

# IN THE FAIR WORK COMMISSION

Annual Wage Review 2019/20

C2020/1

## SUBMISSIONS OF THE ACTU – TIMETABLE VARIATION

1. These submissions are made in response to the Statement [2020] FWC 1544, issued by the President on 23 March 2020.

### Response to Ai Group Proposal

2. The Ai-Group's proposal is articulated at pages 31 to 34 of its of initial submission. There are three elements to that proposal:
  - (a) The timetable for the Review should be amended so as to permit interested parties to file a further written submission by 8 June 2020, following the release of the March quarter 2020 National Accounts on 3 June 2020;
  - (b) The expert panel should not hand down its decision until after those submissions (and the data) have been considered by it; and
  - (c) The operative date for the decision of Panel should be deferred until 15 July, on account of "exceptional circumstances" within the meaning of sections 286(2) and 287(4) of the Act.

3. We indicate at the outset that we are in agreement with the following statements made by the Ai Group in support of its proposal:

*"the Australian community is facing a rapidly escalating health threat from the COVID-19 pandemic"*

*"The Australian economy has been disrupted by measures implemented to respond to COVID-19 internationally and further, deeper disruptions now seem inevitable"*

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4. It is not the ACTU's position in this submission to seek to dispute the position that the COVID-19 pandemic has significant economic implications for employees and employers operating in multiple sectors in the economy. The fact that the ACTU has acted swiftly and collaboratively with its affiliates and employer associations to facilitate targeted short term adjustments to the Award safety net in response to the COVID-19 pandemic demonstrates its acceptance of this.
5. The ACTU accepts that it is necessary for the Panel to inform itself of the best data and analysis available about the impacts of the COVID-19 pandemic on employees, employers and the economy. However, the Panel is also required by law to complete the Review in the financial year in which it is undertaken<sup>1</sup>. It follows that there is necessarily some limitation on the period during which the Panel may continue to receive new information.
6. In our view, the proposal by the Ai Group that the Panel take into account the March Quarter National Accounts release is sensible in the current circumstances where the earlier data is perhaps a poorer indicator of future performance than might be the case in previous years. Further, procedural fairness, both in a general sense and in the specific sense set out in subsections (1), (2) and (5) of section 289, requires that interested parties be given a reasonable opportunity to make submissions about how the March Quarter National Accounts should be taken into consideration by the Panel and further, that interested parties have a reasonable opportunity to at least "comment"<sup>2</sup> on those submissions.
7. What a reasonable opportunity in the circumstances is must be informed by the fixed outer limits prescribed by the legislation, which are as follows<sup>3</sup>:

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<sup>1</sup> s. 285(1), s. 292, [2012] FWAFB 3500 at [239]-[240]

<sup>2</sup> s. 289(5)

<sup>3</sup> See also [2014] FWCFB 3500 at [493]

- (a) Firstly, as referred to in paragraph 5 above, section 285(1) requires that the Commission must “conduct and complete” a Review “in” each financial year;
- (b) Secondly, section 285(2)(c) makes it mandatory that the Commission “must make a national minimum wage order” “in an annual wage review” conducted and completed within those limits;
- (c) Thirdly, although the Commission is not *required* to but instead “may make one or determinations varying modern awards to set, vary or revoke modern award minimum wages”<sup>4</sup> in a Review, it “must” review both modern award minimum wages and the existing national minimum wage order “in” the Review which it must conduct and complete subject to the same outer limits<sup>5</sup>; and
- (d) Fourthly, if modern award minimum wages in a Review are to be varied as a result of the Review, then the determinations to effect those variations are required by section 292(1)(a) to be published before 1 July in the financial year following that in which the Review is undertaken.

8. Other provisions of the Act essentially provide that the practical effect of the national minimum wage order (or rather some of the national minimum wages prescribed by it) and the practical effect of a determination to vary modern award minimum wages, *may* be deferred by the Commission where it is satisfied there are “exceptional circumstances”. There are subtle distinctions between the provisions which relate to the national minimum wage order and those that relate to determinations to vary modern award minimum wages in this respect. These were explained by the Panel in its decision for the 2013/14 Review, as follows:

“The Act provides that, in conducting an annual wage review, the Panel may make one or more determinations setting, varying or revoking modern award minimum wages (s.285(2)(b)) and must make a national minimum wage order (s.285(2)(c)). The Panel must complete an annual wage review in each financial year, with any determination made

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<sup>4</sup> s. 285(2)(b)

<sup>5</sup> s. 285(1), 285(2)(a).

