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24 February 2020

Commissioner Hampton
Fair Work Commission
Level 6, North Terrace
Adelaide SA 5000

Dear Commissioner,

Re. C2020/1 – Annual Wage Review – Apprentice Rates of Pay in the Rail Award

We refer to the above matter and to the [Background Paper](#) published by the Fair Work Commission (**Commission**) on 30 January 2020.

In the context of the *2018-19 Annual Wage Review*, the Australian Rail, Tram and Bus Union (**RTBU**) claimed that it is inappropriate for any apprentice rates contained within the *Rail Industry Award 2010* (**Rail Award**) to fall below those provided to award/agreement free apprentices.

The Background Paper includes comparisons between the minimum rates for junior and adult apprentices in the Rail Award with those for the equivalent year of an apprenticeship in Special National Minimum Wage 4 (**NMW4**) and notes examples where those in the Rail Award fall below NMW4. Five issues for consideration have been listed at paragraph [15] of the Background Paper.

Ai Group intends to appear at the conference on 27 February 2020. Consistent with paragraph [16] of the Background Paper, Ai Group provides the following outline of our position on this matter.

In the context of the *2010-11 Annual Wage Review*, the Expert Panel determined to adopt the provisions of the *Miscellaneous Award 2010* as the basis for the Special National Minimum Wage for award/agreement free employees to whom training arrangements apply.¹ The Expert Panel also determined that the apprentice provisions in the *Miscellaneous Award 2010* would be incorporated by reference into the National Minimum Wage Order.² In the *2014-15 Annual Wage Review*, the Expert Panel decided to adopt the provisions of the *Miscellaneous*

¹ [2011] FWAFB 3400, [408].

² [2011] FWAFB 3400, [408].



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Award 2010 as the basis for the Special National Minimum Wage applicable to adult apprentices.³

The Australian Industrial Relations Commission, in making the *Miscellaneous Award 2010*, determined that the conditions applicable should be 'basic'. No suggestion was ever made that the rates applicable under this award were intended to constitute the minimum across the award system.⁴

The statutory framework relevant to the setting of the National Minimum Wage should be taken into account for the purpose of the present proceedings. The *Fair Work Act 2009* (Cth) (**FW Act**) does not require that the minimum wage rates for award-covered apprentices be equal to or higher than the wage rates for award/agreement free apprentices. There is nothing in the FW Act to suggest that such an approach is intended or required.

As already flagged in the Background Paper, varying the Rail Award to address only those rates in the Award which are currently lower than NMW4 would disrupt existing relativities. The scale of rates in each modern award is designed to reflect an appropriate graduated scale of rates for the relevant industry. The resulting distortion of the rates applicable to apprentices under the Rail Award should persuade the Commission that it is not appropriate to vary the Rail Award as proposed by the RTBU.

Similar arguments to those above were raised by Ai Group in the context of the recent application by the Australian Workers' Union to address a perceived anomaly concerning junior rates in the *Vehicle Manufacturing Repair Services and Retail Award 2010* which were below the rates in Special National Minimum Wage 3 (**NMW3**). The matter extended to a number of other awards. In the *2018-19 Annual Wage Review Decision*, the Expert Panel did not accept the AWU's proposal (emphasis added):⁵

[417] We consider that there is some force in the propositions advanced by Ai Group regarding the basis upon which we have been requested to adjust the junior rates in the 19 modern awards. As has been noted in previous Reviews, the review and variation of modern award minimum wages is a separate, though related, function to reviewing and making a NMW order. In exercising its powers to set, vary or revoke modern award minimum wages, the Panel 'must take into account the rate of the national minimum wage that it proposes to set in the Review', but

³ [2015] FWCFB 3500, [567].

⁴ [2009] AIRCFB 945, [153].

⁵ [2019] FWCFB 3500, [417].



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there is no mandated relationship between wage rates set by a NMW order and modern award minimum wages and certainly no requirement that any particular modern award minimum wage rate be no less than a NMW rate. Without a proper consideration of the basis upon which the rates in the modern awards and NMW3 were set, we are unable to determine whether adjustments are justified, including whether any such adjustments would distort existing relativities.

The issues relevant to the present proceedings are very similar to those which were before the Expert Panel concerning the appropriateness of junior rates for award-covered employees being below NMW3.

If the question of the appropriateness of minimum wage rates applicable to award-covered apprentices being below NMW4 is to impact the Rail Industry Award, the particular circumstances of the rail industry and the Award should be taken into account. Given the nature of the Annual Wage Review proceedings, it would be more appropriate for the RTBU to pursue an application under s.157 of the FW Act and bring a substantive case in support of its position. Should this avenue be pursued, any increase in the minimum rates applicable to apprentices under this award would need to be supported by work value considerations consistent with s. 135 of the FW Act.

Yours sincerely

Stephen Smith
Head of National Workplace Relations Policy