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24 March 2019

Deputy President Gostencnik
Fair Work Commission
11 Exhibition Street
Melbourne VIC 3000

By email: chambers.gostencnik.dp@fwc.gov.au

Dear Deputy President,

Re. AM2018/22 Food, Beverage and Tobacco Manufacturing Award 2010 – Substantive Claims

We refer to the above matter and the directions issued by the Fair Work Commission (**Commission**) on 20 March 2019 (**Directions**).

The Australian Industry Group (**Ai Group**) has a significant interest in the *Food, Beverage and Tobacco Manufacturing Award 2010 (Award)*. We write to request that the matter be listed for mention and directions before the Commission for the purposes of hearing from Ai Group and other interested parties regarding our request hereunder that the Directions be amended.

The Directions require interested parties to file “any written submissions they wish to make on the substantive claims made by parties” by 5pm on Monday 10 June 2019. The Directions do not:

- (a) Require the proponents of the claims to file draft determinations that identify the specific terms of the variations proposed.
- (b) Contemplate the filing of any evidence.
- (c) Provide respondent parties with an express opportunity to reply to material filed by the proponents of the claims in writing (by way of submissions and any evidence) prior to the hearing.

In our respectful view, the Directions should be amended to address the aforementioned matters for the purposes of ensuring that respondent parties such as Ai Group are not prejudiced and to facilitate the efficient conduct of the matter.

We also note that in a statement issued by the Commission on 6 February 2019, interested parties were advised that “programming mentions will be scheduled prior to directions being issued in any of the matters in the substantive matters timetable”¹, which included the matter here before the Commission. As this matter was not listed for mention before the issue of the Directions, interested parties have not yet had an opportunity to be heard as to an appropriate program for the matter.

¹ *4 yearly review of modern awards–Award stage–Substantive Issues* [2019] FWC 717 at [8].



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A Requirement to File Draft Determinations

As noted above, the Directions relate to “substantive claims made by the parties”.

United Voice and the Australian Manufacturing Workers’ Union (collectively, **Unions**) have previously foreshadowed that they intend to pursue numerous and significant substantive variations to the Award². To date, those claims have been described only in broad terms. The Unions have not identified the precise terms of the variations sought.

Ai Group considers that as a respondent party to the Unions’ claims, it will be prejudiced if the Unions are not required to identify the specific variations they seek. We will necessarily be limited in our ability to properly respond to the claims absent the filing of draft variation determinations.

We consider that the Unions should be directed to file draft variation determinations in relation to the claims they are pursuing in short order. This will enable Ai Group to better understand the nature and scope of the variations proposed and in turn, consider the nature of the case it may seek to advance in response.

We also note that the substantive claims proposed by the Unions have not previously been the subject of any discussion between the parties. Ai Group considers that in such circumstances, there may be merit in listing the matter for conference before a member of the Commission in order to assess whether there is scope to narrow the issues in dispute between the parties. The filing of draft variation determinations would aid such a process.

An Opportunity to File Evidence

The Directions do not expressly require the filing of any evidence. It is therefore unclear whether parties have an opportunity to call evidence in support of and/or in opposition to the claims and if so, when such evidence is to be called.

Moreover, in the interests of affording procedural fairness to all interested parties, the Directions should require that any evidence to be relied upon by the proponents of the claims should be filed in advance of the hearing and respondent parties should be provided with an opportunity to call evidence in reply.

An Opportunity to File Reply Material

The Directions contemplate that all interested parties file their submissions by the same deadline. To date, the Unions have not identified the claims they seek to advance, nor have they filed submissions or evidence in support of their claims. As such, there is no material of substance for respondent parties to reply to at this stage.

We consider that the more appropriate course would be to require respondent parties to file submissions and any evidence in relation to the Unions’ claims after the proponents have filed their material. We anticipate that such an approach would better facilitate the efficient conduct of the matter and by extension, reduce the time required to hear the matter.

² *4 yearly review of modern awards–Award stage–Group 4 awards–Substantive Issues* [2018] FWC 6107.



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Proposed Alternate Timetable

In light of the above, we respectfully suggest that the Directions be replaced with those that follow:

1. Any interested party seeking variations to the *Food, Beverage and Tobacco Manufacturing Award 2010 (Award)* is to file a draft determination identifying the variations proposed by **close of business on 12 April 2019**.
2. The matter will be listed for conference before the Commission to discuss the variations proposed on **<insert date>**.
3. Any written submissions and evidence in support of the proposed variations must be filed by **close of business on 12 June 2019**.
4. Any written submissions and evidence in opposition to the proposed variations must be filed by **close of business on 4 September 2019**.
5. The matter will be listed for hearing on **<insert dates not before 23 September 2019>**.
6. Parties are granted liberty to apply to vary these directions.

In addition to the matters outlined in our correspondence above, the proposed timetable also takes into account the following considerations:

- (a) The proposed timetable would enable the parties to engage in discussions beyond the conference listed at paragraph 2 of the proposed directions, if they consider that there is merit in such discussions continuing.
- (b) Ai Group is involved in a number of award review matters timetabled or to be timetabled in August 2019:
 - i) AM2017/51 Overtime for Casuals (to be listed for hearing during the week of 29 July – 2 August 2019).
 - ii) AM2018/25 Plumbing and Fire Sprinklers Award (listed for hearing on 5 – 7 July 2019).
 - iii) AM2017/40 Penalty Rates – Hair and Beauty Industry Award 2010 (which we understand will be listed during August 2019 to hear submissions and/or evidence).
- (c) The proposed timetable affords proponents and respondents 12 weeks to prepare their material. A period of at least two and a half weeks would lapse between the filing of material in reply and the hearing; thereby affording interested parties with time to prepare for the hearing as well as a small window to further extend the timeframes for filing material if it becomes necessary.

We may seek to address the Commission further in relation to the matters canvassed in this correspondence at any directions hearing or mention listed in relation to this matter.



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Yours sincerely,

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