(s.286(1)) and the national minimum wage order (s.287(1)) required to come into operation on 1 July in the next financial year, except in exceptional circumstances.

Further context for the Commission's power to make modern award minimum wage determinations is provided by s.284(4) of the Act, which sets out the meaning of "setting" and "varying" modern award minimum wages:

*"Setting* modern award minimum wages is the initial setting of one or more new modern award minimum wages in a modern award, either in the award as originally made or by a later variation of the award. *Varying* modern award minimum wages is varying the current rate of one or more modern award minimum wages."

A note to s.286(2) states that, if the Commission exercises its power under that section to specify that a determination comes into operation on a later day, it may need "to make more than one determination, if different circumstances apply to different employers".

Different arrangements apply to the national minimum wage order. The Act provides that, except in exceptional circumstances:

- the national minimum wage and casual loading for award/agreement free employees must be the same for all employees; (s.287(2)(a)); and
- a special national minimum wage set for a specified class of employees must be the same for all employees in that class (s.287(3)(a)).

The national minimum wage order may set different wages or loadings only to the extent necessary because of the particular situation to which the exceptional circumstances relate (s.287(2)(b)) and s.287(3)(b)). Similarly, if the Commission is satisfied that exceptional circumstances exist justifying why a modern award minimum wage determination or an adjustment to an item in the national minimum wage order should commence after 1 July, the determination or adjustment must be limited to the particular situation to which the exceptional circumstances relate (s.286(2) and s.287(4)(b)).

Section 286(4) provides that a modern award minimum wage determination cannot take effect on a day later than the day it comes into operation, which must be 1 July, unless exceptional circumstances apply. The national minimum wage order differs in that it must come into operation on 1 July, but its elements (the NMW, casual loading for award/agreement free employees and special national minimum wages) may take effect on a later day in exceptional circumstances (s. 287(1) and (4)).<sup>6</sup>

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<sup>6</sup> [2014] FWCFB 3500 at [493]–[498]

9. Importantly, the provisions which provide the Commission with a discretion to delay in the implementation of a new national minimum wage or varied modern award minimum wages where it is satisfied of “exceptional circumstances”, do not permit the Review to extend beyond the financial year in which it is conducted. It follows that any claim by any party that there are exceptional circumstances such as to enliven the Commission’s relevant discretion, must be determined before 1 July<sup>7</sup>.
  
10. We support the Ai Group’s proposal that the Commission hand down its decision in the Review in mid June. However, we do not support the Panel now deciding to delay the operative date of any national minimum wage or determination to vary any modern award minimum wages until 15 July. There are three reasons for adopting that view.
  
11. Firstly, it is clear that the only basis upon which to extend the operative dates of national minimum wages expressed in national minimum wage orders and determinations to vary modern award minimum wages is the discretion to do so where the Panel is satisfied of “exceptional circumstances”. The Ai Group, the Housing Industry Association and the National Retail Association have each put the position in their initial submissions that such exceptional circumstances exist and that the Panel should exercise that discretion. The Australian Government has not yet filed its initial submission. The Panel has, by paragraph [3] of its Statement issued on 23 March, allowed until 23 April to respond to those initial submissions. It is accordingly premature to determine either the threshold issue of “exceptional circumstances” or the discretionary issue which follows if that threshold is met. To not allow those issue to be ventilated in accordance with that timetable would run the risk of not according procedural fairness.

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<sup>7</sup> [2012] FWAFB 5000 at [282]-[284], [2013] FWCFB 400 at [524], [2014] FWCFB 3500 at [515] to [520].

