awards, the Chambers submit that the CBWP system proposed in the union applications are contrary to the modern award objective specified in sections 134(1)(c) and (d) of the FW Act which provide:

- (c) *the need to promote social inclusion through increased workforce participation;*⁴⁵
- (d) *the need to promote flexible modern work practices and the efficient and productive performance of work; and*
- (f) *the likely impact of any exercise of modern award powers on business, including productivity,....and the regulatory burden...*

How can CBWP issues be resolved?

One size does not fit all

3.47 As mentioned above, in response to Recommendation 12 of the Expert Panel's Report,⁴⁶ in 2011 the Australian Government undertook consultations with relevant stakeholders regarding CBWP.

3.48 The Australian Government submits that the intention of these initial discussions was to determine whether a model CBWP clause for modern awards could be formulated. However, some stakeholders did not support the idea of a "one size fits all" approach to all modern awards given the differences in training requirements and practices across industries.⁴⁷ As a result, the CBWP Principles (as discussed at paragraph 3.27 above) were formulated instead.

3.49 The Chambers agree that there is not a CBWP provision that will suit all modern awards. Rather, CBWP provisions and associated frameworks will often need to be

⁴⁴ Refer to *Australian Government's Submission in relation to Common Matters for Modern Award Review 2012 Apprentice, Trainee and Juniors* dated 1 February 2013, at [1.13]

⁴⁵ Refer to paragraph 4.3.18 below which provides that promoting social inclusion is directed to removing exclusionary practices

⁴⁶ Recommendation provided that a culture of competency based progression in apprenticeships and traineeships should be promoted, in consultation with industry bodies and employers

⁴⁷ Refer to the *Australian Government's Submission in relation to Common Matters for Modern Award Review 2012 Apprentice, Trainee and Juniors* dated 1 February 2013, p 12

aligned with the needs and requirements of particular industries through consultation etc as set out at paragraphs 3.34 to 3.40 of our Submissions above.

- 3.50 For these reasons, the Chambers further assert that the mere introduction of the proposed CBWP amendments in the relevant modern awards will not in itself create an effective CBWP scheme for the relevant industries.

Integrated model

- 3.51 A number of Submissions filed in these proceedings have mentioned that CBWP and completion is dependent upon the integration of training regulations/frameworks and workplace/industrial legislation (i.e. modern awards).⁴⁸

- 3.52 The requirement for integration was raised by the Master Builders Association some years ago as follows:

“Recognition of competency training arrangements cannot, however, occur in the industrial relations system as a means to recognise wage progression without some fundamental systemic changes. These changes will need to be comprehensive....Infrastructure for assessment of competencies which provides an appropriate level of rigor must be introduced...The current system of assessment of competency does not permit a ready means of recognition of each point of competence required to be established in order to obtain a wage increase so in the design of the new system that factor must be taken into account.”⁴⁹

- 3.53 The Chambers also refer to comments made by the then President of FWA in the Broad Review Statement as set out at paragraph 1.8 in our above Submissions (i.e. any review of modern awards should take into account other elements of the regulatory framework.)

- 3.54 The Chambers agree that such integration of training regulations/frameworks (i.e. such as a robust system for assessing competency) and workplace/industrial legislation is crucial to the efficacy of any CBWP system as the mere introduction of the proposed CBWP amendments in the relevant modern awards will not in itself create an effective CBWP scheme for the relevant industries.

- 3.55 The Chambers further assert that such integration must occur at the same time. For example, if the proposed CBWP amendments were implemented into the relevant awards, training frameworks (i.e. guidance about assessing competency) would need to be simultaneously introduced to facilitate CBWP.

⁴⁸ Refer to the *New South Wales Government: Education and Communities Office of Education’s Submission* dated 29 January 2013, p 3; the *Government of Western Australia’s Submission to the Fair Work Commission Modern Award Review on Matters Concerning Apprentices, Trainees and Juniors* dated 29 January 2013, at [17]; and the *Australian Government’s Submission in relation to Common Matters for Modern Award Review 2012 Apprentice, Trainee and Juniors* dated 1 February 2013, p 13

⁴⁹ Refer to *Challenging the Apprenticeship System: Skill Needs for the Future*, p 12

3.56 In conclusion, the Chambers submit that the abovementioned issues need to be resolved before CBWP will work in practice and in particular, before any further CBWP provisions are introduced into further awards.

Consistency with other modern awards

3.57 With respect to the Airline Award, the AMWU assert that their proposed variations are modelled on the provisions contained, or sought, in the Manufacturing Award.⁵⁰

3.58 With respect to the Sugar Award, the AMWU assert that their proposed amendments are modelled on that currently contained within the Manufacturing Award.⁵¹

3.59 With respect to the Graphics Award, the AMWU assert that the proposed amendments reflect the existing wording of the Manufacturing Award.⁵²

3.60 With respect to the BCGOS Award and the *Joinery and Building Trades Award 2010 (Joinery Award)*, the CFMEU assert that the proposed amendments are very similar to the CBWP provisions in the Manufacturing Award.⁵³

3.61 The Chambers repeat paragraphs 1.43 to 1.45, 1.51 and 1.52 above, and respectfully submit that implementing the CBWP amendments to ensure consistency with other awards is not a legitimate reason within the scope of the 2-year review process.

3.62 For the reasons set out above, the Chambers respectfully request that the FWC dismiss the relevant union applications which seek to introduce further CBWP provisions into modern awards.

4.0 Suspension, Cancellation and Termination – Schedule 4 of Table of Common Claims

4.1 Specific Jurisdictional Issues

4.1.1 The regulation of apprentice and traineeship arrangements is primarily a responsibility of the States and Territories.

4.1.2 The Chambers repeat paragraph 1.30 above.

4.1.3 The Chambers further note that for the purposes of section 27(1)(b) of the FW Act, regulation 1.13 of the Regulations prescribe a range of preserved State and Territory laws, including:

- a law dealing with the suspension, cancellation or termination of a training contract;

⁵⁰ Refer to the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, p 50

⁵¹ Refer to the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, p 52

⁵² Refer to the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, p 48

⁵³ Refer to the CFMEU's *Submission regarding the Modern Awards Review - Apprentices, Trainees and Juniors* dated 31 January 2013, at [4.4]

- a law dealing with the suspension, cancellation or termination of a contract of employment that is associated with a training contract and entered into as part of a training contract; and
- a law dealing with a period of probation of an employee, that is part of a training arrangement but is not a period of probationary employment.

4.1.4 This means that State and Territory laws dealing with these matters are preserved subject to the further interaction rules between the FW Act and Regulations as set out at paragraphs 1.32 to 1.50 above.

4.2 Proposed amendments

4.2.1 Schedule 4 of the Table of Common Claims indicates that applications have been made which seek to vary the following eight modern awards:

- Sugar Award;
- Graphics Award;
- Airline Award;
- Manufacturing Award;
- Vehicle Award;
- *Electrical, Electronic and Communications Contracting Award 2010 (Electrical Award)*;
- Joinery Award; and
- BCGOS Award.

4.2.2 The Chambers submit that the “common matter” of suspension, cancellation or termination can be further broken down into the following subject matters:

Subject matter	Variation	Modern Award	Applicant
1. Notice of cancellation or suspension	2 weeks’ notice to be given to apprentice prior to notifying training authority	Sugar Award	AMWU
		Graphics Award	AMWU
		Airline Award	AMWU
		Manufacturing Award	AMWU
		Vehicle Award	AMWU
		Electrical Award	CEPU
		Joinery Award	CFMEU
		BCGOS Award	CFMEU

Subject matter	Variation	Modern Award	Applicant
2. Suspension/cancellation in accordance with training contract	Apprenticeship cancelled or suspended only in accordance with training contract and State/Territory legislation and training authority	Sugar Award Graphics Award Airline Award Vehicle Award Joinery Award	AMWU AMWU AMWU AMWU CFMEU
3. Trainee apprentice/existing worker apprentice notice of termination	The notice of termination provisions of the NES shall apply where an apprentice is a trainee apprentice or an existing worker apprentice)	Joinery Award	CFMEU

4.3 Notice of cancellation or suspension

- 4.3.1 The applications by the AMWU, CEPU and CFMEU seek to vary the eight modern awards set out in the table at paragraph 4.2.2 (bullet point 1) above to insert the provision that two weeks' notice is given to the apprentice where the employer is considering or has made a decision to apply to a training authority to cancel or suspend an apprentice's training contract, identifying the reason for the proposed cancellation or suspension and the apprentice's rights under the training contract.
- 4.3.2 The applications seek to add another layer of regulation to an already highly regulated area. The process for suspending or cancelling a training contract is extensively regulated by State and Territory training law and no apprentice can be suspended or have their training contract cancelled without the decision of the relevant training authority.
- 4.3.3 Under the New South Wales *Apprenticeship and Traineeship Act 2001* (**NSW Training Act**) applications for suspending a training contract is subject to a seven day cooling-off period, if applied by consent of the employer the apprentice, during which time any party may withdraw their consent. In the case where only one party has applied, the other party has twenty-one days to either consent or oppose the application. Suspension will not be granted if one of the parties has been placed under undue influence. Where

disputes between employers and apprentices, including whether a training contract should be suspended, cannot be resolved by the State Training Services, the matter must be referred to the NSW Vocational Training Tribunal for resolution.⁵⁴

- 4.3.4 Under the Western Australia *Vocational Education and Training Act 1996* (**WA Training Act**) and the *Vocational Education and Training Regulations 2009* (**WA Training Regulations**), an apprentice may be suspended for serious misconduct if given a written notice stating that the apprenticeship is suspended on the grounds of serious misconduct and the date of suspension. A copy of the notice must be given to the State Training authority before 5pm on the next working day. If the employer seeks to terminate the contract of training an application must be lodged within 7 days of the suspension. The apprentice must continue to be paid during the period of suspension. If an application for termination is refused, the suspension will be cancelled the next working day.⁵⁵
- 4.3.5 In South Australia, under the *Training and Skills Development Act 2008* (**SA Training Act**), an employer can make an application to the South Australian Industrial Relations Commission to suspend an apprentice for up to 7 working days when accused of serious or wilful misconduct. The South Australian Industrial Relations Commission must be notified immediately and the suspension must be confirmed in writing by the employer within 3 days of suspension. A conciliation conference will be held within 7 working days of the suspension. If the matter remains unresolved, it will proceed for a formal hearing. The suspension can be disputed by the apprentice if they believe the suspension is unjust or the length is unreasonable.⁵⁶
- 4.3.6 In Queensland an apprentice may be suspended for serious misconduct under the *Vocational Education, Training and Employment Act 2000* (**QLD Training Act**) and the *Vocational Education, Training and Employment Regulation 2000* (**QLD Training Regulation**) by the employer giving the apprentice a suspension notice. Skills Queensland must be notified within 1 working day of the suspension and be provided with a copy of the suspension notice within 5 working days. Where the notice states the employer seeks to cancel the training contract, the apprentice is taken to

⁵⁴ NSW Training Act, section 22, 39-40

⁵⁵ WA Training Act, section 60E, 60G; WA Training Regulations, r49-r50,

⁵⁶ SA Training Act, section 64-65; Training and Apprenticeship Services – Department of Further Education, Employment, Science and Technology 2012, *South Australia's Traineeship and Apprenticeship System Information Booklet*.

be stood down from employment without pay until the application is decided by Skills Queensland. In determining the application, Skills Queensland must act as quickly as possible and allow for the parties to make oral or written submissions.⁵⁷

- 4.3.7 As shown above the various State Training laws, regulations and guidelines provide an extensive regulatory framework of the training contract. In addition, the State Training Authorities offer a range of support services, information, guides and assistance to apprentices.⁵⁸ The forms issued by the State Training Authorities to apply for a suspension or cancellation of training contract commonly set out the rights and obligations of both the employer and the apprentice and directs either party to contact the relevant authority if they are unsure of the effect of agreeing to the suspension or cancellation (see Schedule A). Given these arrangements, it seems highly unlikely that an apprentice would have their training contract suspended or cancelled without being informed of the reasons or that a mutual consent form would be signed due to a lack of information, assistance or advice.
- 4.3.8 In all jurisdictions, the State Training Authorities point out that cancellation of the training contract is the last resort and that dispute resolution procedures such as mediation and conciliation is recommended where a cancellation is sought (see Schedule B). The Chambers submit that the Applicants (AMWU, CFMEU and CEPU) have not presented any verifiable data which demonstrates that State Training Authorities are not meeting their responsibilities in this regard (i.e. for example that State Training Authorities are agreeing to terminate training contracts without making any inquiries or offering the parties any assistance).
- 4.3.9 The Applicants (AMWU and CEPU) submit that the notice period will assist apprentices in seeking further information.⁵⁹ However, nothing in the current State/Territory training laws or regulations would prevent an apprentice from seeking further information from the relevant authorities,

⁵⁷ QLD Training Act, section 64; QLD Training Regulation , Part 4.

⁵⁸ Refer to Apprenticeships Info Queensland Government, <http://apprenticeshipsinfo.qld.gov.au/index.html>; Apprentices and Trainees - Department of Education and Early Childhood Development, <http://www.education.vic.gov.au/training/learners/apprentices/Pages/default.aspx>; Training and Apprenticeship Services – Department of Further Education, Employment, Science and Technology, <http://www.skills.sa.gov.au/apprenticeships-traineeships/already-an-apprentice-or-trainee>; Department of Training and Workforce Development; <http://www.trainingwa.wa.gov.au/apprenticentre/detcms/portal/>; State Training Services – NSW Department of Education and Communities, http://www.training.nsw.gov.au/individuals/apprenticeships_traineeships/index.html

⁵⁹ Refer to the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, p 18; and to the CEPU's *Submissions: Applications to Vary Multiple Awards re Apprentices* dated 31 January 2013, p 87

a parent or a union. As raised in paragraph 4.3.7 above, even the forms to be used for cancellation and suspension inform the parties of their rights and direct them to seek further information if unsure. Therefore, the Chambers submit that the introduction of a notice period is not necessary to enable an apprentice to seek the necessary information and advice in order to make an informed decision.

- 4.3.10 Another aspect of the proposed variation is a provision requiring employers to inform the apprentice of their rights under the training contract. The Chambers submit that providing relevant information on the rights and obligations under the training contract and State training laws is the responsibility of the State training authority. The Chambers further submit that it is not only unreasonable to place this burden on employers, but it is also unnecessary given the extensive information resources that are available from the State training authorities.
- 4.3.11 A key question relating to the applications is whether the variations to require two weeks' written notice of the intention to apply to suspend or cancel the training contract, including written reasons, are capable of being included in modern awards under section 139 of the FW Act. The AMWU and ACTU make brief submissions on this point, suggesting that an apprenticeship is an employment category and that the variation is therefore capable of being included under section 139(1)(b) of the FW Act.⁶⁰ The ACTU also raises that the variation relates to consultation and therefore can be included under section 139(1)(j) of the FW Act.⁶¹
- 4.3.12 The Chambers submit that apprenticeships cannot be considered to be, a standard employment category such as full-time, part-time or casual employment. Rather, apprentices have a unique industrial character given that they are subject to a training contract binding both parties for a period of time and requiring the approval of a third party (i.e. a State Government authority) for either varying, suspending or terminating the contract. Therefore, the Chambers submit that this matter does not relate to section 139(1)(b) of the FW Act.
- 4.3.13 In relation to whether the matter can be included under section 139(1)(j) of the FW Act, the Chambers submit that consultation historically has been confined to major workplace change and dispute resolution to disputes

⁶⁰ Refer to the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 2013, p 19-20; and the ACTU's *Submission regarding Apprenticeship Wage Review* dated January 2013, p 16.

⁶¹ Refer to the ACTU's *Submission regarding Apprenticeship Wage Review* dated January 2013, p 16

under the award.⁶² The Chambers further submit that the provision of two weeks' written notice, including reasons for the proposed cancellation or suspension, and informing apprentices of their rights under the training contract, has very little to do with either consultation or dispute resolution. Rather, it relates to termination and disciplinary procedures. The Full Bench of the Australian Industrial Relations Commission in the Award Simplification Process determined whether provisions requiring an employer to provide written reasons for a decision to suspend or terminate an employee could be included in awards. Although carried out under a different legislative context, the following findings of the Full Bench Dec 218/99 V Print R2700 on 12 March 1999 provides relevant guidance:

*[192] 8.1.3 When an employee is dismissed, suspended or reduced in salary or is informed of being disrated, and within four weeks thereafter asks in writing to be furnished with the reasons for such action, **the employee shall be informed in writing thereof within fourteen days provided that no employee shall be dismissed, suspended, disrated, or reduced in salary as a result of any charge or complaint made without being informed of the nature of such charge or complaint and being given a reasonable opportunity to make an explanation.***

*[193] **This clause deals with disciplinary and other procedures. It is not an allowable award matter.** It was submitted by the employers, the VTHC and the Power Industry Unions that the provision is incidental to redundancy pay (s.89A(2)(m)) and notice of termination (s.89A(2)(n)) and necessary for the effective operation of the award. We reject that submission. We cannot see any basis for a conclusion that the notice and redundancy pay provisions of the award will not operate effectively if we delete the clause. We shall do so.
[Emphasis added]*

In line with the observations above, the Chambers submit that the proposed variation to require two weeks' notice to be given of the intention to suspend or cancel the training contract, including written reasons and information about the apprentice's rights seeks to introduce a disciplinary procedure in the modern awards, where there is no coverage in section 139(1) of the FW Act for such terms to be included in modern awards. Therefore, the Chambers further submit that the common claim variation regarding suspension, cancellation and termination is not capable of being included in modern awards.

4.3.14 However, if the FWC makes a finding that the variations to require two weeks' written notice of the intention to apply to suspend or cancel the training contract, including written reasons, are capable of being included under section 139(1) and/or section 55 of the FW Act, the Chambers submit

⁶² [2008] AIRCFB 717; Re Award Simplification Decision; Re The Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1995 (1997) 75 IR 272, Print P7500

that the Applicants (i.e. the AMWU, CFMEU and CEPU) have failed to demonstrate that the variations are necessary to achieve the modern awards objective.

4.3.15 The AMWU submits that the variations, as outlined in 4.3.14 above, are necessary to ensure that the modern award meets the modern award objective,⁶³ in particular taking into account:

- 134(1) (a) *relative living standards and the needs of the low paid;*
- 134(1) (c) *the need to promote social inclusion through increased workforce participation; 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.*

4.3.16 In response, the Chambers submit that the considerations in section 134(1) of the FW Act have little or no relevance to the claim that two weeks' notice and written reasons for the suspension or cancellation should be provided before an application is lodged with the relevant State/Territory training authorities.

4.3.17 The Chambers submit that the AMWU, CFMEU and CEPU have failed to produce any verifiable data that employers frivolously and irresponsibly apply to have training contracts suspended or cancelled, that State/Territory training authorities fail to take the view of the apprentice into account or that the process of investing, assessing and determining applications for suspension is unreasonably slow resulting in section 134(1)(a) of the FW Act being undermined. The witness statement by Mr O'Hearn, relied on by CFMEU in supporting their application⁶⁴, refers to that *"A common issue is apprentices not receiving any notice of termination or cancellation of their apprenticeship"*. This is general statement only and no data is presented how "common" this. Further, nothing in Mr O'Hearn's statement demonstrates that the variation is necessary to achieve the modern awards objective, including section 134(1)(a) of the FW Act.

4.3.18 The AMWU's claim that the variation is necessary to provide for social inclusion through increased workforce participation cannot be substantiated. The Applicants (AMWU, CFMEU and CEPU) have not provided any evidence showing that the prospective apprentices are

⁶³ Refer to the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, p 19

⁶⁴ Refer to CFMEU's *Submission regarding the Modern Awards Review - Apprentices, Trainees and Juniors* dated 31 January 2013, *Witness Statement of Liam O'Hearn* at [14]; Refer to CFMEU's *Submission regarding the Modern Awards Review - Apprentices, Trainees and Juniors* dated 31 January 2013, p 36

discouraged from undertaking an apprenticeship simply because the modern award does not prescribe additional requirements in relation to the suspension and cancellation of training contracts. With respect to the 2-year review regarding the *Oil Refining and Manufacturing Award 2010*, Vice President Watson in Decision [2012] FWA 7212 explained the meaning of promoting social inclusion as follows:

*"[31] Further, I do not consider that the modern awards objective of promoting social inclusion has any real significance in relation to this application. **Promoting social inclusion is directed to removing exclusionary practices.** It has not been demonstrated how this would be achieved by granting an additional day of compassionate leave in this industry. No case for varying the conclusion of the award modernisation Full Bench has been established."*

[Emphasis added]

- 4.3.19 In this context, the Chambers submit that the Applicant (AMWU) has not provided any evidence to demonstrate that the provision of two weeks' notice of the intention to apply for a suspension or cancellation is "*directed to removing exclusionary practices*".
- 4.3.20 The Chambers also reject the AMWU's claim that the additional regulation of the suspension and cancellation of contracts of training will lead to a simple and easy to understand modern awards system as per section 134(1)(g) of the FW Act. Rather than providing clarity, the variation will undermine the current delineation of apprentices regulation whereby State/Territory laws primarily regulate matters pertaining to employer registration, lodgement and registration of the training contract and modern awards and the FW Act primarily provide the entitlements and conditions of work. The Chambers also submit that the variation will expand Federal regulation into an area that is largely the domain of the States and Territories today, in circumstances where no analysis or data shows that the current regulatory and enforcement regimes are deficient.
- 4.3.21 The Chambers submit that the variations to require two weeks' notice to be given to the apprentice including written reasons for the suspension or cancellation and their right under the training contract sought by the Applicants (i.e. the AMWU, CFMEU and CEPU) are contrary to the modern awards objective, in particular taking section 134(1)(f) of the FW Act into account (i.e. the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden). The Chambers further submit that the variations will further add

to the regulatory burden of employer and increase compliance costs which is contrary to section 134(1)(f) of the FW Act.

- 4.3.22 The Applicants have failed to show that the variation is necessary as per the observations of the Full Bench in the Landmark Decision and the requirements under section 138 of the FW Act, and not merely desirable.
- 4.3.23 The AMWU also relies on the witness statement of Mr Reid in which it is alleged that apprentices are unaware of their rights and are being told to sign a form mutually terminating the apprenticeship.⁶⁵ In response, the Chambers submit that extensive information, support, guidance and advice to apprentices are provided by State/Territory training authorities today through a range of means. If there is scope for further improving this information and how it is disseminated, this would be more effectively addressed by having discussions with the relevant State/Territory training authority rather than introducing additional regulation through the modern award system. Further, the Chambers submit that if there are instances where an apprentice is being coerced or unduly influenced to sign a form mutually agreeing to terminate the apprenticeship, this is already unlawful or alternatively would result in the training contract not being terminated under the State/Training laws.⁶⁶
- 4.3.24 The CEPU submits that the variation will give an apprentice more time to prepare and respond to an application by an employer to suspend or cancel a training contract.⁶⁷ In response, the Chambers submit that there are no regulatory impediments today to an apprentice seeking advice and information before deciding to sign or not to sign a form suspending or cancelling the apprenticeship.
- 4.3.25 The CFMEU on the other hand raises a specific issue pertaining to the regulation of “trainee apprentices” engaged under the NSW Training Act.⁶⁸ They seek as specific provision set out in the table in at paragraph 4.2.2 (bullet point 3) above whereby the notice of termination provisions in the NES shall apply where the apprentice is a trainee apprentice or an existing worker apprentice. According to the National Centre for Vocational Education Research⁶⁹ (NCVER) historically New South Wales has provided

⁶⁵ Refer to the AMWU’s *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, *Schedule of Witnesses, Witness Statement of Phillip Reid* at [17]

⁶⁶ SA Training Act, section 53; QLD Training Act, section 61; NSW Training Act, section 22

⁶⁷ Refer to CEPU’s *Submissions: Applications to Vary Multiple Awards re Apprentices* dated 31 January 2013, p 87

⁶⁸ NSW Training Act, section 7, section 12, Schedule 4 section 12

⁶⁹ NCVER 2001, *Apprenticeship in Australia: An historical snapshot*

for trainee apprentices that do not enter into term indentures. Instead they are able to move between different registered employers. In response, the Chambers submit that this is a state-specific issue and it is not appropriate to use modern awards as a vehicle to address a matter that is limited to one State. The Chambers also submit that the CFMEU has failed to demonstrate that this variation to insert references to a trainee apprentice in the Joinery Award and the BCGOS Award is necessary to achieve the modern awards objective.

