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Annual Wage Review 2016-17: Preliminary Issues

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1 Introduction

On 19 September 2016 the Fair Work Commission (Commission) issued a Statement announcing the release of three background papers covering material in relation to the following matters:

- [a proposal for a medium-term target](#);
- [a review of transitional matters](#); and
- [a review of existing arrangements for employees with disability](#).

As such, these submissions are made on behalf of the Australian Chamber of Commerce and Industry in taking up the Commission's invitation to respond to the questions put forward in the background papers ahead of a hearing scheduled for 24 October 2016.

The focus of this submission relates to the United Voice proposal for a medium term wage target given the general relevance of this issue to the Australian Chamber membership and employers in Australia. The Australian Chamber foresees that some of its members will make submissions that address the circumstances of the particular instruments of interest to them and this submission is made without prejudice to the views expressed by Australian Chamber members.

2 The statutory context does not support a medium-term wage target

As noted in the Commission's Background Paper addressing the proposal for a medium-term target, during the Annual Wage Review 2015-16 United Voice proposed a separate process of submissions and hearings to consider such a target as an "additional tool to assist in the performance of its annual obligations".¹ Parties addressing the Background Paper have been invited to address a number of questions, key among them being:

- 1. Taking into consideration the powers of the panel to set national minimum wages and modern award minimum wages under s.285(2) and the minimum wages and modern award objectives set out in s 284 and 134 of the Fair Work Act 2009, does the legislative framework allow the Panel to adopt a medium-term target (or target range) for the NMW or modern award minimum wages?**

Consistent with the Australian Chamber's submissions made during the Annual Wage Review 2015-16, it remains the Australian Chamber's position that the statutory context does not support such an approach.

Section 285 of the *Fair Work Act 2009* (Cth)(Act) requires the Expert Panel (Panel) to conduct and complete an annual wage review in each financial year. A determination made varying minimum wages must come into operation on 1 July in the next financial year unless there are exceptional circumstances.²

¹ United Voice, *Submission to Annual Wage Review 2015-16*, 30 March 2016 at pp. 5-6.

² *Fair Work Act 2009* (Cth) ss 286 and 287.

Subdivision B of Part 2-6 of the Act sets out provisions about the conduct of annual wage reviews, including:

- section 289 which sets out a requirement for the Commission to ensure that all persons and bodies have a reasonable opportunity to make written submissions for consideration in the annual wage review and to comment on published submissions;
- section 290 which enables the President to give directions requiring that a matter be investigated and that a report about the matter be prepared for consideration in an annual wage review;
- section 291 which provides that if the FWC undertakes or commissions research for the purposes of an annual wage review, the FWC must publish the research so that submissions can be made addressing the issues covered by the research;
- section 292 which relates to the requirement to publish varied modern award minimum wages.

These provisions prescribe processes that are structured in contemplation of an *annual* review of a nature that sits poorly with the notion of a medium term target extending beyond a single year. A medium term target would influence each annual wage review outcome on the basis of pre-determined criteria sitting outside of the statutory criteria and there is no statutory mechanism for the setting of such a target under the Act's provisions. The Australian Chamber submits that the important procedural fairness requirements prescribed by Act for the purposes of the annual wage review (as reflected in the provisions above) apply to each separate annual review and are at risk of being undermined should such a target be determined in advance of the annual wage review.

The annual review is also required to be carried out within the broader statutory context of the Act. In particular, section 284(2) of the Act provides that the minimum wages objective applies to the Commission's functions and powers under Part 2-3 of the Act (so far as they relate to setting, varying or revoking modern award wages) and Part 2-6 of the Act. That objective is contained within section 284(1) and provides:

- (1) *The FWC must establish and maintain **a safety net** (emphasis added) 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; and*
 - (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.*

In the context of setting, varying or revoking modern award minimum wages the Expert Panel also needs to take into account the modern awards objective as contained within section 134 of the Act which provides:

