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21 April 2017

Associate to President Iain Ross
Fair Work Commission
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Via email: chambers.ross.j@fwc.gov.au

Dear Associate

4 yearly review of modern awards – Sunday Penalty Rates (AM2014/305) – Transitional Arrangements – Reply Submission

On 24 March 2017, the Australian Chamber lodged its initial submission on the implementation of reductions in Sunday penalty rates (PR), as per the Full Bench's 23 February 2017 PR Decision ([2017] FWCFB 1001), at paragraph [2042].

As per the 23 February decision, and chambers' email to parties of 6 April 2017 providing an extended time for the filing of submissions in reply, please find attached the Australian Chamber's 'reply submission' responding to:

- Key points made by other submitting parties, principally unions and those seeking similar approaches to implementing reductions in Sunday penalty rates [Part A of this submission].
- Various matters raised by the Full Bench in Attachment B to its statement of 5 April 2017 ([2017] FWCFB 1934) [Part B of this submission].

Again, we ask that this reply submission be read in conjunction with, and in support of, those of our member organisations in relation to particular hospitality and retail industry modern awards.

Yours Sincerely

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IN THE FAIR WORK COMMISSION

AM 2014/305

FOUR YEARLY REVIEW OF MODERN AWARDS: PENALTY RATES

SUNDAY PENALTY RATES – TRANSITIONAL ARRANGEMENTS

PART A: REPLIES TO OTHER PARTIES' SUBMISSIONS

1. Attachment A of the Full Bench's statement of 5 April 2017 ([2017] FWCFB 1934), lists 30 initial submissions on transitional arrangements for reduced penalty rates (PR).

2. The key submissions the Australian Chamber wishes to respond to are those of the ACTU, unions, and parliamentary Labor leaders (all proposing similar approaches to implementing the PR Decision).

Core proposals to respond to

3. Rather than reply in detail to each submission we have addressed the core / common proposals being advanced by unions and parliamentary Labor. These are:

   Proposal 1: The 23 February 2017 PR Decision should be reversed / set aside.

   Failing this….

   Proposal 2: There should be a 24 month delay in starting to phase in PR reductions (i.e. no changes prior to 1 July 2019).

   Proposal 3: Phasing in after the 24 month delay should then be across 5 or 6 years. This would see full commencement of delayed until well into the 2020s.

   Proposal 4: Commencement should be delayed to allow unions to pursue inflated claims in the annual award wage review process to somehow compensate for the PR reductions.

Burden of proof

4. Employers have advanced approaches to phasing in changes to Sunday PR that are consistent with and shaped by the provisional views of the Commission in the 23 February PR Decision[1]. The employer proposals would in essence see:

[1] Australian Chamber Submission – Implementation, 24 March 2017.

a. A phasing in of Sunday PR reductions.

b. The commencement of phasing in from 1 July 2017, consistent with the commencement date for other PR changes / the Commission's provisional approach.

c. Phasing in over not less than 2 instalments.

5. The Commission's stated views on implementing the PR changes were provisional. However they were also very clearly expressed and reasons were provided for the proposed approaches to implementing the PR Decision. These provisional approaches should be applied unless there are good reasons not to do so, or a superior approach is properly prosecuted during the current, post decision, process.

6. The burden of proof in this matter should lie with any party wishing to depart from the Commission's provisional view, which was reached after hearing the extensive evidence in this matter as clearly set out in the 23 February 2017 PR Decision.

7. Unions and those supporting them must bear the burden of convincing the Commission that it should depart from its provisional views on implementation.

8. This burden has not been met. Examining the various union and parliamentary Labor submissions, there is little beyond contention and commentary and nothing that should convince the Commission to depart from its provisional views. The approach to implementation should be that put to you by the Chamber and its members.

Proposal 1: Reversing / setting aside the PR Decision

9. At [7] of Attachment B to the Statement of 5 April 2017[2], the Commission notes that it has been asked to reconsider its 23 February 2017 Decision to reduce PR in the Hospitality and Retail Awards and to effectively set aside that Decision. Such calls come from the SDA[3], ACTU[4], United Voice[5] and parliamentary Labor leaders[6].