4.3.26 For the reasons above, the Chambers respectfully request that the applications be dismissed.

4.4 **Suspension and cancellation in accordance with the training contract**

4.4.1 The applications by the AMWU and CFMEU seek to vary the five modern awards set out in the table at paragraph 4.2.2 (bullet point 2) above to insert a provision stating that apprenticeships may be suspended or cancelled only in accordance with the requirements of the training contract and the requirements of State legislation and the apprenticeship authority.

4.4.2 Given that apprentices are engaged under training contracts, in which terms governing suspension/cancellation are standard, and the training contracts are registered with the relevant State Training Authority, both employers and apprentices understand and are expected to understand the training contract as well as the relevant State legislation governing suspension or cancellation. Therefore, the Chambers submit that the inclusion of such a provision is unnecessary.

4.4.3 The Chambers also submit that the proposed variation is not capable of being included in the modern awards under section 139 of the FW Act. The Chambers adopt their reasons on the two weeks' notice period set out at paragraph 4.3.12 above that apprentices are not an employment category for the purposes of section 139(1) of the FW Act. However, if the FWC would find to the contrary, we submit that the variation is not an incidental term for the purposes of section 142 of the FW to any apprenticeship term. In relation to incidental terms, the Explanatory Memorandum sets out that:

560. Subclause 142(1) provides that a modern award may include terms that are incidental to a term that is permitted or required to be in the modern award and essential for the purpose of making a particular term operate in a practical way.

4.4.4 The Chambers submit that the proposed variation is not essential for the operation of any apprenticeship term in the modern awards. The variation therefore is opposed.

- 4.4.5 If the FWC finds that the proposed provision is capable of being included in modern awards the Chambers submit that the Applicants have not demonstrated that the inclusion of such a provision is necessary to achieve the modern awards objective and why the modern awards in their current form fail to achieve the modern awards objective. The Chambers further submit that the applications therefore merely represent a position that the Applicants see as desirable, rather than a variation that is necessary.
- 4.4.6 For the reasons outlined above, the Chambers respectfully request that the application be dismissed.

5.0 Training Requirements – Schedule 5 of Table of Common Claims

5.1 Overview of applications

5.1.1 Schedule 5 of the Table of Common Claims indicates that applications have been made which seek to vary the following eight modern awards:

- Sugar Award;
- Graphics Award;
- Airline Award;
- Manufacturing Award;
- Vehicle Award;
- Electrical Award;
- Joinery Award; and
- BCGOS Award.

5.1.2 The Chambers submit that the “common matter” of training requirements can be further broken down into the following subject matters:

Variation	Modern Award	Applicant
1. Contract of Training	Joinery Award BCGOS Award Airline Award Sugar Award	CFMEU AMWU AMWU AMWU
2. Training Without Loss of Pay	Airline Award Sugar Award Joinery Award	AMWU AMWU CFMEU

Variation	Modern Award	Applicant
3. Relevant Work & Qualifications	Joinery Award BCGOS Award Manufacturing & Award Airline Award Graphics Award Sugar Award Vehicle Award Electrical Award	CFMEU CFMEU AMWU AMWU AMWU AMWU AMWU CEPU
4. Mentoring	Joinery Award BCGOS Award Manufacturing Award Airline Award Graphics Award Sugar Award Vehicle Award Electrical Award	CMFEU CMFEU AMWU AMWU AMWU AMWU AMWU CEPU
5. Training Facilities and Facilitation of Training by Experienced People	Joinery Award BCGOS Award Manufacturing Award Airline Award Graphics Award Vehicle Award Electrical Award	CFMEU CFMEU AMWU AMWU AMWU AMWU CEPU
6. Supervision Consistent with the Health and Safety Requirements	Joinery Award BCGOS Award Manufacturing Award Graphics Award Sugar Award Vehicle Award Electrical Award	CFMEU CFMEU AMWU AMWU AMWU AMWU CEPU
7. Fees and Training Materials	Joinery Award BCGOS Award Manufacturing Award Airline Award Graphics Award Sugar Award Vehicle Award Electrical Award	CFMEU CFMEU AMWU AMWU AMWU AMWU AMWU CEPU
8. Labouring (not pressed at this time)	Manufacturing Award Sugar Award	AMWU AMWU

5.2 Contract of Training

5.2.1 The applications by the CFMEU and AMWU seek to vary the four modern awards set out in the table at paragraph 5.1.2 (bullet point 1) above to insert the provision that a person undertaking an apprenticeship must be party to a contract of training registered with the appropriate State Training Authority.

- 5.2.2 In support of their claim, the CFMEU relies on the witness statement of Mr O’Hearn which cites examples of young people being paid apprentice wages without formally undertaking an apprenticeship and not being party to a training contract.⁷⁰ If this is occurring, the Chambers submit that such practices are already unlawful as it is a legal requirement under State/Territory training laws that employers are registered and/or lodge a training contract with the relevant State/Territory training authority in order to engage an apprentice.⁷¹ Also there are already avenues to report complaints of underpayments including to the Fair Work Ombudsman.
- 5.2.3 State/Territory training authorities are very clear that an apprentice must be under a formal contract of training that has been lodged with and approved by the relevant State/Territory training authority.⁷² Penalties apply for failing to comply with the requirements under the State/Territory training laws.⁷³
- 5.2.4 On this basis, the Chambers submit that the inclusion of the provision is unnecessary and will do nothing other than simply restate what is already required. Modern awards should not be used as a notice board to promote the existence of the plethora of other laws that directly or indirectly affect employment.
- 5.2.5 The Chambers also submit that the engagement of apprentices is already a highly regulated area and there is no evidence that the variation is necessary to achieve the modern awards objective or that the provision is even capable of being included in modern awards.

5.3 Training Without Loss of Pay

- 5.3.1 As set out in the table at paragraph 5.1.2 above (bullet point 2), the AMWU and CFMEU seek to include a provision which requires an employer to provide training or access to training consistent with the contract of training without loss of pay.
- 5.3.2 The AMWU submit a similar provision exists in the Manufacturing Award and therefore should be included in the Airline Award. The CFMEU also points to the inclusion of this provision in the Joinery Award.
- 5.3.3 Under the training contract, which is nationally standardised document applying in all jurisdictions, it is already mandatory to ensure that the

⁷⁰ Refer to CFMEU’s *Submission regarding the Modern Awards Review - Apprentices, Trainees and Juniors* dated 31 January 2013, *Witness Statement of Liam O’Hearn* at [6]

⁷¹ NSW Training Act, section 7; QLD Training Act, section 52-54; WA Training Act, section 60F; SA Training Act, section 55-62, section 46, section 48

⁷² State Training Services NSW 2013, *A Guide to Apprenticeships and Traineeships in New South Wales*; Department of Training and Workforce Development Western Australia 2012, *Apprenticeships and Traineeships: A guide for employers*; Training and Apprenticeship Services – Department of Further Education, Employment, Science and Technology 2012, *South Australia’s Traineeship and Apprenticeship System Information Booklet*; Apprenticeships Info Queensland Government 2012, *Employer Responsibilities*

⁷³ NSW Training Act, section 7; QLD Training Act, section 52-54; WA Training Act, section 60F; SA Training Act, section 55-62, section 46, section 48

apprentice or trainee is provided with or has access to training consistent with the contract of training without loss of pay as stated below:

For the employer

I agree that I will:

- a) *employ and train the apprentice/trainee as agreed in our Training Plan and ensure the apprentice/trainee understands the choices that he/she has regarding the training*
- b) *provide the appropriate facilities and experienced people to facilitate the training and supervise the apprentice/trainee while at work, in accordance with the Training Plan*
- c) *make sure the apprentice/trainee receives on-the-job training and assessment in accordance with our Training Plan*
- d) *provide work that is relevant and appropriate to the vocation and also to the achievement of the qualification referred to in this Contract*
- e) **release the apprentice/trainee from work and pay the appropriate wages to attend any training and assessment specified in our Training Plan**
- f) *meet all legal requirements regarding the apprentice/trainee, including but not limited to, occupational health and safety requirements and payment of wages and conditions under the relevant employment arrangements*
- g) *repay any payment I receive that I am not entitled to*
- h) *work with our RTO and the apprentice/trainee to make sure we follow our Training Plan, keep training records up-to-date, and monitor and support the apprentice/trainee's progress; and*
- i) *let the relevant State/Territory Training Authority and the RTO know within five working days (or when the local State/Territory legislation requires, if this is different) if our Training Contract has become jeopardised.*

I acknowledge that it is an offence to use information in the Contract to discriminate against any person, including the apprentice/trainee.

[Emphasis added]

- 5.3.4 The Chambers submit that if there are instances where paragraph (e) is not complied with, this is a breach of the training contract and should be raised with the State/Territory training authority.
- 5.3.5 On this basis, the Chambers submit that the variation is unnecessary as it simply seeks to double-up on existing requirements that are adequately and appropriately dealt with by the State/Territory training authorities.
- 5.3.6 The fact that a similar provision may exist in another modern award is not a reason in itself to justify the inclusion of this provision in other modern awards.
- 5.3.7 The engagement of apprentices is already a highly regulated area and there is no evidence that the variation is necessary to achieve the modern awards

objective or that the provision is even capable of being included in modern awards.

5.4 Relevant Work & Qualifications

5.4.1 The applications by CFMEU, AMWU and CEPU seek to vary the eight modern awards set out in the table at paragraph 5.1.2 (bullet point 3) above to insert a provision that the employer must provide work that is relevant and appropriate to the vocation and also to the achievement of the qualification referred to in the apprentice's training contract.

5.4.2 This variation is already adequately dealt with in the legally binding training contract, in (d) below:

For the employer

I agree that I will:

- a) *employ and train the apprentice/trainee as agreed in our Training Plan and ensure the apprentice/trainee understands the choices that he/she has regarding the training*
- b) *provide the appropriate facilities and experienced people to facilitate the training and supervise the apprentice/trainee while at work, in accordance with the Training Plan*
- c) *make sure the apprentice/trainee receives on-the-job training and assessment in accordance with our Training Plan*
- d) **provide work that is relevant and appropriate to the vocation and also to the achievement of the qualification referred to in this Contract**
- e) *release the apprentice/trainee from work and pay the appropriate wages to attend any training and assessment specified in our Training Plan*
- f) *meet all legal requirements regarding the apprentice/trainee, including but not limited to, occupational health and safety requirements and payment of wages and conditions under the relevant employment arrangements*
- g) *repay any payment I receive that I am not entitled to*
- h) *work with our RTO and the apprentice/trainee to make sure we follow our Training Plan, keep training records up-to-date, and monitor and support the apprentice/trainee's progress; and*
- i) *let the relevant State/Territory Training Authority and the RTO know within five working days (or when the local State/Territory legislation requires, if this is different) if our Training Contract has become jeopardised.*

I acknowledge that it is an offence to use information in the Contract to discriminate against any person, including the apprentice/trainee.

[Emphasis added]

5.4.3 The Chambers submit that if there are instances where paragraph (d) is not complied with, this is a breach of the training contract and should be raised with the State/Territory training authority. The issues raised in the witness statements of Mr Kesby and Mr O'Hearn are mainly about compliance with

existing requirements and do not provide any specific support for the inclusion of the provision in the modern awards.⁷⁴

5.4.4 The Chambers further submit that there are already appropriate mechanisms that an apprentice/trainee has access to in the event of a dispute with their employer, for instance if the apprentice is of the view that the employer does not comply with section (d) in the training contract.⁷⁵ Grievances of this sort could be raised with the State Training authority or another appropriate body. For example in South Australia, the Office of the Training Advocate (**OTA**) provides confidential support and advice to all apprentices and trainees.⁷⁶

5.4.5 The Chambers also submit that the variation is unnecessary as it simply seeks to double-up on existing requirements that are adequately and appropriately dealt with by the State/Territory training authorities.

5.5 **Mentoring**

5.5.1 The applications by the CFMEU, AMWU and CEPU seek to vary the eight modern awards in the table set out above at paragraph 5.1.2, bullet point 4, to insert the relevant provision with respect to mentoring.

5.5.2 Whilst a sophisticated mentoring scheme is desirable for the purposes of apprentice retention, it may not be feasible for all employers, in particular small businesses, to make such a commitment.

5.5.3 To support mentoring the Australian Government has initiated a \$101 million Australian Apprenticeships Mentoring package which forms part of the Australian Government's initial response to the recommendations from the Expert Panel's Report. The package will support around 10,000 Australian apprentices through approximately 330 mentors. This initiative commenced in the 2011/2012 financial year. The initial year had \$10 million in funding with each additional year having \$19.8 million in funding until 2014-2015. The package aims to increase apprentice retention rates particularly in the first 12 months of training.⁷⁷

5.5.4 However, imposing this requirement on all employers that engage apprentices could discourage businesses, particularly small businesses, from engaging apprentices, simply because they would not have the staff available to actively mentor the apprentice. There are already extensive

⁷⁴ Refer to the CFMEU's *Submission regarding the Modern Awards Review - Apprentices, Trainees and Juniors* dated 31 January 2013, *Witness Statement of Liam O'Hearn*, *Witness Statement of Terry Kesby*

⁷⁵ State Training Services NSW 2013, *A Guide to Apprenticeships and Traineeships in New South Wales*, p 24, Department of Training and Workforce Development Western Australia 2012, *Apprenticeships and Traineeships: A guide for employers* p. 11.; Training and Apprenticeship Services – Department of Further Education, Employment, Science and Technology 2012, *South Australia's Traineeship and Apprenticeship System Information Booklet*; Apprenticeships Info Queensland Government 2012, "General Problems and what to do", <http://apprenticeshipsinfo.qld.gov.au/apprentices/advice-support/general-problems.html>

⁷⁶ <http://www.skills.sa.gov.au/apprenticeships-traineeships/already-an-apprentice-or-trainee/resolving-issues>

⁷⁷ <http://www.australianapprenticeships.gov.au/documents/MentoringGuidelines.pdf>

requirements on employers taking on apprentices, for example under the training contract, the employer is required to:

For the employer

I agree that I will:

a) *employ and train the apprentice/trainee as agreed in our Training Plan and ensure the apprentice/trainee understands the choices that he/she has regarding the training*

b) provide the appropriate facilities and experienced people to facilitate the training and supervise the apprentice/trainee while at work, in accordance with the Training Plan

[Emphasis added]

5.5.5 Imposing mentoring obligations on all employers of apprentices will further add to the regulatory and cost burden of business, contrary to section 134(1)(f) of the FW Act.

5.6 Training Facilities and facilitation of training by experienced people

5.6.1 As set out in the table above at paragraph 5.1.2, bullet point 6, the Applicants (i.e. the AMWU, CFMEU and CEPU) seek to include a provision requiring the employer to provide appropriate facilities and experienced people to facilitate the training while at work in accordance with the Training Plan.

5.6.2 This is also already a requirement of the training contract – a nationally standardised document applying in all jurisdictions, as shown in (b) below:

For the employer

I agree that I will:

a) *employ and train the apprentice/trainee as agreed in our Training Plan and ensure the apprentice/trainee understands the choices that he/she has regarding the training*

b) provide the appropriate facilities and experienced people to facilitate the training and supervise the apprentice/trainee while at work, in accordance with the Training Plan

c) *make sure the apprentice/trainee receives on-the-job training and assessment in accordance with our Training Plan*

d) *provide work that is relevant and appropriate to the vocation and also to the achievement of the qualification referred to in this Contract*

e) *release the apprentice/trainee from work and pay the appropriate wages to attend any training and assessment specified in our Training Plan*

f) *meet all legal requirements regarding the apprentice/trainee, including but not limited to, occupational health and safety requirements and payment of wages and conditions under the relevant employment arrangements*

- g) repay any payment I receive that I am not entitled to*
- h) work with our RTO and the apprentice/trainee to make sure we follow our Training Plan, keep training records up-to-date, and monitor and support the apprentice/trainee's progress; and*
- i) let the relevant State/Territory Training Authority and the RTO know within five working days (or when the local State/Territory legislation requires, if this is different) if our Training Contract has become jeopardised.*

I acknowledge that it is an offence to use information in the Contract to discriminate against any person, including the apprentice/trainee.

[Emphasis added]

5.6.3 In addition, this requirement is also specifically provided in various State and Territory training laws. For example, in Queensland section 79 of the QLD Training Act states that:

79 Employer to provide facilities

The employer of an apprentice or trainee must provide, or arrange to provide, to the apprentice or trainee the facilities, range of work, supervision and training required under the training plan for the apprentice or trainee.

5.6.4 In the NSW Training Act a similar provision is contained in section 13(1)(a):

13 Duties of employers under apprenticeships and traineeships

(1) The employer of an apprentice or trainee must, in accordance with the relevant training plan, take all reasonable steps:

- (a) to enable the apprentice or trainee to receive the work-based component of the required training, in particular **by providing all necessary facilities and opportunities to acquire the competencies of the vocation concerned.***

[Emphasis added]

5.6.5 The variation is opposed as it once again would add further regulation that it already provided for by each State or Territory. Therefore, the variation is unnecessary and is duplicative.

5.7 Supervision consistent with the health and safety requirements

5.7.1 As set out in the table above at paragraph 5.1.2, bullet point 6, the Applicants (i.e. the AMWU, CFMEU and CEPU) seek to insert a provision stating that an apprentice shall not be left unsupervised consistent with the health and safety requirements of the job being performed and the competence of the apprentice.

5.7.2 AMWU submits⁷⁸ that the variation reflects the existing requirements under the training contract – a nationally standardised document applying in all jurisdictions, in (f), (b) and (h) as included below:

⁷⁸ Refer to the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, p.27
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For the employer

I agree that I will:

- a) employ and train the apprentice/trainee as agreed in our Training Plan and ensure the apprentice/trainee understands the choices that he/she has regarding the training
- b) provide the appropriate facilities and experienced people to facilitate the training and supervise the apprentice/trainee while at work, in accordance with the Training Plan
- c) make sure the apprentice/trainee receives on-the-job training and assessment in accordance with our Training Plan
- d) provide work that is relevant and appropriate to the vocation and also to the achievement of the qualification referred to in this Contract
- e) release the apprentice/trainee from work and pay the appropriate wages to attend any training and assessment specified in our Training Plan
- f) **meet all legal requirements regarding the apprentice/trainee, including but not limited to, occupational health and safety requirements and payment of wages and conditions under the relevant employment arrangements**
- g) repay any payment I receive that I am not entitled to
- h) **work with our RTO and the apprentice/trainee to make sure we follow our Training Plan, keep training records up-to-date, and monitor and support the apprentice/trainee's progress;** and
- i) let the relevant State/Territory Training Authority and the RTO know within five working days (or when the local State/Territory legislation requires, if this is different) if our Training Contract has become jeopardised.

I acknowledge that it is an offence to use information in the Contract to discriminate against any person, including the apprentice/trainee.

[Emphasis added]

- 5.7.3 Replicating and repeating requirements already covered in the training contract, State/Territory Training laws and guidelines⁷⁹ and Work Health and Safety laws,⁸⁰ shows that the variation is not necessary as it will simply double-up on existing requirements.
- 5.7.4 The variation would turn work health and safety into an industrial matter, whereby employers may have dual responsibilities and obligations under both State and Territory Work Health and Safety Acts as well as under modern awards. This will not improve safety outcomes, but will simply add to the regulatory burden and create confusion and uncertainty whether work health and safety is a matter regulated by the States or Territories or

⁷⁹ Training and Skills Commission – Government of South Australia 2010, *Guidelines For Persons Who Supervise Apprentices or Trainees*; QLD Training Act, section 79, NSW Training Act, section 13, WA Training Act, section 60E

⁸⁰ Work Health and Safety Act 2011 (NSW); Work Health and Safety Act 2011 (QLD); Work Health and Safety Act 2012 (SA); Occupational Health and Safety Act 1984 (WA)

an industrial matter regulated by the national industrial relations commission through modern awards.

5.7.5 In support of the variation, the AMWU⁸¹ refers to the Full Bench Decision [2012] FWA FB 10080 regarding work health and safety issues in relation to the BCGOS Award and claims that the decision has established that occupational health and safety provisions may be included in an award. That is a mischaracterisation of the decision, as the Full Bench made no general finding that work health and safety matters are capable of being included in modern awards under section 139(1) of the FW Act. Rather, the Full Bench determined that the specific provisions in question were dealing with matters specified in section 139(1) of the FW Act.

5.7.6 Further, the AMWU refers to the witness statement of Ms Vallance who refers to a number of prosecutions over breaches of the work health and safety laws and expresses an opinion that “*industrial instruments tend to be more understood [...] than health and safety instruments.*”⁸² In the absence of any verifiable data from the relevant health and safety authorities, the Chambers assert that Ms Vallance’s evidence simply represents an opinion.

5.8 Fees and Training Materials

5.8.1 As set out in the table above at paragraph 5.1.2, bullet point 7, the Applicants (i.e. the AMWU, CFMEU and CEPU) seek to insert a provision requiring employers to pay training fees and text books associated with attending TAFE or an alternative registered training provider .

5.8.2 The Manufacturing Award, Electrical Award, Joinery Award, BCGOS Award and Sugar Award currently require the employer to reimburse the apprentice for all fees paid attending technical colleges, RTO or TAFE provided satisfactory reports are provided. The applications (as set out in the table above at 5.1.2, bullet point 7) seek to reverse this by requiring the employer to pay the fees up-front as well as the textbooks without the requirement that satisfactory progress is proven.

5.8.3 The variation will increase the cost burden on employers by adding the cost of books and materials to the employer’s expenses. As shown by the NCVER,⁸³ the cost of directly hiring an apprentice can be well in excess of \$200,000 over the life of the apprenticeship. Further adding to this cost of the apprenticeship will make businesses, particularly small businesses, less likely to engage apprentices. Increasing the costs would undermine the achievement of the modern awards objective, in particular taking into account section 139(1)(f) of the FW Act (i.e. the likely impact of any exercise

⁸¹ Refer to the AMWU’s *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, p.27

⁸² Refer to the AMWU’s *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, *Schedule of Witnesses, Witness Statement of Deborah Vallance* at [22]-[23]

⁸³ Nechvoglod, Karmel and Saunders 2009, *The Cost of Training Apprentices*, NCVER Adelaide

of modern award powers on business, including on productivity, employment costs and the regulatory burden).

