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To: Chambers - Hatcher VP; Melissa Adler (m.adler@hia.com.au); Shaun Schmitke (shaun.schmitke@masterbuilders.com.au); Raul Baonza; Louise.Hogg@ablawyers.com.au; Rebecca Sostarko (rebecca@masterbuilders.com.au); Vasuki Paul; Stephen Crawford - AWU (stephen@crawforddecarn.com.au); Guy Noble (guy@etuastralia.org.au); Michael Nguyen (michael.nguyen@amwu.asn.au)

Subject: Junior rates

Dear Deputy President Hatcher:

On the 3rd of April 2017 you asked CCF to address the following issue:

"Just one issue, and you don't need to address this now, but can I flag it, is that section 156(3) of the Fair Work Act says that the Commission can only vary modern award minimum wages if we are satisfied on work value grounds. On one view, the insertion of junior rates in circumstances where adults rates may currently be payable would be a variation to modern award minimum wages. So, at some appropriate stage and, again, you don't need to answer this now if you don't want to, you might need to address whether that section applies and if so whether work value grounds exist for the variation of your proposal"

In order to save time and perhaps assist the parties better prepare I have attached CCF submission in regard to that matter.

I hope the Commission will find this approach acceptable and useful.

Kind regards,



The Voice of the Industry

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IN THE FAIR WORK COMMISSION

MATTERS AM 2016/23, AM 2014/260, 274 and 278

Fair Work Act 2009 (Cth)

Part 2-3, Division 4

Section 156 – 4 yearly review of modern award

SUBMISSION BY CIVIL CONTRACTORS FEDERATION (CCF)

**Re JURISDICTION OF THE FAIR WORK COMMISSION IN RELATION TO
INSERTING JUNIOR RATES IN RELEVANT AWARDS**

1. In these proceedings CCF argues for the insertion of junior rates into the Building and Construction General on Site Award 2010 Modern Award relating to the construction industry that are the subject of these proceedings.
2. At the commencement of the substantive hearing the Commission enquired of the CCF as whether the Commission's ability to deal with the argument as to junior rates advanced by CCF could only be dealt with by way of a work value assessment, by reason of the contents of Sub section (3) of Section 156 of the *Fair Work Act 2009* (Cth) ('the FW Act').
3. The case presented by CCF in these proceedings has not been based on "work value reasons" as prescribed by Section 157 (3) as that expression is defined in Section 157 (4). The Full Bench has not been asked by CCF to vary the existing minimum rates in the award - junior rates does not relate to doing a particular kind of work.
4. Rather, our case is based, firstly, on the contention that junior rates were a feature of awards in the construction industry prior to the making of the Modern Awards but those awards did not retain junior rates, with no explanation for that omission being found in the Commission's decision making those awards (see [2009] AIRCFB 345) ("the 2009 AIRC Decision"). The Commission has the power, by virtue of Section 160 (1) of the FW Act, to rectify such omissions.
5. Further, it is contended that bearing in mind the modern award objectives stated in Section 134 of the FW Act, and with regard to the prevalence of junior rates in modern awards, such rates can be inserted in the award by the Commission.

6. The decision by the Full Bench of the Commission entitled “4 Yearly Review of Modern Awards : Preliminary Jurisdictional Issues” [2014] FWCFB 1788 (“the 2014 FWC Decision”) makes clear (in paragraph [60] Item 1) that in exercising its powers in a Review the Commission is exercising “modern award powers” as referred to in Section 134 (2) (a) of the FW Act and that necessarily means that the modern award objective in Section 134 applies to the Review, which objectives include “the need to promote social inclusion through increased workforce participation” (c), and “the likely impact of any exercise of modern award powers on employment growth...” (h).
7. The “modern award powers” that are available in a Review include the functions and powers of the Commission under Part 2-6, so far as they relate to modern award minimum wages “ (see Section 134(2) (b)).
8. Under Section 284 the “minimum wages objective” includes “providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability” (e).
9. In the course of its decision in *National Retail Association v Fair Work Commission* [2014] FCAFC, the Full Court of the Federal Court (which was dealing with a question relating to the variation by the Commission of the junior rates clause in the General Retail Industry Award 2010, in the context of the 2012/2013 Transitional Review of modern awards, said this at paragraph 64:

“There is no basis for any suggestion that the object of establishing and maintaining “a safety net of fair minimum wages” is not a necessary element in achieving “a fair and relevant minimum safety net of terms and conditions”. Accordingly, the minimum wages objective must be regarded as not only relevant to, but an inherent the important consideration in, any assessment of whether, by reference to the minimum wages provided by a modern award, that award achieves the modern award objective. The intended integral connection of the minimum wages objective to the modern award objective is expressed in Item 6(4) and also in Section 138 of the FW Act. It is also reflected in the substantial commonality of matters that need to be taken into account in the pursuit of each of the two objectives, as specified in Sections 134(1) and 284(1) of the Act.”

10. Furthermore, in the 2014 FWC Decision the Full Bench made it clear that the 4 yearly Review process is broader in scope than the Transitional Review of modern awards completed in 2013, in that “the Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net, taking into

account, among other things, the need to ensure a 'stable' modern award system (paragraph [60] Item 3).

11. In this matter, CCF contends that by force of the above considerations, the Commission's Review of these Construction awards must have regard to the question of whether the minimum rates objective in the FW Act has been satisfied in a situation where the Commission has not previously, in the modern award context, ruled on the question of whether junior rates should be included in these awards.
12. While it is not disputed that in the proceedings that lead to the making of these Modern awards submissions in relation to the inclusion of junior rates (or their non inclusion) were before the Commission, there is nothing in the 2009 AIRC Decision to disclose or suggest that the Commission ruled on what is clearly an important matter forming part of the minimum wages objective.
13. This state of affairs is such that CCF contends that there is an ambiguity or error that the Commission can address pursuant to Section 160 (1). The facility for this is mentioned by the Full Bench in the 2014 FWC Decision, which can be done in the course of a Review on the Commission's own motion (se paragraph [60] Item 9). Whether or not there was a failure by employer parties to raise this point at a prior time, the fact remains that currently there is a situation where a significant matter that the Commission is required to address in the course of exercising its powers in the Modern award process has not previously been addressed.
14. By reason of these special circumstances, it is contended that sub section (3) of Section 156 is not engaged, as the Commission is not being asked to vary minimum rates in the subject awards, but to in fact insert them in circumstances where the argument as to whether they should be inserted was not ruled on in the modern award process.
15. We add acknowledgement that this Commission does have the authority to make a decision on junior rates has, up until now, been given by those arguing against our case for the insertion of junior rates. Submissions in reply from those opposing us have accepted the Commission's power by focusing their challenge on the grounds that no omission factually occurred in 2009 and that junior rates are an exploitation of young workers, not whether or not this Commission has the authority to make a ruling.
16. This acceptance of the Commission's authority by the parties on this point is in fact long standing. During the past two and a half years of conciliation, never has it been raised by any party, including the Commission itself, that this Commission, and

certainly not a full Bench of this Commission, would not have the power to make a ruling on such fundamental points – points to go whether the very objective of the modern awards are being met, or whether an omission has occurred in their making.

17. It is our submission that the Commission has the power to introduce junior rates without being bound by the requirement to justify it with a work value reason.
18. These submissions go only to the question of how the Commission might deal with this aspect of the CCF case in these proceedings, not to the merits, which is dealt with in the submissions already before the Commission.

R BAONZA

CIVIL CONTRACTORS FEDERATION