



2 May 2014

Justice Iain JK Ross AO
President
Fair Work Commission
GPO Box 539 Canberra City
ACT 2601

Dear Sir

SUBMISSION TO ANNUAL WAGE REVIEW 2014

On 7 April 2014 I wrote to you as President of the Fair Work Commission (FWC) to ask why the Commission was continuing to follow the practice of passing through a percentage rise in the National Minimum Wage to all modern awards, despite the fact that the Fair Work Act 2009 makes it clear that the adjudication of modern awards and the National Minimum Wage are separate activities.

I have been advised by your office that such questions must be framed as submissions to the Annual Wage Review and was granted an extension until today if I wished to resubmit my query.

I was also referred to Chapter 2 and Chapter 10 of the Annual Wage Review 2012-13 Decision.

Having read this report, I am re-submitting these matters for consideration in this review, since I find the Commission's justification as set out in the Annual Wage Review 2012-13 to be forced and unpersuasive.

By way of background, I manage a number of small businesses in the accommodation sector in regional Australia and we are a member of the Accommodation Association of Australia, whose submissions I have read.

Determination of Award Rates on a sectorial basis

The *Fair Work Act 2009* makes it clear that the setting of the National Minimum Wage and the determination of Modern Awards each year, are in fact separate processes. Submissions have been made in the past which correctly point this out, and the legal reality of this has been accepted by the Commission. Nonetheless, in the Annual Wage Review 2012-13 ('AWR13') the Commission set out its continued justification as to why they are using the discretion provided to them to link these activities, with very serious consequences for Australian businesses.

Having analysed the Commission's justification in sections 77-102 of AWR13, I continue to believe that the approach of the Commission is wrong.

There are many detailed arguments against the Commission's position. However, there are a number of key issues that I will make here:

1. Despite the Commission's justification, the submission of ACCI is far more persuasive in that if Parliament had intended increases in the minimum wage

to be passed through all Awards, they would have said so. This, combined with the fact that the processes are separate in the Act, fatally undermine the view of the Commission that it is more logical that Parliament actually meant something that they did not legislate.

2. The Commission invoke the text “may make *one or more determinations* varying modern awards to set, vary or revoke modern award minimum wages” as justification of their view that the Commission has discretion to form policy that all Awards can be treated together. In fact, it says no such thing. This text could quite easily be interpreted to say that it would be quite acceptable for the Commission to make no orders at all in relation to awards and therefore that changes to the National Minimum Wage need not be passed on to modern awards at all. The Commission are using their ‘discretion’ to create policy, which is not their role. The discretion that is granted to them should be exercised on each and every issue presented to them, and I regret to say that I find the Commission’s statements in AWR13 to be in conflict with their responsibilities.
3. In my view, the Commission has developed a view of the concept of a ‘safety net’ that is inconsistent with the legislation and the reality. As I repeat, the National Minimum Wage and the modern awards are totally separate concepts. It is reasonable that the combination of the National Minimum Wage and the National Employment Standards form a safety net, under which no employee may drop. However, although the Act refers to the objective of modern awards as to “provide a fair and relevant minimum safety net of terms and conditions’, it is not true to state the converse that modern awards *are* the safety net. Only a small part of the function of awards is a safety net, and awards go far further – they prescribe wage rates (in some cases, such as mine) for an entire industry, across a large range of incomes, many of which could not claim to be ‘low paid’.

Throughout AWR13, the Commission has invoked the concept of the safety net to justify why every award must be increased by the same amount.

The Commission’s view of the ‘safety net’ lacks logic. The safety net must exist to protect the standard of living of the employee. If the National Minimum Wage is not ‘safe’, then surely they would increase it? If it is ‘safe’, then why would higher award wages also need to form a ‘safety net’? Why would workers with higher positions not be ‘safe’ at the national minimum wage – why would a more senior employee be less ‘safe’ in this regard unless they have a higher wage?

All this, of course, is nonsense. The National Minimum Wage (which is incorporated into each modern award as the lowest available rate) and the National Employment Standards ARE the safety net. Higher award wages for other grades exist not as a safety net, but because the Commission has judged (as is their role) that they DESERVE higher wages, not because they are being protected from a socially unacceptable standard of living, since this has already been protected by the National Minimum Wage. And, based on the provisions of the Fair Work Act, this determination by the Commission is really a form of statutory collective bargaining. Both employer and employee groups are invited to make submissions which the Commission is meant to

rule on impartially. This is the very essence of a collective bargaining approach which the Fair Work Act establishes as its required model, although in the case of awards it is performed compulsorily on behalf of employees who may not be formally organized.

