In the Fair Work Commission

Variation of Social, Community, Home Care and Disability Services Industry Award 2010 on the initiative of the Commission

Matter No: AM2020/100

REPLY SUBMISSIONS OF THE HEALTH SERVICES UNION

19 February 2021

1. The Health Services Union (**HSU**) makes these submissions in reply to the submissions of the Australian Industry Group (**AIG**) of 20 January 2021 in this matter.

2. In its submission, AIG opposes the Fair Work Commission's provisional view in the Statement [2020] FWCFB 6333 dated 26 November 2020 (**the Statement**), that the final rates of pay required to be paid by the relevant equal remuneration order (**ERO**) should be incorporated into Schedules B and C of the Social, Community, Home Care and Disability Services Industry (**SCHCDSI**) Award.

3. AIG's submissions should be rejected for the following reasons:

The proposed variation does not alter the legal obligations on employers

4. AIG suggest that the proposed variation will alter the legal obligations on employers.[1] This assertion should not be accepted.

5. The proposed variations to Schedules B and C will merely publish in the SCHCDSI Award the true minimum rates applicable to employees under those Schedules, as required by the ERO. The ERO has the effect of varying the applicable rates in the Award. The Full Bench is not introducing or altering an obligation on employers. Employers are legally required to pay these minimum rates. S 305 of the *Fair Work Act* provides that employers '*must not contravene a term of an equal remuneration order*'. S 305 is a civil penalty provision and subject to penalties under the Act.

[1] AIG Submission, 20 January 2021, [6].

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6. Accordingly, it is in the interests of employers as well as employees for the rates payable under the ERO to be clearly set out in the SCHCDSI Award. AIG's preferred approach, rather, could potentially open employers to the risk of penalties for a breach of the Act if the minimum rates payable to employees covered by the SCHCDSI Award are unclear.

7. We agree with the submissions of the ASU and the NDS that the reference to the ERO (and the TPEO) should be retained in clause 15. This makes clear that the legal obligation to pay employees the ERO rates stems from the ERO itself. Retaining this reference, moreover, would appear to satisfy many of the concerns raised by AIG in their submission. To the extent that AIG suggest inserting the ERO rates in the award may be construed as varying minimum award wages,[2] (which we say it could not), retaining this reference in clause 15 makes it abundantly clear where the wage rates derive from.

The Fair Work Commission has jurisdiction to make the proposed variation

8. Contrary to the submissions of AIG, our view is that the proposed variation is permitted by s 139(1)(a). We do not agree that the term 'minimum wages' here has such a narrow scope as AIG seek to ascribe it.[3] The ERO rates are the applicable minimum wages for employees covered by Schedules B and C of the SCHCDSI Award. It is appropriate and consistent with the Act that the rates are reflected in the Award.

The 'absorption provision' issue is overstated

9. As AIG observe at paragraph [36] of their submission, the SCHCDSI Award does contain an absorption provision with the same effect as that in the ERO at clause 2.2.

10. If the provision were to be removed, as AIG posit could hypothetically occur,[4] the terms of the ERO would not change, and does not alter its legal obligations on employers.

The purported 'unfair consequences' are unfounded

11. We do not agree that the operation of s 206, and the differences between s 206 and s 306 are so significant as AIG suggest, as to lead to 'unfair consequences' on employers.[5]

12. As stated above, the Full Bench's proposed variation is a proposal to publish the ERO rates in Schedules B and C of the SCHCDSI Award, not to alter the provisions of the Award, the ERO or the Act. AIG's argument in this regard unnecessarily convolutes the matter.

[2] Ibid, [23], [24].
[3] Ibid, [20]-[24].
[4] Ibid, [35].
[5] Ibid, [40]-[41].

13. Further, AIG's assertion that the better off overall test (**BOOT**) does not apply to ERO rates[6] is questionable. S 193(1) provides that:

> *An enterprise agreement that is not a greenfields agreement passes the better off overall test under this section if the FWC is satisfied, as at the test time, that each award covered employee, and each prospective award covered employee, for the agreement would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee.*

14. The test in s 193(1) is whether the employee would be better off if the '*award applied to the employee*'. An employee for whom the rates in Schedules B or C of the SCHCDSI Award apply is entitled to the rates under the ERO. This is relevant to the BOOT, whether or not the ERO rates are published in Schedules B and C.

15. In addition, AIG's concern that the proposed variation will be unduly unfair on employers paying over award rates appears to be a purely hypothetical concern that is not supported by concrete examples or evidence.[7] This concern should, accordingly, be given little weight. As should the concern that the variation could 'undermine' collective bargaining,[8] which again is wholly unsubstantiated.

The 'alternate approach' should be rejected

16. The HSU does not support the AIG's 'alternate' proposal of inserting a Note in the Award. Such an approach is no substitute for a clear, easily understandable award setting out of the rates applicable to employees covered by Schedules B and C of the SCHCDSI Award.

Health Services Union

[6] Ibid, [44].
[7] Ibid, [37], [38].
[8] Ibid, [44].