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**Fair Work Commission: Annual Wage Review**

**OUTLINE OF SUBMISSIONS IN REPLY**

**ANNUAL WAGE REVIEW**

**C2017/1**

**AUSTRALIAN BUSINESS INDUSTRIAL AND NSW BUSINESS CHAMBER**

**17 OCTOBER 2015**

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## 1. INTRODUCTION

- 1.1 On 19 September 2016 the Fair Work Commission released a Statement *Annual Wage Review 2016-17 Preliminary Hearing – Release of Background Papers* [2016] FWCFB 6730 (**Statement**) in the Annual Wage Review 2016-17 (C2017/1) (**AWR**).
- 1.2 The Statement indicated that the Commission had released 3 background papers covering material in relation to the following matters:
- (a) A proposal for a medium-term target;
  - (b) A review of transitional instruments;
  - (c) A review of existing arrangements for employees with a disability.
- 1.3 These matters will be addressed at the preliminary hearing scheduled for 24 October 2016.
- 1.4 A summary of the position of ABI and NSWBC in response to the questions posed in the background papers was filed on 11 October 2016 (**ABI Initial Submissions**).
- 1.5 These submissions are filed in reply to submissions filed by other parties in response to the background papers on or about 10 October 2016.

### **A Proposal for a Medium-Term Target**

- 1.6 As noted by our primary submission, in the view of ABI and NSWBC, the adoption of a medium-term target or target range for the National Minimum Wage or modern award minimum wages would be inconsistent with the prevailing statutory context relating to the AWR.
- 1.7 A number of parties have provided submissions in support of the adoption of a medium term target.
- 1.8 Four points in summary need to be made in reply to these materials.

### **Threshold Question**

- 1.9 The materials filed in support of a medium term target primarily seek to develop an argument for wage increases relative to the median wage. What is largely undeveloped is the threshold question as to whether the Panel can adopt a medium-term target in circumstances where such a mechanism is not contemplated by the *Fair Work Act 2009* (Cth) (**Act**).
- 1.10 The primary force of the argument by the ACTU and the United Voice for the adoption of a medium term target appears to be that the current provisions of the Act in relation to the AWR process are insufficient. Without the adoption of a policy position external to the operation of the Act, the Commission will apparently be left “*rudderless in navigating its task from year to year*”.<sup>1</sup> Indeed the ACTU laments the difficulty of determining a path for minimum wages over time using purely annual decisions.<sup>2</sup> In conducting the AWR on the basis of the annual review system identified by the Act, it is also said that the Panel leaves itself open to the “*boiling frog problem*”, i.e. that without a target, it will be oblivious to prevailing economic trends and relativities until it is “*too late*”<sup>3</sup>.
- 1.11 With respect, the Panel has an awareness far greater than the metaphorical frog. The Act outlines a detailed and complex exercise for the Commission to undertake in performing the AWR each year.

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<sup>1</sup> See ACTU Submissions at p 1

<sup>2</sup> See ACTU Submission at page 8

<sup>3</sup> See ACOSS Submission at p3

The requirements of the Act are outlined in our previous submission. Further, trends and forecasts relating to wage rates and relativities over time are inevitably considered by AWR determinations.

- 1.12 In the submission of ABI and NSWBC, the nature of a target means that if a medium-term target were imposed onto the statutory framework of the Act, it would serve to inappropriately influence the conduct of the AWR by requiring undue focus on a factor not prescribed by the statute.
- 1.13 It is not submitted that the Commission cannot have regard to the relativities and trends that the ACTU and other unions identify, it is merely submitted that a medium-term target cannot override the express provisions of the Act.
- 1.14 In the view of ABI and NSWBC, this is a consequence of the operation of the Act.