10. The PR case was one of the largest and most detailed in the Commission's history (and the history of its precursor tribunals). The Commission issued a 550 page decision after carefully considering:

a. 39 days of hearing.

b. 143 lay and expert witnesses.

c. More than 5,900 submissions.

[2] [2017 FWCFB 1934]
[3] SDA Submission – Transitional and Related Matters, 24 March 2017
[4] ACTU Submission – Transition, 24 March, [5]
[5] United Voice Submission – Transition, *passim*
[6] E.g. Federal Opposition Submission - Transition, [1.1.1], p.3

11. The proceedings were conducted in an open and transparent manner, in accordance with s.577 of the Fair Work Act 2009.[7]

12. Few if any matters in the Commission's 113 year history have been so rigorously, extensively, and openly litigated. Employers, unions and all those interested to participate had extensive opportunities to be heard on appropriate PR for weekend and holiday work.

13. The Australian Chamber is not aware of any appealable error in the decision, or of any faults in the process under which parties were heard and the matter considered.

14. Mere assertion of dissatisfaction with decision is not relevant to the Commission's consideration of how its PR Decision should be implemented.

15. On the information provided in [6] and [7] of the 5 April 2017 statement, and on examining the submissions of those asking for the reversal or setting aside of the PR Decision, the Commission has been provided with no basis upon which it should or could reverse or set aside its decision.

16. If any party asserting that the Commission should reconsider and set aside its PR Decision has a genuine basis to appeal the decision or genuine grounds to prosecute an error on the part of the Full Bench, they should pursue an appeal / review in the Federal Court.

17. We understand United Voice does now intends to seek such judicial review. We also understand that United Voice intends to seek some form of stay on orders in this matter pending the Court proceedings. Australian Chamber members will address any stay applications that may come before the Commission.

<u>Fairness and the living standards of the low paid:</u>

18. The ACTU[8] and others effectively argue the Decision was somehow in error because of (what they see as) its impact on the fairness and relevance of the safety net, and impact on the low paid. This appears part of a wider argument that the Commission somehow erred in its consideration and application of the legislative framework in this matter.

19. Such claims are not sufficiently developed in the 24 March implementation submissions from unions to be persuasive.

20. They also appear to be incorrect. The Commission did consider the matters now being raised by the ACTU and unions, and did so at length.

[7] [2017] FWCFB 1007 [6]
[8] ACTU Submission – Penalty Rates Implementation, 24 March 2017, [3] – [5]

21. Chapter 3 of the 23 February 2017 PR Decision[9] addresses the legislative framework in detail, including the Modern Awards Objective[10], what a fair safety net is, and the relative living standards of the low paid.

22. It is useful to recall the Commission's finding in the PR decision on how it should approach the considerations now raised by unions and parliamentary Labor:

> **[196]** *Importantly, the requirement to take a matter into account does not mean that the matter is necessarily a determinative consideration. This is particularly so in the context of s.134 because s.134(1)(da) is one of a number of considerations which we are required to take into account. No particular primacy is attached to any of the s.134 considerations. The Commission's task is to take into account the various considerations and ensure that the modern award provides a 'fair and relevant minimum safety net'.*

23. The ACTU, SDA and others are re-asserting an approach which has already been considered by the Commission in the principal matter and specifically rejected. This cannot be reopened during this post-decision, implementation stage.

<u>Scope for the Commission to reduce award terms</u>

24. Related to / encompassed in the statutory construction arguments, the SDA argues that the PR Decision should be set aside on the basis that:

    a. The Fair Work Act does not permit any reduction in take home pay.

    b. No transition period can protect the take home pay of the low paid workforce covered by the Awards.[11]

25. The SDA's approach appears at odds with the exercises of balance that are the very *raison d'être* of this tribunal. The various object provisions dotted throughout the Fair Work Act 2009 indicate that the Commission is always and inherently asked to balance competing considerations. The Commission also has a range of options / mechanisms available to it in applying its decisions under the Fair Work Act 2009 that are not restricted as argued by the SDA.