- 5.8.4 Removing the requirement that an apprentice prove satisfactory progress before being reimbursed, means that an employer is simply expected to pay all the costs up-front without any requirement on the apprentice having to make satisfactory progress. In the case an apprentice failed their units, failed to attend the required training or wished to cancel the apprenticeship during the probationary period, the employer having paid the training fees, textbooks and materials, would have no recourse and would unnecessarily have incurred these costs.
- 5.8.5 Witness statements have been provided stating that despite relevant award conditions, the costs are not reimbursed to the apprentice.⁸⁴ This is simply a matter of enforcement and compliance and does not demonstrate that the variation is necessary.
- 5.8.6 Requiring employers to pay training fees and costs of text books and materials would place an unreasonable burden on employers, particularly small businesses. The costs are not incurred in the apprentice's course of their employment with the employers, but are the result of the apprentice agreeing to the training contract – a nationally standardised document applying in all jurisdictions, that requires the apprentice to:

I agree that I will:

- a) *attend work, do my job, and follow my employer's instructions, as long as they are lawful*
- b) work towards achieving the qualification stated in our Training Contract**
- c) undertake any training and assessment in our Training Plan.**

- 5.8.7 The responsibilities of the employer under the training contract centres around the provision of on-the-job training, allowing the apprentice to attend any off-the-job training, supervising the apprentice and providing appropriate facilities.
- 5.8.8 The fact that some modern awards including Manufacturing Award, Electrical Award and Joinery Award currently contain a provision requiring training costs to be reimbursed does not mean that such provisions are capable of being included in modern awards under section 139 of the FW Act in the first place. In the Award Modernisation Process, the decisions or statements of the Full Bench rarely, if ever, discussed and assessed specific provisions against the requirements in section 576J and 576M (i.e. as an incidental term) of the then Workplace Relations Act 1996.

⁸⁴ Refer to the CFMEU's *Submission regarding the Modern Awards Review - Apprentices, Trainees and Juniors* dated 31 January 2013, *Witness Statement of Liam O'Hearn*, *Witness Statement of Terry Kesby*
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- 5.8.9 The proposed variation therefore must be assessed against the requirements in section 136 of the FW Act to determine whether a provision requiring training fees and the costs of textbooks and materials to be paid by the employer can be validly included.
- 5.8.10 The Applicants contend that the variation is a “good employment condition” (AMWU),⁸⁵ that it is unrealistic to expect apprentices to pay training fees (CFMEU)⁸⁶ and that it will assist apprentices (CEPU).⁸⁷ However, no details have been provided to show that the provision falls under the terms that can be included in modern awards.
- 5.8.11 The Chambers submit that the provision sought does not fall within the scope of section 139(1) of the FW Act. It does not relate to section 139(1)(g) of the FW Act (i.e. allowances) as the training fees and cost of textbooks cannot be classified as (i) “*expenses incurred in the course of employment*” and do not relate to responsibilities or skills (ii) or disabilities associated with particular tasks (iii).
- 5.8.12 The Applicants have sought to justify their other variations under the Common Claims Schedule 5 – Training Requirements in the context of section 139 of the FW Act by claiming that an apprenticeship is a type of employment for the purposes of section 139(1)(b) of the FW Act. However, as pointed out in 4.3.12 in these submissions, apprenticeships are not a standard employment category, but have a unique industrial character given that they are subject to a training contract binding both parties for a period of time and requiring the approval of third party. This variation therefore does not deal with the matter of employment types. Even if the FWC would find to the contrary, the Chambers submit that the payment of course fees and payment for textbooks and materials neither is an integral part of section 139(1)(b) of the FW Act, nor is an incidental matter “*essential for the purpose of making a particular term operate in a practical way*”, under section 142 of the FW Act.

5.9 Labouring Work

- 5.9.1 As set out in the table at paragraph 5.1.2 above (bullet point 8), the AMWU seeks to include a provision restricting labouring to instances “where this genuinely forms part of their training and broader skills development” and “where the genuine need arises”.⁸⁸

⁸⁵ Refer to the AMWU’s *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, p 29

⁸⁶ Refer to the CFMEU’s *Submission regarding the Modern Awards Review - Apprentices, Trainees and Juniors* dated 31 January 2013 at [6.7]

⁸⁷ Refer to the CEPU’s *Submissions: Applications to Vary Multiple Awards re Apprentices* dated 31 January 2013, p 94

⁸⁸ Refer to the AMWU’s *Further amended application to vary the Sugar Industry Award 2010* dated 21 November 2012
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5.9.2 The Chambers note that the AMWU has not pressed the matter of labouring work in their submissions at this time⁸⁹.

5.10 Section 139 of the FW Act

5.10.1 In a number of the variations sought, the Applicants (AMWU, CFMEU and CEPU) provide no details to demonstrate that the variations are capable of being included in modern awards. For example, no explanation is given by the applicants⁹⁰ on what basis variation 1 – contract of training and variation 2 – training without loss of pay are matters that can be included in modern awards. Where the applications seek to replicate an existing provision, the FWC must still be satisfied that the matter falls under the terms in section 136 of the FW Act that may be included in modern awards.

5.10.2 In the instances where the Applicants provide references to section 139(1) of the FW Act these are very brief and lack detail.

5.10.3 The ACTU contends that all of the variations set out in Schedule 5 of the Table of Common Claims deal with matters provided for in sections 139(1)(b)(i.e. types of employment), 139(1)(a)(i) (i.e. skilled based classification structures) and 139(1)(g) (i.e. allowances) of the FW Act.⁹¹

5.10.4 The Chambers submit that this cannot be correct. None of the variations sought relate to the duties and work to be performed by apprentices, the purposes of determining pay and conditions, or are characteristics that are necessary to include in order to determine whether a person is an apprentice or not. Rather, the variations impose a number of requirements on the employer in relation to supervision, facilities, health and safety, access to training and mentoring. There is no evidence that the intention of section 139(1)(a)(i) of the FW Act is to enable modern awards to regulate work health and safety, facilities and the provision of mentoring. None of these requirements are commonly found in classification structures or appear to have been included elsewhere in modern awards under section 139(1) of the FW Act.

5.10.5 As discussed in the submission on fees and training materials above, provisions requiring the payment of course fees, textbooks and materials do not fall under section 139(1)(g) of the FW Act. These expenses are not incurred in the course of employment as it is not a requirement by the employer that the apprentice attends the training or purchase the books or materials, but a requirement under the training contract with the State/Training authority.

⁸⁹ Refer to the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, p 26

⁹⁰ Refer to the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013; Refer to the CFMEU's *Submission regarding the Modern Awards Review - Apprentices, Trainees and Juniors* dated 31 January 2013; Refer to the CEPU's *Submissions: Applications to Vary Multiple Awards re Apprentices* dated 31 January 2013

⁹¹ Refer to ACTU *Submission regarding Apprenticeship Wage Review* dated January 2013, p 16

- 5.10.6 As none of the terms in section 139(1)(a)-(j) of the FW Act could be read to support the inclusion of any of the variations sought by the applicants, the Chambers respectfully request that the applications are dismissed.

6.0 Payment for specific costs associated with attending training, and when training time is work time, and what follows from this – Schedules 6 and 7 of Table of Common Claims

When training time is work time, and what follows from that

Proposed Amendments

- 6.1 The Chambers oppose the variations requested in Schedule 7 of the Table of Common Claims made by the ACTU on behalf of the AMWU, the CFMEU and the CEPU that would amend the operation of the specified modern awards with respect to apprentices with the effect that training is work time (including travel to attend training). For example, the amendments propose that:
- 6.1.1 Time spent by an *apprentice* to attend off-the-job training or other employer endorsed training (including travel to that training) shall be work time for all purposes of the award. Without limiting the generality of this provision, it includes payment of wages, continuity of employment and the payment of the fares and travel allowance; and
- 6.1.2 An entitlement to any leave entitlement under this award or the NES accrues during training time.
- 6.2 The Chambers oppose these variations on the basis that implementing them:
- 6.2.1 would require a significant departure from the existing position in the modern awards in this respect, and would negatively impact on both employers and apprentices;
- 6.2.2 would be inconsistent with recent legal decisions that have specifically dealt with the question of whether training time is work time, and which will be explored below;
- 6.2.3 would result in the awards failing to achieve the modern awards objective; and
- 6.2.4 create uncertainty.

Claims Supported

- 6.3 With respect to the claims in Schedule 7 of the Table of Common Claims (as set out above), the Chambers support an entitlement to leave entitlements accruing under the relevant award or the NES during training time if the training occurs during ordinary hours, and not during associated travel time.
- 6.4 The Chambers also support the variation sought by the Australian Industry Group (AiG) in Schedule 7 of the Table of Common Claims with respect to the National Training Wage Schedule.⁹² The variations being sought are to the effect that training is work time (excluding travel to attend training). For example, time spent by a *trainee* in attendance at training and assessment specified in the training contract is to be regarded as time worked.
- 6.5 The Chambers consider that the variations requested by AiG in its application with respect to clauses X.6.2, X.6.3 and X.6.4 of the National Training Wage Schedule would overcome a number of interpretation problems that have arisen in relation to these clauses since the National Training Wage Schedule has been in operation.

Consideration of proposed variations to awards

- 6.6 The proposed variations entail amendments to existing clauses, or the addition of new clauses, in specified modern awards that would extend to apprentices operating under those awards the benefit of award provisions that entitle employees to travel allowances and expenses when they undertake work away from their usual workplace.
- 6.7 These variations involve significant changes to the content of the awards and the manner in which they deal with apprentices that were not made or agreed to during the award modernisation process.
- 6.8 This submission will look more closely at one of the modern awards at the subject of these claims for variations.

Manufacturing Award

- 6.9 The AMWU has made an application to vary the Manufacturing Award⁹³ as set out by the ACTU in Schedule 7 of the Table of Common Claims. The proposed variation would see the existing clause 15.11 be deleted, and replaced with a new clause 15.1 that states:

⁹² AM2012/128 – Application by the Australian Industry Group to vary the National Training Wage

⁹³ AM2012/109 - Application by the Australian Manufacturing Workers' Union to vary the *Manufacturing and Associated Occupations and Industries Award (2010)*

6.9.1 Except where otherwise expressly stated:

- (1) Time spent by an apprentice to attend off-the-job training shall be work time for all purposes of the award. Without limiting the generality of this provision, it includes payment of wages, continuity of employment and the payment of fares and travel allowance.
- (2) An entitlement to any leave entitlement under this award or the NES accrues during training time.
- (3) Redundancy provisions do not apply to apprentices.

6.10 Clause 15.14 of the Manufacturing Award provides that an “employer must provide and/or provide access to training consistent with the training agreement without loss of pay’, while clause 15.15 requires that apprentices ‘attending technical colleges or schools or RTO or TAFE and presenting reports of satisfactory progress must be reimbursed all fees paid by them”.

6.11 Therefore, under the Manufacturing Award apprentices are paid to attend training that is undertaken in accordance with the training agreement, and will have the cost of this training paid for (that is, the time that is actually spent in training as set out in the trainee’s training agreement). As such, they are protected from ‘loss of pay’ or ‘continuation of employment’ whilst undertaking training.

6.12 The Manufacturing Award makes clear that while apprentices are entitled to be paid whilst attending training as required by their training contract, the distinction between ‘work’ and ‘training’ is maintained.

6.13 In light of this, these variations seem to have been proposed in recognition of the lack of common law support for an interpretation of ‘work’ as including ‘training’ undertaken by apprentices (see CFMEU case referred to in paragraphs 6.15 to 6.17 below). By seeking variations to the Manufacturing Award, and other specified awards, to the effect that training time is work time, entailing payment of wages, continuity of employment and the payment of the fares and travel allowance, the ACTU, the AMWU and other union applicants are apparently trying to insert in these awards a new and independent source of travel allowances and compensation for travel expenses for apprentices.

6.14 We consider that the CFMEU case remains authoritative in this regard. The reasoning in that case and its relevance to the variations being sought will be explored below.

CFMEU v Master Builders Training Scheme

- 6.15 In *CFMEU v Master Builders Training Scheme Inc* [2007] FCAFC 165 (**CFMEU case**), the Full Federal Court held that the long accepted nature of a contract of apprenticeship, the language of the relevant award and the purpose for which the fares and travel patterns allowance was paid to employees all suggested that an apprentice attending trade school would not be entitled to the fares and travel patterns allowance that a person 'employed at work' would have received under the award.⁹⁴
- 6.16 The Court found that an apprentice who attends trade school as required by their training contract was not 'employed at work' within the meaning of the relevant award. It was noted that under the award, the fares and travel patterns allowance was paid to employees for travel patterns and costs peculiar to the industry which include 'mobility requirements on employees and the nature of employment on construction work'.
- 6.17 Therefore, the apprentice's travel to trade school did not involve travel patterns and costs peculiar to the building industry, and was not specific to the nature of employment on construction projects.
- 6.18 In *Rohrlach v Career Employment Group Inc* [2012] SAIR Comm 11 (**Rohrlach**), the South Australian Industrial Relations Commission (**SAIRC**) considered a similar matter with respect to the Manufacturing Award. The SAIRC noted the importance of the distinction drawn between 'work' and 'training' in the CFMEU case, and maintained this distinction in its decision to dismiss an apprentice's claim for travel expenses associated with attending trade school.
- 6.19 Here, it was claimed that clause 15.1 of the Manufacturing Award, which provided that 'the terms of this award apply to apprentices...except where otherwise stated', entitled apprentices who had to travel to trade school as part of their training contract to the benefit of clauses 32.4 and 32.5 of the Manufacturing Award, which in turn conferred an entitlement on employees to allowances and reimbursements of expenses they incurred while undertaking 'work at a job away from the employer's usual workplace'.
- 6.20 The SAIRC held that this clause was confined to employees engaging in the provision of labour for the benefit of their employer, as distinct from 'training'.
- 6.21 This was found not to be inconsistent with clause 15.14 of the Manufacturing Award, which requires employers to provide access to training required by the training contract without loss of pay. This clause required the payment of wages while the apprentice was in attendance at training. It did not give rise to an implied obligation

⁹⁴ [2007] FCAFC 165, 21

on the part of the employer to meet costs associated with the apprentice's attendance at training.

CEPU v Exelior Pty Ltd

6.22 *CEPU v Exelior Pty Ltd* [2012] FMCA 621 considered the interaction between the *Telecommunications Services Award 2010* and the National Training Wage Schedule.

Clause E.6.3 of the NTW Schedule provided that:

Time spent by a trainee, other than a trainee undertaking a school-based traineeship, in attending any training and assessment specified in, or associated with, the training contract is to be regarded as time worked for the employer for the purposes of calculating the trainee's wages and determining the trainee's employment conditions.

6.23 While the CEPU argued that clause E.6.3 was a 'definitional clause' that modified the meaning of 'work' in the award so that it included 'training', Cameron FM held that the effect of clause E.6.3 did not operate to change the definition of 'work' in the award, noting that there was a historical distinction between training and work that had underpinned a number of previous decisions (including the *CFMEU Case*).⁹⁵

6.24 Consequently, while the award required trainees be paid while in attendance at training, no allowances were payable to trainees who were required to travel for training purposes.

6.25 The CEPU has appealed this decision, and the appeal is due to be heard by the Federal Court in March of this year.

Implications of case law

6.26 Beginning with the *CFMEU case*, there is clearly a consistent thread in the case law on the issue of when training time is work time, and the implications this has on employers' obligations toward apprentices.

6.27 While the *CFMEU case* pre-dates the commencement of the modern awards, the Federal Court's finding that there exists a historical distinction between 'work' and 'training' has found support in subsequent decisions, namely *CEPU v Exelior*, and *Rohrlach*, where this historical distinction was noted to have been evinced in the language of the *Manufacturing Award* and the *Telecommunications Services Awards*.

6.28 The variations being sought by the ACTU on behalf of union applicants are not only at a disjuncture with this case law, but appear to have very limited support generally in the common law or in relevant industrial decisions.

⁹⁵ [2012] FMCA 621, 58-59

Implications of implementing the proposed variations

- 6.29 If the proposed variations are made to the specified modern awards, there will potentially be significant negative consequences for both employers and apprentices, including:
- 6.29.1 Cost increases for employers in taking on new apprentices that may act as a deterrent to doing so in the future. These cost increases could include additional wages payable for travel time and additional overtime costs. Any increases in the cost to employers of taking on an apprentice could serve to weaken already dwindling commencement figures for apprentices and trainees. Early trend estimates from the NCVER show a declining trend in the number of apprenticeship and trainee commencement levels, with commencements in the December 2012 Quarter at their lowest levels since the September 2009 Quarter.⁹⁶
 - 6.29.2 Uncertainty for employers about what their apprentice's wages will be, as the wages paid for time spent travelling to training will vary depending on where an apprentice resides, where they undertake training and how they travel there.
 - 6.29.3 Higher youth unemployment and increased skills shortages that may result from employers taking on less employees in training roles as the costs associated with doing so rise.
 - 6.29.4 Compliance problems for employers in ascertaining the correct number of hours for which they must pay apprentices. It may be problematic for employers to verify how long apprentices spend travelling to and from work, particularly if they use different means of transportation each time they travel.
 - 6.29.5 As a corollary of the compliance difficulties that employers may experience in ascertaining the correct numbers of hours for which they must pay their apprentices, there may also be enforcement difficulties for the Fair Work Ombudsman (**FWO**) in seeking to ensure that apprentices are being correctly paid.

Jurisdictional and related issues

- 6.30 The proposed variations would result in the specified modern awards failing to meet the modern awards objective as set out in section 134(1) of the FW Act, including:

⁹⁶ NCVER (2013) *Apprentices & Trainees: Early trend estimates – December Quarter 2012*. Available from: www.ncver.edu.au/publications/2600.html

- 6.30.1 The need to promote social inclusion through increased workforce participation (i.e. section 134(1)(c) of the FW Act). For example, the proposed variations would potentially disadvantage employers and young people in regional, rural and remote areas: if employers were required to pay apprentices for travel time and travel expenses, this would constitute a significant disincentive for engaging trainees and apprentices.
- 6.30.2 The need to promote flexible modern work practices and the efficient and productive performance of work (i.e. section 134(1)(d) of the FW Act).
- 6.30.3 The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (i.e. section 134(1)(f) of the FW Act). For example, the proposed variations are likely to negatively affect businesses by requiring more expenditure on unproductive activities such as travel and accommodation costs for apprentices.
- 6.30.4 The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (section 134(1)(h) of the FW Act). For example, the proposed variations have the potential to deter employers from engaging apprentices, while the increase in employment costs that they may result in could affect the sustainability, performance and competitiveness of Australian employers.
- 6.31 The proposed variations may also operate to create uncertainty about the extent of employers' obligations to their apprentices.

Variations to the National Training Wage Schedule

6.32 The application by AiG to vary clauses X.6.2, X.6.3 and X.6.4 of the National Training Wage Schedule (**NTW Schedule**) to clarify their original intent, and to prevent these clauses being used as the basis for claims that trainees travelling to off-the-job training are entitled to payment for time spent travelling and travelling expenses.

6.33 AiG is seeking clauses X.6.2, X.6.3 and X.6.4 to be amended as follows:

X.6.2 'A trainee is entitled to be released from work without loss of continuity of employment and to the payment of the appropriate wages ~~to attend~~ when in attendance at any training and assessment specified in, or associated with, the training contract.'

X.6.3 'Time spent by a trainee, other than a trainee undertaking a school-based traineeship, ~~is attending any in attendance at~~ in attendance at training and assessment specified in, or associated with, the training contract is to be regarded as time worked for the employer for the purposes of calculating the trainee's wages and determining the trainee's employment conditions'.

X.6.4 *'Subject to clause X.3.5 of this schedule, all other terms and conditions of this award that are applicable to the trainee, apply to a trainee unless specifically varied by this schedule.'*

- 6.34 The Chambers support AiG's requested variations on the basis that the NTW Schedule:
- 6.34.1 Contains anomalies and technical problems arising from the Part 10A award modernisation process (item 6(2)(b) of Schedule 5 of the TPCA Act);
 - 6.34.2 Does not achieve the modern awards objective (section 134(1) of the FW Act); and
 - 6.34.3 Creates ambiguity and uncertainty.
- 6.35 These clauses are based on provisions of the National Training Wage Award 2000 (**NTW Award 2000**), and according to AiG's application were intended to operate in a similar manner to the earlier provisions. Clauses X.6.2 and X.6.3 are both designed to make clear that trainees are entitled to be paid for the time spent in off-the-job training.
- 6.36 Sub-clause X.6.3 was added following submissions by the Queensland Government and the ACTU, who were concerned that clause X.6.2 did not adequately protect trainees who may be directed to undertake off-the-job training outside of ordinary working hours (which, for example, would have implication for a trainee's overtime payments).
- 6.37 AiG's application in which it seeks the variations (AM 2012/128) demonstrates that the intent of the Queensland Government and the ACTU was to ensure that the time spent by an employee 'in training' would be recognised as time worked for the purposes of the hours of work and overtime provisions of the award. AiG has submitted that it was on this basis that employer groups did not object to the inclusion of these clauses.
- 6.38 The subsequent efforts by the CEPU (and now the ACTU and other unions) to expand these clauses to entitle trainees to be paid for time spent travelling to, or expenses while travelling to, such training, are inconsistent with the intention behind the development of these clauses. This is because they result in anomalous consequences including:
- 6.38.1 The CEPU's interpretation of 'to attend' in X.6.2 would mean that a trainee is entitled to be paid for the time spent on travel to work (using whatever means they choose, e.g. public transport, car, bicycle, etc) so that the entitlements of each trainee would differ depending upon how far away from the off-the-job training facility they lived, entitlements would change

each time an apprentice moved to a different home or used different means of transport, and employers and the FWO would have no way of accurately determining the entitlements of employees.

- 6.38.2 The CEPU's interpretation of 'in attending' in clause X.6.3 would mean that a trainee is entitled to have time spent travelling to training (again, using whatever means they choose) included within the ordinary working hours of each trainee. As such, a trainee who spent 38 hours in attendance at a TAFE in a given week would be entitled to overtime payments for the number of hours spent travelling that week.
- 6.38.3 The CEPU's interpretation of clause X.6.4 is that all terms and conditions of an award are applicable to a trainee regardless of whether such provisions are appropriate.
- 6.38.4 With respect to clause X.6.4, AiG submits that the ACTU is seeking to attribute a different interpretation than the one that was intended by the parties involved when the terms of the NTW Schedule were determined in late 2009 (noting that previous versions of clause X.6.4 in the NTW Award 2000 only entitled trainees to the benefit of 'applicable' provisions in the relevant modern award). The ACTU did not give any indication at that time that it intended clause X.6.4 to operate differently from its predecessor in the NTW Award 2000. For example, as noted above, travelling allowances in an award were held in the CFMEU case not to be applicable to trainees and apprentices who attend off-the-job training because training is not 'work'.

CEPU v Excelior

6.39 In *CEPU v Excelior*, the CEPU sought to apply a different interpretation of sub-clauses X.6.2, X.6.3 and X.6.4 than that agreed upon in the drafting of these clauses.