However, the approach of the Commission fatally undermines this purpose of the Act. To illustrate, the Accommodation Association of Australia has made submissions this year (and every year) on the specific issue of the Hospitality (General) Award and setting out the views of their members, the employers, and explaining conditions in the industry. However, by stating that all Awards must increase by the same amount, the Commission is basically saying that the representation on behalf of accommodation employers is doomed to be ignored, whatever the content. It cannot have been the intention of Parliament that employer submissions be ignored. Yet that is the reality of the situation. To claim, as the Commission appears to, that these submissions are actually considered when they were never intended to be actioned is a nonsense.

4. In AWS13, the Commission has moved from claiming discretion [75] to establishing a policy [77], claiming that any alternative exercise of discretion is inconsistent with the Act [79] and then reversing the burden of proof for anyone who wishes to disagree [543]. This is all highly inappropriate. There is no logic in using discretion granted to rule that discretion should not be used. The function of the Commission is to follow the law, not re-interpret it to meet their own policy objectives.
5. In paragraph 77 of AWS13, the Commission claim "*In our view, considerations of fairness and stability tell against an award-by-award approach to minimum wage fixation. If differential treatment was afforded to particular industries this would distort award relativities and lead to disparate wage outcomes for award-reliant employees with similar or comparable levels of skill.*"

The reference to fairness appears to relate to section 134(1) of the Act, in which case the concept of fairness seems to have become very selective. The concept of 'fairness', according to the Act, applies equally to both employees and employers. In fact, no weighting is given to the various items ((a)-(h)) which the Commission is meant to consider.

It would appear to be totally unfair for an employer in an industry which is performing far less well than the national average to be forced to accept a pay increase which was determined by looking at the performance of the economy as a whole, especially when it may cause considerable stress to their business. The fact that different outcomes of different industries may result in employees being paid differently is a simple reality of a market economy, and is only 'unfair' to those who do not subscribe to this approach. If, as the Commission claims, your function is to provide a safety net, why are you trying to standardize wages across different industries? That is a completely different goal than the one you are tasked with.

Equally 'unfair' is the situation you have created in the accommodation industry where many employees receive a higher hourly rate than their senior managers and, very often, the business owners. I believe you have also been told this by the catering industry. This is a reflection of the fact that award

wages have completely distorted the labor market in these industries. To claim, as the Commission has, that this is simply due to you providing a 'safety net' is inaccurate and misleading. The distortion can and should be removed by adjusting the award wages to reflect the economic reality of the industries.

Frankly, the approach of Commission is negated by section 143 (1) (e) "the principle of equal remuneration for work of equal or comparable value". 'Value' can only be read as economic value, since there is nothing in the Act that I can find that allows the Commission to make moral assessments of the 'value' of employees. On this basis it is quite inevitable that a worker who chooses to work in an industry which is performing less well than another creates less economic value and therefore would not expect to be paid the same. As long as they are protected by the safety net, there is no basis in the Act for the Commission to force the same wages on everyone.

6. Paragraph 79 of the AWS13 states that "*Enterprise level collective bargaining is the primary means by which the statutory framework envisages differential treatment based on the circumstances in particular enterprises, which would be influenced by relevant sectoral considerations.*" Frankly, reading this I can only be reminded of the submission made to this Annual Wage Review by Gary E on 11 April 2014, which is probably more relevant than any of the submissions made by lobby groups on which this process depends. He is representing the reality of small business owners across the country, and in my view is fully correct (including, sadly, his comment on the likely fate of his submission).

The actions of the Commission, in fact, totally undermine the possibility that enterprise collective bargaining can take place in large parts of award-reliant industries such as accommodation. If you insist on awarding pay increases that far outstrip the economic performance of specific industries, and if enterprise bargaining agreements have to be more generous than the award, on exactly what basis does the Commission think that enterprise level bargaining can possibly occur? Perhaps large hotel chains in major cities may be in a position to pay above award, but I can assure you that small and medium businesses in the accommodation sector absolutely cannot, never have and probably never will. For most small and medium business in award-reliant industries, the concept of collective bargaining above the award is a fantasy.

In fact, if the Commission genuinely wanted to see "differential treatment based on the circumstances in particular enterprises" as it claims, it would need to *lower* the National Minimum Wage and/or the modern award rates, particularly in industries that are not performing as well as the average, so as to create room for employers to actually compete for employees labour. I would love to pay my well-performing employees more than their less productive colleagues – it is the Commission that is stopping this happening, since by forcing up wages for all workers beyond the economic ability of the enterprise to pay it, the better workers have no ability to bargain for higher wages.