26. The submission that the Commission can never 'cut' take home pay for low paid workers is also inconsistent with the previous scope to secure Take Home Pay Orders under the transitional legislation. If the Fair Work Act 2009 always and in all circumstances demanded a highest common denominator approach and take home pay could never be reduced (the logic now advanced by the SDA), there would have been no need for such orders and each provision of the modern awards would have necessarily been set to the highest possible levels.

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[9] [2017] FWCFB1001, [95] – [270]
[10] Fair Work Act 2009, s.134
[11] SDA Submission – Transitional and Related Matters, 24 March 2017, [8]

27. If unions and parliamentary Labor were correct contending that no employee can ever see their take home pay be reduced (by changes in minimum pay and entitlements) under the Fair Work Act 2009, then Federal Labor's *Fair Work Amendment (Pay Protection) Bill 2017* would also be unnecessary and not be doing any work.

28. We also reiterate that there are avenues available to unions if they believe the PR Decision was in legal error. United Voice has now indicated it will pursue its concerns in the Federal Court, which underscores that such claims of error are not relevant to the settlement of how the PR Decision is to be implemented.

29. The Leader of the NSW Opposition states that:

> *I believe that there is no transitional process or phase in arrangement that would:*
>
> - *Protect the take home pay of all current employees who are employed either under the relevant awards or on agreement which relies on penalty rates in the awards;*
>
> - *Protect take home pay of all future employees covered by the relevant awards; or*
>
> - *Prevent these cuts to penalty rates being used by employers in future bargaining to reduce workers' take home pay; and which would also*
>
> - *Ensure that modern awards are a guaranteed minimum safety net of take home pay.*
>
> *Instead of determining how this decision should be implemented, I invite the Full Bench to reconsider the decision altogether…*

30. If the NSW Opposition leader considers that no transitional arrangement could achieve his stated aims, then his submission cannot be relevant to the implementation considerations before the Commission.

Equal pay:

31. The Commission's 23 February 2017 PR Decision also takes into account at some length the equal pay considerations in s.134(1)(e) of the Fair Work Act 2009.[12] The Commission has thereby taken into account the gender pay gap considerations raised by the ACTU[13] in reaching its decision on future PR. This cannot be a consideration weighing in favour of setting aside the decision.

[12] [2017] FWCFB1001, [204] – [216]
[13] ACTU Submission – Penalty Rates Implementation, 24 March 2017, [4]

<u>Proposal 2</u>: Delaying the start of any phased PR reductions

32. If the decision is not reversed / set aside, unions and those allied with them alternatively propose a delay or deferral of the first tranche of phased reductions.

    a. The SDA and United Voice seek to have the commencement of phased reductions in Sunday PR delayed until 1 July 2019.

    b. This delay is put to the Commission without any supporting information or basis to conclude in the unions' favour.

33. Such a delay would not be consistent with the Commission's PR Decision, nor in light of that decision, with the merits of the case and the statutory framework under which it was considered. As the Chamber made clear in its initial implementation submission, delaying the commencement of the decision means delaying the additional jobs, additional hours, and additional services the Commission has determined changes to PR will deliver.

34. The Commission has also already expressly considered and at least provisionally rejected such a delay, stating:

> *Contrary to the views expressed by the Productivity Commission we do not think it appropriate to delay making any changes to Sunday penalty rates for 12 months, as it would impose an unnecessary delay on the introduction of any reduction in Sunday penalty rates and would give rise to a sharp fall in earnings for some affected employees at the end of the 12 month period.*[14]

35. This provisional view is:

    a. An invitation to any who do not want the provisional view to become the concluded view to make a case to change it, and to change the Commission's mind on a 12 month delay prior to any PR reductions coming into effect.

    b. A clear indication that unless a substantial case is made out to depart from the provisional view, it will become concluded / final.