- 6.39.1 Specifically, the CEPU submitted that:
- i. Clause E.6.3 deemed time spent in training to be time worked so that for the purpose of calculating entitlements under the Telecommunications Services Award, Schedule E modified the meaning of 'work' to include training (thus displacing the common law position identified in the CFMEU Case).
 - ii. Because clause E.6.3 spoke of the time a trainee spent 'in attending any training and assessment specified in, or associated with, the training contract', it governed not only the time spent attending training and assessment but also time associated with it.

- iii. As clause 17.1 of the award extended travel entitlements to time spent and expenses incurred in the course of an employee's work, and because training and associated activities were deemed by E.6.3 to be 'work', training and associated activities attracted the entitlements which 17.1 provided.
- 6.39.2 These arguments were rejected by Cameron FM, who held that:
- i. Clause E.6.3 did not change the definition of 'work' in the award to include 'training'. Cameron FM followed the reasoning in the CFMEU case and noting that apprenticeship and training arrangements have two components – work and training. Clause E.6.3 is best understood as dealing with the remuneration of trainees for the time they spend in training and with the establishment of a mechanism to effect this (i.e. in absence of clause E.6.3, a trainee would not be paid for time spent in training).
 - ii. Cameron FM also noted that clause E.6.3 does not say that 'training attended by a trainee is to be regarded as work undertaken for the employer' (emphasis added). By deeming time spent in training to be time worked and by not deeming training to be work, E.6.3 recognises and maintains the distinction between training and work established in CFMEU. Therefore, it does not alter the meaning of 'work' where it appears in clause 17.1.

Implications of the CEPU's interpretation of the NTW Schedule clauses

- 6.40 It is important that these variations are made. Despite the apparently clear intent behind the drafting of the relevant clauses and the decision handed down *CEPU v Excelior*, union applicants, including the ACTU, CEPU and others, appear to be intent on pursuing a contrary interpretation that yields anomalous and undesirable results.
- 6.41 If the proposed variations are not made to the NTW Schedule (and the CEPU's interpretation of the clauses is adopted) there will potentially be significant negative consequences for both employers and trainees, including:
- 6.41.1 Cost increases for employers in taking on trainees that may act as a deterrent to doing so in the future. These cost increases could include additional wages payable for travel time and additional overtime costs. Any increases in the cost to employers of taking on a trainee could serve to weaken already dwindling commencement figures for trainees. Early trend estimates from the NCVET show a declining trend in the number of

apprenticeship and trainee commencement levels, with commencements in the December 2012 Quarter at their lowest levels since the September 2009 Quarter.⁹⁷

- 6.41.2 Uncertainty for employers about what their trainees' wages will be, as the wages paid for time spent travelling to training will vary depending on where a trainee resides, where they undertake training and how they travel there.
- 6.41.3 Higher youth unemployment and increased skills shortages that may result from employers taking on less employees in training roles as the costs associated with doing so rise.
- 6.41.4 Compliance problems for employers in ascertaining the correct number of hours for which they must pay trainees. It may be problematic for employers to verify how long trainees spend travelling to and from work, particularly if they use different means of transportation each time they travel.
- 6.41.5 As a corollary of the compliance difficulties that may be experienced by employers, and logistical issues that they may confront in ensuring that their trainees' hours are calculated correctly, there may be enforcement difficulties for the FWO in seeking to ensure that trainees are being correctly paid.

Jurisdictional and related issues

- 6.42 The proposed variations are required to correct anomalies that have arisen in respect of the clauses as they are currently drafted.
- 6.43 Clauses X.6.2 and X.6.3 should be varied because the CEPU, a major union, is pursuing an interpretation of these clauses that conflicts with submissions made by ACTU in support of those provisions (and certain interpretations thereof).
- 6.44 With regard to clause X.6.4, problems have arisen as a result of the way in which it was drafted by the ACTU on the basis that it would have the same effect as the previous version of this clause under the NTW Award 2000 (which provided that trainees would only be subject to applicable provisions under an award). Clause X.6.4 was drafted using more simple drafting; however, AiG submits that the ACTU never evinced any intention that clause X.6.4 would operate so that all provisions of an award would be applicable to apprentices unless otherwise specified. This is having anomalous consequences, and should be varied accordingly.

⁹⁷ NCVET (2013) *Apprentices & Trainees: Early trend estimates – December Quarter 2012*. Available from: www.ncver.edu.au/publications/2600.html

- 6.45 Without the proposed variations being made, clauses X.6.2, X.6.3 and X.6.4 do not meet the modern awards objective as set out in section 134(1) of the FW Act, including:
- 6.45.1 The need to promote social inclusion through increased workforce participation (i.e. section 134(1)(c) of the FW Act. The proposed variations would potentially disadvantage employers and young people in regional, rural and remote areas: if employers were required to pay trainees for travel time and travel expenses, this would constitute a significant disincentive for engaging workers in a training capacity.
 - 6.45.2 The need to promote flexible modern work practices and the efficient and productive performance of work (i.e section 134(1)(d) of the FW Act).
 - 6.45.3 The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (i.e. section 134(1)(f) of the FW Act). The proposed variations are likely to negatively affect businesses by requiring more expenditure on unproductive activities such as travel and accommodation costs for apprentices.
 - 6.45.4 The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (i.e. section 134(1)(h) of the FW Act). The proposed variations have the potential to deter employers from engaging trainees, while the increase in employment costs that they may result in could affect the sustainability, performance and competitiveness of Australian employers.
- 6.46 The proposed variations are necessary because the clauses currently create ambiguity.
- 6.47 In its submission, AiG has advanced a strong rival contention that the interpretation being pursued by the CEPU is 'arguable'.⁹⁸ It is therefore possible to determine that ambiguity exists with respect to the clauses and that they should be varied in order to remedy this.
- 6.48 The variations are necessary because the clauses create uncertainty.
- 6.48.1 It is clear that the interpretations of clauses X.6.2, X.6.3 and X.6.4 by the CEPU (and now the ACTU and other unions) have created uncertainty as to what the correct interpretation of the clauses are, and what employers' compliance obligations are in this respect. Given that the interpretation

⁹⁸ See *Tenix Defence Pty Ltd* [PR917548] 28,29

sought by the CEPU differs from that issued by the courts, it is important that employers have certainty about the extent of the employment costs associated with current and future trainees.

6.48.2 The variations proposed are in accordance with the original intent of the clauses and subsequent judicial interpretations thereof.

Payment for specific costs associated with attending training

6.49 The question of whether employees are required to pay for specific costs associated with attending training has already been discussed in the context of whether 'work' includes 'training' with respect to apprentices and trainees (see above).

6.50 The Chambers oppose the variations proposed in Schedule 6 of the Table of Common Claims prepared by the ACTU with respect to specified awards for apprentices, trainees and juniors, namely that:

6.50.1 Payment of all fares and travelling time associated with off-site training, in excess of that normally spent travelling to and from the usual place of work and usual residence; and

6.50.2 Where off-the-job training involves block release training away from home, all other reasonable expenses should be paid (or reimbursed) such as lodging for overnight absences.

6.51 The Chambers oppose the proposed variations on the basis that implementing them:

6.51.1 Would require a significant departure from the existing position in the modern awards in this respect, and would negatively impact on both employers and employees;

6.51.2 Would be inconsistent with recent judgments that have specifically dealt with the question of whether employers must pay the costs associated with the training costs of apprentices and trainees, and which will be explored below; and

6.51.3 Would result in the awards failing to achieve the modern awards objective.

CEPU v Excelior

6.52 In *CEPU v Excelior Pty Ltd*, it was argued that the words 'associated with...in attending' in relation to the provision 'time spent by a trainee...in attending any training... associated with...the training contract' meant that expenses associated with training, but not directly travel or the training, were compensable expenses, if training was included in the definition of work.

- 6.53 Cameron FM rejected this contention, and held that the words ‘associated with’ and ‘in attending’ do not expand the operation of clause E.6.3 to activities or expenses beyond *actual attendance at the training*, such as associated travel, accommodation and meals while at the training.⁹⁹
- 6.54 Cameron FM also found that clause 17 of the Award provided that payments for travelling time are to be based only on the travelling time that exceeds the time which the employee would normally take to travel from home to work – that is, clause 17 makes clear that the Award *does not provide an independent source of travel allowances or compensation for travel expenses*.¹⁰⁰
- 6.55 In *Rohrlach*, the SAIRC noted the importance of the distinction drawn between training and work in the CFMEU case in concluding that apprentices who attended off-the-job training were not entitled to travel allowances and expenses.
- 6.56 It also noted that clause 32.4 related to expenses and allowances associated with travelling and working away from the usual place of work, while clause 32.5 dealt specifically with ‘training costs’. While an apprentice would be entitled to travel costs when ‘undertaking training agreed to by the employer, which exceed those normally incurred in travelling to and from work’, they would only be entitled to meals consumed as a direct incident of this travel, and not meal or accommodation costs incurred during the course of the apprentice’s time at training.
- 6.57 It should be noted that many jurisdictions already subsidise travel expenses incurred by apprentices and trainees who undertake off-the-job training away from their usual place of work. For example,
- 6.57.1 In Queensland, apprentices and trainees registered in Queensland who have to travel at least 100km (return) to attend off-the-job training away from their usual place of employment may be eligible to claim subsidies. They must attend their closest training organisation able to deliver training in the relevant qualification in order to be eligible for a subsidy.¹⁰¹
- 6.57.2 Subsidies are available for accommodation, land, air and sea travel, and some meals. Schedule C of these Submissions sets out the details of available subsidies.
- 6.57.3 Similar subsidies are available in other jurisdictions.

⁹⁹ [2012] FMCA 621, 58, 59

¹⁰⁰ [2012] FMCA 621,75

¹⁰¹ Department of Education, Training and Employment (2012) *Travel and Accommodation Allowance: Policy Statement and Guidelines*. Available at www.apprenticeshipsinfo.qld.gov.au/resources/pdf/tracc-policy-guidelines.pdf

Implications of the proposed variations

- 6.58 It is important that these variations are made. Despite the apparently clear intent behind the drafting of the relevant clauses and the decision handed down *CEPU v Excelior*, union groups appear to be intent on pursuing a contrary interpretation that yields anomalous and undesirable results.
- 6.59 If the proposed variations are made to modern awards specified in Schedule 6 of the Table of Common Claims, there may potentially be significant negative consequences for both employers, apprentices and trainees, including:
- 6.59.1 Cost increases for employers in taking on employees in a training capacity that may act as a deterrent to doing so in the future. These cost increases could include additional wages payable for costs associated with training, including travel, meals and accommodation costs. Any increases in the cost to employers of taking on an apprentice or trainee could serve to weaken already dwindling commencement figures. Early trend estimates from the NCVER show a declining trend in the number of apprenticeship and trainee commencement levels, with commencements in the December 2012 Quarter at their lowest levels since the September 2009 Quarter.¹⁰²
- 6.59.2 Higher youth unemployment and increased skills shortages that may result from employers taking on less employees in training roles as the costs associated with doing so rise.

Jurisdictional and related issues

- 6.60 If the proposed variations are made to modern awards specified in Schedule 6 of the Table of Common Claims, they may not meet the modern awards objective as set out in section 134(1) of the FW Act, including:
- 6.60.1 The need to promote social inclusion through increased workforce participation (i.e. section 134(1)(c) of the FW Act). The proposed variations would potentially disadvantage employers and young people in regional, rural and remote areas: if employers were required to pay trainees and apprentices for travel expenses, this would constitute a significant disincentive for engaging workers in a training capacity.
- 6.60.2 The need to promote flexible modern work practices and the efficient and productive performance of work (i.e. section 134(1)(d) of the FW Act).

¹⁰² NCVER (2013) *Apprentices & Trainees: Early trend estimates – December Quarter 2012*. Available from: www.ncver.edu.au/publications/2600.html

- 6.60.3 The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden (i.e. section 134(1)(f) of the FW Act). The proposed variations are likely to negatively affect businesses by requiring more expenditure on unproductive activities such as travel and accommodation costs for apprentices. The payment of these costs is also somewhat duplicative given that, as noted above, subsidies are generally available from State Governments for the cost of travel, meals and accommodation.
- 6.60.4 The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (i.e. section 134(1)(h) of the FW Act). The proposed variations have the potential to deter employers from engaging apprentices and trainees, while the increase in employment costs that they may result in could affect the sustainability, performance and competitiveness of Australian employers.

7.0 Recognition of Service – Schedule 8 of Table of Common Claims

Proposed amendments

- 7.1 Schedule 8 of the Table of Common Claims indicates that the AMWU, CEPU and CFMEU seek the following amendments to various modern awards:¹⁰³
- 7.1.1 where the apprentice continues with the employer after the completion of the apprenticeship, the period of the apprenticeship will be counted as service for the purposes of award entitlements (including long service leave);¹⁰⁴
- 7.1.2 if an apprentice is terminated at the end of their apprenticeship but then re-engaged by the same employer within 6 months of such termination, the period of the apprenticeship should be counted as service in determining any future award and/or NES entitlements unless these entitlements were paid out on termination; and
- 7.1.3 if a training contract is entered into between an employer and a person who is already in the employment of the employer, the termination, or

¹⁰³ AMWU – *Airline Operations - Ground Staff Award 2010; Graphic Arts, Printing and Publishing Award 2010; Manufacturing and Associated Industries and Occupations Award 2010; Sugar Industry Award 2010, and Vehicle Manufacturing, Repair, Services and Retail Award 2010*. CEPU – *Electrical, Electronic and Communications Contracting Award 2010*. CFMEU – *Joinery and Building Trades Award 2010*

¹⁰⁴ Bullet point (a) only raised by AMWU with respect to the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*, and CFMEU with respect to the *Joinery and Building Trades Awards 2010*

expiry of the term, of the training contract does not itself terminate the person's employment with the employer,¹⁰⁵

collectively, the **Recognition of Service Amendments**.

- 7.2 The Chambers oppose the Recognition of Service Amendments for the reasons set out below.

Award-specific grounds in support of Recognition of Service Amendments

- 7.3 The AMWU, CFMEU and CEPU seek the Recognition of Service Amendments based on the following award-specific grounds.

Award modernisation process – Joinery Award

- 7.4 The CFMEU seek to amend the Joinery Award to include the Recognition of Service Amendments set out at paragraphs 7.1.1 and 7.1.2 of our above submissions.¹⁰⁶

- 7.5 In support of these claims, the CFMEU refer to clause 15.2(c) of the BCGOS Award and an award modernisation decision¹⁰⁷ (**Stage 2 Decision**) in which the Full Bench discussed the introduction of similar amendments into the BCGOS Award.¹⁰⁸

- 7.6 Notably, in the Stage 2 Decision, the Full Bench stated that they had added a provision into what would become the BCGOS Award to:

“...make it clear that notice of termination and redundancy provisions do not apply to apprentices, subject to the apprenticeship period being counted as service in the event that the employment is continued at the completion of an apprenticeship or resumed within six months of completion.”

- 7.7 The CFMEU further assert that they are seeking the above amendments to the Joinery Award to ensure that there is “consistency in the provisions of the awards” (i.e. between the BCGOS Award and the Joinery Award).¹⁰⁹

- 7.8 The Chambers submit that in the Stage 2 Decision, the Full Bench considered and discussed the Joinery Award¹¹⁰ separately from the BCGOS Award.¹¹¹

- 7.9 As a result, the Full Bench's comments in the Stage 2 Decision with respect to the BCGOS Award are not applicable to the Joinery Award.

- 7.10 The Chambers repeat paragraphs 1.43 to 1.45, 1.51 and 1.52 above, and submit that ensuring “consistency in the provisions of the awards” is not a legitimate reason for seeking amendments within the scope of the 2-year review process.

¹⁰⁵ Bullet point (c) raised by the AMWU in all relevant applications

¹⁰⁶ Refer to the CFMEU's *Application to Vary the Joinery and Building Trades Award 2010* dated 8 March 2012, p 5

¹⁰⁷ [2009] AIRCFB 345 at [83]

¹⁰⁸ Refer to the CFMEU's *Submission regarding the Modern Awards Review - Apprentices, Trainees and Juniors* dated 31 January 2013, at [3.31] and [9]

¹⁰⁹ Refer to the CFMEU's *Submission regarding the Modern Awards Review - Apprentices, Trainees and Juniors* dated 31 January 2013, at [9.2]

¹¹⁰ See at [112] to [113] of Stage 2 Decision

¹¹¹ See at [68] to [91] of Stage 2 Decision

- 7.11 The Chambers further submit that the CFMEU have not produced any other evidence which suggests that the proposed amendments to the Joinery Award fall within the scope of the 2-year review process as set out in paragraphs 1.51 and 1.52 above.
- 7.12 Finally, the Chambers repeat paragraph 1.18 above and submit that the CFMEU have not produced any evidence to suggest that the proposed Recognition of Service Amendments to the Joinery Award are required to remove ambiguity, uncertainty or correct an error in accordance with section 160 of the FW Act.

Award modernisation process – Vehicle Award

- 7.13 The AMWU seek to amend the Vehicle Award to incorporate all of the Recognition of Service Amendments set out in our above Submissions.¹¹²
- 7.14 In support of their general claims with respect to the Vehicle Award, the AMWU assert that:

“At the time of publishing the modern vehicle award the Full Bench noted the “widespread support for an integrated vehicle industry award to apply as reflected in the exposure draft”, and that the modern award “generally accords with the structure and content of the antecedent awards”..... Other than these deletions [i.e. which related to the removal of apprentice progression scales], there was no specific examination of the apprentice provisions during the award modernisation process.”¹¹³

- 7.15 The AMWU then refer to the following excerpt from the Landmark Decision in which the Full Bench provided that:

“In circumstances where a party seeks a variation to a modern award in the Review and the substance of the variation sought has already been dealt with by the Tribunal in the Part 10A process, the applicant will have to show that there are cogent reasons for departing from the previous Full Bench decision, such as a significant change in circumstances, which warrant a different outcome.”¹¹⁴

- 7.16 On this basis, the AMWU assert that their application to vary the Vehicle Award is permissible as it is not a re-agitation of the substance of a variation which was dealt with during the award modernisation process.
- 7.17 Assuming that the substance of the AMWU’s Recognition of Service Amendments were not directly addressed during the award modernisation process and therefore are not a re-agitation of matters considered during the award modernisation process, the Chambers submit that the AMWU has failed to provide any evidence to suggest that the proposed amendments fall within the scope of the 2-year review process as set out at paragraphs 1.51 and 1.52 above.

Re-engagement after 6 months – Manufacturing Award

- 7.18 The AMWU seek to amend the Manufacturing Award to include the amendment set out at paragraph 7.1.2 of these Submissions for the following reasons:¹¹⁵

¹¹² Refer to the AMWU’s *Application to Vary the Vehicle Manufacturing, Repair, Services and Retail Award 2010* dated 24 February 2013, p 7

¹¹³ Refer to the AMWU’s *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, pp 9 & 10 [2012] FWA 5600 at [89]

¹¹⁵ Refer to the AMWU’s *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, pp 20 - 21
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- 7.18.1 the variation is an incidental and supplementary term permitted under sections 55(4) and 142 of the FW Act;
- 7.18.2 the conference report identified that employer groups did not raise a jurisdictional objection to this variation;
- 7.18.3 the variation is consistent with clause 15.2(c) of the BCGOS Award which provides the same entitlement regarding re-engagement with the same employer; and
- 7.18.4 the clause is also consistent with the policy position behind clause 42.2 of the Manufacturing Award which provides that the unclaimed balance of paid personal/carers leave continues from the date of re-engagement where an employee is terminated by their employer and re-engaged within 6 months.
- 7.19 The Chambers respectfully submit that none of the above grounds raised by the AMWU fall within the scope of the 2-year review process.
- 7.20 In particular, with respect to the AMWU's ground set out at paragraph 7.18.2 above, the Chambers submit that unless a matter was agreed to at the previous conferences, these discussions have no bearing on these proceedings.
- 7.21 With respect to the AMWU's grounds set out at paragraphs 7.18.3 and 7.18.4 above, the Chambers submit that ensuring that the terms of various modern awards are consistent is not a legitimate justification for seeking an amendment to a modern award within the scope of the 2-year review process as set out at paragraphs 1.43 to 1.45, 1.51 and 1.52 above. Further, whilst clause 42.2 of the Manufacturing Award may bear some similarities to the amendments being sought by the AMWU, the Chambers submit that simply drawing analogies to other provisions within an award does not support the fact that the proposed amendments fall within the scope of the 2-year review as set out at paragraphs 1.43 to 1.45, 1.51 and 1.52 above.
- 7.22 Finally, with respect to the AMWU's ground set out at 7.18.1 above, the Chambers submit that the AMWU has failed to provide any evidence to suggest that the proposed amendments fall within the scope of sections 55(4) or 142 of the FW Act. Further, even if the proposed amendments are permissible terms within the meaning of sections 55(4) and 142 of the FW Act, the Chambers submit that the AMWU have failed to identify a legitimate reason within the scope of the 2-year review process as set out at paragraphs 1.51 and 1.52 above for implementing this amendment.

Expiry/termination of training contract – Manufacturing Award

- 7.23 The AMWU seek to amend the Manufacturing Award to include the amendment as set out in paragraph 7.1.3 of the above submissions for the following reasons:¹¹⁶

¹¹⁶ Refer to the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, pp 21 - 22
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7.23.1 the claim is incidental to section 139(1)(b) of the FW Act and within the ambit of section 142(1) of the FW Act;

7.23.2 the variation is based on ensuring that apprentices are treated fairly and is consistent with provisions in particular state/territory legislation. In particular, the AMWU refer to section 54 of the SA Training Act which provides that:

“If a training contract is entered into between an employer and a person who is already in the employment of the employer, the termination, or expiry of the term, of the training contract does not of itself terminate the person's employment with the employer.”

In addition, the AMWU refer to section 31 of the NSW Training Act which provides that:

“The fact that a person who is registered as an existing worker trainee completes a traineeship does not authorise the employer to terminate the person's employment with the employer.”

