Ai GROUP SUBMISSION

Fair Work Commission

Annual Wage Review 2022 – 2023

Reply Submission – Copied State Awards

6 March 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 in reply of the Australian Industry Group (**Ai Group**) relates to the aforementioned issue and is filed in accordance with the Commission's directions issued on 13 December 2022[1] and the extension of time subsequently granted to Ai Group by the Commission on 3 March 2023.

2. Summary of Ai Group's Position

As set out in our submission of 17 February 2023, 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, or formulae for increasing, wages across all CSAs.

We oppose the position advocated the Australian Council of Trade Unions (**ACTU**) in its submission of 17 February 2023 for the reasons articulated hereunder.

3. Response to the ACTU's Submissions

Four key themes appear to emerge from the ACTU's submissions:

(a) The Commission is required to review CSAs. Any contention that CSAs should not be varied during an annual wage review (**AWR**) absent a party contending for a particular adjustment is inconsistent with that obligation.

(b) The Commission should increase wages in CSAs by the proportion determined by the Commission in an AWR, less any increases already afforded to employees under the terms of the instrument. This is referred to as the **Top Up Approach**.

(c) The Commission should have regard to the wage increases that employees covered by a CSA would have received if they had remained employed by their previous State employer. This is referred to as the **Base Case**.

(d) Employees covered by CSAs should not be left worse off than what would be the case if they had remained in their respective State systems.

We respond to the ACTU's submissions as follows.

[1] *Annual Wage Review 2022 – 23* [2022] FWC 3280 at [4].

First, the submissions advanced by the ACTU are, respectfully, somewhat opaque. The precise position being advanced is difficult to decipher. This has necessarily confined our ability to respond to the submissions.

Should their meaning become clearer during the upcoming hearing of this matter and if the issues arising from them have not been dealt with in this submission, we may seek an opportunity to file further written reply submissions.

Second, if it were accepted, as contended by the ACTU, that the approach advanced by Ai Group would not constitute the conduct of a *'review'* of CSAs as required by the FW Act, it necessarily follows that the ACTU's proposed approach would also not result in the Commission discharging its obligation to review CSAs. Its approach would not require the Commission to identify and consider the terms of the instruments that would be impacted by its decision.

Third, the former s.156(2) of the Act required the Commission to *'review all modern awards'* every four years. Similarly, Part 2 of Schedule 5 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* also required the Commission to conduct a *'review of all modern awards'*.

Each of those reviews were conducted by reference to proposals advanced by parties in relation to specific awards. No party took issue with this. The method proposed by Ai Group for AWRs in relation to CSAs is analogous to this. It would similarly constitute the conduct of a review. It is not necessary that all of the relevant instruments be varied in order for the requisite review to have been undertaken.

Fourth, the Top Up Approach should not be adopted for the various reasons articulated in our previous submission. In addition, it would unfairly require employers covered by CSAs to be aware of the outcome of an AWR, to understand its application to CSAs and to calculate the resulting rates. The imposition of such a regulatory burden on employers would not be appropriate, particularly given that the interplay between CSAs and the AWR is not widely known or understood amongst employers.

Fifth, in its decision concerning the 2021 – 2022 Annual Wage Review, the Commission said as follows about the intention underpinning Part 6-3A of the Act:

> **[428]** As related earlier, Part 6-3A is directed to preserving the employment terms and conditions of the transferring employees as they would have been in the absence of the transfer of business to a national system employer, subject, of course, to the Commission's obligation to maintain a safety net of fair minimum wages.

Part 6-3A of the Act is, in our submission, directed towards preserving the terms and conditions of transferring employees at a point in time; that being the terms and conditions that applied to them when their employment with the State employer terminated (**Termination Time**).[2]

The Act does not require, directly or indirectly, that the Commission ensure the preservation of State terms and conditions on an enduring basis, including in relation to the wage rates payable to employees covered by CSAs. Indeed, the Act expressly provides that where the terms of a State award were affected by an order, decision or determination by a State industrial relations tribunal <u>before</u> the Termination Time, a CSA is taken to be similarly affected by that order, decision or determination.[3] Tellingly, the Act does not require the same in relation to decisions, orders etc issued by State tribunals <u>after</u> the Termination Time. Rather, the Commission is thereafter required to establish and maintain a *'safety net of fair minimum wages'* and in doing so, must review CSAs. There is simply no requirement to ensure that wage rates prescribed by CSAs are adjusted in a manner that is consistent with relevant State tribunal decisions and / or to ensure that employees do not receive wages that are less than those that they would have received had they remained under the State system.

[2] Section 768AE(2) of the Act.
[3] Section 768AI(3) of the Act.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, engineering, transport & logistics, labour hire, mining services, the defence industry, civil airlines and ICT.

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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