- (1) *The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant **minimum safety net** (emphasis added) of terms and conditions, taking into account:*
- (a) *relative living standards and the needs of the low paid; and*
 - (b) *the need to encourage collective bargaining; and*
 - (c) *the need to promote social inclusion through increased workforce participation; and*
 - (d) *the need to promote flexible modern work practices and the efficient and productive performance of work; and*
 - (da) *the need to provide additional remuneration for:*
 - (i) *employees working overtime; or*
 - (ii) *employees working unsocial, irregular or unpredictable hours; or*
 - (iii) *employees working on weekends or public holidays; or*
 - (iv) *employees working shifts; and*
 - (e) *the principle of equal remuneration for work of equal or comparable value; and*
 - (f) *the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
 - (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; and*
 - (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.*

The objects of the Act as contained in section 3 of the Act, produced below, must also be taken into consideration:

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

- (a) *providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and*
- (b) *ensuring a guaranteed **safety net** (emphasis added) of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and*
- (c) *ensuring that the guaranteed **safety net** (emphasis added) of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and*
- (d) *assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and*
- (e) *enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and*

- effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and*
- (f) *achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and*
- (g) *acknowledging the special circumstances of small and medium-sized businesses.*

The Act's reference to minimum wages as a "safety net" is reflective of the reality that minimum wages are not market rates of pay and this reference warrants close attention as it is replicated in both the minimum wages and modern award objectives set out in sections 284 and 134 as well as the Act's general objects in section 3.

2.1 Establishing a "safety net"

The Panel's first annual wage decision under the Act's statutory framework was delivered during the Annual Wage Review 2009-10. In this decision the Panel highlighted the differences between the statutory criteria under the Act and the criteria within the *Workplace Relations Act 1996* (Cth)(WR Act) which had guided the former Australian Fair Pay Commission in its wage setting functions. In this regard the Panel stated:

[14] While it is not useful to make a detailed comparison between the minimum wages objective and the parameters which guided the AFPC, there are some important differences which should be noted. In particular s.284(1) contains a requirement that a safety net be established and maintained. Therefore the principal consideration relates to the safety net rather than the "promotion of economic prosperity". We discuss in some detail later a number of other important considerations. They include promoting social inclusion through increased workforce participation and relative living standards and the needs of the low paid.³

...

[16] It is clear that in carrying out this review we are required to apply an expanded range of considerations...⁴

During the Annual Wage Review 2015-16 the ACTU and United Voice both suggested that the Panel's requirement to consider relative living standards means it should use its determination to reverse the decline in Australia's minimum wage bite and improve the overall relativities between award wages and other methods of pay setting.⁵ Paragraph's 34-55 of the Australian Chamber's 2015-16 Annual Wage Review submission addresses this argument in economic terms, explaining the reasons for the decline in the minimum wage relative to average wages and noting that compositional effects combined with the pay increases provided by the Panel in recent years mean that:

³ [2010] FWAFB 4000 at para [14].

⁴ [2010] FWAFB 4000 at para [16].

⁵ United Voice 2015-16 Annual Wage Review Initial Submission; ACTU 2015-16 Annual Wage Review Initial Submission, para 212 to 306.

- the average income of those on awards has actually increased relative to the average for those on all methods of pay setting over the last 10 years, and
- the average wage of those on awards has actually increased more quickly than the average wage of all methods of pay setting over the past six years.

However notwithstanding the economic arguments that highlight the problems with the United Voice contentions, when considered against the minimum wages and modern award objectives set out in sections 284 and 134 as well as the Act's general objects in section 3 which clearly described the role of minimum wages as a safety net, the United Voice proposal does not provide a foundation for the establishment of a medium term target for the minimum wage. As noted earlier, it is also inappropriate in the context of the broader statutory framework.