In further support of this ground, the AMWU have provided the witness statement of Ian Curry which makes reference to section 54 of the SA Training Act. In particular, Mr Curry states that:

This provision was inserted into the Act following representations from the AMWU who were concerned about the potential for apprentices or trainees to signed onto Training Contracts following periods of employment, then having their Training Contracts terminated during the probationary period thus ending their employment. An Award Clause that made a similar provision would remove the ambiguity that currently exists and provide clarity and protection for the employment of an individual that seeks engagement under a Training Contract. This would provide some confidence to, and perhaps encourage more existing workers to participate in apprenticeship and to contribute to the skills base of the economy.¹¹⁷ ;

7.23.3 the variation makes obvious an entitlement that will encourage, support and protect existing employees to commence an apprenticeship. The variation ensures that the modern award with the NES articulates a fair and relevant standard for existing employees who commence an apprenticeship;

7.23.4 without the variation the award does not make clear an existing workers' right to access the safety net standard regarding termination;

7.23.5 it makes the award simple and easy to understand as required by the modern award objective;

7.23.6 the clause is necessary to assist the significant number of employees who were engaged prior to commencing the apprenticeship; and

¹¹⁷ Refer to Witness Statement of Ian Curry in the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, at [148] to [149]

- 7.23.7 the provision will assist employers to understand their obligations at the end of the training contract.
- 7.24 The Chambers respectfully submit that none of the above grounds raised by the AMWU fall within the scope of the 2-year review process.
- 7.25 In particular, with respect to the AMWU's ground set out at paragraph 7.23.1 above, the Chambers repeat paragraph 4.3.12 above and submit that the AMWU have failed to provide any evidence to suggest that the proposed amendment is a permissible term within the meaning of sections 139(1)(b) and/or 142(1) of the FW Act. Further, even if the proposed amendments are permissible terms within the meaning of sections 139(1)(b) and 142(1) of the FW Act, the Chambers submit that the AMWU have failed to identify a legitimate reason within the scope of the 2-year review process as set out in paragraphs 1.51 and 1.52 above for implementing this amendment.
- 7.26 With respect to the AMWU's ground set out at paragraph 7.23.2 above, the Chambers submit that the ground of ensuring that apprentices "are treated fairly" does not fall within the scope of the modern award objective. Rather, section 134(1) of the FW Act provides that the FWC must ensure that modern awards and the NES provide a fair and relevant minimum safety net of terms and conditions taking into account a number of factors. Notably, the AMWU have failed to link this justification for the proposed amendment back to the relevant factors set out in section 134(1) of the FW Act. The Chambers also assert that the evidence provided by Ian Curry that the proposed amendment could "perhaps encourage more existing workers to participate in apprenticeship and to contribute to the skills base of the economy" has not been explicitly linked back to the relevant modern award objective or substantiated. Therefore, Mr Curry's evidence cannot be relied upon to support that the proposed amendment is required to achieve the modern award objective.
- 7.27 The Chambers also submit that the AMWU's further ground set out at paragraph 7.23.2 above, that the proposed amendment is required as it is consistent with the provisions in particular state/territory legislation, does not fall within the scope of the 2-year review as set out at paragraphs 1.43 to 1.45, 1.51 and 1.52 above. The Chambers submit that:
- 7.27.1 the AMWU have failed to provide any evidence that suggests that any proposed amendments to modern awards which seek to ensure consistency with state/territory legislation fall within the scope of the 2-year review;
- 7.27.2 any amendment which seeks to duplicate the provisions in modern awards and South Australian/New South Wales legislation is both unnecessary and contrary to the modern award objective (i.e. sections 134(1)(f) and (g) of the FW Act which stipulate that consideration should be made to the

regulatory burden on employers and that the modern award system should be simple, easy to understand, stable and sustainable);

7.27.3 section 54 of the SA Training Act and section 31 of the NSW Training Act are unique and do not appear to be replicated in other state/territory legislation. In fact, section 60H of the WA Training Act is silent with respect to the entitlements of pre-existing employees. However, this section provides that if a training contract ceases to have effect because it is terminated or expires, the employment of the apprentice under the contract ceases but the parties may enter into another employment agreement or arrangement. Therefore, it is our understanding that at least in Western Australia, upon the expiry or termination of a contract, the ongoing employment of an apprentice (including what would appear to be a pre-existing employee) is a matter that is dealt with on a case by case basis rather than ongoing employment being guaranteed. On this basis, the implementation of this proposed amendment into modern awards would not ensure consistency across all state/territory legislation; and

7.27.4 based on our position outlined above and contrary to the evidence provided by Ian Curry, the amendment is not required to remove an ambiguity or anomaly in accordance with section 160 of the FW Act as no ambiguity has been identified but rather differences between the state/territory legislative frameworks which address the proposed amendment.

7.28 With respect to the AMWU's ground set out at paragraph 7.23.3 above, the Chambers repeat paragraphs 1.51 and 1.52 above and submit that the AMWU has failed to provide any evidence which suggests that the ground of making an entitlement obvious which will "encourage, support and protect existing employees to commence an apprenticeship" falls within the scope of the 2-year review process. We note that this ground could potentially be linked back to section 134(1)(h) of the FW Act (i.e. the likely impact of any exercise of modern award powers on employment growth), however as mentioned the AMWU have failed to provide any evidence to suggest that the proposed amendment is required to achieve any modern award objective. The Chambers also submit that the AMWU has failed to provide any evidence which suggests that their further ground of ensuring that the modern award and the NES articulates "a fair and relevant standard for existing employees who commence an apprenticeship" falls within the scope of the 2-year review as the AMWU have failed to link this justification for the proposed amendment back to the relevant factors set out in section 134(1) of the FW Act.

7.29 With respect to the AMWU's ground set out at paragraph 7.23.4 above, the Chambers repeat paragraphs 7.27.3 and 7.27.4 above and submit that there is not a clear right for existing workers to access the proposed safety net regarding termination in all states and territories.

- 7.30 With respect to the AMWU's ground set out at paragraph 7.23.5 above, the Chambers repeat paragraphs 7.27.2, 7.27.3 and 7.27.4 7.27.1 above and in-turn submit that the proposed amendment will not simplify the award in accordance with the modern award objective.
- 7.31 With respect to the AMWU's ground set out at paragraph 7.23.6 above, the Chambers submit that the AMWU has not produced any evidence to suggest that any proposed amendments to modern awards which seek to assist "the significant number of employees who were engaged prior to commencing the apprenticeship" falls within the scope of the 2-year review as set out in paragraphs 1.51 and 1.52 above.
- 7.32 With respect to the AMWU's ground set out at paragraph 7.23.7 above, the Chambers repeat paragraphs 7.27, 7.27.3 and 7.27.4 above and submit that as the position with respect to the proposed amendment is different in various states and territories, the amendment will not assist employers to understand their respective obligations at the end of the training contract.

Electrical Award

- 7.33 The CEPU seek to amend the Electrical Award to include the amendment set out in paragraph 7.1.1 of these Submissions for the following reasons:¹¹⁸
- 7.33.1 the proposed clause is necessary given the existence in the industry of practices that have the effect of avoiding accrued entitlements where apprentices are terminated at the end of their apprenticeship, only to re-hire the apprentices shortly thereafter. In support of this ground, the CEPU refer to the witness statement of Omar Merhi which provides at [44]:¹¹⁹
- "...I have regularly encountered scenarios where, to minimise entitl[e]ments, apprentices are dismissed upon completing their trade, but then re-hired after 3 months or even less."*
- 7.33.2 similar provisions are found in clause 15.2(c) of the BCGOS Award;
- 7.33.3 a significant proportion of apprentices working under the modern Electrical Award work for electrical contractors providing services to the construction industry;
- 7.33.4 a similar provision applies to all employees with respect to personal/carer's leave under clause 42.2 of the Manufacturing Award (i.e. if an employee is terminated by their employer and is re-engaged by the same employer within a period 6 months then the employee's unclaimed balance of paid personal/carer's leave continues from the date of re-engagement); and

¹¹⁸ Refer to the CEPU's Submissions: Applications to Vary Multiple Awards re Apprentices dated 31 January 2013, pp 87 - 88

¹¹⁹ Refer to the Witness Statements in the CEPU's Submissions: Applications to Vary Multiple Awards re Apprentices dated 31 January 2013, p 97

- 7.33.5 the CEPU otherwise adopts the submissions of the AMWU and CFMEU regarding the preservation of entitlements upon re-engagement.
- 7.34 The Chamber respectfully submits that none of the above grounds raised by the CEPU fall within the scope of the 2-year review process.
- 7.35 With respect to the CEPU's ground set out at paragraph 7.33.1 above, the Chambers submit that the CEPU have failed to provide sufficient evidence to substantiate that employers avoid their obligations with respect to the accrual of entitlements by terminating apprentices' employment and then shortly thereafter re-hiring the apprentices. For example, the CEPU have referred to only one witness statement to support this claim and the witness statement provided does not provide any particularity about such accusations (i.e. employers, dates, etc). The Chambers also note that the CEPU have failed to produce any evidence which suggests that the any proposed amendments to modern awards which seek to prevent employers from allegedly circumventing their accrual obligations to employees falls within the scope of the 2-year review as set out in paragraphs 1.51 and 1.52 above.
- 7.36 With respect to the CEPU's ground set out at paragraphs 7.33.2 and 7.33.3 above, the Chambers submit that ensuring consistency between the terms of the BCGOS Award and the Electrical Award (even when a number of electrical workers provide services to the construction industry) is not a legitimate reason for seeking amendments within the scope of the 2-year review process as set out in paragraphs 1.43 to 1.45, 1.51 and 1.52 above.
- 7.37 With respect to the CEPU's ground set out at paragraph 7.33.4 above, whilst clause 42.2 of the Manufacturing Award may bear some similarities to the proposed amendments being sought by the CEPU, the Chambers submit that simply drawing analogies to other provisions within an award does not support the fact that the proposed amendments fall within the scope of the 2-year review as set out in paragraphs 1.43 to 1.45, 1.51 and 1.52 above.
- 7.38 With respect to the CEPU's ground set out at paragraph 7.33.5, the Chambers repeat their award-specific Submissions made above and their general-award Submissions made below in relation to the AMWU and CFMEU's proposed Recognition of Service amendments.
- 7.39 Finally, the Chambers repeat paragraph 1.18 and submit that the CEPU has not produced any evidence to suggest that the proposed amendment is required to remove ambiguity or uncertainty or to correct an error in accordance with section 160 of the FW Act.

Consistency between modern awards

- 7.40 With respect to the Sugar Award, the AMWU assert that unless otherwise stated their proposed variations mirror the variations sought for the Manufacturing Award.¹²⁰
- 7.41 With respect to the Graphics Award, the AMWU assert that the new conditions being sought are consistent with those being sought in the Manufacturing Award.¹²¹
- 7.42 With respect to the Airline Award, the AMWU assert that their proposed variations are modelled on the provisions contained, or sought, in the Manufacturing Award.¹²²
- 7.43 With respect to the Vehicle Award, the AMWU assert that the proposed variations are aligned with the amendments sought in the Manufacturing Award.¹²³
- 7.44 As identified at paragraphs 7.18 to 7.32 of our Submissions above, the Chambers submit that the AMWU have failed to establish that the proposed Recognition of Service Amendments to the Manufacturing Award fall within the scope of the 2-year review. For this reason, any reliance on similar justifications for making similar Recognition of Service Amendments to the Sugar Award, Graphics Award, Airline Award and Vehicle Award will also fail.
- 7.45 The Chambers also submit that implementing the Recognition of Service Amendments to ensure consistency with other awards is not a legitimate reason within the scope of the 2-year review process as set out in paragraphs 1.43 to 1.45, 1.51 and 1.52 above.

General grounds in support of Recognition of Service Amendments

- 7.46 The AMWU, CFMEU and CEPU have raised the following general grounds in support of the Recognition of Service Amendments:¹²⁴
- 7.46.1 to encourage apprentices to commence and complete their training and hence to support skill acquisition, minimise skill shortages, support economic activity in the Australian community and contribute to productivity;

¹²⁰ Refer to the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, p 51

¹²¹ Refer to the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, p 52

¹²² Refer to the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, p 50

¹²³ Refer to Attachment H of AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, p 122

¹²⁴ Refer to the AMWU's *Further Revised Application to vary the Manufacturing and Associated Industries and Occupations Award 2010* dated 31 January 2013, pp 10-11; the AMWU's *Further Revised Application to vary the Airline Operations – Ground Staff Award 2010* dated 31 January 2013, p 17; Bullet point 6 of the AMWU's *Further Revised Application to vary the Sugar Industry Award 2010* dated 31 January 2013; Schedule C of the AMWU's *Amended Application to vary the Vehicle Manufacturing, Repair, Services and Retail Award 2010* dated 31 January 2013; Bullet point 3 of the AMWU's *Further Revised Application to vary the Graphic Arts, Printing and Publishing Award 2010* dated 31 January 2013; Bullet point 3 of the CEPU's *Amended Application to vary the Electrical, Electronic and Communications Contracting Award 2010* dated 21 November 2012; the CFMEU's *Application to vary the Joinery and Building Trades Award 2010* dated 8 March 2012, p 2; and the CFMEU's *Submission regarding the Modern Awards Review - Apprentices, Trainees and Juniors* dated 31 January 2013, [9]

- 7.46.2 to ensure apprenticeships are competitive as an employment and career choice;
- 7.46.3 to provide apprentices with a guaranteed safety net of fair, relevant and enforceable minimum standards consistent with sections 3(a) and (b) of the FW Act;
- 7.46.4 to provide apprentices with a fair and relevant minimum safety net of terms and conditions consistent with section 134(1) of the FW Act and in particular sections 134(1)(a), (c), (d), (f), (g) and (h) of the FW Act; and
- 7.46.5 to ensure the provisions of the award do not undermine the NES.
- 7.47 To the extent these general grounds were not already addressed in relation to the Applicant's award-specific grounds discussed above, the Chambers respectfully submit that the Applicants have failed to produce any evidence which suggests that the ground stipulated in paragraph 7.46.2 above falls within the scope of the 2-year review process as set out in paragraphs 1.51 and 1.52 above.
- 7.48 Further, to the extent these general grounds were not already addressed in relation to the Applicant's award-specific grounds discussed above, the Chambers submit that whilst the grounds stipulated in paragraphs 7.46.1, 7.46.3, 7.46.4 and 7.46.5 above could potentially fall within the scope of the 2-year review as set out in paragraphs 1.51 and 1.52 above, the AMWU has not produced any explicit evidence to support their proposed amendments.
- 7.49 Finally, the Chambers repeat paragraph 1.18 above and submit that the Applicant's have not produced any evidence to suggest that the Recognition of Service Amendments are required under section 160 of the FW Act.

Recognition of Service Amendments - Not an apprenticeship matter

- 7.50 The Chambers submit that the Recognition of Service Amendments, particularly the amendments set out at paragraphs 7.1.1 and 7.1.2 of these Submissions, attempt to govern the subsequent employment relationship of an apprentice rather than terms and conditions of the apprenticeship.
- 7.51 We therefore submit that such amendments are outside the scope of this review which relates only to terms in modern awards regarding apprentices as opposed to general employment terms.

Recognition of Service Amendments - Disincentive for employers

- 7.52 The Chambers submit that the Recognition of Service Amendments will likely act as a disincentive for employers to offer ongoing employment to apprentices following completion of their apprenticeship or to re-engage apprentices at a later stage.

Conclusions regarding Recognition of Service Amendments

7.53 Based on our above Submissions, the Chambers respectfully request that the applications to vary the relevant modern awards to include the Recognition of Service Amendments are dismissed.

8.0 Attendance at Training on Rostered Days Off – Schedule 9 of Table of Common Claims

Proposed amendments

8.1 Schedule 9 of the Table of Common Claims indicates that the AMWU seeks to amend various modern awards¹²⁵ to stipulate that:

8.1.1 an apprentice working in an establishment under a particular work cycle who attends technical college on a Rostered Day Off (**RDO**), must be afforded another ordinary working day off as substitution for the RDO; and

8.1.2 any substituted day must be taken in the current or next succeeding work cycle,

collectively, the **RDO Amendments**.

8.2 The Chambers oppose the RDO Amendments for the reasons set out below.

Unnecessary overlap with existing award provisions

8.3 Notably, the Graphics Award already contains a provision which is similar in nature to the provisions proposed in the RDO amendments.

8.4 For example clause 30.7(c)(ii) of the Graphics Award provides that where an employer adopts a system of work which entitles an employee to a day off during that work cycle, an apprentice who is required to attend trade school on a RDO must be entitled to substitute a day as soon as practicable following attendance at trade school.

8.5 The Chambers submit that implementing the RDO Amendment into the Graphics Award would be contrary to sections 134(1)(f) and (g) of the FW Act (i.e. that consideration should be made to the impact of regulatory burden on employers and that the modern award system should be simple, easy to understand, stable and sustainable). In particular, the Chambers submit that multiple provisions dealing with the same matter would create additional complexity as well as uncertainty as to which provision took precedent.

¹²⁵ AMWU – *Graphic Arts, Printing and Publishing Award 2010; Sugar Industry Award 2010; Manufacturing and Associated Industries and Occupations Award 2010; and Vehicle Manufacturing, Repair, Services and Retail Award 2010.*

Award-specific grounds in support of RDO Amendments

8.6 The AMWU seek the RDO Amendments based on the following award-specific grounds.

Manufacturing Award

8.7 With respect to the Manufacturing Award, the AMWU assert that the variation is:¹²⁶

8.7.1 of a similar intention to clause 44.3 of the same award;

8.7.2 within section 139(c) of the FW Act (i.e. hours of work, rostering etc); and

8.7.3 covered by section 142(1) of the FW Act.

8.8 The Chambers respectfully submit that none of the above grounds fall within the scope of the 2-year review process.

8.9 Whilst clause 44.3 of the Manufacturing Award may bear some similarities to the proposed RDO amendments being sought by the AMWU, the Chambers submit that simply drawing analogies to other provisions within an award does not support the fact that the proposed RDO Amendments fall within the scope of the 2-year review as set out in paragraphs 1.43 to 1.45, 1.51 and 1.52 above.

8.10 The Chambers further note that the AMWU has failed to provide any evidence to suggest that the proposed RDO Amendment are permissible terms within the meaning of sections 139(c) and 142(1) of the FW Act. Further, even if the proposed RDO Amendments are permissible terms in accordance with sections 139(c) and 142(1) of the FW Act, the Chambers submit that the AMWU have failed to identify a legitimate reason within the scope of the 2-year review process as set out in paragraphs 1.51 and 1.52 above for implementing these changes.

Consistency with other modern awards

8.11 With respect to the Sugar Award, the AMWU assert that unless otherwise stated their proposed variations mirror the variations sought for the Manufacturing Award.¹²⁷

8.12 Similarly, with respect to the Graphics Award, the AMWU assert that the new conditions being sought are consistent with those being sought in the Manufacturing Award.¹²⁸

8.13 As identified at paragraphs 8.8 to 8.10 of our Submissions above, the AMWU have failed to establish that the RDO Amendments to the Manufacturing Award fall within the scope of this 2-year review. For this reason, any reliance on similar justifications

¹²⁶ Refer to the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, p 32

¹²⁷ Refer to the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, p 51

¹²⁸ Refer to the AMWU's *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, p 52

for making the same RDO Amendments to the Sugar Award and Graphics Award will also fail.

- 8.14 The Chambers also submit that implementing the RDO amendments to ensure “consistency with other awards” is not a legitimate reason within the scope of the 2-year review process as set out in paragraphs 1.43 to 1.45, 1.51 and 1.52 above.

Award modernisation process – Vehicle Award

- 8.15 The Chambers repeat paragraphs 7.13 to 7.16 of our above Submissions in relation to the Vehicle Award.
- 8.16 Assuming that the substance of the AMWU’s RDO Amendments were not directly addressed during the award modernisation process and therefore are not a re-agitation of matters considered during the award modernisation process, the Chambers submit that the AMWU has failed to provide any evidence to suggest that the proposed amendments fall within the scope of the 2-year review as set out at paragraphs 1.51 and 1.52 above.

General grounds in support of RDO Amendments

- 8.17 The AMWU have raised the following general grounds in support of the RDO Amendments:¹²⁹
- 8.17.1 to encourage apprentices to commence and complete their training and hence to support skill acquisition, minimise skill shortages, support economic activity in the Australian community and contribute to productivity;
 - 8.17.2 to ensure apprenticeships are competitive as an employment and career choice;
 - 8.17.3 to provide apprentices with a guaranteed safety net of fair, relevant and enforceable minimum standards consistent with sections 3(a) and (b) of the FW Act;
 - 8.17.4 to provide apprentices with a fair and relevant minimum safety net of terms and conditions consistent with section 134(1) of the FW Act and in particular sections 134(1)(a), (c), (f), (g) and (h) of the FW Act; and
 - 8.17.5 to ensure the provisions of the award do not undermine the NES.

¹²⁹ Refer to the AMWU’s *Further Revised Application to vary the Manufacturing and Associated Industries and Occupations Award 2010* dated 31 January 2013, pp 10-11; Bullet point 6 of the AMWU’s *Further Revised Application to vary the Sugar Industry Award 2010* dated 31 January 2013; Schedule C of the AMWU’s *Amended Application to vary the Vehicle Manufacturing, Repair, Services and Retail Award 2010* dated 31 January 2013; and Bullet point 3 of the AMWU’s *Further Revised Application to vary the Graphic Arts, Printing and Publishing Award 2010* dated 31 January 2013

- 8.18 To the extent that these general grounds were not already addressed in relation to the AMWU's award-specific grounds discussed above, the Chambers respectfully submit that the AMWU has failed to produce any evidence which suggests that the ground stipulated in paragraph 8.17.2 above falls within the scope of the 2-year review process as set out in paragraphs 1.51 and 1.52 and above.
- 8.19 Further, to the extent these general grounds were not already addressed in relation to the AMWU's award-specific grounds discussed above, the Chambers submit that whilst the grounds stipulated in paragraphs 8.17.1, 8.17.3, 8.17.4 and 8.17.5 of our Submissions above could potentially fall within the scope of the 2-year review as set out in paragraphs 1.51 and 1.52 above, the AMWU has not produced any explicit evidence to support their proposed RDO Amendments. For example, the RDO Amendments do not appear to be addressed in any of the AMWU's witness statements.
- 8.20 Finally, the Chambers repeat paragraph 1.18 above and submit that the AMWU has not produced any evidence to suggest that the RDO Amendments are required under section 160 of the FW Act (i.e. to remove ambiguity or uncertainty or to correct an error).

Conclusions regarding RDO Amendments

- 8.21 Based on our above Submissions, the Chambers respectfully request that the AMWU's applications to vary various modern awards to include the RDO Amendments are dismissed.

9.0 Hours of Work – Schedule 10 of Table of Common Claims

Proposed amendments

- 9.1 Schedule 10 of the Table of Common Claims indicates that the AMWU seeks to amend a number of modern awards¹³⁰ to stipulate that:
- 9.1.1 an apprentice under the age of 18 years is not required to work overtime and/or shiftwork unless such an apprentice so desires; and
- 9.1.2 no apprentice except in an emergency is to work or be required to work overtime or shift work at times which would prevent their attendance in training consistent with their training contract/agreement;
- collectively, the **Hours of Work Amendments**.

¹³⁰ AMWU – Airline Operations - Ground Staff Award 2010; Graphic Arts, Printing and Publishing Award 2010; and Vehicle Manufacturing, Repair, Services and Retail Award 2010

9.2 The Chambers oppose the proposed Hours of Work Amendments for the reasons set out below.

Award specific grounds for Hours of Work Amendments

9.3 The AMWU seek the Hours of Work Amendments based on the following award-specific grounds.

Consistency between modern awards

9.4 With respect to the Airline Award, the AMWU assert that the variations are modelled on the provisions contained in the Manufacturing Award.¹³¹

9.5 Similarly, the AMWU assert that with respect to the Vehicle Award, the proposed variations mirror clause 15.16 of the Manufacturing Award.¹³²

9.6 The Chambers submit that the ground of ensuring “consistency with other awards” is not a legitimate reason within the scope of the 2-year review process as set out in paragraphs 1.43 to 1.45, 1.51 and 1.52 above.

Award modernisation process – Vehicle Award

9.7 We repeat paragraphs 7.13 to 7.16 of our Submissions above which were made in relation to the Vehicle Award.

9.8 Assuming that the substance of the AMWU’s Hours of Work Amendments were not directly addressed during the award modernisation process and therefore are not a re-agitation of matters addressed during award modernisation, the Chambers submit that the AMWU has failed to provide any evidence to suggest that the proposed amendments fall within the scope of the 2-year review process as set out at paragraphs 1.51 and 1.52 above.

