# Ai GROUP REPLY SUBMISSION

Fair Work Commission

## Annual Wage Review 2016-2017

**13 April 2017**

## About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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# Contents

# 1. Introduction

On 29 March 2017, the Australian Industry Group (**Ai Group**) filed its main submission in the Annual Wage Review 2016-2017 (Ai Group's **March 2017 submission**). In our submission**,** we urged the Expert Panel of the Fair Work Commission to adopt a cautious approach when determining the level of any minimum wage increase in this year's Annual Wage Review.

In our March 2017 submission, we highlighted the following factors:

1. Employment growth is exceedingly weak nationally;
2. Inflation has been low over an extended period;
3. Rising energy costs and other cost pressures have eroded businesses' capacity to afford wage increases;
4. Measurable productivity growth is very weak; and
5. National aggregate income remains weak and unevenly distributed.

We also pointed out that rising youth unemployment and underemployment, and falling participation, suggest significant pockets of spare capacity are building up, particularly at the lower-skilled end of the labour market. In the circumstances, we submitted that, when all the relevant factors are weighed up, a modest wage increase of 1.5 per cent is warranted in this year's Annual Wage Review. This equates to an increase of about $10.10 per week in the National Minimum Wage and about $11.75 per week at the base trade level.

We have considered the submissions of other parties and none have led us to change the views expressed in Ai Group's March 2017 submission.

In this Reply Submission, we address some of the issues raised by other parties. We have not sought to address all the issues covered in the submissions of other parties, as Ai Group's position on most issues will be evident from our March 2017 submission.

We regard the level of wage increase proposed by the unions this year as particularly unrealistic. Such very large increases would inflict significant harm on businesses. As a consequence, significant harm would be inflicted on low paid workers, the unemployed and the underemployed, because their job security and employment prospects would be substantially reduced.

# 2. