IN THE FAIR WORK COMMISSION

C2017/1

Annual Wage Review 2016-17
Application by CPSU

SUBMISSIONS OF THE ACTU IN REPLY

1. These submissions respond to the Submissions of Water NSW in the above matter.

2. Paragraphs 2.3 – 3.6 of Water NSW's submissions appear to argue that there is an implied limitation on the exercise of power under section 602(2)(b). The implied limitation rest on the unexpressed premise that it is impermissible to do indirectly what it prohibited to be done directly. The Applicant in this matter is not seeking to do any such thing. Water NSW's mistaken characterisation relies upon a misunderstanding of section 603 and a false equivalence between the nature of an order under 602 and an order under section 603.

3. The evident purpose of section 603 is in to constrain, by subsection (3) thereof, the class of decisions that the FWC can vary or revoke. This is because FWC is presumed, by section 33(3) of the *Acts Interpretation Act 1901,* to already possess the power to vary or revoke a determination made in an Annual Wage Review[1], or the National Minimum Wage Order[2] "..in the like manner and subject to the like conditions" that apply to the making of that decision (at least in so far as it is a decision under Part 2-6, which the present relevant part of the decision is not for reasons expressed in our and the Applicant's earlier submissions). The exclusion in sub-paragraph (3)(d) of section 603 of decisions made under Part 2-6 is entirely harmonious with the scheme of Part 2-6 in providing *Annual* reviews of the national minimum wage, special national minimum wages and modern award minimum wages. The conception of "instrument" in section 33 of the *Acts Interpretation Act* is a broad one[3] and capable of embracing the "orders" and "determinations" that may or must be made while an Annual Wage Review is occurring.

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[1] Section 285(2)(b)
[2] Section 285(2)(c)
[3] See *Flaherty v. Secretary Department of Health and Aging* [2010] FCAFC 67 at [61]; *R v. Ng.* [2002] VSCA 108 at [50]-[54]. Note the version of the *Acts Interpretation Act* that section 40A of the *Fair Work Act* applies was amended in 2011 explicitly to confirm that this "broader" view was the correct one, as indicated by paragraphs 169-173 of the Explanatory Memorandum to the *Acts Interpretation Amendment Bill 2011*

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4. Section 603, like section 33(3) of the *Acts Interpretation Act,* is concerned with a re-application of the considerations or criteria that govern an exercise of power in order to revoke or vary a decision or outcome on the merits. Section 602 has a very different and far more limited purpose – to correct an obvious error. The observations of the High Court this week are apposite:

> "The Fair Work Commission has broad powers under s 603 of the *Fair Work Act* to vary or revoke orders, including power to vary or revoke orders retrospectively. The very considerable breadth of the power accorded by s 603 stands in contrast to the more limited power accorded by s 602 to correct "obvious errors". Thus, although it has been said that courts should eschew the exercise of inherent power to vary an order *nunc pro tunc* where the variation would have the effect of altering the substantive rights of the parties[, the statutory power accorded by s 603 is different. As was observed in *George Hudson Ltd v Australian Timber Workers' Union* in relation to the retrospective operation of the *Conciliation and Arbitration Act*, the provisions of that Act were not to be read down as if confined to a prospective operation at the expense of the "great public policy" which the Act embodied, namely, that of encouraging and maintaining "industrial peace in the Commonwealth". So also, in *Australian Tramway and Motor Omnibus Employees Association v Commissioner for Road Transport and Tramways (NSW)*, the Court held that the Conciliation Commissioner had power to vary the terms of an award that had expired (but continued in force by operation of statute). As Murphy J stated in *R v Gough; Ex parte Key Meats Pty Ltd*, it was clear that the Australian Conciliation and Arbitration Commission was entitled to vary or set aside an award provision in accordance with the Act even if its new provision operated 'locally, temporarily, prospectively or retrospectively, provided the provision would have been within the scope or ambit of the original dispute'."[4]

5. The Applicant is not indirectly seeking a reconsideration on the merits of the 2016-17 Annual Wage Review or the determination made under Item 20(1) of Schedule 9 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act* (as modified by Item 14 in the Table below section 768BY(2) of the *Fair Work Act* 2009) made while that Review occurred. It is merely seeking for that determination to be corrected. That relief is clearly available under section 602.

6. Paragraphs 3.1 to 3.14 of Water NSW's submissions nonetheless, unconvincingly, seek to argue that what the applicant seeks in this matter is the very species of double dipping that the Commission, in its 2012-13 decision, sought to prohibit. The submissions fail to appreciate that what the Commission actually did in its 2012-13 decision is establish a framework to transition and align the wage fixation cycle of newly created notional federal instruments that are "copied state awards" with that which applies to other federal instruments that are considered in an Annual Wage Review.

7. The national minimum wage order and the determinations that vary modern award minimum wages are typically made in late June, commence on 1 July of the next financial year[5] and are

[4] *Esso Australia v. AWU* [2017] HCA 54 at [49]
[5] s. 286, 287.

conventionally expressed to take effect in the first pay period that starts on or after that date[6]. It cannot be said that an employee to whom only the national minimum wage order or a modern award applies benefits from any double dipping by successive Annual Wage Review Decisions.

8. The relevant "State minimum wage decision" for the relevant employees appears to be that reflected in the *Crown Employees (Public Sector – Salaries 2016) Award*[7]. It was made on 21 June 2016 and commenced "on and from 1 July 2016"[8]. Since that time, the relevant employees have been covered by the relevant copied State Awards which are notional federal system instruments. No further minimum wages decisions of the NSW Industrial Relations Commission have benefited those employees. The relevant employees are in a like category of other minimum wage dependent workers in the federal system – they are dependent for any wage increase on decisions commencing on 1 July of each year. Granting the application would not result in "double dipping".

9. In response to paragraphs 4.1-4.9 of Water NSW's submissions, we submit that the Commission should be cautious in adopting verbatim the jurisprudence on the limitations on the *slip rule* when construing section 602 of the *Fair Work Act 2009.* Whilst it is true that paragraph 2316 of the Explanatory Memorandum states that (then) clause 602 was "intended to be the statutory analogue of the 'slip rule' used by superior courts", that extrinsic statement and more importantly the provision itself needs to be construed mindful of the reality that the Tribunal which the Parliament granted the power in section 602 to is not a court. Jurisprudence relating to the inherent powers of courts (or provisions in rules of court) to correct errors, mistakes or other accidental 'slips' are necessarily coloured by the role of courts and the nature of judicial power. The Fair Work Commission is a very different institution, whose functions may variously be described as arbitral[9], regulatory[10] or administrative[11]. Controversy between parties to *inter partes* litigation about the application of the *slip rule* might lead to some reluctance on the part of a court to apply it. The same

[6] s. 166(5), 287(5)

[7] http://arp.nsw.gov.au/sites/default/files/TC16-07_Industrial_Relations_Crown_Employees_Public_Sector_Salaries_2016_Award.pdf

[8] See clause 9(iv).
[9] E.g. part 6-2
[10] E.g. Division 4 of part 2-3, Part 2-6
[11] E.g. Subdivision A of Division 6 of Part 3-4

reluctance ought not to be presumed appropriate, and is not appropriate, in the exercise of section 602 by the Fair Work Commission in the present circumstances.

10. There being no compelling case to the contrary, the relief sought by the Applicant should be granted.

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