Australian Industry Group

Proposed Variation to the *Social, Community, Home Care and Disability Services Industry Award 2010*

Submission

Proposed Incorporation of the Equal Remuneration Order Rates (AM2020/100)

20 January 2021

AM2020/100 SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010

Introduction

1. This submission is filed in response to the Fair Work Commission's (**Commission**) statement[1] of 26 November 2020 (**Statement**) concerning a proposed variation to the *Social, Community, Home Care and Disability Services Industry Award 2010* (**SCHADS Award** or **Award**).

2. The Full Bench has expressed the provisional view that the final rates of pay required to be paid by the relevant equal remuneration order[2] (**ERO**) should be incorporated into Schedules B and C of the SCHADS Award. It has also proposed removing a reference in the SCHCDS Award to the ERO.

3. The Statement does not expressly indicate why it has reached its provisional view; though it may be inferred from the Statement that the completion from 1 December 2020 of the transitional arrangements in ERO was the catalyst for the Commission's proposal to vary the SCHCDS Award.

4. Ai Group holds a number of concerns about the proposed course of action, which we contend justify the Commission exercising its discretion to not proceed with implementing the proposed variations.

5. The extent of such concerns, however, depend in part upon whether the amendments to Schedule B and C to the SCHCDS Award will create award-derived entitlements to be paid the relevant rates, or whether they will merely provide an articulation of the rates that are required to be paid pursuant to the combined operation of the Award and the ERO. It appears to us that the proposed award provisions would require the payment of the new rates. That is, the clause would not merely serve to make parties aware of the rates that are payable pursuant to the ERO.

[1] [2020] FWCFB 6333.
2 PR525485.

6. The basis for our opposition to the proposed course of action can be characterised as arising firstly from a concern that the Full Bench does not have power to make the specific variations proposed and secondly, from a contention that the Full Bench should not be satisfied that the variation is necessary to meet the modern awards objective or, to the extent that it may be relevant, the minimum wages objective.

7. In relation to the second contention, we observe at the outset that the proposed variation would not constitute an insubstantial amendment to the Award. It is not a variation that would simply make the current regulatory obligations upon employers easier to identify or understand. Rather, it would alter the legal obligations imposed upon employers to whom the Award applies and to employers who are covered by the Award but subject to an enterprise agreement. It is foreseeable that the variations will potentially have adverse consequences for employers.

8. In support of our second contention we point to the following specific considerations:

   (a) There are difficulties that will flow from the interaction between the current terms of the SCHADS Award and the proposed variations.

   (b) The absence of any provision enabling employers to absorb over-award payments into the proposed rates, in a manner comparable to what is currently provided for under the ERO.

   (c) The potentially detrimental, and arguably unfair, effect on employers covered by enterprise agreements of increasing award derived rates flowing from s.206 of the *Fair Work Act 2009* (**Act**) and the potential for the variation to discourage employers from engaging in collective bargaining.

   (d) The absence of any articulated justification for why the proposed variation is necessary to ensure that the meets the modern awards objective and the lack of any evidentiary material that would enable a proper consideration of factual matters relevant to the matters identified in s.134. This point is pertinent given the merits of the proposal are, for reasons we identify in this

submission, contestable and because the proceedings leading to making of the ERO did not necessitate or otherwise involve the Commission taking into account whether the rates prescribed in the ERO are necessary to ensure that the Award achieves the modern awards objective.

9. In the submissions that follow, we further elaborate on the first three points raised above and the jurisdictional considerations associated with the Commission's power to make a determination implementing the proposed variations. We then propose an alternate approach to varying the SCHADS Award to assist parties to understand the combined effect of the Award and the ERO.

The Interaction between the Award and the Proposed Variations

10. The proposed inclusion of rates in Schedule B and C that currently merely provide classification definitions will potentially be confusing. The proposed approach would also undermine the operation of the relevant Award and the ERO provisions enabling salary packaging arrangements.

11. Clause 13 of the Award deals with classifications and employee progression between pay points or classifications. It provides that classification definitions are contained within schedules to the Award. Relevantly for present purposes, Schedules B and C contain classification descriptors for employees to whom the ERO apply.