General grounds for Hours of Work Amendments

9.9 The AMWU seeks the proposed Hours of Work Amendments based on the following general grounds:¹³³

9.9.1 to encourage apprentices to complete their training and hence to support skill acquisition, minimise skill shortages, support economic activity in the Australian community and contribute to productivity;

¹³¹ Refer to the AMWU’s *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, p 50

¹³² Refer to Attachment V of the AMWU’s *Submission to the 2012 Review of Modern Awards: Apprentices* dated 31 January 2013, p 124

¹³³ Refer to Schedule C of the AMWU’s Amended Application to vary the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* dated 31 January 2013; Bullet point 3 of the AMWU’s Further Revised Application to vary the *Graphic Arts, Printing and Publishing Award 2010* dated 31 January 2013; and the AMWU’s Further Revised Application to vary the *Airline Operations - Ground Staff Award 2010* dated 31 January 2013, p 17 -18

- 9.9.2 to ensure apprenticeships are competitive as an employment and career choice;
 - 9.9.3 to provide apprentices with a guaranteed safety net of fair, relevant and enforceable minimum standards consistent with section 3(b) of the FW Act;
 - 9.9.4 to provide apprentices with a fair and relevant minimum safety net of terms and conditions consistent with section 134(1) of the FW Act and in particular sections 134(1)(a), (c), (f), (g) and (h) of the FW Act; and
 - 9.9.5 to ensure the provisions of the award do not undermine the NES.
- 9.10 To the extent these general grounds were not already addressed in relation to the AMWU's award-specific grounds discussed above, the Chambers respectfully submit that the AMWU has failed to produce any evidence which suggests that the ground stipulated in paragraph 9.9.2 falls within the scope of the 2-year review process as set out in paragraphs 1.51 and 1.52 above.
- 9.11 Further, to the extent these general grounds were not already addressed in relation to the AMWU's award specific grounds discussed above, the Chambers submit that whilst the grounds stipulated in paragraphs 9.9.1, 9.9.3, 9.9.4 and 9.9.5 of our Submissions could potentially fall within the scope of the 2-year review as set out in paragraphs 1.51 and 1.52 above, the AMWU has not produced any explicit evidence to support their proposed Hours of Work Amendments. For example, we note that the performance of overtime is referred to in a number of the AMWU's witness statements. However, none of the witnesses appear to raise an issue regarding compulsory overtime and/or an apprentice's inability to meet their training requirements as a result of working overtime or shiftwork.
- 9.12 Finally, the Chambers repeat paragraph 1.18 above and submit that the AMWU has not produced any evidence to suggest that the Hours of Work Amendments are required under section 160 of the FW Act (i.e. to remove ambiguity or uncertainty or to correct an error).

State/Territory Frameworks

- 9.13 The Chambers submit that the State/Territory legislative frameworks or standardised training contracts already address some of the proposed Hours of Work Amendments.

9.14 For example, the Western Australian template training contract¹³⁴ provides that an employer must agree to release an apprentice from work to attend any training and assessment specified in the Training Plan.¹³⁵

9.15 This essentially means that employers have a contractual obligation to ensure that apprentices are released to attend their requisite training.

9.16 The Chambers therefore submit that the Hours of Work Amendments are unnecessary and that the implementation of these amendments would be contrary to the modern awards objective (i.e. section 134(1)(f) and (g) of the FW Act which require consideration is made to the regulatory burden of employers and that the modern award system is simple, easy to understand, stable and sustainable).

Conclusions regarding Hours of Work Amendments

9.17 Based on our above Submissions, the Chambers respectfully request that the AMWU's applications to vary various modern awards to include the Hours of Work Amendments are dismissed.

10.0 Extension & Probation – Schedules 11 & 12 of Table of Common Claims

10.1 The Chambers oppose the union applications seeking to amend various modern awards in relation to the extension and probation common issues.

11.0 Redundancy – Schedule 13 of Table of Common Claims

Proposed amendments

11.1 Schedule 13 of the Table of Common Claims indicates that the AMWU seeks to amend the Vehicle Award and the CEPU seeks to amend the Electrical Award to stipulate that:

11.1.1 the NES will be supplemented by making redundancy pay payable to apprentices in accordance with section 119(2) of the FW Act when an apprentice is made redundant prior to completing their apprenticeship; and

11.1.2 redundancy pay is not payable when an apprentice's employment is terminated solely because an apprentice has completed the apprenticeship pursuant to the training contract/agreement,
collectively, the **Redundancy Amendments**.

¹³⁴ The provisions in these contracts are standardised across all States/Territories

¹³⁵ Refer to Schedule 1 of *Vocational Education and Training (General) Regulations 2009* (WA), p 46

Chambers' position regarding proposed Redundancy Amendments

- 11.2 The Chambers would seek to strongly oppose the implementation of the Redundancy Amendments into any modern awards on a number of grounds. In particular, the Chambers submit that such changes would create inconsistencies between modern awards, and between modern awards and the NES.
- 11.3 However, we note that the Table of Common Claims does not accurately reflect the AMWU and CEPU's current position regarding the Redundancy Amendments.
- 11.4 Notably, the AMWU filed an amended application in the FWC regarding the Vehicle Award dated 31 January 2013. In this application, the AMWU withdrew the component of their application in which they sought the Redundancy Amendments to the Vehicle Award.¹³⁶ The AMWU also reiterated that this was their position in their Submissions which were filed in the FWC on 1 February 2013.¹³⁷
- 11.5 Further, the CEPU filed Submissions in the FWC regarding the Electrical Award dated 31 January 2013. In these Submissions, the CEPU advised that they no longer sought the Redundancy Amendments to the Electrical Award.¹³⁸
- 11.6 The Chambers also note that the AMWU initially made a number of other applications in which they sought the implementation of the Redundancy Amendments into other modern awards (i.e. *Sugar Award*, *Black Coal Mining Industry Award 2010*, and *Higher Education Industry – General Staff – Award 2010*). However, the AMWU subsequently withdrew this component of their applications through various amended applications which were filed in the FWC on 18 December 2012.
- 11.7 Based on the factors outlined above, it is the Chambers' understanding that the Redundancy Amendments are no longer being pursued by any relevant parties. As a result, it is unnecessary for the Chambers to provide any further Submissions opposing the implementation of such amendments.
- 11.8 Nonetheless, the Chambers reserve their right to provide the FWC with further Submissions regarding any proposed amendments to the redundancy provisions in modern awards at the first instance hearing or at any subsequent stage should any such amendments be pursued.

¹³⁶ Refer to Schedule B – Clause 15, B.1.5, 15.6(h) of the AMWU's Amended Application dated 31 January 2013

¹³⁷ Refer to Attachment V, p 122 of the AMWU's *Submission to 2012 Review of Modern Awards: Apprentices* dated 31 January 2013

¹³⁸ Refer to the CEPU's *Application to vary the Electrical, Electronic and Communications Contracting Award 2010* AM2012/157, p 5

ATTACHMENT A

1. About CCIWA

- 1.1 CCIWA is the leading employer associations in WA, and with over 7,800 members is one of the largest organisations of its kind in Australia.
- 1.2 CCIWA members operate across most industries including: manufacturing; resources; agriculture; transport; communications; retailing; hospitality; building and construction; local government; community services; and finance. CCI members are located throughout Western Australia.
- 1.3 Most of CCIWA's members are private businesses, although CCI also has a significant proportion of members in the not for-profit sector and the government sector.
- 1.4 Approximately 70% of CCIWA members are small businesses employing up to 19 employees, with over 20% employing between 20 and 99 employees and over 5 employing more than 100 employees.
- 1.5 CCIWA through Apprenticeships Australia, a wholly owned subsidiary, also direct employs approximately 500 apprentices and trainees through a range of industries and occupations.

2. About CCIQ – Powering Business Potential

- 2.1 The Chamber of Commerce and Industry Queensland (CCIQ) has been Queensland's peak body for small and medium businesses since 1868.
- 2.2 CCIQ is a private, not-for-profit business organisation.
- 2.3 CCIQ's mission is to achieve the best possible business environment for our members through advocacy at the state and federal levels.
- 2.4 CCIQ's activities include:
 - Advocacy on behalf of members on a range of issues, including workplace relations, workplace health and safety, education and training, productivity, regulation and red tape, electricity pricing and more. As part of this, we engage with a range of stakeholders, including state and federal governments, parliamentary committees, government departments, tribunals and other industry groups.
 - Publishing a range of materials, including survey results, policy submissions, monthly Business Updates, and other employer guidance documents.

- Providing a range of member services, including training courses, an employee assistance hotline (advice on workplace relations, OH&S, workers compensation etc), legal advice and business migration services, as well as working with government to deliver programs (such as the School Business Community Partnership Program).
- 2.5 CCIQ's advocacy agenda includes making submissions to discussion papers, parliamentary committees and hearings and review processes, developing our own policies and documents on given issues (as set out above) and conducting consultation with small and medium businesses in Queensland.
- 2.6 CCIQ's membership is largely comprised of small and medium businesses, and this heavily influences our advocacy agenda.
- 2.7 Our members come from a broad range of industries, including:
- Tourism and Hospitality;
 - Healthcare and Community Services;
 - Agriculture and Primary Production;
 - Building and Construction;
 - Manufacturing;
 - Property and Business Services;
 - Resources;
 - Transport and Storage; and
 - Retailing.
- 2.8 Most of CCIQ's members are private businesses, although some do come from the not-for-profit and government sectors.
- 2.9 CCIQ's publications include:
- The *Westpac/Pulse Survey of Business Conditions*, published on a quarterly basis;
 - Business Updates, emailed to all members on a monthly basis;
 - Submissions on relevant business issues; and
 - *Inform* magazine, CCIQ's in-house magazine on business issues for SMEs.

3. Business SA Background:

Business SA, the trading name for the South Australian Employers' Chamber of Commerce and Industry Inc, is South Australia's leading business organisation and represents thousands of businesses through direct membership and affiliated industry and association groups.

Business SA is a registered association of employers under the South Australian *Fair Work Act 1994* and recognised under that and other legislation as the State's peak business and employer group.

Business SA is also a transitionally recognised association under the *Fair Work (Registered Organisations) Act 2009*.

Through membership of the Australian Chamber of Commerce and Industry (ACCI), Business SA is able, on behalf of the South Australian business community, to play an active role in national issues that impact on the local business community.

Business SA provides a comprehensive representative and advisory service on modern awards. Our service not only extends to the supply of requested awards to industry but also includes continual updates and consulting with the relevant industrial parties in award related matters.

4. About VECCI

4.1 Who We Are

The Victorian Employers' Chamber of Commerce and Industry ("VECCI") is Victoria's leading and most influential employer group, servicing over 15,000 Victorian businesses every year. An independent, non-government body, VECCI was started by the business community to represent business. Our membership base is diverse, with involvement from all levels and sectors of industry including: manufacturing, health and community, business services, hospitality, construction, transport, retail and tourism.

VECCI is a member of Australia's largest and most representative business advocate, the Australian Chamber of Commerce and Industry ("ACCI") which develops and advocates policies that are in the best interests of Australian business, the economy and the wider community.

4.2 What We Do

VECCI are involved in every facet of industry and commerce across the State. Our role is to represent the interests of business at a State level as well as nationally. We act as a sounding board for government decision-making and as an instrument of active lobbying.

Our focus is clear – to lead business into the future, actively represent the needs of employers in a complex regulatory climate, and provide real business value.

The VECCI Workplace Relations Helpline provides VECCI members with relevant, up-to-date, independent and accurate advice on a range of workplace relations issues, including expert assistance with and interpretation of industrial instruments such as modern awards, performance management of employees and redundancies and employee entitlements.

The VECCI Workplace Relations Consulting team offers members professional, detailed advice and assistance. The VECCI Workplace Relations Consulting team – comprised of Industrial Relations, Occupational Health and Safety and Equality/Equal Opportunity specialists – offers a complete service for members and regularly appears on behalf of members at courts and tribunals dealing with the spectrum of members' workplace relations issues, disputes and challenges under the Fair Work system.

SCHEDULE A



FORM VT16 (January 2002)

Department of Education and Training
CANCELLATION OF APPRENTICESHIP or TRAINEESHIP BY CONSENT
Apprenticeship & Traineeship Act, 2001 Section 22

Application to Cancel an Apprenticeship or Traineeship
No. (T/A ID)

WHERE RELEVANT PLEASE COMPLETE ALL INFORMATION AS DETAILED IN YOUR TRAINING CONTRACT AND DELETE THE WORD APPRENTICE OR TRAINEE, AS APPROPRIATE, IN THIS FORM

We,
(apprentice/trainee – please print full name)

of
(address)

and
(employer - please print employer name as per the contract)

of
(address)

being the parties to a training contract in the vocation of:

.....
(name of apprenticeship/traineeship)

hereby mutually and voluntarily agree to the cancellation of the apprenticeship/traineeship with effect

from the.....day ofyear.....

- I certify that I have read and understood the information and instructions contained overleaf.
I understand that the Commissioner for Vocational Training will direct this cancellation to be effected 7 days from the date of lodgement of this form, unless either party notifies the Commissioner that they have withdrawn their consent to this cancellation.

Signed:

EmployerWitness
(Independent person)

Apprentice/TraineeWitness
(Independent person)

Date

REASON FOR CANCELLATION (for statistical purposes only)

.....
.....

Cancellation of an Apprenticeship or Traineeship by Consent is also known as mutual cancellation.
The original copy of this application should be sent to the nearest State Training Centre (see overleaf) for referral to the Commissioner for Vocational Training.
The employer and the apprentice or trainee, should retain a copy of this document.

INFORMATION ON THE MUTUAL CANCELLATION OF AN APPRENTICESHIP / TRAINEESHIP TRAINING CONTRACT

(Section 22 of the *Apprenticeship & Traineeship Act, 2001* (A&T Act))

- An apprenticeship/traineeship training contract may be cancelled by the mutual and voluntary agreement of both parties to that apprenticeship or traineeship.
- Such arrangements require the mutual agreement of the employer and the apprentice/trainee. **The application form overleaf (VT16) must be used for this purpose.**
- Where either party to the apprenticeship/traineeship is uncertain about entering into a mutual cancellation of the training contract, immediate assistance should be sought from the nearest State Training Centre (see below). **No coercion is to take place for either party to enter into a mutual cancellation of an apprenticeship/traineeship.**
- If one of the parties does not agree with the cancellation of the apprenticeship/traineeship, contact should be made with the nearest State Training Centre (see below) for assistance.
- Mutual cancellation of an apprenticeship or traineeship does not preclude the apprentice or trainee from continuing the apprenticeship or traineeship with another employer. Apprentices and trainees are advised to continue attendance in any off the job training program being undertaken at the time of cancellation.

Commissioner for Vocational Training

STATE TRAINING CENTRE ADDRESSES AND TELEPHONE NUMBERS

Clients from anywhere in NSW can contact their nearest Centre by calling **13 28 11** for the cost of a local call.

<p>Sydney City, Northern Sydney & Southern Central Coast Level 13, 12 Help Street CHATSWOOD NSW 2067 Ph: (02) 9242 1700</p> <p>Southern Sydney & South-Western Sydney Level 2, 41-45 Rickard Road (PO BOX 3515) BANKSTOWN NSW 2200 Ph: (02) 8707 9600</p> <p>Western Sydney Station House, 16-18 Wentworth Street PARRAMATTA NSW 2150 (PO BOX 1007 PARRAMATTA NSW 2124) Ph: (02) 9204 7400</p> <p>Hunter & Northern Central Coast State Office Block Level 1, 117 Bull Street NEWCASTLE WEST NSW 2302 (Locked Bag 542, Newcastle NSW 2300) Ph: (02) 4974 8570</p>	<p>Illawarra State Office Block Level 1, Block E, 84 Crown Street WOLLONGONG EAST NSW 2520 (PO BOX 469 WOLLONGONG EAST NSW 2520) Ph: (02) 4224 9300</p> <p>New England Level 2, Noel Park House 155-157 Marius Street (PO BOX 399) TAMWORTH NSW 2340 Ph: (02) 6755 5099</p> <p>North Coast Level 4, Suite 3 (PO BOX 575) 29 Molesworth Street LISMORE NSW 2480 Ph: (02) 6627 8400</p> <p>Riverina 87 Forsyth Street (PO BOX 2304) WAGGA WAGGA NSW 2650 Ph: (02) 6937 7600</p> <p>Western NSW Level 1, State Office Building Cnr Anson & Kite Streets (PO BOX 53) ORANGE NSW 2800 Ph: (02) 6392 8500</p>
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Department Of Education and Training
SUSPENSION OF APPRENTICESHIP OR TRAINEESHIP BY CONSENT

Apprenticeship and Traineeship Act, 2001 Section 22

FORM VT13 (January 2002)

Application to Suspend an Apprenticeship or Traineeship
No. (TA ID)

We,
(apprentice/trainee - please print full name)

and
(employer - please print employer name as per the contract)

being the parties to a training contract in the vocation of:
.....
(name of apprenticeship/traineeship)

hereby mutually agree to the suspension of the apprenticeship / traineeship training contract for a period commencing from

..... and ending on
day month year day month year

The reason for this suspension is:

- **I certify that I have read and understood the information and instructions contained overleaf.**
- **I understand that the Commissioner for Vocational Training will direct this suspension to be effected 7 days from the date of lodgement of this form, unless either party notifies the Commissioner that they have withdrawn their consent to this suspension.**

The parties further agree as follows:

1. At the end of this period the apprenticeship / traineeship training contract will recommence and the apprentice/trainee will return to work at the normal starting time on the first working day following the expiry of this agreement.
2. Where this agreement is entered into due to lack of work or training in the employer's business, then the following conditions will apply.
 - Both parties will make efforts to locate an alternate employer to whom the apprentice/trainee can be transferred.
 - In the event that an alternate employer is found who is unwilling to take over the apprentice/trainee without cancelling the existing contract, then the parties will agree to cancel the contract. (This allows for employers to take over the apprenticeship/traineeship with a new training contract or by employing the apprentice as a trainee apprentice).
 - The apprentice/trainee will continue to attend the appropriate trade course.
 - Should work become available in the employer's business this agreement will cease to have effect and the apprentice/trainee will immediately return to work with the employer.

Suspensions for reasons such as illness or extended leave do not require the agreement of the parties to point 2 above.

Signed:

Employer Witness
(independent person)

Apprentice/Trainee Witness
(independent person)

.....
date

This application must be signed before the commencement date of the suspension.
The original copy of this application should be sent to the nearest State Training Centre (see overleaf) within 14 days of the commencement of the suspension for referral to the Commissioner for Vocational Training.
The employer and the apprentice/trainee should retain a copy of this document.

INFORMATION ON THE MUTUAL SUSPENSION OF AN APPRENTICESHIP / TRAINEESHIP TRAINING CONTRACT

(Section 22 of the *Apprenticeship & Traineeship Act, 2001 (A&T Act)*)

- An apprenticeship/traineeship training contract may be mutually suspended due to a lack of work, eg, during lay-off periods or under other special circumstances such as in the case of maternity leave or extended leave to travel or study overseas. Where any time lost through suspension is detrimental to the progress of the apprentice/trainee, time lost is **to be added to the term of the apprenticeship/traineeship in the year of the occurrence of the lost time.**
- Such arrangements require the mutual agreement of the employer and the apprentice/trainee. **The application form overleaf (VT13) must be used for this purpose.**
- Where either party to the apprenticeship/traineeship is uncertain about entering into a mutual suspension of the training contract, immediate assistance should be sought from the nearest State Training Centre (see below). **No coercion is to take place for either party to enter into a mutual suspension of an apprenticeship/traineeship.**
- If one of the parties does not agree with a suspension to the apprenticeship/traineeship, contact should be made with the nearest State Training Centre (see below) for assistance.
- Employers should be aware of industrial implications where an apprentice/trainee is required to take leave entitlements due to lack of work, rather than entering into a suspension agreement.

Commissioner for Vocational Training

STATE TRAINING CENTRE ADDRESSES AND TELEPHONE NUMBERS

Clients from anywhere in NSW can contact their nearest Centre by calling 13 28 11 for the cost of a local call.

<p>Sydney City, Northern Sydney & Southern Central Coast Level 13, 12 Help Street CHATSWOOD NSW 2067 Ph: (02) 9242 1700</p> <p>Southern & South-Western Sydney Level 2, 41-45 Rickard Road (PO BOX 3515) BANKSTOWN NSW 2200 Ph: (02) 8707 9600</p> <p>Western Sydney Station House, 16-18 Wentworth Street PARRAMATTA NSW 2150 (PO BOX 1007 PARRAMATTA NSW 2124) Ph: (02) 9204 7400</p> <p>Hunter & Northern Central Coast State Office Block Level 1, 117 Bull Street NEWCASTLE WEST NSW 2302 (Locked Bag 542, Newcastle NSW 2300) Ph: (02) 4974 8570</p>	<p>Illawarra State Office Block Level 1, Block E, 84 Crown Street WOLLONGONG EAST NSW 2520 (PO BOX 469 WOLLONGONG EAST NSW 2520) Ph: (02) 4224 9300</p> <p>New England Level 2, Noel Park House 155-157 Marius Street (PO BOX 399) TAMWORTH NSW 2340 Ph: (02) 6755 5099</p> <p>North Coast Level 4, Suite 3 (PO BOX 575) 29 Molesworth Street LISMORE NSW 2480 Ph: (02) 6627 8400</p> <p>Riverina 87 Forsyth Street (PO BOX 2304) WAGGA WAGGA NSW 2650 Ph: (02) 6937 7600</p> <p>Western NSW Level 1, State Office Building Cnr Anson & Kite Streets (PO BOX 53) ORANGE NSW 2800 Ph: (02) 6392 8500</p>
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Single party application to cancel a training contract

This form has been specifically developed for use by **one party** of a training contract to apply in writing to the Department of Education, Training and Employment (DETE) to cancel the training contract (where the other party does not agree to cancel) as per Section 63 of the *Vocational Education, Training and Employment (VETE) Act 2000*.

This form is not to be used where both parties mutually agree to cancellation.

Cancellation of an apprenticeship or traineeship will not take effect, and is therefore to remain ACTIVE, until a decision has been made by a Training Queensland officer (as a delegate of Skills Queensland).

Note: There are options available for employers and apprentices/trainees to consider as alternatives to cancellation. For example:

- temporary stand down of the training contract
- amend the training contract to part time
- temporary placement of the apprentice/trainee with another employer (temporary assignment).

Where to return this form

Please return the completed form to your nearest [DETE Training Queensland district office](#). Address, fax and email details can be found at www.apprenticeshipsinfo.qld.gov.au > Find your local Training Queensland office (in Quicklinks menu) or phone 1800 210 210.

