

# Ai GROUP SUBMISSION

Fair Work Commission

**Annual Wage Review 2022 – 2023  
Submission – Copied State Awards**

17 February 2023

**Ai**  
GROUP

# 1. Introduction

In the context of the Annual Wage Review 2022 – 2023 (**2023 AWR**), the Fair Work Commission (**Commission**) is considering, as a preliminary issue, how it should deal with copied State awards (**CSA**). This submission of the Australian Industry Group (**Ai Group**) relates to the aforementioned issue and is filed in accordance with the Commission’s directions of 13 December 2022.<sup>1</sup>

For the reasons set out in this submission, it is Ai Group’s position that the Commission should not vary wages in a CSA unless an interested party seeks a variation to it and, subsequently, the Commission determines that the proposed variation is appropriate. Before making such a determination, the Commission should afford all interested parties a reasonable opportunity to be heard in relation to any proposed increases.

By extension, the Commission should not implement a uniform increase to wages across all CSAs.

## 2. The Key Reasons for Ai Group’s Position

Ai Group’s position in this matter is based on the following key propositions:

- (a) Some CSAs provide, of their own force, for wage increases.
- (b) The wages prescribed in some CSAs are increased as a product of determinations made by state / territory industrial relations tribunals.
- (c) The wages prescribed in CSAs are often significantly higher than those prescribed in modern awards covering similar employees. They are not ‘*minimum wages*’ and the relevant instruments do not, as such, form part of the ‘*safety net*’.
- (d) A presumption or decision-rule that favours increasing wages in CSAs in the absence of an employer successfully arguing that the outcome of an AWR should *not* flow on to a particular CSA would require an employer to be aware of and understand the implications of the AWR for CSAs, as well as to participate in the AWR.
- (e) Automatically increasing wage rates in CSAs may discourage enterprise bargaining.
- (f) The applicable statutory framework does not support automatically applying the outcome of AWRs to all CSAs.

It would be inappropriate and unfair to take an approach that differs from the one proposed by Ai Group.

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<sup>1</sup> *Annual Wage Review 2022 – 23* [2022] FWC 3280 at [4].

### 3. The Relevant Statutory Framework

The Commission is afforded a discretion to vary wages in CSAs during the course of its AWRs.<sup>2</sup> The Commission is not required to vary such wages and the applicable statutory provisions do not mandate the application of the same approach to modern awards and CSAs.

The following provisions of the *Fair Work Act 2009 (Act)* are relevant to the AWR:

- (a) Section 577(1) of the Act: (emphasis added)

#### **577 Performance of functions etc. by the FWC**

- (1) The FWC must perform its functions and exercise its powers in a manner that:
- (a) is fair and just; and
  - (b) is quick, informal and avoids unnecessary technicalities; and
  - (c) is open and transparent; and
  - (d) promotes harmonious and cooperative workplace relations.

Note: The President also is responsible for ensuring that the FWC performs its functions and exercises its powers efficiently etc. (see section 581).

- (b) Section 578 of the Act: (emphasis added)

#### **578 Matters the FWC must take into account in performing functions etc.**

In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:

- (a) the objects of this Act, and any objects of the part of this Act; and
- (b) equity, good conscience and the merits of the matter; and
- (c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, breastfeeding, gender identity, intersex status, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

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<sup>2</sup> Item 20 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and section 768BY of the *Fair Work Act 2009*.

(c) The objects of the Act, at s.3: (emphasis added)

### 3 Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

- (a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
- (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
- (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
- (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and
- (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and
- (g) acknowledging the special circumstances of small and medium-sized businesses.

- (d) The minimum wages objective, at s.284(1) of the Act: (emphasis added)

**284 The minimum wages objective**

What is the minimum wages objective?

- (1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:
- (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
  - (aa) the need to achieve gender equality, including by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and addressing gender pay gaps; and
  - (b) promoting social inclusion through increased workforce participation; and
  - (c) relative living standards and the needs of the low paid; and
  - (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

This is the **minimum wages objective**.

The following salient points emerge from the relevant provisions of the Act:

- (a) The Commission must exercise its functions, including in the context of AWRs, in a manner that is fair and just.
- (b) In performing its functions, the Commission must take into account equity and good conscience.
- (c) The minimum wages objective requires the Commission to establish and maintain a safety net of minimum wages.
- (d) The Act is directed towards, *inter alia*, achieving productivity and fairness through an emphasis on enterprise-level collective bargaining.

## 4. The Reasons for our Proposed Approach

The Commission should not increase wage rates prescribed by any CSA without properly examining its terms and the relevant surrounding circumstances, including:

- (a) How the wage rates prescribed by the CSA compare to minimum wages prescribed by relevant modern awards (i.e. the modern awards that would cover the relevant employees if the CSA did not apply to them);
- (b) Whether the wage rates prescribed by the CSA were recently adjusted;
- (c) Whether the wage rates prescribed by the CSA will be adjusted in the foreseeable future through means other than the AWR and if so, when and to what extent;
- (d) When the CSA will terminate; and
- (e) Whether the employer covered by the CSA is engaged in, or intends to engage in, enterprise bargaining.

Any other approach risks the following unfair and unjust outcomes:

- (a) Employers may be required to increase employees' wages twice within a period of 12 months, or an even shorter period of time. This would result in unjustifiable increases to employment costs and employers would face an additional regulatory burden associated with implementing multiple increases. Moreover, it may, in essence, result in a form of double-dipping, as has previously been acknowledged by some unions<sup>3</sup> and the Commission<sup>4</sup>.
- (b) The increases awarded through the AWR may compound on increases afforded through other means, such as by force of the CSA or through state / territory industrial relations tribunal decisions. This would further the adverse consequences that would flow for employers and render the outcome particularly inappropriate.
- (c) Employers may be required to increase wage rates that already well-exceed the minimum rates prescribed by relevant modern awards. As demonstrated in the submissions filed by certain employers during the 2022 AWR, wage rates contained in CSAs may in fact reflect market rates; or the rates may be higher than the minimum safety net because they reflect the specific circumstances of the relevant employer, cohort of employees, the nature of the work that they perform and / or historical considerations (such as the circumstances of the previous public sector employer). CSAs generally do not reflect safety net conditions. The minimum wages objective and the conclusions reached by the Commission in the AWR by reference to it are, therefore, of little relevance to such CSAs.

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<sup>3</sup> *Annual Wage Review 2021 – 22* [2022] FWCFB 3500 at [360].

<sup>4</sup> *Annual Wage Review 2021 – 22* [2022] FWCFB 3500 at [431].

Further, if the outcome of an AWR flows to CSAs of this kind, the disparity in the wage rates prescribed by modern awards *vis-à-vis* CSAs would increase. Careful consideration should first be given to whether such an outcome is appropriate, warranted and desirable.

- (d) Contrary to the objects of the Act, the imposition of unjustifiable or unsustainable wage rates in CSAs would likely discourage employers covered by them from engaging in collective bargaining. It is trite to observe that wage rates are typically a key aspect of any enterprise agreement that is struck between an employer and its employees. A requirement to pay excessive wage rates would leave employers with limited if any scope to agree to a bargain that includes improved rates of pay.
- (e) The interaction between the AWRs and CSAs is complex and may not be widely known or understood amongst employers. The burden of identifying situations in which wage rates should not be increased in accordance with an AWR decision should not fall to employers. Those unaware of the process or without the resources to participate in an AWR ought not to be unfairly saddled with the outcome of the review.

For these reasons, CSA wage rates should be adjusted as a consequence of an AWR only where the Commission has had regard to the specific terms and context of that CSA. Any other approach may result in inequitable, unfair or unjust consequences for employers.



## ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak national employer organisation representing traditional, innovative and emerging industry sectors. We have been acting on behalf of businesses across Australia for 150 years. Ai Group and partner organisations represent the interests of more than 60,000 businesses employing more than 1 million staff. Our membership includes businesses of all sizes, from large international companies operating in Australia and iconic Australian brands to family-run SMEs. Our members operate across a wide cross-section of the Australian economy and are linked to the broader economy through national and international supply chains.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. We provide the practical information, advice and assistance businesses need. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and we support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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