36. Unions have failed to take up this invitation. Their submissions do not step through and rebut the basis upon which the Commission reached its provisional parameters for implementation. Unions also fail to explain the basis for their proposed 24 month delay in commencing phasing in, particularly given that the only delay canvassed in the proceedings was the 12 months recommended by the Productivity Commission.

37. The Commission should make absolute / concluded its provisional rejection of any delay in the commencement of phased PR reductions.

[14] [2017] FWCFB 1007, [48](i)

38. Any applications for a stay of the decision pending referral of United Voice's concerns to the Federal Court:

    a. Will be addressed by the Australian Chamber members that participated throughout this matter.

    b. Should be considered as a proposal fro a stay pending judicial review, and not be allowed to become a default means to achieve the delays in implementation sought by unions in this matter.

Proposal 3: Deliberately extended phasing in of the PR reductions

39. United Voice seeks to follow two years of inaction with a three year implementation (delaying full implementation until 2021).[15]

40. The SDA also propose a two year period with no change, and then a 6 stage phased implementation commencing in 2019. This would see full implementation not commence until 1 July 2024.[16]

41. So, in essence, unions are proposing:

    a. Two years of inaction during which the Commission would be asked to accept and not act on the findings that led it to conclude that PR should change.

    b. Only then, after two years of inaction, commencing the phasing in of PR reductions.

    c. Phasing in over a period of five or more years – a course that was specifically rejected on a preliminary basis in the 23 February 2017 PR Decision:

> *As to the number of annual instalments, the 5 annual instalment process which accompanied the making of the modern awards is too long for present purposes. It will be recalled that the Award Modernisation Full Bench was dealing with an array of award provisions that were the subject of transitional arrangements including minimum wages, whereas we are only dealing with one provision, Sunday penalty rates. It is likely that at least 2 instalments will be required (but less than 5 instalments).*[17]

42. Unions do not appear to have engaged with the reasoning clearly outlined by the Commission in its 23 February 2017 PR Decision, namely that:

    a. A 5 year transition is likely to be too long; which unions have plainly ignored in putting up such a proposal. Unions' "slow implementation" proposals are also advanced without any evidence or support that could convince the Commission to change its provisional view against delayed implementation.

[15] United Voice Submission – Transition, p.5
[16] SDA Submission – Penalty Rates Implementation, 24 March 2017, [20]
[17] [2017] FWCFB 1007, p.13/15

b. The PR transition is relatively straightforward and distinguishable from the highly complex, multi-issue transition from pre-modern to modern awards.[18]

c. Delaying or slowing the PR changes would:

i. Delay the increased jobs, hours and services that led the Commission to change Sunday PR.[19]

ii. Prolong a situation in which awards fail to meet the modern award objective.[20]

iii. Prolong a situation in which awards fail to provide a fair and relevant safety net.[21]

iv. Prolong a situation in which PR are based on considerations that have expressly been found to no longer be relevant.[22]

v. Prolong a situation in which PR reflect levels of disutility that no longer apply.[23]

vi. Prolong inconsistencies between PR settings in retail and hospitality awards.[24]

Proposal 4: A delay to allow unions to pursue compensatory award wage rises

43. In proposing deferred commencement until 1 July 2019, paragraph 10(b) of the SDA submission indicates that[25]:

> *This will also allow adequate opportunity for the SDA and any other interested parties to prepare an application for increases in modern award minimum rates of pay, given that the Commission has identified that that is the best means of addressing the needs of the low paid and which it has found will be adversely affected by the decision. In light of the Commissions' findings about the adverse effects of the penalty rate cuts on the needs of the low paid, it would be unfair and unjust if those reductions were to commence before the SDA and other interested parties have had an opportunity to seek increases in modern award minimum wages.*

44. Putting to one side the illegitimacy of using minimum wages to compensate for other changes awarded by the Commission, and the extensive arguments against such an approach, if unions wish to advance such a claim to the Expert Panel, employers will respond to it.