While determining wages in a different statutory context, the Australian Industrial Relations Commission (AIRC) had previously rejected the notion of a safety net being set on the basis of movements in market rates and bargained wage outcomes. In its 2005 Safety Net Review Decision, the Full Bench of the AIRC made the following statements when considering the statutory concept of an award safety net which remain relevant:

[384] The Commonwealth rejected the ACTU's submission that there should be an appropriate nexus between average award movements and average movements in the WPI. It reiterated the position it has put in other safety net reviews that market rates and movements in earnings should not be the basis for safety net adjustments. In the alternative it submitted that if movements in the market are to be taken into account, comparison should be limited to the WPI.

[385] In relation to these submissions we accept that the statutory concept of an award safety net requires that there be a separation between minimum rates and agreement rates and that bargained wage outcomes should not be transmitted through the award system. The Commission has also previously accepted, as the Commonwealth has already pointed out, that the WPI is the most useful indicator for our purposes.⁶

While the Panel has identified that the statutory considerations under the Act relevant to minimum wage determinations vary from those under the WR Act in that they include promoting social inclusion through increased workforce participation and relative living standards and the needs of the low paid, there is still no basis for these statutory considerations to be applied in pursuit of income redistribution given the primary role of minimum wages as providing a 'safety net'. In its 2001 national wage case decision, the AIRC crucially articulated the limitations of its role in determining outcomes affecting the capacity of the low paid to meet their needs and expenditures:

As noted in previous decisions the statutory scheme does not give to the Commission a supervening social welfare responsibility either for incomes generally or their distribution. The scheme regulates wages and conditions of employment and requires the adjustment of the minimum wages safety net contained in awards having regard to particular considerations. The information about income levels and distribution provided by the

⁶ 2005 Safety Net Review Decision [PR002005].

parties is informative of Australian living standards. However, it must be taken into account having regard to the limited nature of our task and statutory responsibilities.⁷

While made in the context of a different statutory regime, the Australian Chamber submits that this statement remains relevant to the work of the Panel as it administers its functions and powers under the Act. ‘Relative living standards’ is one of many considerations that the Panel is required to take into account and information directed at this consideration, while relevant, should not elevate this consideration above others and should not undermine the primary function of the Panel in establishing and maintaining a **safety net of fair minimum wages**.

The Background Paper asks:

2. Should a medium-term target be set for the NMW or both the NMW and modern award minimum wages?

The Australian Chamber submits that a medium-term target of the nature sought by United Voice should not be set for either the National Minimum Wage or the modern award minimum wages. Doing so would see the annual wage review applied improperly as a tool for wage distribution instead of a tool for maintaining a ‘safety net’ having regard to the full range of considerations reflected in the statutory framework.

3 Problems with “target setting”

The Background Paper asks:

3. What are the reasons for or against setting a medium-term target?

In interpreting the statutory context, the Panel has previously stated:

The minimum wages objective, modern awards objective and objects of the Act contain some common elements. As we indicated in the Annual Wage Review 2011–12 decision (2011–12 Review decision) and the 2012–13 Review decision, the matters of direct relevance to the Review can also be understood by grouping them into three broad categories: economic; social; and collective bargaining.¹²

The Panel has further explained its approach to grouping these provisions:

[Economic considerations] *For example, promoting productivity and economic growth (s.3(a)); promoting flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)); the likely impact of any determination on business including on productivity, employment costs and the regulatory burden (s.134(1)(f)); the likely impact of any determination on employment growth, inflation and the sustainability, performance, and competitiveness of the national economy (s.134(1)(h)); the performance and competitiveness of the national economy, including productivity, business*

⁷ (2001) Safety Net Review, [Print PR002001], at [125].

competitiveness and viability, inflation and employment growth (s.284(1)(a)); and acknowledging the special circumstances of small and medium-sized businesses (s.3(g)).

[Social considerations] For example; the establishment and maintenance of a safety net of fair, relevant and enforceable minimum wages within the context of an easy to understand, stable and sustainable modern award system (ss.3(b), 134(1), 134(1)(g) and 284(1)); the promotion of social inclusion and [sic] through increased workplace participation (ss.134(1)(c) and 284(1)(b)); relative living standards and the needs of the low paid (ss.134(1)(a) and 284(1)(c)); the principle of equal remuneration for work of equal or comparable value (ss.134(1)(e) and 284(1)(d)); and providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability (s.284(1)(e)).