12. Secondly, to the extent that the Ai Group’s submission seeks to meet the “exceptional circumstances” threshold by reference to allowing employers sufficient time to administratively prepare to implement the minimum wage and modern award minimum wages determined by the Panel (which appears to be the position put on page 32 of the initial submission), it is misconceived. The Panel has been required to consider “exceptional circumstances” numerous times and it has never held that the occasioning of such inconvenience could satisfy that threshold. Rather, the Panel has set out very clearly and consistently the manner in which exceptional circumstances are to be determined where such a claim is made.<sup>8</sup> The Ai Group makes no attempt to articulate its claim in manner that could reach that threshold. Whereas the Panel has consistently required a strong, targeted case to be made, the Ai Group submission merely asserts that the matter speaks for itself: “if exceptional circumstances are not held to exist this year, it is hard to see what circumstances would be sufficient to convince the Panel that such circumstances exist”.<sup>9</sup>

13. What does speak for itself is that it simply cannot be the case that the lateness of the Panel’s decision can constitute an “exceptional circumstance” which determines its outcome. Exceptional circumstances, as explained in the Panel’s decisions to date<sup>10</sup>, provide a basis for *differential* treatment between identified classes of employers (and their employees) affected by modern award minimum wages or minimum wages in national minimum wage orders. To seek to use the “exceptional circumstances” provision as means to bring about consistency of treatment for all of those disparate (but unidentified) classes, as the Ai Group does, is antithetical to the very notion of exceptional.

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<sup>8</sup> See [2019] FWCFB 3500 at [447]-[450], [2017] FWCFB 3500 at [181]-[185], [2013] FWCFB at [492]-[493], [543]-[549], [2014] FWCFB 3500 at [512]-[516], [2012] FWAFB 5000 at [250]-[261].

<sup>9</sup> at page 34.

<sup>10</sup> See note 10 above.

14. In any event, whilst the Panel observed in its 2011/12 decision that it would hand its decisions down in early June, this was merely judged as a matter of “practicality” flowing from the legislative restrictions on the time allowed to conclude the Review.<sup>11</sup> In recent days, the Commission has seen employer associations (including the Ai Group) and unions agree to the almost immediate implementation of significant temporary changes to modern awards. That, we suggest, is a surer guide for informing a contemporary assessment of what is practical.

15. Thirdly, if one accepts that:

(a) The law requires that a claim for exceptional circumstances must be determined *in* a Review, and;

(b) that the March Quarter National Accounts data should be considered *in* this Review because, in light of COVID-19 “it is vital the Expert Panel make a careful decision on the basis of up-to-date statistics on how the economy is faring”<sup>12</sup>,

Then there is a logical inconsistency in simultaneously asserting that the existence or not of exceptional circumstances should be determined now, without the benefit of that vital information.

### **Future timetable**

16. We respectfully submit that an appropriate timetable for the remainder of the Review is as follows:

(a) Questions on Notice for parties to be published by 3 April 2020.

(b) Responses to questions on Notice to be lodged on Monday 27 April, along with reply submissions on the same date. Reply submissions be permitted to address any data published by the ABS on its COVID-

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<sup>11</sup> [2012] FWA 5000 at [240], [282].

<sup>12</sup> Ai Group submission at page 31.

19 update page (<https://www.abs.gov.au/covid19>) and any other data published since 13 March.

- (c) Any additional or supplementary questions (in lieu of the consultation questions normally published where consultations occur)– be published on 19 May.
- (d) Responses to additional/supplementary questions to be lodged by 29 May, together with any brief statement any Party wishes to make in lieu of an opening statement and any comment on the submissions lodged on 27 April;
- (e) Submissions in relation to the March Quarter National Accounts and any other data published by the ABS on its COVID-19 update page since 27 April be lodged on 8 June.
- (f) Comments in response to the 8 June submissions be lodged on 12 June.
- (g) Decision to be issued on or before 19 June.

17. For completeness, we note that nothing precludes the Panel from expressing a provisional view and inviting a response to it at any stage of the timetable, and it may be that a decision which embodied the additional/supplementary consultation questions referred to at paragraph (c) above would be a convenient procedural step in which those provisional views could be expressed.

**Australian Council of Trade Unions**  
1 April 2020