[18] [2017] FWCFB 1007, p.13/15
[19] [2017] FWCFB 1007, [31]
[20] [2017] FWCFB 1007, [18]
[21] [2017] FWCFB 1007, [18]
[22] [2017] FWCFB 1007, [7]
[23] [2017] FWCFB 1007, [7]
[24] [2017] FWCFB 1007, [36]
[25] Emphasis added.

45. However, the SDA cannot validly claim that it has not had a chance to adjust its wages claim following the PR decision.

46. The Commission issued its PR Decision on 23 February 2017.

    a. Initial submissions in the 2016-17 minimum wage review were required by 29 March, more than a month later. The SDA and unions could easily have adjusted their minimum wage claims and arguments during this time to account for changes to PR (i.e. the determinations that led the Commission to decide that PR need to change).

    b. The SDA and unions went public directly after 23 February with an assessment of what employees stood to 'lose'. If the SDA had this information / data, it should have been able to use it to adjust its minimum wage claim, and it had more than a month to do so.

    c. The SDA could have approached the Expert Panel for an extension in lodging its initial annual wage review submission on the basis that it wished to properly consider the PR Decision in formulating its wage review position. We do not understand this occurred.

47. The purported 'unfairness' and 'injustice' the SDA complains of:

    a. Are not germane statutory considerations relevant to implementing the PR Decision.

    b. Could not outweigh the inconsistencies with the Fair Work Act 2009 that the Commission found warrant changes to PR.

48. Having found that existing PR in awards are no longer consistent with the requirements of the statute, the Commission is bound to move expeditiously to implement the changes it has awarded. As set out in [42], above, delaying the implementation of the decision would be inconsistent with the statute.

49. Even putting this to one side:

    a. The ACTU and unions are asking for a $45 per week increase in 2017, virtually triple that awarded last year. There is clearly an extraordinary level of ambit in the 2017 wage claim, and it is hard to conceive that the wage increase sought could have been even higher to "compensate" for the PR changes, had time allowed.

    b. The SDA is asking for a two year delay, until 1 July 2019. The SDA is effectively asking the Commission to accept that the union is incapable of formulating its 'compensatory' minimum wages claim, not just in 2017, but also in both 2018 and 2019 (given the timetable for annual wage review submissions).

50. The course of action outlined in 10(b) of the SDA submission is so unrealistic and unsubstantiated as to not be relevant to the consideration at hand. The Commission should have no regard to this argument from the SDA[26] in determining how to implement its 23 February 2017 PR Decision.

Politicising the Commission

51. This Commission (and its precursors) has consistently eschewed calls to politically or electorally determine either its decisions, or their implementation.

52. In the combination of delays being commended to you, the Commission is being asked to deliberately implement its PR decision so slowly that the next federal election will intervene prior to PR changes taking effect, allowing an incoming Labor government (if elected) to step in, override the decision and preserve existing PR.

53. The Commission has provided strong provisional indications towards rapid, but suitably phased-in implementation. Nothing has been put to the Commission that should convince the Commission to depart from this course.

Relevance of commentary / reaction submissions

54. Much of what has been put before the Commission is essentially reaction to and comment on the 23 February decision, and repeating arguments that have already been considered in detail. Such commentary on the PR Decision is not relevant to the Commission's consideration of how it is to be implemented (the consideration at hand).

55. Such submissions also fail to give the Commission what it expressly requested under "Next Steps" in Section 12 of the PR Decision[27].

> "*Interested parties (were invited) to file written submissions in relation to the transitional arrangements to apply to the reduction in Sunday penalty rates by 4.00 pm Friday, 24 March 2017*".

a. This is not an invitation to reopen the merits of the case, nor to criticise or protest the PR Decision.

b. Input which does not relate to transitional arrangements / implementation should be disregarded.

c. Unions have had an opportunity to input the implementation of this matter and robustly prosecute alternatives to the Commission's provisional views on implementation.