By coming to the conclusion that you have stated, the Commission is demonstrating that it does not understand the difference between industries where the award wages exceed the economic value of labour and those where it does not. This is exactly why it is essential that the Commission discontinues its 'one size fits all' approach to setting wages.

7. Your comment in 79 that *"The award-by-award approach to minimum wage fixation, based on sectoral considerations, advocated by some parties in these proceedings is inimicable to the safety net nature of modern award minimum wages"* once again shows the unequal weight that you are applying to the items mentioned in section 134(1). As noted in point 3, modern award wages are not really a safety net (except at the lowest grade), but a determination of value. I will provide an example based on real circumstances.

As you are aware from the submissions of the Accommodation Association of Australia, revenue in the industry is generally flat or in decline for many operators. Input costs, however, are rising far beyond the level indicated by the CPI (which, as a consumer measure, has no relevance in measuring the level of business cost increases). In these circumstances, a business may not be able to pass these costs on to the market if conditions are poor. Therefore, they have a choice between accepting a lower profit (or making a loss) or reducing labour costs. A decision to accept lower profits will only reduce growth and investment in the small business community in future, and for many small businesses, the 'profits' actually form the owners income (for whom, of course, you do not provide a safety net). Labour costs across most of the sector are calculated as a fixed percentage of revenue. If revenue is flat, and wage rate rise, the amount of labour will be reduced to meet this target.

It is concerning that, faced with this obvious truth, the Commission seems to find a lack of evidence to support it (ref 530 AWS13). Forcing a standard pay rise in an industry with below trend growth will, as a virtual certainty, reduce overall employment in that industry. When hours are reduced, particularly amongst casuals, your 'safety net' becomes somewhat redundant. There is no point offering a safety net to people who are already on the floor.

So long as the minimum rate earned by any individual staff member is at least equal to the National Minimum Wage, and the employer offers terms in line with the National Employment Standards, the safety net is preserved. At that point, maximizing available hours becomes the key priority in protecting the low paid. Other preferential features of the award simply improve the standard of living of the employees, assuming they still have a job, and the Commission is meant to balance this benefit against the costs to business and the other factors set out in the Act. In fact, the Commission seems to have decided that the 'safety net' is more important than any of the other considerations set out in the legislation and this is the basis of their decision to ignore business submissions on the state of each industry.

If the Commission were to accede to the request of the Accommodation Association of Australia, employment levels would likely be maintained, which is the best way of maintaining a real safety net for more people. In light of the facts, I find the statement of the Commission in 79 AWS13 to be false.

Overall, I contend that the policy of the Commission in respect of setting award increases contravenes every instruction provided to them under s134(1). Specifically:

- (a) relative living standards and the needs of the low paid – *this cannot be achieved if hours are reduced to compensate for wage increases that cannot be economically recovered.*
- (b) the need to encourage collective bargaining – *as noted, higher award wages eliminate the option of collective bargaining in industries where award wages exceed the economic value of labour.*
- (c) the need to promote social inclusion through increased workforce participation – *award constrained companies will simply reduce employment hours to compensate, reducing workforce participation.*
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work – *if businesses cannot afford to pay award wage increases without incurring economic loss, they will not be in a position to reward productivity in well performing staff.*
- (e) the principle of equal remuneration for work of equal or comparable value – *based on the economic value of work, the Commission is distorting this criteria rather than supporting it.*
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden – *clearly, the impact on a business of a wage raise in excess of the overall conditions of the industry will impact negatively on all of these criteria.*
- (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 – *passing wage rises on an annual basis to industries that have below growth trend is not sustainable.*
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy – *a one size fits all approach to wage setting reduces growth and undermines the performance of the economy.*

The National Minimum Wage/Questions for submissions in reply

I refer to the document 'Questions for submissions in reply' posted by the Commission on 1 April. I will offer feedback on some questions.

Question 1

I have no information that would apply to Australia. I would however refer to the situation in the UK economy after the Global Financial Crisis. Due to the unregulated labour market, wages in the UK private sector were allowed to reduce, a situation that is hard to imagine in Australia under the Commission. Although UK wages have

only just regained the average levels of 2008, the large increases in unemployment that have traditionally followed such a recession were largely avoided, a fact well understood in the UK.