#### **Nature of a Target**

- 1.15 It is apparent that the utility and appropriateness of a medium-term target will depend in large part on the nature of such a target.
- 1.16 It has not been seriously suggested by any party that the Commission could adopt a determinative medium-term target (although the United Voice submit that a target would “*anchor expectations and direction*”<sup>4</sup> (our emphasis)). Such an approach would clearly be at odds with the operation of the Act.
- 1.17 Accordingly, the nature of the medium-term target proposed is considerably more fluid than what would ordinarily be described as a ‘target’.
- 1.18 The ACTU submits that such a target would be inherently flexible, characterising the proposal as an aspiration or policy goal rather than a binding directive.<sup>5</sup> The United Voice submits the target would not operate to require a particular outcome to restrict the discretion of the Panel in a given year’s proceedings<sup>6</sup> and propose a 4 year review period of the medium term target.
- 1.19 In the submission of ABI and NSWBC, the flexibility of such a mechanism severely compromises any utility that may arise from its introduction. For example, if a medium-term target was introduced and was not met (or exceeded), what would be the consequence? Would it be incumbent on the Panel to explain the “failure” to reach the target? If the target was not influential in the determination of the AWR, what would be its purpose? If it were influential, would this not undermine the express provisions of the Act that make no mention of it?
- 1.20 In the submission of ABI and NSWBC the introduction of a target would place an artificial performance metric on the Panel which would either inappropriately influence it or otherwise provide no meaningful utility.

#### **Target would only apply to one Limb**

- 1.21 It must be noted that the nature of the proposed target (% of median wage) appears only to relate to the “*relative living standards and the needs of the low paid*” considerations of the AWR. The imposition of a target which relates to a single factor in a multi-factorial assessment is inappropriate and likely to lead to results inconsistent with the proper operation of the Act.

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<sup>4</sup> See United Voice Submissions at [31]

<sup>5</sup> See ACTU Submissions at 30

<sup>6</sup> See United Voice Submissions at 7

### **Target would be similar to previous phasing-in Arrangements**

- 1.22 From [40] of the United Voice submissions, the United Voice seeks to equate the adoption of a medium-term target with previous decisions of the Panel to phase-in increases to penalty rates.
- 1.23 In the view of ABI and NSWBC, this analogy is not well made, and also puts in question the idea that the target itself would be flexible.
- 1.24 The example used is the determination of the Panel to increase the casual loading for agreement/award free employees in 2009-10. In [2010] FWA 4000 the Panel accepted that the casual loading for award/agreement free employees should be brought into line with standard casual loading in modern awards but that it would not be appropriate to increase the loading to the full 25% immediately and it would be done incrementally.
- 1.25 This decision relates to a determination by the Panel that a particular rate was appropriate, and the imposition of a transitional arrangement to phase that rate in.
- 1.26 The medium-term target proposed is of a different nature (as we understand it). The medium-term target proposed is not described as a determination of an existing appropriate rate to be phased in, but rather a non-binding and flexible analytical tool to assist the Panel in its annual function.
- 1.27 These concepts are fundamentally different and should not be equated.

## **2. A REVIEW OF TRANSITIONAL INSTRUMENTS**

### **Question 1 - Given the operation of s.113 of the Fair Work Act, can the long service leave awards be terminated?**

- 2.1 The ACTU Submissions advocate that:

*“It is arguable that if a given award or State reference transitional award is terminated, there are no “terms of an award, or a State reference transitional award” for the remainder of section 113 to operate upon. We would therefore urge the Commission to be cautious of the unintended consequences in terminating such instruments.”*

- 2.2 This is a position echoed by a number of the union submissions.
- 2.3 The Ai Group has also advocated that the long service leave awards should not be terminated if there is “any doubt” about the impact of the termination on “applicable award-derived long service leave terms”.
- 2.4 For the reasons outlined at section 4 of the ABI Initial Submissions and the Submissions of the Australian Government dated 10 October 2016, these concerns are unfounded. The termination of the so called “long service leave awards” by the Fair Work Commission will not result in any alteration to employee entitlements with respect to long service leave.
- 2.5 The Commission can and therefore should terminate the long service leave awards.

### **Question 7 - Given the 2012 ERO preserves the operation of transitional provisions and the Fair Work Act obliges Commission to terminate transitional instruments, is there any reason why the Commission should not terminate the remaining transitional instruments related to the SACS modern award?**

- 2.6 Having reviewed the ACTU and ASU submissions, it appears there is some ambiguity as to how the ERO 2012 order is to be interpreted and applied.

- 2.7 If the Commission considers that the ERO 2012 order relies upon relevant transitional instruments continuing to operate through to 2020, the Commission may be required to either:
- (a) maintain the operation of the transitional instruments until 2020 (such a step might conflict with the Commission's statutory obligations to terminate transitional instruments as soon as practicable after award modernisation); or
  - (b) vary the ERO 2012 to address this issue.
- 2.8 ABI is willing to address this matter further, if required.