IN THE FAIR WORK COMMISSION

C2017/1

Annual Wage Review 2016-17
Application by CPSU

SUBMISSIONS OF THE ACTU

1. We have had the benefit of reviewing the submissions made by the Applicant in this matter. We support and adopt those submissions ("Applicant's Submissions").

2. Further to paragraphs 7 and 8 of the Applicant's Submissions, we add that a decision to vary minimum wages in a copied State Award is a decision under Item 20(1) of Schedule 9 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009,* as modified by Item 14 in the Table below section 768BY(2) of the *Fair Work Act 2009*. Such a decision is not a decision made under Part 2-6 of the *Fair Work Act 2009.*

3. The Applicant has brought this Application pursuant to section 602 of the *Fair Work Act 2009*. The limitation at paragraph (d) of subsection 603(3) is irrelevant to the determination of an application brought under section 602 as there is no warrant for the Commission to read section 602 to be limited by the exclusions in subsection (3) of section 603. Subsection (3) of section 603 clearly deals only with the power to vary or revoke "…decisions of the of FWC *under this section*" (emphasis added) and has no bearing on section 602.

4. However, section 603 does provide an independent pathway to the result that the Applicant seeks in these proceedings, which may be activated on the Commission's own initiative, subject to the principles of procedural fairness.

5. Paragraphs [559]-[560] of the 2012-13 AWR decision clearly envisage that employees covered by copied state awards would have the full benefit of the increases awarded to other federal system employees when their last increase occurred on 1 July of the previous year or before. The first dot point in paragraph [560] of that decision gives effect to that approach. The remaining dot points provide that a discounted federal increase applies where a state based increase was received in the first part of the financial year and that no federal increase applies where a state based increase was received in the second part of the financial year.

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6. Subsequent decisions of the AWR reveal an intention to continue to apply that approach:

    a. The 2013-14 AWR decision at paragraph [572] explicitly stated that "..for copied State Awards currently in operation, we have decided that increases should be consistent with the 2012-13 Review decision". However, the first dot point beneath that paragraph did not in fact provide that consistency and suffered from the same error as that to which the present application relates.

    b. The 2014-15 AWR decision at paragraph [536] stated "In the absence of any submissions on this matter, we have decided that increases to these instruments should be consistent with the approach set down in the 2012-13 decision and adopted in the 2013-14 decision". However, the decision did not give effect to the approach set down in the 2012-13 AWR decision, nor did it recognise that that approach was not (due to error) ultimately given effect to in the 2013-14 AWR decision. The departure, again, reflects the same error as that to which the present application relates.

    c. The 2015-16 AWR decision at paragraph [593] stated that "In the absence of any submissions on this matter, we have decided that increases to these instruments should be consistent with the approach set down in previous AWR decisions". Footnoted to this were references to the relevant passages of each of the previous AWR decisions including the 2012-13 AWR decision. The only "approach set down" is the approach in the 2012-13 AWR decision as each of the subsequent decisions simply endorsed and adopted that approach but ultimately erroneously failed to give effect to it.

7. There is presently no material upon which the Commission could satisfy itself that the errors referred to in sub paragraphs (a) to (c) above have had any impact. For completeness, we confirm that our affiliates have not brought any relevant circumstances to our attention. We merely refer to the decisions in sub paragraphs (a)-(c) above to highlight the similarities of expression therein and with paragraph [699] of the 2016-17 AWR decision and to hypothesise that the repeating errors may have emerged through a process that includes using the text of previous decisions as a reference point during drafting. An error emerging through such a process is among those amenable to correction under section 602.

8. The relief sought by the Applicant should be granted.

Australian Council of Trade Unions