12. Schedules B and C do not currently contain any reference to rates of pay. They do not operate to impose obligations upon employers to pay rates independently of the other provisions of the Award. They merely provide relevant definitions, as contemplated by clause 13.

13. Clauses 15 – 17 of the Award set minimum weekly wages for the relevant classifications and pay points. Clause 14 deals with the issue of salary packaging. It permits the salary packaging of wages provided for under clauses 15 – 17.

14. The structure of the Award is not amenable to the insertion of rates in Schedules B and C. Indeed, if the schedules were amended so that they required payment

of the rates specified in the draft determination, there is a risk that these rates will be overlooked, given a reader would not expect schedules dealing with classification definitions to include additional rates of pay.

15. The insertion of rates in the Schedules will also mean that they are not able to be the subject of salary packaging arrangements as contemplated by clause 14, unless consequential amendments were made to clause 14. The ERO provides for salary packaging of the amounts provided for under the order.

16. The removal of the reference to the ERO in clause 15 will also make it less likely that a reader will be made aware of contents of the ERO. This is undesirable as the proposed variations do not reflect all elements of the ERO. For example, it does not include the notion of absorption found at clause 2.2 of the ERO.

Jurisdictional Considerations

17. It appears that the Full Bench proposes to vary the Award of its own motion pursuant to s.157 of the Act. We are concerned that s.139 of the Act may not permit an award to include terms that are essentially about rates that are a product of an ERO.

18. We also observe, for completeness, that the Commission would not otherwise have power pursuant to s.157 to vary the minimum rates in the Award outside of an annual wage review to reflect the operation of the ERO, although we acknowledge that it is not clear that this is what is proposed or intended.

19. Section 139 permits an award to include terms about minimum award wages.

> (1) A modern award may include terms about any of the following matters:
>
> (a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:
>
> (i) skill-based classifications and career structures; and
>
> (ii) incentive-based payments, piece rates and bonuses;

20. Ai Group doubts that the new rates that would be required to be paid as a product of the proposed variations would constitute minimum award wages as contemplated by s.139. Although the term "minimum wages" as utilised in this section is not defined in the Act, s.284 defines the term "modern award minimum wages" in the following manner:

> (3) Modern award minimum wages are the rates of minimum wages in modern awards, including:
>
> (a) wage rates for junior employees, employees to whom training arrangements apply and employees with a disability; and
>
> (b) casual loading; and
>
> (c) piece rates.

21. It appears to us that the minimum wages in the SCHADS Award are those prescribed by clause 15 – 17 and that the rates contained in the proposed new tables and described as "final equal remuneration rates" would accordingly not constitute minimum wages. We note that the Full Bench has not proposed to alter the minimum rates prescribed by clause 15 – 17 of the Award but has rather proposed the rates of pay from the ERO be separately incorporated into the Award.

22. Assuming that the proposed new rates do not constitute minimum wages, s.139 does not appear to permit their inclusion in the Award. The section does not permit terms about an equal remuneration order. Nor is it apparent why the terms would be permissible under s.142.

23. Alternatively, if the proposed new rates would constitute 'minimum wages', the proposed course of action would arguably amount to the Full Bench making a determination varying the minimum wages in the Award. We contend that it is at least arguable that this is what the proposed course of action amounts to. In substance, the proposed variation will result in the insertion of provisions in the Award setting higher wages for certain classifications of employees, even if the clause does not label them as 'minimum wages'.

24. This issue is significant as the Full Bench does not have power to vary the minimum rates of pay in the Award or set new minimum rates pursuant to s.157 in the current context in order to simply reflect the content of the ERO.

25. Section 157(2) provides as follows:

> (2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:
>
> (a) the variation of modern award minimum wages is justified by work value reasons; and
>
> (b) making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective.
>
> Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).
>
> (2A) ***Work value reasons*** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:
>
> (a) the nature of the work;
>
> (b) the level of skill or responsibility involved in doing the work;
>
> (c) the conditions under which the work is done.