[26] SDA Submission – Penalty Rates Implementation, 24 March 2017, [10(b)]
[27] [2017] FWCFB 1001, [2039]-[2043]

d. Unions and parliamentary Labor leaders have misunderstood or disregarded the Commission's direction to address "*the transitional arrangements to apply to the reduction in Sunday penalty rates*". As such, their submissions are essentially irrelevant to the implementation arrangements the Commission is to determine.

e. Nothing in the intention of United Voice to seek judicial review of the PR Decision should persuade the Commission to depart from its provisional views on implementation.

PART B: RESPONSES TO FULL BENCH QUESTIONS

56. The Full Bench raises various questions to parties in Attachment B to its statement of 5 April 2017.[28] A number have been addressed in Part A of this submission; others are addressed below.

Question 1: *Impact of the Penalty Rate s Decision*

57. The Commission questions whether it should be take steps to mitigate the impact of the PR Decision on affected employees.[29]

58. The appropriate approach to mitigation has already been identified by the Commission through its provisional intention to phase-in the PR reductions. Mitigation should be achieved by appropriate phasing in as per the Australian Chamber's initial implementation submission and those of our members.

59. This would see the Commission :

a. Not unduly draw out transition or delay implementation.

b. Not delay the additional jobs, hours and services the Commission identified in determining it would adjust PR.

c. Phase-in the PR reductions in not more than two (2) tranches/stages.

d. Have the first tranche of any phased transition commence on 1 July 2017.

e. Reject delayed commencement of the PR reductions beyond 1 July 2017.

f. Reject proposals for a zero increase in the first year(s) or for "back ended" implementation (Part A of this submission addresses such proposals from unions).

[28] [2017] FWCFB 1934
[29] [2017] FWCFB 1934, [6] p.4

Question 1.4 *Loaded hourly rates*

60. The concept of loaded rates (which could conceivably be hourly, weekly or annual) was clearly canvassed in the PR Decision:

> *[90] It seems to us that, subject to appropriate safeguards, schedules of 'loaded rates' may make awards simpler and easier to understand, consistent with the considerations in s.134(1)(g). Schedules of 'loaded rates' would also allow small businesses to access additional flexibility without the need to enter into an enterprise agreement.*[30]

61. Prosecution of loaded rates of pay should be a matter for award parties – unions and employer representatives – and the Australian Chamber defers to its member organisations with direct employer members working under the four awards in this regard.

62. The Commission has already recognised this:

> **[94]** *We envisage that the development of loaded rates will be an iterative process undertaken in consultation with interested parties. That process will commence after we have determined the transitional arrangements in respect of the reductions in Sunday penalty rates.*[31]

63. It is also clear that creating schedules of loaded rates for particular awards will be a matter of some length and complexity:

> **[92]** *In raising this matter, we are alive to the potential complexity involved in the task of developing schedules appropriately for loaded rates. It has to be borne in mind that any loaded rate will remain part of the safety net and will have to be fair and relevant. Determining an appropriate loaded rate would not be straightforward. For example, an employee who worked the vast majority of their hours on a weekend or late at night, when a penalty rate would apply, would require a higher loaded rate than, say, an employee who worked the vast majority of their hours during the ordinary spread of hours, Monday to Friday.*

64. In relation to loaded rates, the Commission should conclude:

    a. Loaded rates may offer a useful accompaniment to the implementation of the changes awarded to PR, and may in time offer simpler and clearer rates obligations in some circumstances (essentially reiterating the approach the Commission has taken to date in this matter).

[30] [2017] FWCFB 1001, p.22
[31] [2017] FWCFB 1001, p.23

b. This is a very complex consideration and even the preliminary identification of the issues to be traversed[32] points to a very major and time consuming exercise to create loaded rates schedules.

c. No loaded rates proposals have been advanced to the Commission at the time at which it must start to implement its PR Decision (i.e. for 1 July 2017).

d. It is neither necessary nor appropriate to delay the commencement of PR changes for the creation of loaded rate schedules. To do so would not be consistent with the Fair Work Act 2009 or the PR Decision.

e. Consideration of loaded rates can be progressed after changes to PR have started to be phased in.

f. The Commission should not compel or call on any consideration of loaded rate arrangements on its own motion.

g. Rather, the Commission should in its decision on the implementation of the 23 February 2017 PR Decision:

   i. Reiterate that consideration of loaded rates schedules may be instigated by unions or employers, by application.

   ii. Indicate that there is liberty to apply regarding loaded rates and that the Commission stands ready to consider any such proposals that come before it.

h. The Commission is not compelled to create loaded rate schedules in awards as part of the 4-yearly review, and any applications should be made and considered under s.157 of the *Fair Work Act 2009*.