Question 2

I do not believe that any experience of the US in relation to the minimum wage can be applied to or compared to Australia, due to the massive difference in the level of the minimum wage. If the article quoted is indeed correct, it would most likely be because the minimum wage in the US is not set above the actual economic value of the labour offered in most cases, which is why such a small proportion of the US workforce (fewer than 3% according to the German Institute for the Study of Labor) are paid at the minimum wage.

Question 3

The primary purpose of a minimum wage internationally is to eliminate exploitation, where workers are paid at a value less than the economic value of the labour because businesses signal to each other that they will bid for labour at an unfair amount. In most countries, if the minimum wage produces a socially unacceptable standard of living this is corrected by the Government through the welfare and social security systems.

As soon as the minimum wage approaches the true economic value of labour, it is inevitable that employees will tend to bid at around that amount. The modern award system makes this far worse in Australia because it removes the incentive for employees to perform better since pay is linked to position and not performance. Due to the relatively high level of award wages, employees are generally content to remain on award wages permanently rather than improve their skills to gain a better paid position. I do not recall ever having an employee (below the level of department head) even ask to be paid at higher than the award rate.

Question 4

As noted above, I agree with this view, because the UK and US minimum wages are set low enough that they do not materially distort the labour market but act to prevent exploitation. The contrast with France and Australia is considerable.

Question 5

This is the most fundamental issue. Minimum wages in Australia cannot be reliably compared to minimum wages in other developed countries since, in Australia, hardly anyone actually gets paid the actual minimum wage. In the UK (for example) the minimum wage of GBP 6.31 is what many people actually get paid. In Australia, the vast majority of people are covered by awards that push their pay well above the national minimum wage. Since many employees on minimum wage are casual, you can add the 25% loading, even before adding the various other loadings (eg 10% for out of hours and weekend and other loadings).

The reality is that 'low paid' staff on award in Australia are in completely different league compared to minimum wage earning employees in other countries. As an example, under the Hospitality (General) Award a casual waiter with basically no

qualifications or supervisory responsibility (which in the UK/US would probably be paid at minimum wage) earns \$17.49 an hour (eg already 7% above the minimum wage) PLUS casual loading taking them to \$21.86. If we assume that they work a variety of evenings and weekends as is typical in the industry, they will earn around \$24-25 per hour on average, even assuming no public holidays. This is over double the UK minimum wage (equivalent to \$11.50), and the UK has the one of the highest minimum wages in Europe.

To put it another way, a full-time waiter working a 38 hour week in a typical hospitality pattern will earn at least \$40,000 per year in Australia, whilst an equivalent UK employee on minimum wage would earn roughly GBP 12,500 or \$22,700 per annum. In fact, the Australian employee, who has no skills or qualifications at this level, is earning only 15% less than the overall median UK wage.

The Commission needs to differentiate between the National Minimum Wage and the 'minimum award wages' which are completely different things and have different purposes.

Questions 6/7

I have no information to offer in relation to these matters, other than to refer to earlier comments as to the direct relationship between wage increases and hours offered for employees in industries that are growing slower than the average.

Conclusions

I submit that the Commission should act as follows in relation to this Annual Wage Review:

1. Permit no increase the National Minimum Wage.
2. Permanently alter the Commission policy in relation to Award reviews, and determine an increase in each award individually based on the submissions made by each industry group and employee group, and failing which act on information otherwise available to the Commission as to the overall performance of each industry.
3. I support the recommendation of the Accommodation Association of Australia that there should be no increase in the Hospitality (General) Award this year. Any increase given the poor trading conditions which have now lasted for over two years will be devastating to the industry and would be contrary to the criteria set out in the Act.
4. The increase to the superannuation guarantee must be determined as a deduction from employee pay, rather than an employer cost. The relevant legislation is absolutely clear that superannuation contributions are an employee deduction, and employee savings, and the Commission acted very questionably when it set up modern awards to show them as an employer cost. It is time to rectify this error.
5. Given the terrible response to the Annual Wage Review in terms of submissions from non-lobby groups, the Commission needs to urgently engage with both individual business owners and employees to gain a better understanding of the factors that affect each group and should be visiting small and medium business workplaces to obtain direct feedback. The practice of obtaining information largely from lobby groups is highly

undesirable and appears to have resulted in the Commission treating these reviews as an academic exercise rather than a process which can break businesses and inflict significant harm on employees.

I would be grateful if you would direct any correspondence or notices to rs@mandala.net.au or my home address as above.

Yours faithfully

A handwritten signature in blue ink, appearing to read 'RS', followed by a large, sweeping horizontal flourish that extends to the right and then curves back down and to the left.

Ryan Shaw