26. Section 284 establishes the minimum wages objective and dictates when it applies:

> **The minimum wages objective**
>
> What is the minimum wages objective?
>
> (1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:
>
> (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
>
> (b) promoting social inclusion through increased workforce participation;
>
> (c) relative living standards and the needs of the low paid; and
>
> (d) the principle of equal remuneration for work of equal or comparable value; and

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

This is the minimum wages objective .

When does the minimum wages objective apply?

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

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

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

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the modern awards objective also applies (see section 134)

27. The meanings of the terms "setting modern award minimum wages" and "varying minimum award wages" are defined in s.284(4) of the Act.

28. If the proposed new rates are "minimum award wages", the proposed course of action would need to accord with the requirements of s.157(2). This requires that in order to the vary the minimum wages in the Award, or to set new minimum wages, the Full Bench must be satisfied that it is justified by work value reasons.[3] There is no apparent basis for such a justification.

29. The Full Bench must also be satisfied that it is necessary to vary the Award *outside* of the system of annual wage reviews to achieve the modern awards objective. [4] It is similarly not apparent why this would be necessary.

30. The modern awards objective and the minimum wages objective must also be taken into account in considering the proposed variation. Ai Group contends that the proposed variations are not consistent with the modern awards and minimum wages objective. We elsewhere identify problems flowing from that proposed variation that we submit support such a contention.

31. Regardless, we contend that in a context where the industrial merit of the variation appears to be readily contestable, there is insufficient material before

[3] Section 157(1)(a).

[4] Section 157(1)(b).

the Full Bench to enable it to properly take into account the mandatory considerations identified in s.134 and s.284 so as to enable the Full Bench to be satisfied that the proposed variations are appropriate or necessary. We also observe that such considerations were not the basis upon which the rates in the ERO were set. The principle of equal remuneration for work of equal or comparable value is but one of many considerations that must be balanced under the modern awards objective and the minimum wages objective. Accordingly, the mere existence of the ERO does not justify the amendment of the Award to replicate or incorporate its content.

32. For the above reasons alone, the Award should not be varied as proposed.

The Absence of an Absorption Provision

33. Clause 2.2 of the ERO permits the absorption of the monetary obligations imposed on employers by this order into over-award payments. The proposed determination does not provide for the inclusion of a comparable provision to clause 2.2 of the ERO into Schedules B and C of the Award.

The Full Bench's 2012 decision relating to the ERO dealt with the issue of absorption in the following manner:

> **[77]** The next matter is whether the order should provide for the absorption of overaward payments. There was general support for absorption. We think it is appropriate that the order should include a provision similar to clause 2.2 of the modern award.[5]

34. The Full Bench decision did not indicate that the ERO should only provide for absorption for a limited period of time. It did not, for example, indicate that clause 2.2 of the order should be a transitional mechanism.

35. If the award was amended as proposed, employers may not be able to absorb over-award payments into the rates prescribed by Schedules B and C. Their ability to do so would be dependent upon the terms of any contractual agreement with their staff and the operation of clause 2.2 of the SCHADS Award.

[5] [2012] FWAFB 1000.

36. Although the Award currently retains what may be described as an absorption provision a clause 2.2 which, on its face, would have the same effect as clause 2.2 of the ERO, the validity of such a provision in an Award has been questioned in the context of 4 Yearly Award Review and a decision has been made to ultimately remove such provisions from awards.[6]

37. The ability to absorb over-award payments into the rates that are required to be paid by the ERO should not be undermined by the incorporation of such rates into the Award. Such an outcome would be unfair to employers who have agreed in the current regulatory context to pay over-award rates but may have done so in a manner that would not necessarily permit them to apply or set-off such payments in satisfaction of a new award derived obligation.

38. This unfairness weighs heavily against proceeding with the proposed variation. Moreover, in our view, there is no apparent countervailing justification for undermining or negating the current facility for absorption available the ERO.

