Australian Business Industrial

AUSTRALIAN BUSINESS INDUSTRIAL

ANNUAL WAGE REVIEW 2016-17

REPLY SUBMISSIONS OF AUSTRALIAN BUSINESS INDUSTRIAL AND THE NSW BUSINESS CHAMBER Ltd

13 April 2017

About ABI and the NSWBC

Australian Business Industrial (ABI) is registered under the *Fair Work (Registered Organisations) Act 2009* and has some 4,200 members and the NSW Business Chamber Ltd (NSWBC) is registered under the (NSW) *Industrial Relations Act 1996* and is a State registered association recognised pursuant to Schedule 2 of the *Fair Work (Registered Organisations) Act 2009.*

The NSWBC has some 20,000 members.

ABI comprises those NSWBC members who specifically seek membership of a federally registered organisation.

These submissions have been approved by the Council of ABI on behalf of its members and endorsed by the workplace policy committee of the NSWBC.

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Submissions in reply

ABI and the NSWBC (for brevity, collectively referred to as ABI) appreciate the opportunity to make these further submissions to the 2016-17 Annual Wage Review.

In its initial submission ABI questioned the utility of parties recommending actual increases or some variant of this such as a ceiling or floor increase, but nonetheless recommended a ceiling for any increase of 1.8% to award minimum wages and an increase of no more than 1.8% to the adult rate in the national minimum wage order (NMWO). It did so on the basis of the following key factors:

- a persistent low inflation, low wages growth environment which ought to bias toward more moderate increases (than previous decisions) in pursuit of delivering a comparable effect;
- weaker labour market conditions with slower rates of employment growth, increased unemployment and underutilisation, and elevated levels of youth and long term unemployment in the labour market; and
- softer conditions (or mixed at best) in the award-reliant industries.

Data released since the initial submissions were due have not altered the basic picture which supported this recommendation.

Some parties have proposed that the Panel award a money increase to lower classifications and a percentage increase to higher ones, with the effect that the lowest paid classifications receive a disproportionately high percentage increase.

ABI has consistently opposed this approach. Reducing the relativities between those with the lowest levels of work useful skills impacts their propensity to acquire skills. Closing the relativity gap between lower skilled and higher skilled employees favours the employment of those with higher skills than needed for the job where award minimum rates can be paid. Because higher skilled employees are also more likely to have employability skills they are better qualified for the job, even if somewhat overqualified for the task.

Other parties have recommended a monetary increase. ABI has not ever done this because of its impact on relativities. ABI acknowledges that one reason for proposing a monetary increase rather than a percentage increase is that the cumulative impact of percentage increases, even if individually modest, is increasingly large monetary increases for higher paid classifications. Firms' profits are ultimately in dollars, not percentages, and the extent to which increases in the costs of production can be passed on differs in different economic circumstances.

Developments

Since initial submissions were lodged the Panel has issued a comprehensive decision ([2017] FWCFB 1931) (Decision) dealing with the matters which it dealt with as a preliminary hearing prior to the closing date for initial submissions to the annual wage review (AWR). These matters were

- a proposal for a medium term target;
- a review of transitional instruments; and
- a review of existing arrangements for employees with a disability.

A medium term target

In its consideration of the first of these matters, the possibility of setting a medium term target, the Panel found that it could not set a hard medium term target and that any settable target would be of little assistance.

The Panel's approach is to take into account available social and economic data and changes in them from previous years. All other things being equal if there were no change the review would give rise to a similar outcome to that of its predecessor. Noting that this approach does not expressly address the issue of the cumulative effect of annual determinations the Panel also said:

> […]We do recognize, however, that a series of independent annual Review decisions might have a cumulative impact that was not explicitly intended. It is for this reason that the Panel routinely considers (and publishes in its statistical report) the evolution of economic and social data over the past 10 years, as well as over the more immediate time frame.[1]

In its Decision the Panel noted that it must take into account specified considerations which include the modern awards objective, the minimum wages objective and the objects of the FW Act as well as equity, good conscience and the merits of the matter and the need to respect the diversity of the workforce. These matters are to be treated as matters of significance in the decision making process. The Panel was at pains to re-stress that no particular primacy is attached to any particular one of the matters specified in the modern awards or minimum wages objectives for consideration.[2] While this is accepted and is an important factor when considering the merits of targets, objectives or arguable rules, ABI draws attention to its initial submission which outlined concern about the relative opacity of how the Panel comes to its quantified increase.[3]

[1] Para 65, [2017] FWCFB 1931
[2] Para 50, [2017] FWCFB 1931. See also paras 48, 56 and 66.
[3] Page 28, *Transparency and clarity for submitting parties*, ABI submission

Transitional instruments

The question of remaining pre-Fair Work instruments was in part raised by ABI in its submissions to the Panel in its 2015-16 AWR because of the dependence of the *Social, Community, Home Care and Disability Services Industry Equal Remuneration Order 2012* on the operation and variation of a number of these instruments.