[Collective Bargaining] For example, the need to encourage collective bargaining (s.134(1)(b); see also s.3(f)).⁸

The Panel has found that it needs to use broad judgement to balance these groups of considerations, stating:

*It is important to appreciate that there is often a degree of tension between the economic, social and other considerations which the Panel must take into account. For example, a substantial wage increase may better address the needs of the low paid and improve the relative living standards of award-reliant employees, but it may (depending upon the prevailing economic circumstances) also reduce the capacity to employ the marginalised and hence reduce social cohesion. **It is this complexity that has led the Panel to reject a mechanistic or decision rule approach to wage fixation, such as the adoption of real wage maintenance.** The real wages of award-reliant employees are relevant to our task, but not determinative. The range of considerations we are required to take into account calls for the exercise of broad judgment rather than a mechanistic approach to fixing minimum wages.⁹*

This rationale was reinforced in its subsequent decision with the Panel stating:

As the Panel has observed before, there is often a degree of tension between the economic, social and other considerations which the Panel must take into account. It is this complexity which has led the Panel to consistently reject a mechanistic or decision rule approach to wage fixation, such as the adoption of real wage maintenance.

The real wages of award-reliant employees are relevant to our task, but they are not determinative. To adopt real wage maintenance as a decision rule would fail to take into account other considerations including, for example, relative living standards (as we are

⁸ [2014] FWCFB 3500, endnotes 8-10.

⁹ [2014] FWCFB 3500, para 72.

required to do by s.284(1)(c)) in circumstances where the rate of growth in average earnings and bargained rates of pay have outstripped growth in minimum rates of pay.¹⁰

In this regard, the Panel has already identified the problems with applying a more mechanistic approach in its annual wage review function. It is clear that that simple rules such as real wage maintenance cannot capture the full range of considerations that the Panel must take into account. However the United Voice proposal appears to proceed on the basis that “[m]inimum wages have failed to keep pace with incomes in the economy more generally”. Notwithstanding that these concerns can be challenged on economic grounds, it should be acknowledged that implementing a medium-target based approach on the basis of this concern alone fails to acknowledge the broad range of considerations that the Panel must take into account as described above.

As noted earlier in this submission ‘relative living standards’ is one of many considerations that the Panel is required to take into account and information directed at this consideration, while relevant, should not elevate this consideration above others and should not undermine the primary function of the Panel in establishing and maintaining a safety net with reference to the broad range of statutory considerations. A ‘target setting’ approach that was concerned with maintaining or seeking to increase the minimum wage bite would have this effect.

4 Concerns relating to a “target setting” approach

In its Annual Wage Review Decision 2015-16, the Panel stated that its “...task is to consider relevant statutory matters in the context of the **prevailing economic and social environment** in order to make its decision in the Review” (emphasis added).¹¹ This suggests a greater focus on conditions existing at the time of the review rather than projected conditions and in this sense each year’s decision is independent of the last. This has not prevented the Panel from examining trend data to contextualise prevailing conditions. This is acknowledged at paragraph 7 of the Annual Wage Review Decision 2015-16 with the Panel stating:

*In taking into account **available economic and social data**, the Panel’s approach is to assess the changes in these data over the past year and to consider longer-term trends in order to determine how they inform the statutory criteria.¹²*

This reflective process draws on data from a range of credible sources and has been adopted since the commencement of the Annual Wage Review process under the Act. For example data identified as relevant to the economic growth, productivity, inflation and labour market performance during the Annual Wage Review process commencing in 2009-10 considers ABS data for the decade preceding the decision as well as data from DEEWR and the IMF.¹³

Data from the *Household, Income and Labour Dynamics in Australia* (HILDA) Survey is also considered when examining issues such as the incidence and characteristics of low paid employees. This approach has been reflected in subsequent wage reviews, supplemented by

¹⁰ [2015] FWCFB 3500 at paras [64] and [65]

¹¹ [2016] FWCFB 3500 at para [4].