Unfair Consequences – s.206 of the Act and Collective Bargaining

39. If the Award were amended to incorporate the ERO rates, it would potentially result in adverse consequences for employers covered by enterprise agreements given the operation of s.206. The section provides as follows:

> **Base rate of pay under an enterprise agreement must not be less than the modern award rate or the national minimum wage order rate etc.**
>
> If an employee is covered by a modern award that is in operation
>
> (1) If:
>
> (a) an enterprise agreement applies to an employee; and
>
> (b) a modern award that is in operation covers the employee;
>
> the base rate of pay payable to the employee under the agreement (the agreement rate) must not be less than the base rate of pay that would be payable to the employee under the modern award (the award rate) if the modern award applied to the employee.

[6] *4 yearly review of modern awards – award stage – standard absorption clause – calculation of casual loading [2015] FWCFB 6656*

(2) If the agreement rate is less than the award rate, the agreement has effect in relation to the employee as if the agreement rate were equal to the award rate.

40. Given the proposed draft determination appears to set rates that will amount to an employee's ordinary rate, but which do not include any separately identifiable amounts that can be attributed to the operation of the ERO, we are concerned that they would become an employee's base rate of pay, as contemplated by the Act, and consequently caught by s.206(1) so as to then require that they are taken to be the base rate of pay under an enterprise agreement pursuant to s.206(2). Depending upon the terms of such industrial instruments, this may then require that various penalties or other amounts prescribed by such instruments would need to be calculated in a manner that compounds upon such amounts. This outcome would not have been foreseeable when such agreements were struck as s.206 only operates by reference to the base rate of pay that would be payable to an employee under a modern award. Section 206 does not capture amounts that are payable under an equal remuneration order.

41. For completeness, we here note that employees covered by an enterprise agreement do receive the benefits of the ERO. Moreover, section 306 protects employees from receiving less than the amount that is payable under the ERO. However, it differs in its operation to s.206. Relevantly, s.306 does not operate to incorporate the rates of the ERO into an enterprise agreement. Consequently, although consideration would need to be given to the terms of each enterprise agreement, s.306 would not necessarily result in the unfair and unjustifiable outcome of the various penalty rates or premiums that may be said to apply to the base rate prescribed under the agreement needing to be calculated on the separately identifiable quantum that would be required to be paid to the employee pursuant to the terms of the ERO.

42. The differences in the operation of s.306 and s.206 is a relevant consideration and weighs against the granting of the claim. The potential for the variation to have an adverse impact upon employers covered by enterprise agreements means that a consideration of the likely impact of the variation on business and employment costs as required by s.134(1)(f) would weigh against the granting of the claim.

43. It is also foreseeable that the differing operation of s.306 and s.206 may serve as a disincentive, at least in some instances, to employers engaging in collective bargaining if the proposed amendments are made. The requirement to take into account the need to encourage collective bargaining pursuant to s.134(1)(g) would weigh against proceeding with the proposed variation.

44. We also here note that increasing the rates of remuneration that are required to be paid under the Award would lift the threshold for when a proposed agreement may pass the better off overall test provided for under the Act. This may, logically, further serve undermine the encouragement of enterprising bargaining in the sector.

A Potential Alternate Approach

45. Despite Ai Group's articulated concerns about the proposed amendment of the Award to require payment of rates higher than those specified in clauses 15 – 17, we recognise that there is merit in further assisting parties to identify the rates of pay that are required to be paid as a consequence of the combined operation of the instrument and the ERO.

46. To this end, we suggest that a less contentious course of action may be to include a provision in the nature of a 'note' in the Award that both refers the reader to the ERO and potentially contains a link to a document prepared and update by the Commission setting out the rates that are required to be paid as a product of the operation of ERO. The crucial point is that any such note should be framed in a manner that makes it clear that the payment of these amounts is not an award derived obligation.

47. Such a provision would, in our view, be permissible under s. s.142, given that in practice a party applying the Award would need to be aware of such rates in order to apply various provisions of the Award in a manner that conforms with the requirements of the ERO.

48. This approach would be somewhat analogous to the inclusion of various notes now included in awards referencing or otherwise alerting a reader to provision of the Act that are in some way relevant to matters dealt with under awards.

49. Alternatively, we propose that the proposed variations should not be made at this stage and that such matters potentially be given further consideration in the context of the foreshadowed proceedings relating to the redrafting of the instrument in plain language.