ABI recognises and acknowledges the comprehensive research which the Commission undertook to draft the background paper which it prepared for the preliminary hearing and the time it has put into the Decision in what is an extremely complex matter.

The nomenclature, and change in nomenclature, of various types of pre-Fair Work instrument transiting through successive waves of major legislative change is itself a source of complexity, as is the diverse paths taken by various instrument types on transition. As well, there has been an array of differently named sets of instruments: each set based on a shared characteristic which is not the basis of membership of a second set, based on a different shared characteristic, of which some are members of the first set and others are not.

ABI thanks the Commission.

In its consideration of continuing transitional instruments the Panel concluded that there is no express power to terminate an instrument during the course of an AWR and that the general termination power in Item 3 of Schedule 5 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* was linked to the award modernisation process. This supports the view that the power to terminate these instruments is not available to the Commission constituted as the Panel.[4]

Under the FW Act the Panel's functions are those imposed by Part 2-6, and this can include the revocation of modern award minimum wages arising out of its review of modern award minimum wages and the NMWO, and whilst this might extend to cover APCSs, allowing the Panel to revoke them were it satisfied as to coverage, the capacity seems inadequate to extend to other types of ABTIs. There seems little doubt that the Commission constituted otherwise than by an Expert Panel is able to terminate these instruments.

Employees with a disability

The question of setting the NMWO for employees with a disability was also addressed in the Decision.

One of the prompting factors giving rise to this matter was the fact that two wages are determined in the NMWO for employees with a disability. The first is set at the same level as the NMW for adult employees and applies to employees with a disability which does not impact their productivity.

However, doing away with this minimum wage requires legislative amendment. In the case of other employees with a disability whose wage is set by the NMWO, the Panel determined

[4] Paras 144 - 147, [2017] FWCFB 1931

that it should not proceed at present in large part because of proceedings about wage assessment tools in the *Supported Employment Services Award 2010* which could impact the Supported Wage System which is the basis of the NMW for employees with a disability impacting their productivity. ABI agrees with the Panel's approach.

ACTU submissions

The ACTU claim

The ACTU has recommended an increase of $45 pw for adult employees under the NMW and to award minimum wages for classifications up to C10 ($783.30 pw) and an increase of 5.7% to classification rates above C10. The ACTU submitted that its recommendation followed from

- a growth in award reliance which it characterised as dependency on the lowest lawful minimum wage (which is not the same thing as low wages, as demonstrated by its analysis of the configuration of award reliance);
- the propensity for those in receipt of low pay to spend beyond their income flow and to spend any additional income conducing to jobs growth and increasing profits for firms;
- increasing nominal wage dispersion; and
- a sound economy.

It is not clear, even through an extreme interpretation of the available evidence, how current circumstances could justify an increase of the magnitude recommended by the ACTU. It is ABI's strong view that the current climate ought to warrant an even more cautious approach than might have been justified in previous years (accounting for ABI's recommendation of 1.8% being lower than its recommendation in the 2015-16 AWR), yet the ACTU's recommendation represents a significantly higher increase in comparison to what has been proposed previously.

ABI summarised its views on the capacity of the Australian economy to deliver a minimum wage increase with reference to the statutory considerations and does not seek to resubmit those views as part of this submission. However, ABI wishes to reflect on a number of the ACTU's claims about the state of the Australian economy and the potential impact of the claim it has sought. Its observations include:

- The ACTU's claim that GDP growth exceeded RBA and Treasury forecasts is demonstrably incorrect noting that the RBA had forecast year-ended growth of 2½ - 3½ per cent for 2016 (the RBA downgraded its assessment to 2 per cent after the end of the calendar year in its February 2017 Statement on Monetary Policy). ABI contends that 2.4 per cent growth is not particularly robust in the context of the ACTU's claim.

- Contrary to the impression provided by the ACTU submission, conditions in the award-reliant industries are generally weaker than in 2016 with the total GVA of the top five award-reliant industries growing by 2.0 per cent in the year to December 2016 compared with 2.3 per cent the previous year (but also more acutely on other metrics such as employment as noted in ABI's initial submission).

- The ACTU pointed to consumer spending growth sustained by a falling saving ratio (rather than household income growth). This is not generally a solid foundation upon which to be confident that industries can afford to deliver increases of the magnitude claimed by the ACTU.

- The ACTU provides misleading impression about the strength of the retail sector which is facing challenges associated with retail sales falling in both December 2016 and February 2017 (MoM), interrupted only by the sales boost which generally occurs over the New Year period. Company gross operating profits for the retail sector fell by 3.7 per cent over the year to December 2016 inhibiting retailers' capacity to absorb wage increases anywhere remotely near the ACTU claim.

