
IN THE FAIR WORK COMMISSION

FWC No. C2019/1

Annual Wage Review 2018/19

AWU Further Submission on Junior Rates

Introduction

1. On 15 May 2019, Hampton C held a conference on junior rates on behalf of the Panel. This submission by the AWU supplements our position outlined during the conference and replies to subsequent employer party submissions. (The AWU continues to support the position of the ACTU as presented at the conference.)
2. Junior rates in the repair, services and retail stream of the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (the **VMRSR Award**) have been the subject of discussions between union and employer parties, but no agreed position has been reached. As such, the AWU submits that the ACTU's proposal should be adopted for this stream of the VMRSR Award. With respect to the manufacturing stream, Ai Group has agreed to the AWU's proposed change.¹

The Background Paper

3. The Background Paper identifies 19 awards in which junior rates fall below special national minimum wage 3 (**special NMW3**) of the current National Minimum Wage Order (the **NMW Order**). The Background Paper identifies another 15 awards in which the junior percentages fall below the percentages outlined in special NMW3.²
4. The AWU's answers in brief to the issues raised at [22] of the Background Paper are as follows:

- (a) Whether it is appropriate that any junior rates under modern awards be less than the equivalent junior rates provided for award-free employees in special NMW3.

Answer: It is not appropriate that any award junior rates be less, in dollar terms, than the equivalent junior rates provided for award-free employees in special NMW3.

- (b) To what extent should the particular circumstances of each modern award be taken into account in assessing issue 1.

Answer: Each award's particular circumstances should not be taken into account in assessing issue 1. Awards do not provide junior-specific benefits to justify a downward

¹ Ai Group Submission filed 16 May 2019, p 7.

² See cl 8.2 of the NMWO and Background Paper, Attachment A (Tables 1 and 2).

variation in the wages of award-covered junior employees relative to their adult counterparts against the NMW Order.

- (c) Where it is not appropriate for junior rates to be less than the equivalent junior rates for award-free employees in special NMW3, what variations should be considered and when?

Answer: As a first step, variations should be made in accordance with the ACTU proposal outlined at the conference and reflected in the spreadsheet uploaded to the Commission website. The Panel should further consider junior rates as part of next year's review.

The Ai Group Submission and Merits

5. Ai Group submits that the Panel's decision in the 2010-11 Review demonstrates that the Panel made a deliberate decision to permit award junior rates to fall below special NMW3.
6. The Panel in the 2010-11 Review did not state it was comfortable with award junior rates falling below the rates to be set by special NMW3. It is not possible to discern from the decision whether the Panel knew that this result would eventuate. It merely made references to the perspectives of various industrial parties, before concluding on the scale set by the *Miscellaneous Award 2010*.³
7. In any event, it is inconsistent with the modern awards and minimum wages objective to permit award junior rates to fall below those set in the NMW Order for award-free junior employees. While it is true that the NMW Order only directly applies to award-free employees, the rates in the order also constitute the 'floor' of the safety net below which award wages cannot fall. That conclusion follows from a purposive and fair-minded reading of the Act read as a whole and the obligations in s 135(2) and s 285(3) that the Commission take into account the national minimum wage in setting modern award minimum wages.
8. A national minimum wage means a wage which is the "*least or smallest amount or quantity possible, attainable, or required*" and which is "*relat[ed] to or characteristic of a nation; common to a whole nation*".⁴ The scheme of the Act is designed to "*provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians*".⁵ The principal integers of the scheme, employees and employers, are described as "*national system employees*" and "*national system employers*".⁶
9. Having regard to the use of the word 'national' in the statute, there is no basis to think the legislature intended the national minimum wage to be relevant only to a small cohort of low-paid, award-free employees. If Parliament had not wanted the national minimum wage to be set a floor for award wage-setting, it could have described it as the "national award-free minimum wage". There are no words of limitation in the statutory text warranting a such a confined role. The

³ [2010] FWAFB 4000, [389]-[396].

⁴ Definitions taken from Oxford Dictionaries Online.

⁵ *Fair Work Act 2009* s 3.

⁶ *Fair Work Act 2009* ss 13 and 14. The terms 'employee' and 'employer' throughout Chapter 2 of the Act (*Terms and conditions of employment*) are defined to mean 'national system employee' and 'national system employer' respectively.

national minimum wage has both (a) a narrow, direct effect on rights and obligations in the award-free sector and (b) a broader, indirect role as the floor of the statutory safety net.