Apprentice or trainee details

Training contract registration number: 2 0 _____

Name: _____ Mobile No: _____

Home address: _____ Postcode: _____

Postal address: _____ Postcode: _____
(if the same as your home address, state 'AS ABOVE')

Email: _____

Employer details

Trading name: _____ Phone No: _____

Postal address: _____ Postcode: _____

Email: _____

Cancellation details

I hereby make application for the cancellation of the abovementioned training contract. My reasons for seeking cancellation are:

(please attach additional information if necessary)

If employment has ceased, what was the last date of employment: _____

Applicant's name (please print): _____

If applicant is employer representative, please provide position: _____

Applicant's signature: _____ Date: _____
(if applicant is under 18 years, the parent or guardian who signed the training contract must sign this form)

Parent or guardian's name (please print): _____

Parent or guardian's signature: _____ Date: _____

Privacy Notice – The Department of Education, Training and Employment (DETE) is collecting the information on this form in accordance with Sections 63, 66 – 69 and 82 of the *Vocational Education, Training and Employment Act 2000* (Qld) in order to assess the cancellation of the training contract between the abovementioned parties. Information collected on this form may also be used by DETE for generating statistics on cancellations. Where the personal details provided, such as address, differ from the details already held by DETE this information will be used to update the person details held on DETE's DELTA database. DETE routinely gives some or all of this information to the Department of Education, Employment and Workplace Relations, Australian Apprenticeships Centres, Queensland Studies Authority and schools (for school-based apprentices/trainees) and registered training organisations for the purpose of updating the status of the training contract and/or verify subsidy claims. Your information will not be disclosed to any other person or agency unless you have given permission or it is required or authorised by law.

Agreement to cancel a training contract

This form has been specifically developed for use by the parties to a training contract, to provide written notification to the Department of Education, Training and Employment (DETE), of their mutual agreement to cancel their training contract as per Section 61 of the *Vocational Education, Training and Employment (VETE) Act 2000*.

This form is **NOT** to be used where only one party is applying for cancellation.

If you do not agree, do not sign this form. Contact Apprenticeships Info on 1800 210 210 for assistance.

Where parties to a training contract mutually agree to a cancellation date, this will be date of effect of cancellation. Parties must notify DETE, in writing, within 14 days of reaching an agreement to cancel.

Note: There are options available for employers and apprentices/trainees to consider as alternatives to cancellation. For example:

- temporary stand down of the training contract
- amend the training contract to part time
- temporary placement of the apprentice/trainee with another employer (temporary assignment).

Where to return this form

Please return the completed form to your nearest [DETE Training Queensland district office](#). Address, fax and email details can be found at www.apprenticeshipsinfo.qld.gov.au > Find your local Training Queensland office (in Quicklinks menu) or phone 1800 210 210.

Apprentice or trainee details

Training contract registration number: 2 0

Name: _____ Mobile No: _____

Home address: _____ Postcode: _____

Postal address: _____ Postcode: _____

(if the same as your home address, state 'AS ABOVE')

Email: _____

Employer details

Legal name: _____ ABN/ACN: _____

Trading name: _____ Mobile No: _____

Postal address: _____ Postcode: _____

Email: _____

Cancellation details

AGREED DATE OF CANCELLATION: _____

(The date of cancellation is the date the parties mutually agreed to cancel the training contract, unless otherwise agreed.)

We are aware of our rights as provided by the *VETE Act 2000* and agree to cancel the stated training contract.

Apprentice or trainee's signature: _____ Date: _____
(if the apprentice or trainee is under 18 years, the parent or guardian who signed the training contract must sign this form)

Parent or guardian's name (please print): _____

Parent or guardian's signature: _____ Date: _____

Name of person authorised to sign on behalf of employer (please print): _____

Employer's signature: _____ Date: _____

Privacy Notice – The Department of Education, Training and Employment (DETE) is collecting the information on this form in accordance with Sections 61, 67 – 69 and 82 of the *Vocational Education, Training and Employment Act 2000* (Qld) in order to process the cancellation of the training contract between the abovementioned parties. Information collected on this form may also be used by DETE for generating statistics on cancellations. Where the personal details provided, such as address, differ from the details already held by DETE this information will be used to update the person details held on DETE's DELTA database. DETE routinely gives some or all of this information to the Department of Education, Employment and Workplace Relations, Australian Apprenticeships Centres, Queensland Studies Authority and schools (for school-based apprentices/trainees) and registered training organisations for the purpose of updating the status of the training contract and/or verify subsidy claims. Your information will not be disclosed to any other person or agency unless you have given permission or it is required or authorised by law.

Traineeship and Apprenticeship Services
Application to Suspend a Training Contract



Government of South Australia
Department of Further Education,
Employment, Science and Technology

Subject to the Training and Skills Development Act 2008, a Training Contract may not be suspended without the approval of the Training Skills Commission.

Training Contract Number _____ Employer Postcode

Apprentice/Trainee Name _____

Employer Legal Name _____

Vocation _____

Suspension period from to (Max 30 days if business reasons)

Is the Training Contract currently suspended? Yes No

Suspension is for Business or Non-business reasons

(If the initial suspension application is for more than 30 days, or this is an application to continue a non-business related suspension, evidence must be attached. For information on appropriate evidence to supply, see overleaf)

Reason for suspension (in your own words)

If the reason for suspension is listed as business reasons, please outline below the steps you have taken to avoid the need to suspend. (information on suggested remedies is overleaf)

The suspension must be by mutual agreement between the parties to the contract and parties **should not sign** this document against their will. Employment must recommence at the end of this suspension period.

Apprentice/Trainee's Signature _____ date _____

Parent/Guardian's Signature (if apprentice/trainee is under 18 years of age) _____ date _____

Employer's Signature (authorised employer representative) _____ date _____

Name and title of employer representative _____ Ph _____

Please return this form to:

Traineeship and Apprenticeship Services
GPO Box 320, ADELAIDE SA 5001

OR Fax: (08) 8463 5654 **Phone:** 1800 673 097

Website: <http://www.skills.sa.gov.au/apprenticeships-traineeships> **Email:** dfest.tas@sa.gov.au

Traineeship & Apprenticeship Services

NOTES AND INSTRUCTIONS FOR EMPLOYERS AND APPRENTICES/TRAINEES APPLYING TO SEEK SUSPENSION FOR BUSINESS or NON BUSINESS RELATED REASONS

Business Related Reasons

Under the "Guidelines for Determining the Approval of the Suspension of a South Australian Training Contract for 'Business Related Reasons', Part 16. states:

"The maximum period for a suspension for business related reasons is 30 days. "However, after this period the Commission may review and extend such a Suspension upon consideration of the circumstances, including ongoing action taken to exhaust other avenues by the apprentice/trainee and the employer during the period of suspension."

Guidelines for Suspension of a training contract can be accessed at <http://www.tasc.sa.gov.au/>

To support an application for Suspension of the Training Contract for business related reasons, Traineeship & Apprenticeship Services requires evidence from the employer and the apprentice/trainee that actions have been undertaken to support the resumption of the training. Examples may include:

- In the case where more than 1 apprentice/trainee is employed, details of rotational Suspension arrangements
- Details of leave and/or rostered days off that have been brought forward or exhausted already
- Details of arrangements made with the Registered Training Organisation to bring forward training ***(please note that when an apprentice/trainee attends training the employer is required to pay them for the days they attend)***
- The names of employers approached regarding possible transfer of the Training Contract
- Any other actions taken by the employer including reduction in staffing levels.

Non Business Related Reasons

- Undertaking personal study
- Paternity or Maternity leave
- Personal travel
- Temporary change to role at work
- Personal leave
- Sickness, illness or injury (not work related)

To apply for a suspension citing any of the non-business reasons above where the initial period of suspension being applied for exceeds 30 days and for all applications to extend a contract already granted a suspension Traineeship and Apprenticeship Services requires evidence of the reason for suspension. This may include a prescribed medical certificate, travel itinerary, copies of leave applications, letter from a specialist or medical practitioner relating to an expected date of confinement for pregnancy and birth related long term suspension periods or letter of appointment if a temporary change in role has been granted.

SCHEDULE B



Apprenticeships and traineeships
Information for employers

Business environment changes

If there has been a significant change in your business which affects your ability to train your apprentice or trainee, you need to notify your local Departmental office. This change could be that your business no longer performs a large percentage of the work in which your apprentice or trainee was to receive training.

WHAT TO DO IF BUSINESS IS SLOW

There are a range of options available to you should you be unable to provide the range of work required to train your apprentice or trainee:

- If you are employing your apprentice or trainee through a GTO, contact them to arrange placement of your apprentice or trainee with another host employer.
- Temporary assignment of your apprentice or trainee to another employer. Under temporary assignment, the employer stated in the training contract continues to have the responsibility to work with the SRTO and the apprentice or trainee to ensure training continues in accordance with the training plan and the training record is maintained, and to monitor and support the apprentice or trainee's progress.
- You may be able to negotiate for your apprentice or trainee to take annual leave to cover the slow period.
- The SRTO may be able to deliver additional training to your apprentice during your quiet period.
- Determine if other duties can be offered to the apprentice or trainee until things pick up.
- You can apply for a temporary stand down of the apprenticeship or traineeship until your capacity to train improves. Temporary stand down is essentially unpaid leave, and can also include employing your apprentice or trainee for less than the full working week. The maximum period of a stand down is 30 days and must be approved by the Department before placing the apprentice or trainee on stand down.
- As a last resort, cancellation of the apprenticeship or traineeship may need to be considered.

Stand down applications can be found on the Apprenticeships Info website www.apprenticeshipsinfo.qld.gov.au, by emailing apprenticeshipsinfo@qld.gov.au or by phoning Apprenticeships Info on 1800 210 210.

It is recommended that you contact Apprenticeships Info on 1800 210 210 to discuss the available options in more detail.

WHAT TO DO WHEN THE BUSINESS IS SOLD

Your apprentice or trainee is contracted to you as the owner of your business. If you sell your business, the new owner can agree to continue to train your apprentice or trainee under the registered training contract. If this happens, the contract is taken to have been assigned to the new owner on the day agreed between you and the new owner. Both you and the new owner must advise the Department of the new arrangements in writing within 14 days after the sale occurs and must include:

- date of effect of the change of ownership of the business;
- apprentice/trainee name, signature and training contract registration number;
- original employer's legal name, trading name and signature;
- new employer's ABN, legal name, trading name and address;
- the name of a contact representative for the new employer's business and their signature;
- the SRTO name and signature to confirm they have noted the amendment.

You will also need to contact your AAC so they can make changes to their internal records.

The Assignment/change of legal name form is available for use as the written notification and can be found on the Apprenticeships Info website www.apprenticeshipsinfo.qld.gov.au, by emailing apprenticeshipsinfo@qld.gov.au or by phoning Apprenticeships Info on 1800 210 210.

If the new owner does not want to keep the apprentice or trainee on, then you can apply to the Department to cancel the training contract.

WHAT TO DO IF A BUSINESS PARTNERSHIP IS DISSOLVED

Your apprentice or trainee is contracted to you and your partner(s) as owners of the business. If the partnership is dissolved and you or your partner(s) continue the business, the training contract is assigned to the remaining owner(s) of the business. The continuing employer should provide written confirmation of the changes to the Department within 14 days of the event happening. The notification is required to include:

- date of effect of dissolution of partnership and, whether the business is being continued by one person who was a partner in the dissolved partnership or whether the business is being continued by two or more persons who were partners in the dissolved business;
- apprentice/trainee's name and signature;
- employer's original legal name, trading name and signature;
- employer's new ABN, legal name, trading name and address;
- the name of a contact representative for the new employer's business and their signature;
- the SRTO name and signature.

The Assignment/change of legal name form is available for use as the written notification and can be found on the Apprenticeships Info website www.apprenticeshipsinfo.qld.gov.au, by emailing apprenticeshipsinfo@qld.gov.au or by phoning Apprenticeships Info on **1800 210 210**.

You will also need to contact your AAC so they can amend their records.

If the business is not continued, the Department should be advised so that the training contract can be cancelled.

Changing your Supervising Registered Training Organisation

You and your apprentice or trainee can change SRTO during the apprenticeship or traineeship, providing the parties to the training contract agree.

As the employer you must:

- Write to the SRTO advising them that they are to be replaced. Include the date for the replacement which can be no sooner than 14 days after the day written notice is given. The SRTO you are replacing must provide your apprentice or trainee with a Statement of Attainment to confirm the training that has been completed. This must be provided on or before the replacement date.;
- Advise the Department by completing the Change of SRTO form. This form can be found by visiting www.apprenticeshipsinfo.qld.gov.au, emailing apprenticeshipsinfo@qld.gov.au or by phoning Apprenticeships Info on **1800 210 210**.

Your new SRTO will need to develop a new training plan with you and your apprentice or trainee. In addition if the contract is school-based a new schedule showing the impact of employment and/or training on the student's timetable will need to be developed.

Support and assistance

Support services

Officers from the Department may assist you or refer you to specialist services, to address any issues you and your apprentice or trainee may be having including:

- communication problems or disagreements in the workplace;
- absences or behavioural issues;
- support for apprentices and trainees who are not making reasonable progress.

SRTO support:

- support for apprentices and trainees with learning difficulties or experiencing problems with reading, writing or maths;
- support for apprentices and trainees with a disability.

For more information, contact Apprenticeships Info on **1800 210 210**.

Seek assistance early. The earlier you deal with a problem, the more likely it will be worked out. Then you can get on with the training.

Hints for resolving problems

Step 1: Identify what the problem is—be specific and identify particular behaviours which need to change.

Step 2: Identify who the problem affects, why it is a problem, what the consequence may be and who is contributing to the problem.

Step 3: If applicable, discuss the problem with the SRTO to determine if the behaviour is occurring across all areas of the apprenticeship or traineeship.

Step 4: Identify possible solutions—what would you and your apprentice or trainee prefer to happen and how can you both make this happen.

Step 5: Communicate the specific behaviours you both expect and reach an agreement on exactly what the solution is and how to measure it. It is recommended to put this in writing.

Step 6: Review the solution and give positive feedback.

MISCONDUCT AND DISCIPLINE

If your apprentice or trainee does not do the right thing, you can do something about it.

You should contact the Department before disciplinary action is taken if your apprentice or trainee:

- fails to carry out a reasonable and lawful instruction, consistent with the training contract obligations;
- is absent from work without approval;
- fails to attend training required under the training plan;
- does not participate in training provided under the training plan;
- does not keep a training record or fails to produce it on request;
- fails to make reasonable progress in their training because of their deliberate neglect or default;
- causes serious damage, or risk of serious damage, to your business or business reputation.

Depending on the situation, a range of actions may be taken by the Department including:

- reprimand;
- a fine;
- written direction to comply with the training contract;
- suspension without pay;
- cancellation of the training contract.

SERIOUS MISCONDUCT

You can immediately suspend your apprentice or trainee for serious misconduct for up to one working day. Serious misconduct includes:

- theft, assault and fraud;
- being under the influence of drugs or alcohol at work;
- causing imminent risk of serious bodily injury, work-caused illness or a dangerous event;
- behaving in a way that is inconsistent with the continuation of the training contract.

There are strict legislative requirements and timeframes

that you must comply with in order for the suspension or cancellation to be approved.

You will be required to:

- Advise the apprentice or trainee of the suspension.
- Provide the apprentice or trainee with written notice confirming the suspension within one working day of the suspension occurring. This written notice must also outline the grounds for suspension and state whether you intend to apply for cancellation of the training contract.
- Advise the Department of the suspension within one working day. This can be done in person, by telephone or by email.
- Provide the Department with a copy of the suspension notice within five working days of suspending the apprentice or trainee. The Department will decide whether to uphold the suspension and where applicable, cancel the training contract.

If the Department authorises the cancellation of the training contract you must notify your SRTO.

If you do not fully comply with the legislative requirements, or if the suspension or application for cancellation is not approved, you must immediately resume the training program and reimburse your apprentice or trainee for lost wages.

Due to the strict legislative requirements around serious misconduct it is recommended that you contact Apprenticeships Info **immediately** on **1800 210 210** in the event of serious misconduct.

CANCELLING THE CONTRACT

After the completion of the probationary period, the training contract you have entered into with your apprentice or trainee is legally binding, and you cannot terminate their employment unless the training contract is cancelled or completed in accordance with the VETE Act 2000. This is even if your award or employment agreement has a longer probationary period.

Cancellation of a training contract should only be

considered as a last resort after all efforts have been made to resolve the issues that threaten the continuation of the training contract. Therefore, if you are considering cancelling the training contract, unless the apprentice or trainee (and guardian if they are under 18) agrees, you will need to seek assistance from the Department. Officers will be available to help you work through any issues you and your apprentice or trainee may have.

A party to the training contract may NOT coerce or pressure another party to cancel the training contract.

When you both agree to cancel

You and your apprentice or trainee (and guardian if they are under 18) can agree to cancel the training contract at any time. All parties will need to sign a letter to confirm the agreement to cancel and nominate an effective date of cancellation. Alternatively you can use the Cancellation form available from www.apprenticeshipsinfo.qld.gov.au, by emailing apprenticeshipsinfo@qld.gov.au or phoning **1800 210 210**.

You will need to advise your SRTO that the contract has been cancelled. You should also ask your SRTO to provide your apprentice or trainee with a Statement of Attainment to reflect the competencies they have achieved.

When only one of you wishes to cancel

The person who wishes to cancel the training contract should contact Apprenticeships Info on **1800 210 210** to discuss their situation.

The Department will review the application and commence an investigation if necessary.

Until a decision is made, the training contract is still binding and both you and your apprentice or trainee must continue to honour your obligations. This includes continuation of employment, training and payment of wages.

When can the Department cancel training contracts?

Training contracts can be cancelled by the Department in instances where:

- you or your apprentice or trainee provided false and/or misleading information on the training contract;
- the training contract was registered in error;
- you or your apprentice or trainee have been convicted of an offence against the VETE Act 2000;
- there has been a change in your circumstances or those of your apprentice or trainee that make it unlikely that the contract will be completed;
- the apprentice or trainee is failing to make reasonable progress in the training for a reason other than neglect or default;
- the apprentice or trainee has left your employment and can't be contacted.

REVIEWS, COMPLAINTS AND APPEALS

If you disagree with a decision made by the Department on any apprenticeship or traineeship matter, one of the following may be an option for you:

- lodge a complaint with the Department
- lodge an appeal to the Queensland Industrial Relations Commission.

Complaints relating to a training contract

An employer, apprentice or trainee, parent/guardian and other persons with sufficient interest may lodge a complaint with the Department regarding:

- training delivered to the apprentice or trainee under the training contract
- adequacy of the facilities, range of work and supervision provided by the employer
- circumstances in which the contract was signed or amended or cancelled
- the handling of a matter by the regional office
- the behaviours of training organisations contracted by the Department to deliver training to apprentices/trainees under the User Choice program.

The Department can not deal with a matter if it is before the Queensland Industrial Relations Commission.

To lodge a complaint, email Apprenticeships Info at apprenticeshipsinfo@qld.gov.au or phone **1800 210 210**.

Queensland Industrial Relations Commission

You may lodge an appeal with the Commission if you disagree with a decision relating to:

- refusal to register a training contract;
- refusal to amend or assign a registered training contract;
- order for discipline;
- cancellation of a training contract;
- cancellation of the registration of a training contract;
- cancellation of a completion certificate;
- extension of the nominal term of a registered training contract;
- declaration, variation of a declaration or refusal to vary a declaration of a prohibited employer;
- stand down, or refusal to approve the stand down of an apprentice or trainee.

The Queensland Industrial Relations Commission can be contacted on **1300 592 987** or at qirc.registry@deir.qld.gov.au.



Apprenticeships and traineeships

INFORMATION FOR APPRENTICES
AND TRAINEES

AT011

Queensland the Smart State

 **Queensland Government**
Department of Employment and Training

Problems at work

Just like any job, you may come across some problems at work. It is best if you try and work out the problem with your employer first. However, don't wait until you have had enough and are ready to give up before seeking help.

The Department of Employment and Training provides mediation services to help you deal with problems at work. In most cases, involving someone outside of the workplace is the most effective way to solve the problem. For advice and assistance call the Department of Employment and Training on **1300 369 935**.

If you are under 25, the Young Workers Advisory Service can also provide you with advice about work-related matters. For more information call **1800 232 000**.

Misconduct and discipline

If you do not do the right thing, your employer can do something about it.

Your employer can take disciplinary action if you:

- :: fail to carry out a reasonable and lawful instruction, in line with the training contract
- :: are absent from work without approval
- :: fail to attend training required under the training plan
- :: do not participate in training provided under the training plan
- :: do not keep a training record or fail to produce it when requested
- :: fail to make reasonable progress in your training
- :: cause serious damage, or risk of serious damage, to your employer's business or business reputation.

Depending on the situation, a range of actions may be taken by the Department of Employment and Training including:

- :: a reprimand
- :: a fine
- :: written direction to follow the training contract
- :: suspension without pay
- :: cancellation of the training contract.

Serious misconduct

You can be immediately suspended for serious misconduct.

Serious misconduct includes:

- :: theft, assault and fraud
- :: being under the influence of drugs or alcohol at work
- :: causing risk of serious bodily injury, work-caused illness or a dangerous event
- :: behaving in a way that means the training contract can not continue.

Your employer must advise you in writing of the suspension and why you are being suspended within one working day of the suspension occurring. Your employer may apply to the Department of Employment and Training to have your training contract cancelled.

For more information contact the Department of Employment and Training on **1300 369 935**.

Cancelling the training contract

The training contract you have entered into with your employer is legally binding. As a result, to cancel your training contract before completion of the apprenticeship or traineeship, you and your employer must follow a set process.

If you or your employer are considering cancelling the training contract due to a communication problem or misunderstanding, you should seek help to see if you can solve the problem and continue with the training. Cancellation of a training contract should only be considered as a last resort after everything has been done to solve the problem.

You or your employer can cancel the apprenticeship or traineeship during probation by giving a week's notice.

If you wish to cancel the training contract after the probation period, it is important that you contact the Department of Employment and Training on **1300 369 935** for assistance.



Resolving Issues for employers of apprentices and trainees

Apprenticeships & traineeships / Employing an apprentice or trainee / Resolving issues

From time to time there may be issues, disagreements or disputes between you and your apprentice or trainee. The good news is Traineeship and Apprenticeship Services (TAS) can help.

How it works

If there is a problem, disagreement or dispute between you and your apprentice or trainee, TAS consultants are available to provide impartial advice.

Call 1800 673 097 and speak to an area consultant, or arrange a time for someone to meet with you and your apprentice or trainee.

Next steps

1. Try to resolve it in the workplace. Speak with your apprentice or trainee and outline the issue and how it might jeopardise the training contract.
2. If talking hasn't helped, contact TAS on 1800 673 097 to speak to an area consultant. The consultant will offer impartial advice and let all parties know of their obligations to each other under the law and options for resolving the matter.
3. In cases where you have not been able to resolve the matter to your satisfaction, either party can lodge an application with the South Australian Industrial Relations Commission (SAIRC) Registry.

SAIRC Registry

Street address: Level 6, Riverside Centre, North Terrace, Adelaide

Postal address: PO Box 8046, Station Arcade SA, 5000

Telephone: 8207 0999

Fax: 8207 0995

Email Address: IndustrialTribunals@sa.gov.au

Office hours: 8.30 am to 5.00 pm

You and your apprentice or trainee will be required to attend a conciliation conference where you both can discuss the issues with the assistance of a Commissioner.

In most cases this will resolve the matter.

4. If there's no outcome from the conciliation conference, your matter can be referred to arbitration. This means the decision on what will happen is made for you and your apprentice or trainee and it is final.

Office of the Training Advocate

The Office of the Training Advocate (OTA) provides confidential support and advice to all apprentices and trainees. It is a support service which can refer you to specialised help about your training both on and off-job.

You can remain anonymous when contacting the OTA.

Call the OTA on 1800 006 488 or visit them at 55 Currie St, Adelaide. Office hours are Monday to Friday, 8.30 am to 5.30 pm.