- The ACTU's assertion of a gap between wages and productivity growth must be considered in recognition that recent AWR decisions have granted increases significantly higher than broader measures of wages (such as the WPI). Indeed, minimum wage increases have been significantly higher than measures of labour productivity over recent years.

- The ACTU's assessment of Australia's productivity performance in comparison with other countries is not relevant to assessing the potential impacts of an increase to the minimum wage in Australia. Lower productivity performance in award-reliant industries justifies particular caution as a minimum wage increase above the productivity gains contributed by award-reliant employees will reduce firms' capacity to sustain employment (or hire new staff).

- The ACTU notes that real unit labour costs have moderated, however this is due to low wages growth in the non-award-reliant workforce. If wages growth matched the extent of minimum wage increases over recent years then mathematically, given recent productivity performance, the same result would not be replicated. More succinctly, moderating real unit labour costs do not suggest capacity to deliver higher minimum wage increases unless award-reliant employees are contributing to that moderation. Given the magnitude of recent minimum wage increases it is apparent that that this is unlikely to be the case.

- The ACTU's reference to wages' falling share of income must be viewed in the context of the temporary effects associated with recent commodity price developments which are unlikely to be sustained over the medium term.

- The ACTU does not appear to sufficiently acknowledge that a low prices growth environment is itself a justification for more moderate minimum wage increases because smaller increases are capable of delivering improvements in relative living

standards and addressing the needs of the low paid. Instead the ACTU appears to present moderate prices growth as evidence of the economy's capacity to accept a larger increase. The ACTU contends that *"…a low inflation environment provides the opportunity to raise the minimum wage and lead rather than follow movements in prices."*[5]

- As noted in ABI's initial submission, it is ABI's strong view that changes to award minimum wages should not be seen as a mechanism to kick start inflation and wages growth (to the extent that this is considered desirable).

The ACTU also contends that if its claim were accepted *"...between 35,000 and 80,000 jobs would be created over the year."*[6] This figure is arrived at by crudely applying estimates of fiscal multipliers to its estimate of the total wages bill increase associated with its recommended increase of 5.7%. This methodology, at best, can be described as a back of the envelope calculation ignoring all other impacts beyond the additional consumption that could be potentially generated by award only employees' increasing incomes. In this respect the ACTU has presented what could be described as a 'magic pudding':

- It does not properly account for impacts associated with the tax and transfer system, underestimating this impact to be only 10%. ABI notes cameos from recent ANU modelling demonstrate that $19 of the $45 increase for some households would be lost in tax and foregone welfare.[7] In an environment of fiscal consolidation any contribution to consolidated revenue would not generate economic activity.

- The methodology can be described as partial analysis. The additional wages must be funded from elsewhere in the economy and so any multiplier effect must be net of the negative impacts of taking funds away from where the wages are sourced. It is not appropriate to apply the selected fiscal multipliers in this setting.

- Most importantly the analysis does not consider second-round impacts. An increase in the minimum wage of the magnitude sought by the ACTU would crowd-out a significant amount of economic activity that would otherwise occur. It is this activity which sustains jobs and maintains employment growth momentum. Further, a significant minimum wage increase would produce a substitution effect reducing the attractiveness of award-reliant employees relative to other factors of production.

These observations are not exhaustive.

It is reasonable to presume that an underlying motivation behind the ACTU's submission is to deliver significant improvements in the material standard of living of its members. This is not an objective that is solely held by the ACTU. Rather, differences emerge on questions about the best way to achieve economic prosperity for all Australians. ABI's position on this is that

[5] PP 22-23, *Inflation and wage growth,* ACTU submission
[6] PP 25, *An increase that takes into account all of the relevant factors,* ACTU submission
[7] See http://www.afr.com/news/economy/minimum-wage-hikes-help-middle-class-not-the-poor-study-20170404-gvdg8o?btis

an excessive increase to award minimum wages would put the opportunities available to the most disadvantaged in society at risk.

Minimum wages are a blunt instrument involving trade-offs associated with the benefits of improving the incomes of those employed on minimum wages and the costs of eliminating opportunities for lower skilled workers who are unemployed. The tax and transfer system therefore has a vital role to play in complementing the minimum wage system as a means to ensure that economic opportunities are sustained while ensuring a reasonable standard of living for the low paid.

Further remarks on the ACTU's minimum wage recommendations

ABI notes that the recommended amount is significantly higher than the ACTU's claims over recent years. In the context of ABI's initial submission which questioned the utility of presenting a quantified recommended increase, and given the existing economic environment and needs of the low paid, it seems plausible that the ACTU is seeking to raise its ambit.