10. Unlike s 134 of the Act (the modern awards objective), s 284 applies to both to the setting of wages contained in the NMW Order and the setting of modern award minimum wages.⁷ Section 284 obliges the Panel to set a “*safety net of fair minimum wages*”, relevantly taking into account “*providing a comprehensive range of fair minimum wages to junior employees*”.⁸ This implies that the *range* of minimum wages available to junior employees should be *fair*. Achieving such fairness necessarily requires a comparative exercise. In our view, it is simply inarguable that the wage of a 19 or 20-year-old worker working in a medium-skilled job could be described as ‘fair’ if it fell below the wage for a worker of the same age in a low-skilled or unskilled job. The observations of the Panel in the 2016-17 Review are apposite:

The Australian Government notes that 45 of the 122 modern awards contain rates of pay which are equivalent to the NMW. Generally these are the lowest classification rates for full-time adult employees and, for most of these awards, may be regarded as ‘transitional rates’, in that they are limited to an initial period of employment (usually 3 months) or to the attainment of specific competencies.

If the NMW was set at a level above these modern award minimum wage levels it would raise for consideration whether the maintenance of a modern award minimum wage at a level *below* the NMW meets the minimum wages objective.⁹

11. Ai Group’s submission seeks to prove too much. On its logic, nothing prevents the Panel from raising the national minimum wage to a level above award wages. The Act does not expressly prohibit this outcome, but it is foreclosed by a harmonious reading of the relevant provisions. Moreover, such an approach has been rejected by the Panel in the past.¹⁰
12. The same conclusion follows in relation to the junior minimum wage, special NMW3. The proposition put by Ai Group has the result that the relative labour value of award-covered junior employees (compared with their adult counterparts) may be less than the labour value of award-free junior employees. Awards do not contain beneficial terms specific to junior employees which could justify this downward variation in the established relativity between adult award wages and the adult minimum wage.
13. Ai Group’s view is inconsistent with principle and should be rejected. The national minimum wage constitutes the statutory minimum below which award wages cannot and should not fall.

The ACTU Proposal

⁷ ss 284(2)(a) and 285(2)(a) of the Act.

⁸ At s 284(1)(e) of the Act.

⁹ [2017] FWCFB 3500 at [163]-[164].

¹⁰ [2017] FWCFB 3500 at [159]; [2018] FWCFB 3500 at [106].

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14. The ACTU proposal would increase junior award rates to the level of special NMW3 by uplifting the relevant percentages by the minimum amount necessary to achieve that outcome. That proposal represents the only plausible interim measure (in the time available) to ensure that the minimum wages and modern awards objectives are met for award-covered junior employees.

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1. The Background Paper identifies a wide variety of junior percentages across industries. While the ACTU's interim measure ensures no award junior rates fall below special NMW3, it leaves unresolved the appropriateness of award junior percentages set below those in the NMW Order.
2. Since the Act's commencement on 1 January 2010, there has been no comprehensive review of junior rates conducted either by this Panel or an award review Full Bench. The junior rates adopted by the Australian Industrial Relations Commission during award modernisation were taken from pre-modern awards. The constraints of the modernisation process did not permit a detailed review of the suitability of existing junior percentages in the context of the new statutory framework. As the Full Bench said in its December 2008 decision:

The federal awards and NAPSAs with which we are dealing contain a very wide range of rates for junior employees and apprentices. The relevant instruments fix percentages of the adult wage for juniors and apprentices based on a host of historical and industrial considerations, most of which can only be guessed at. It is not possible to standardize these provisions on an economy-wide basis, at least not at this stage. We have adopted the limited objective of developing new rates which constitute a fair safety net for each of the modern awards based on the terms of the relevant predecessor awards and NAPSAs. We have attempted to strike a balance as between, in some cases, wildly varying provisions.¹¹

3. Current junior percentages in modern awards reflect the truncation of a number of historical compromises and arbitral outcomes made under very different socio-economic and legislative conditions. The last detailed review of junior rate-setting was conducted by the AIRC in the *Junior Rates Inquiry* in 1999, under an entirely different statutory framework.¹²
4. In our submission, it is not possible to fully explore all the issues raised in the Background Paper in the time remaining for the conduct of this year's review. For this reason, the AWU submits that the President should convene a conference at the start of next year's annual wage review to consider (a) holding a preliminary hearing on junior rates or (b) issuing a direction under s 290(1) of the Act that an investigation be conducted into junior rates and report prepared for the Panel.

THE AUSTRALIAN WORKERS' UNION

23 May 2019

¹¹ *Re Request from the Minister for Employment and Workplace Relations – 28 March 2008* (2008) 177 IR 364, [71].

¹² *Junior Rates Inquiry*, Print R5300 (AIRC, 4 June 1999, Munro J, Duncan DP and Raffaelli C).