Some important facts to remember when you have a dispute with your apprentice or trainee

1. For changes to occur to your training contract, there must be agreement between you and the apprentice or trainee and parent or guardian (if apprentice or trainee is under 18 years). **It is unlawful for any person to pressure or use unfair tactics to gain someone else's agreement to a change.**
2. You must continue to provide your apprentice or trainee with work and training and their wages while there is a dispute; and they must continue attending training and work. These are the obligations under the training contract.
3. The only time these obligations **may** change is where you have reasonable grounds to believe your apprentice or trainee has displayed wilful and serious misconduct.

Wilful and serious misconduct

If your apprentice or trainee does something that you consider as wilful and serious misconduct, you can suspend your apprentice or trainee for no more than **seven working days**.

If this happens, you **must** notify the SAIRC Registry (contact details above) of the suspension **immediately**.

The matter will be looked at by the SAIRC, usually within the suspension period, to resolve the matter quickly.

Your apprentice or trainee may not be paid during this period and you may also ask for the suspension period to be added to the term of the training contract.

The SAIRC may confirm, cancel or increase the suspension period.

Apprenticeships and traineeships

A guide for employers



Government of Western Australia
Department of Training
and Workforce Development



APPRENTICENTRE

making apprenticeships work

Support during the apprenticeship/traineeship

Dealing with problems

If problems arise with your apprentice/trainee, deal with them straight away. If you need advice or help contact ApprentiCentre. ApprentiCentre's industry specialists can help you mediate and resolve disputes with your apprentices/trainees.

Changing the apprenticeship/traineeship arrangements

You can make changes during an apprenticeship/traineeship, such as changing the registered training organisation. It is important to contact ApprentiCentre for help if you are planning on making changes to the training contract.

Cancelling an apprenticeship/traineeship

An apprenticeship/traineeship is a contract that should be entered into in good faith by both parties. Cancelling the training contract should be a last resort. However, if both you and your apprentice/trainee want to cancel the training contract, contact ApprentiCentre. A training contract cannot be legally cancelled without ApprentiCentre's approval.

ApprentiCentre can also help you and your apprentice/trainee try to maintain the training contract. You and your apprentice/trainee may access mediation and formal dispute resolution if terminating a training contract.

Suspending an apprenticeship/traineeship

You and your apprentice/trainee may agree to suspend the training contract for a period of time (for example, due to illness or family considerations). After the suspension period ends the apprentice/trainee will return to work.

Completion of an apprenticeship/traineeship

An apprenticeship/traineeship is formally completed when the apprentice/trainee has finished all on and off the job training and is assessed as competent in the qualification listed on the training contract. This can be either before or on completion of the nominal apprenticeship/traineeship term.

The training contract cannot be completed until you, your apprentice/trainee and your training organisation agree. When the contract is completed the apprentice/trainee receives a nationally recognised qualification from the registered training organisation.



Education &
Communities
Office of Education

State Training Services



A GUIDE TO APPRENTICESHIPS AND TRAINEESHIPS IN NEW SOUTH WALES



January 2013

9. Resolving problems

Help is available if problems arise between an employer and their apprentice or trainee.

9.1 Problems that can lead to disputes

Disputes can arise as a result of:

- claims that the employer is not fulfilling their obligation to provide on-the-job training and supervision
- claims that the employer is not fulfilling their obligation to release an apprentice or trainee for off-the-job training, or to provide support for formal training through the RTO
- claims that the employer is not fulfilling their other responsibilities, such as meeting the conditions of the industrial award or workplace agreement, or providing a workplace that is safe and free of discrimination
- claims that the apprentice or trainee is not making satisfactory progress in developing their skills
- claims that the apprentice or trainee is not making satisfactory progress in their formal training through the RTO
- claims that the apprentice or trainee is not meeting their obligation to follow the instructions of their employer
- personal differences between the apprentice/trainee and their employer or other employees
- failure of the parties to agree about a request to transfer, suspend, cancel or vary the training contract.

9.2 Communication between employers and apprentices or trainees

Many workplace problems can be resolved through direct communication between the employer and the apprentice or trainee. Although employers and apprentices and trainees have a right to seek support and assistance from organisations such as employer groups or trade unions, the apprentice or trainee and their employer should first attempt to discuss the issue and seek a solution. Where a solution cannot be reached, State Training Services must be advised phone 13 28 11 to consult with a training advisor.

Supervising your apprentice or trainee is a State Training Services resource that provides an outline of what is expected of the supervisor, and what the supervisor can expect of the apprentice or trainee. If you would like a copy of this booklet, please contact your nearest State Training Services regional office on 13 28 11 or download a copy of [Supervising your Apprentice or Trainee](#).



9.3 Help available through the State Training Services

If difficulties arise between apprentices/trainees and their employers, State Training Services should be contacted immediately on 13 28 11.

State Training Services can be contacted for confidential advice about workplace or training problems. Employers, apprentices and trainees can request advice or assistance in resolving a dispute. State Training Services Training Advisors are trained in mediation and dispute resolution and will talk to both parties to seek a resolution that allows the continuation of the training contract. The Training Advisor may visit the workplace or arrange a meeting away from work in an effort to resolve the dispute.

9.4 Disputes may be referred to the Vocational Training Tribunal

If a Training Advisor is not able to resolve the dispute, the matter must be referred to the NSW Vocational Training Tribunal (VTT) for resolution. The Tribunal will convene a hearing at which it will attempt to reach a settlement that is acceptable to all parties.

In the event that the dispute cannot be resolved, the VTT will make a determination that may result in the complaint being dismissed or a variation, suspension or cancellation of the apprenticeship or traineeship. The VTT also has the power under the *Apprenticeship and Traineeship Act 2001* to caution or reprimand either one or both of the parties, and to order a party to a training contract to redress the situation as it sees fit.

The *Apprenticeship and Traineeship Act 2001* makes provision for certain decisions by the Commissioner or the VTT to be appealed. An appeal will be heard by the Vocational Training Appeal Panel, at which new evidence or information may be given. A final appeal can be made to the NSW Industrial Relations Commission. This can only occur through an application to the Commission for leave to appeal. Such applications must be made within six months of the Appeal Panel's determination unless otherwise allowed by the Commissioner. More information on the appeals process can be obtained from your local State Training Services by contacting 13 28 11.

10. Changes to training arrangements

The training contract can be transferred, suspended, cancelled or varied by mutual agreement between the employer and the apprentice or trainee. In the case of a transfer, the written agreement of the proposed employer is also required. A selection of forms are available on the State Training Services website for this purpose.

If the employer or the apprentice/trainee wants to transfer, suspend, cancel or vary the training contract and the other party does not agree, then either party must contact State Training Services immediately on 13 28 11.

10.1 Transfer

Subject to approval by State Training Services, an apprentice's or trainee's training contract can be transferred from one employer to another providing that all parties agree.

A transfer application form is available from the State Training Services website for this purpose. The form must be signed by all parties, including the new employer. In most cases the new employer must also complete a training contract in which they provide additional information required for assessment of the transfer application. The transfer application form and new training contract should be submitted to State Training Services through the employers nominated AAC. Signed copies must also be kept by the parties.

The RTO responsible for providing the formal training for the apprenticeship or traineeship should be contacted regarding the transfer. The RTO should provide the new employer with a copy of the training plan and discuss the apprentice/trainees' progress to date. If the RTO is not in a position to continue to deliver the formal training as a result of the transfer, a new RTO must be selected and a new training plan submitted.

10.2 Suspension

Apprenticeships and traineeships can be suspended or partially suspended to reduce the working hours, providing that the employer and the apprentice/trainee agree. Suspensions may be necessary due to lack of work or the need for either party to take an extended period of time off as a result of injury or illness. A suspension or partial suspension is generally for a period of three months but may be extended or reduced.

A suspension application form is available from the State Training Services website for this purpose. The form should be submitted to State Training Services within 14 days of commencement of the suspension period. Signed copies must also be kept by the parties.

An apprentice/trainee cannot be forced to suspend a training contract with their employer. The *Apprenticeship and Traineeship Act 2001* stipulates that suspensions will not be approved if undue influence has been exerted on the apprentice/trainee by any party. Similarly, the apprentice/trainee cannot simply cease work without the consent of their employer.

There is a seven-day 'cooling off' period during which either party may elect to change their minds and withdraw their consent to suspending the training contract. The cooling-off period commences on the day on which the application for suspension is lodged with State Training Services.

If either party does not agree to the proposed suspension, or if consent is withdrawn within the cooling-off period, State Training Services must be contacted immediately.

Any request to suspend a training contract should be undertaken in conjunction with the employer's nominated AAC, as changes may impact on eligibility for incentives from the Australian Government. The request needs to be made in writing, signed by all parties and forwarded to State Training Services by the AAC.

10.3 Variations to the training contract or training plan

The employer and apprentice/trainee can apply to have their training contract or training plan varied, providing that there is agreement between the parties. A [contract variation form](#) is available from the State Training Services website for this purpose.

Variations to the training contract may include requests for:

- an amendment to the term of the contract
- changes to the type of apprenticeship/traineeship
- a different qualification
- a change to the type of employment arrangement

Variations to the training plan that must be submitted to State Training Services are requests for:

- a different RTO
- a different type of training delivery

Where a variation to the training plan is sought, the application must be endorsed by the relevant RTO.

Applications for variation of the training contract or training plan will be dealt with by State Training Services or in some cases, referred to the Vocational Training Tribunal (VTT).

Any request to vary a training contract or training plan should be undertaken in conjunction with the employer's nominated AAC as changes may impact on the employer or learner's eligibility for incentives from the Australian Government.

The request needs to be made in writing, signed by all parties and forwarded to State Training Services by the AAC.

10.3.1 Request for an amended term

An application to amend the term of the training contract may be made if the parties want to extend the term (e.g. because the apprentice/trainee will not attain the relevant competencies before the expected completion date of the contract) or reduce the term (e.g. because the apprentice/trainee has gained skills or experience through previous employment or training that will result in them completing their training in a shorter time).

Requests for a reduced term of training should generally be made at the time the training contract is first prepared and submitted to State Training Services for approval through the AAC. However it may not be appropriate to request a reduced term until the RTO has assessed the apprentice's or trainee's existing skills and granted RPL or RCC as part of the process of developing a full training plan. In these instances, if the parties agree, a request to reduce the term of training may be made after the training contract has been lodged and approved.

Applications for variations to the term of the contract must be submitted to State Training Services before the expected completion date. The applications should specify the reason(s) for the request.

Although applications for competency-based completion will have the effect of reducing the training term, more information about competency-based completion is included in the completions chapter (Section 11) of this document.

10.3.2 Request for a change to the type of apprenticeship/traineeship

The *Apprenticeship and Traineeship Act 2001* provides for two types of apprenticeships: full apprenticeships and trainee apprenticeships. Full apprenticeships bind the employer and the apprentice from the end of the probationary period. After the apprenticeship becomes binding, it can only be cancelled, suspended, transferred or varied with the consent of both parties.

Trainee apprenticeships can be cancelled by either party by simply giving notice to the other party, as provided for in the relevant award or workplace agreement. Trainee apprenticeships are only available where there is appropriate industrial coverage.

There are also two types of traineeships in NSW: new entrant traineeships and existing worker traineeships. Definitions of these two types of traineeships can be found in Section 16 Key Terms.

An application for a change to the type of apprenticeship or traineeship is subject to assessment and approval by State Training Services.

10.3.3 Request for an amended qualification or vocation

Apprenticeship and traineeship vocations in NSW are linked to a specific qualification through the Vocational Training Order. Any request for an apprentice/trainee to undertake a qualification other than that specified in the vocational training order should be made at the time the AAC submits the training contract application to State Training Services.

Requests for the vocation and qualification being undertaken by an apprentice/trainee to be varied mid-contract may be submitted but will only be approved by State Training Services if the proposed changes are considered appropriate. The apprentice or trainee will need to demonstrate that the on-the-job training undertaken to date is relevant to the amended vocation. They will also need to demonstrate the capacity to attain competence in the new trade or traineeship vocation and to complete the relevant qualification within the remaining term of the contract. The support of the RTO is required for applications to vary the vocation and/or qualification.

10.3.4 Nomination of a new registered training organisation

Parties to a training contract may apply to change the nominated RTO. The RTO being replaced should be advised by the employer that their services are no longer required. They should be asked to provide a Statement of Attainment listing the competencies that the apprentice or trainee has achieved to date.

10.3.5 Request for an amended type of training delivery

A request to change the type of training delivery must be supported by the relevant RTO. The request should be submitted to State Training Services and will only be approved if the proposed mode of training delivery is considered suitable in the circumstances.

10.4 Cancellation

An apprentice/trainee cannot be forced to cancel a training contract with their employer. The Apprenticeship and Traineeship Act 2001 stipulates that cancellations will not be approved if undue influence has been exerted on the apprentice/trainee by any party. Similarly, the apprentice/trainee cannot simply resign or leave their employment without the consent of their employer. If the employer or the apprentice / trainee wants to transfer, suspend, cancel or vary the training contract and the other party does not agree, then either party must contact State Training Services immediately on 13 28 11.

Apprenticeships and traineeships can be cancelled by mutual agreement of the employer and the apprentice or trainee. A [cancellation form](#) is available for this purpose from the State Training Services website. The form should be submitted to State Training Services as soon as possible after the decision to cancel has been made and within 14 days of the cancellation. Signed copies must also be kept by the parties.

There is a seven-day 'cooling off' period during which either party may elect to change their mind and withdraw their consent to cancelling the training contract. The cooling-off period commences when the cancellation form is lodged with State Training Services.

If either party does not agree to the proposed cancellation, or if consent is withdrawn within the cooling-off period, they should contact a State Training Services Training Advisor immediately on 13 28 11 (see Section 9, Resolving Problems).

Trainee apprenticeships (which are available in some industries where there is provision for them in the industrial award) can be terminated by either the employer or apprentice simply giving notice to the other party and to State Training Services in accordance with the provisions of the industrial award or workplace

agreement under which the apprentice is employed. Similarly, the employment of existing worker trainees can be terminated by either party in accordance with the provisions of the industrial award or agreement that applied prior to the commencement of the traineeship.



SCHEDULE C

Travel and Accommodation Allowance: Policy Statement and Guidelines. *Not for school-based apprentices or trainees.*

Version 15
August 2012

Please note: This information is NOT for school-based apprentices and trainees. School-based apprentices and trainees may obtain their *Travel and Accommodation Subsidy* claim form or *Application for Air Travel* from their school or from the internet at <http://education.qld.gov.au/students/placement/vet/html/apprent.html>.

Privacy Statement

The Department of Education, Training and Employment (DETE) is collecting your personal information to assess your eligibility for the Apprenticeship and Traineeship Travel and Accommodation Subsidy. Information collected by DETE on the *Apprentice and Trainee Land Travel and Accommodation* claim form, *Apprentice and Trainee Land Travel and Accommodation **Advance*** claim form or *Application for Air Travel* form may be used for generating statistics on the Apprenticeship and Traineeship Travel and Accommodation Subsidy. Where the personal details provided, such as address, differ from the details already held by DETE this information will be used to update the personal details held in DETE's DELTA database. The information will only be accessed by authorised employees or contractors within DETE. Some of the information provided in your application will be given to the registered training organisation (college) nominated in your application to verify your college attendance. Information may also be provided to your employer for the purpose of verifying aspects of the claim. Where DETE is booking a flight or ferry travel on your behalf your personal details will be provided to the company or the booking agent for the company who will be providing the transport. Your information will not be given to any other person or agency unless you have given us permission or we are required by law.

Policy Statement

The Department of Education, Training and Employment provides financial assistance to subsidise additional costs incurred by apprentices and trainees who travel specified distances to attend **off-the-job training**, which is undertaken by them as part of their apprenticeship and traineeship training contract.

Guidelines

Eligibility

Apprentices and trainees registered in Queensland who have to travel at least 100 km return to attend off-the-job training away from their usual place of employment may be eligible to claim subsidies.

Apprentices and trainees **must attend their closest training organisation** able to deliver training in the relevant qualification, in order to be eligible for a subsidy.

Setting of Subsidies

- The level of financial assistance will be as determined periodically by the Director-General, Department of Education, Training and Employment
- Eligible apprentices and trainees may receive financial assistance for their return land travel to the required off-the-job training. An accommodation subsidy may be paid to apprentices and trainees if it was necessary to live away from their usual place of residence to attend training.
- Eligible apprentices and trainees will be provided a return economy air ticket to the location of the training organisation. Refer to the Subsidy Rates – Air Travel section of this document for further information.

Subsidy Rates

Accommodation

\$22.00 per day

Accommodation subsidy is paid to apprentices and trainees for assistance when attending college away from their usual place of residence.

Land Travel

Road and Rail

Zone 1	0 – 99 km (return)	Not eligible
Zone 2	100 – 649 km (return)	15 cents per kilometre
Zone 3	650 – 1400 km (return)	19 cents per kilometre

Air Travel

Flights can only be booked by the Department of Education, Training and Employment.

Eligibility for air travel:

- Apprentices/trainees who are required to travel 1400 km or more return to the locations of the training organisation.
- Cape York Peninsula and Islands of the Torres Strait.

Ferry

Full cost recovery

Assessment of Entitlements

In assessing entitlements the following guidelines are to apply:

- Subsidy payments to apprentices and trainees will only be paid into bank accounts in the name of the apprentice or trainee.
- The application form will be returned if it is incomplete. If the apprentice or trainee's bank details are not clear, or the electronic payment will not go through, a cheque will automatically be sent to the postal address nominated on the form. Incomplete or incorrect information will result in delays in processing the payment.
- Allow up to four weeks for processing of claims at which time a payment slip will also be sent.
- The apprentice or trainee will only be entitled to allowances for attendance at the **closest training organisation** that provides the course of instruction for the particular training program.
- The journey distance will be calculated from the usual place of residence (their residential address from where they travel to work each day) of the apprentice/trainee to the off-the-job training location and return.
- The **most direct road route** will be used to determine eligibility for travel subsidies and will be electronically calculated by MAPINFO.
- Persons approved to receive Living Away From Home Allowance (LAFHA) from the Commonwealth Government may only claim from the "Away from Home" address.

- Apprentices/trainees whose contracts are cancelled must seek permission from the DETE prior to attending any college training relevant to their apprenticeship or traineeship. Otherwise, claims for travel and accommodation to attend college while 'cancelled', may not be approved. They should also enquire about *Financial Assistance for Apprentices and Trainees (FAAT)* program offered by the department to cancelled apprentices/trainees. For more information telephone Apprenticeships Info on 1800 210 210.
- Once booked by DETE, airfares are NON TRANSFERABLE and NON REFUNDABLE – unless the designated training dates are cancelled or changed by the training organisation.
- If an apprentice/trainee fails to show for any flight, no alternative flights for that block of training will be approved or booked for that apprentice/trainee, and requests for kilometre subsidy to travel by road due to missing the flight will not be approved.
- There is a maximum of three return flights per year. Applications for additional flights must be applied for with a business case from the apprentice/trainee, employer, or supervising registered training organisation.
- The information provided by apprentices and trainees in their applications may be subject to audit.
- If the apprentice/trainee travels by road for more than 300 kilometres return from their residence to their training organisation, and the training is for more than one day, they will receive subsidy for one return trip only and accommodation for the number of days they attend the training organisation.
- Where the apprentice/trainee is attending college for one day only, regardless of the distance they travel, they are eligible for one return trip and are not entitled to accommodation subsidy.
- Apprentices or trainees who are eligible to claim the accommodation subsidy, may be entitled to additional accommodation payments if they travel the following distances to attend their closest off-the-job training organisation:

more than 300 kilometres <u>return</u>	1 extra day
more than 700 kilometres <u>return</u>	2 extra days
more than 1600 kilometres <u>return</u>	4 extra days

- Correct claim forms must be completed and forwarded to the department prior to decisions on subsidy approvals being made: *Apprentice and Trainee Land Travel and Accommodation Subsidy* claim form, *Apprentice and Trainee Land Travel and Accommodation Subsidy **Advance*** claim form, or *Application for Air Travel* form.
- Apprentices and trainees who are required to attend their supervising registered training organisation to re-sit exams (subsequent to failing assessments of unit of competencies), are eligible to claim travel and accommodation subsidies for that event, only if the employer has not paid for all the maximum number of hours approved for that qualification.
- Apprentices or trainees who are registered in Queensland and reside interstate, will only be eligible for a travel subsidy for the distance travelled that is in excess of the distance they are required to travel to their usual place of work.
- Any claims for subsidy payment deemed to be fraudulent, or the information provided is false, or the apprentice/trainee did not attend college as claimed, the department will reclaim any monies paid to the apprentice, trainee or employer.

Advance Claims

Approval may be granted in special circumstances for travel and accommodation subsidies to be paid in advance. Attending off-the-job training may cause financial hardship to apprentices or trainees as a result of living away from their usual place of residence.

Claims under this provision are considered on a case by case basis, and the following documents need to be submitted to the department:

1. *Apprentice and Trainee Land Travel and Accommodation Subsidy* **Advance Claim** form
AND
2. The Training Notice from the supervising registered training organisation (advising of the dates the apprentice or trainee is required to be in attendance e.g. training start and finish dates).

Special Provision

A) Additional financial assistance

In cases where there are extenuating financial circumstances, a claim for extra financial assistance may be lodged.

It is at the discretion of the Department of Education, Training and Employment (DETE) to approve written applications for Special Provision.

Written applications are to be submitted to the department outlining the specific extenuating financial circumstances. The apprentice or trainee must also attach:

1. *Apprentice and Trainee Land Travel and Accommodation Subsidy* claim form
OR
2. *Apprentice and Trainee Land Travel and Accommodation Subsidy* **Advance** claim form –
AND
The Training Notice from the training organisation (advising of the dates the apprentice or trainee is required to be in attendance e.g. training start and finish dates).

Note: The apprentice or trainee may be asked to provide documented evidence of their expenses (e.g. rent), and also to attend their nearest office of DETE to speak with a Field Officer regarding their claim.

B) 'Special consideration' – attendance at a training organisation which is not the closest training organisation for an apprentice or trainee

In cases where there are exceptional circumstances precluding an apprentice or trainee from attending the closest training organisation, a claim for 'special consideration' may be lodged. It is at the discretion of DETE to approve written applications for 'special consideration'.

Written applications are to be submitted to DETE outlining the specific exceptional circumstances. The apprentice or trainee must also attach:

1. *Apprentice and Trainee Land Travel and Accommodation Subsidy* claim form
OR
2. *Apprentice and Trainee Land Travel and Accommodation Subsidy* **Advance** claim form
AND
3. The Training Notice from the training organisation (advising of the dates the apprentice or trainee is required to be in attendance e.g. training start and finish dates).

Note: The apprentice or trainee may be asked to provide documented evidence of their exceptional circumstances before the 'special consideration' application can be considered.

Role of the Supervising Registered Training Organisation

The supervising registered training organisation (SRTO) is required to:

- Explain to the apprentice/trainee and employer the conditions of eligibility for travel and accommodation subsidies, in particular, **the implications of not utilising the closest training organisation.**
- Complete Section 6 of the Travel and Accommodation Subsidy claim form. Specifically, the SRTO must **sign and stamp** apprentice/trainee claim forms to verify the actual attendance dates at the completion of the off-the-job training period.