The ACTU's claim further underscores ABI's contention that there is little value in the Panel giving deep consideration to actual numbers presented by parties. To this end, ABI notes that its recommended increase of not more than 1.8% was arrived at by giving consideration to the Panel's previous deliberations and the manner in which circumstances have changed (and what increase might therefore be warranted given all of the statutory considerations). It does not, for example, attempt to quantify what is optimal for affected businesses. Nonetheless ABI emphasises that the overarching case for a cautious approach takes precedence over the specific figure provided.

ABI considers that it would not be helpful for parties to engage in 'tit-for-tat' strategies and does not alter its recommendation to the Panel in response to the ACTU's submission.

Different outcomes for different awards

In its submission the ACTU has also raised the issue of different increases to modern award minimum wages in different sectors.[8] Whilst it continues to agree in principle with the Panel's view, last expressed in 2014-15, that proceeding to fix modern award wages on an award-by-award basis, based on sectoral considerations is inimicable (*sic*) to the safety net nature of modern award minimum wages, the ACTU also raised the possibility that, depending on the outcome of the Commission's penalty rates decision, it may be moved to bring a case seeking a different minimum wage outcome for employees in the awards affected.

With respect, these submissions to some extent miss the point of the role of the AWR, and the setting of modern award minimum wages, or at least confuse it.

As submitted by the ACTU, in its *4 yearly review of modern awards – penalty rates* decision ([2017] FWCFB 1001) (penalty rates decision) the Commission recognised that the reduction in penalty rates will have a negative effect on the relative living standards of the low paid who are in receipt of them which was a consideration weighing against determining that

[8] PP 9 – 11, *Observations regarding the legislative framework*, ACTU submission

way. As with many of its key functions the Commission must balance competing considerations – factors which pull in different directions. The penalty rates bench determined that in the context of fairness for the employees and employers in the affected sectors a reduction in a number of cases was warranted.

As noted by the ACTU the penalty bench also drew attention to the fact that penalty rates are compensation for the disutility of working the particular hours in question and the needs of the low paid are best addressed by adjusting modern award minimum wages. Broadly speaking award minimum wages are set to provide a national safety net of fair minimum wages, and penalty rates are set as *additional* compensation for the disutility of working at those particular times.

As a result of its review the Panel may make one or more determinations setting, varying or revoking modern award minimum wages. The fact that the Panel can set new modern award minimum wages, and revoke relevantly irrelevant award minimum wages, as well as vary existing ones by more than one determination indicates that the capacity to determine different outcomes for different awards is available to the Panel.

When it considers its review and sets, revokes or varies award minimum wages the Panel is to take into account, as one of a number of factors, the relative living standards and the needs of the low paid. When it varies modern awards, including for award minimum wages, the Commission, whether constituted as the Panel or not, must take into account, as one of a number of factors, the relative living standards and the needs of the low paid. This is a general obligation generally applied.

As the Panel noted in its 2011-12 decision

> [257] Secondly, the legislative framework reveals a preference for consistent variation determinations across all modern awards. The minimum wages objective requires us to establish and maintain a safety net of fair minimum wages. The modern awards objective requires us to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions. The modern awards objective also speaks of the need to ensure a "stable and sustainable modern award system".
>
> [258] The notion of a fair safety net of minimum wages embodies the concepts of uniformity and consistency of treatment.
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> […]
>
> [260] It is also important to appreciate that in an annual wage review, the Act directs the Panel's attention to a range of macroeconomic and general factors including: the performance and competitiveness of the national economy; inflation; employment growth; relative living standards; the promotion of social inclusion; and the needs of the low paid. The nature of these factors directs the Panel's attention to matters which are relevant to the variation of all modern awards.[9]

Neither modern award minimum wages, nor variations to them can achieve the same standard of living, or the same improvement, for all. Not all employees have the same

[9] Paras 257 – 258, [2012] FWAFB 5000

needs. Individual circumstances, including the amount of work an individual undertakes in hours attracting penalty rates, are too diverse.

It is also relevant that pursuant to the FW Act determinations which vary modern award minimum wages come into effect on 1 July of the next financial year. The Panel does not have the power to defer the effect of a variation, nor to bring a variation forward from 1 July, but the Panel is able in exceptional circumstances to specify a later operative date (a capacity which if exercised can only have the effect that the affected employees would receive a lower increase over the life of the variation). As the Panel has itself also noted the single, common, relatively unalterable operative date of determinations varying modern award minimum wages tells against differential treatment.

Conclusions

Having regard to the balance of factors which the Panel is required to take into account ABI remains of the view that there is not scope for adventure nor leadership in determining variations to modern award minimum wages or determining a new NMWO.