¹² [2016] FWCFB 3500 at para [7].

¹³ [2010] FWAFFB 4000 at part 3.2.

Commission research. However, this approach has not meant that each annual review has not been stand-alone and arrived at following consideration of the relevant facts at the time.

To the extent that forecast data is identified as relevant, only near term forecasts have been considered. These are typically in the form of Treasury forecasts in the context of the Federal Budget for the coming financial year and Reserve Bank of Australia near term forecasts. Where forecast data is taken into consideration it is also qualified by a number of technical assumptions.¹⁴

4.1 Criteria to be applied in setting a medium-term target

The Background Paper asks:

4. **For parties advocating a medium-term target:**
 - (a) **what criteria should be applied in setting a medium-term target?; and**
 - (b) **what target (or target range) should be proposed?**

The Australian Chamber submits that the setting of a medium-term target of the nature described is not appropriate to the current statutory context. It understands that question 4 is only directed at those advocating a medium term target. Notwithstanding this, it is worthwhile highlighting further why the United Voice's proposal for a medium-term target to be set on the basis of is problematic.

In its submission to the Annual Wage Review 2015-16, United Voice stated that it "...wants a medium-term target for the level of the minimum wage that reflects the needs of low paid workers and the values of our country." In this regard, it should be noted that in its Annual Wage Review 2010-11 Decision, the Panel made reference to the difficulties in applying benchmarks in ascertaining the needs of the low paid in its wage setting function. In particular, it stated:

[228] Ascertainment of the needs of the low paid by reference to benchmarks is difficult because of the range of personal and household circumstances which can affect the income of an individual employee. Income includes more than earned wages and, of course, the Panel is able to deal only with minimum wages. The extent to which minimum wages, and in particular the minimum wage, should be set by reference to the needs of a wage earner's dependents will continue to be a matter for debate because of the significant contribution that taxation and government transfer payments make to the income of low-wage earners with dependents. In this chapter we have focused on both relative living standards and the needs of the low paid. It is important to point out that those two considerations, taken together, are required to be taken into account along with a number of other matters specified in the modern awards objective and the minimum wages objective. No one matter or combination of matters should take precedence, although the weight given to them may vary depending on the circumstances at the time.¹⁵

The mechanistic approach advocated by supporters of a medium-term target sits poorly with this rationale. It is also important to note that that taxation and income transfers have an important effect on the relative living standards of workers reliant on minimum wages through their effect on household disposable incomes. The notion of setting a medium-term target that is directed at the minimum wage bite oversimplifies the social considerations underpinning minimum wage setting

¹⁴ See [2010] FWA FB 4000 at part 3.2 for example.

¹⁵ [2011] FWA FB 3400 at para [228].

and the important role that other measures have in impacting the living standards of low paid workers including tax and offset changes, welfare payments and subsidies.

4.2 The Act does not provide a mechanism for assessing or reviewing a medium term target

The Background Paper asks:

5. *If a medium-term target is adopted, how should it be assessed or reviewed during subsequent annual wage reviews?*

As noted above, in contrast to the provisions within the Act that set out processes for the annual wage review reflecting procedural fairness requirements, the statutory framework does not provide the regulatory infrastructure for the assessment or review of a medium-term target. Even if such a target were to be set, the provisions applying to the annual wage review process would enable those participating in the review to make submissions based on prevailing conditions directed to the statutory criteria that would call such a target into question. The process set out in Part 2-6 of the Act cannot be displaced.

The Background paper also asks the following question:

6. *Would parties be assisted if the Panel decided on whether it ought to set a medium-term target prior to initial submissions made to the Annual Wage Review?*

It would assist the parties and efficiency of the process if the Panel's determination on this jurisdictional issue were made in advance of the process for substantive submissions regarding the Annual Wage Review 2016-17.

5 About the Australian Chamber

The Australian Chamber of Commerce and Industry speaks on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses also get involved through our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, making us Australia's most representative business organisation.

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We also represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

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