Question 2: *Take Home Pay Orders*[33]

65. The Australian Chamber reiterates its previous submission that Take Home Pay Orders.[34] are not available for the implementation of changes to PR.

Question 3: *Phasing in*[35]

66. As previously indicated, the Australian Chamber considers the Commission does have the power to apply an arrangement that phases in the reductions awarded to penalty rates in the four retail and hospitality awards (i.e. across a serious of annual steps or stages). Specific proposals for phasing in to particular awards will come from members of the Australian Chamber network.

[32] [2017] FWCFB 1001, [92]-[93], p.23
[33] [2017] FWCFB 1934, [16] p.6
[34] ACCI Submission on Implementation, 24 March 2017 [15]-[26]
[35] [2017] FWCFB 1934, [16] p.6

Question 3.4 *The Productivity Commission's delayed implementation approach*[36]

67. The Commission has already specifically considered, and rejected the Productivity Commission's (PC) approach of delaying the commencement of any PR reductions. Part A of this submission deals with, and rebuts, union proposals for a two year delay in starting to implement the changes awarded in the 23 February 2017 PR Decision.

68. A 24 month delay is not the same as a 12 month delay. Those seeking a 24 month delay are not seeking to implement the PC's recommendation. Noting the question posed to United Voice[37] below [23] of [2017] FWCFB 1934, a two year delay would differ significantly from the PC's proposal, and would be doubly inconsistent with the basis on which the Commission awarded its PR changes. Neither delay should be considered.

Question 4: *Red circling*[38]

69. We note the Commission's question to the SDA on its red circling proposal.[39] It is clear from Part A of this submission that employers oppose the SDA's proposed approach to implementing the 23 February 2017 PR Decision.

70. The Commission's question bells the cat on the SDA's proposed delay before phasing-in commences (two years of inaction, then phasing in over 5 years). At best this could be viewed as an alternative position, given that the Commission is quite correct, the SDA's "preserved rate" proposal obviates its phasing in and delay proposal for existing employees.

71. However, for the reasons set out in Part A of this submission, the wider body of the SDA's submissions and series of implementation proposals should not be accepted.

Question 4.1 *Any other approaches to red circling?*

72. Under Question 4.1 the Commission asks: *Other than the SDA's proposal in relation to the Retail, Fast Food and Pharmacy Awards, are there any other 'red circling' proposals being advanced by any other party?*

73. In the 23 February 2017 PR Decision, under "Next Steps" the Commission clearly set out a process of submissions and replies on appropriate transitional / implementation arrangements, to be followed by a hearing in May 2017

74. If any other party has a red circling proposal, it should have put it forward on 24 March, and it should not be now prosecuted by way of these replies – which should be solely directed to responding to (a) propositions from other parties, and (b) the questions posed by the Commission.

[36] [2017] FWCFB 1934, [16] p.6
[37] [2017] FWCFB 1934, [23] p.8
[38] [2017] FWCFB 1934, [16] p.6
[39] [2017] FWCFB 1934, [27] p.9

75. The Australian Chamber would be concerned at the emergence of any new, 11th hour, proposals to which employers would not have an opportunity to reply under the process set out in the PR Decision[40], and reserves rights to respond to any new substantive new ideas for the implementation of the PR changes, either in writing or at the hearing of 9 May 2017.

Dated: 24 March 2017

SCOTT BARKLAMB
Director – Workplace Relations

[40][2017] FWCFB 1007, p.13/15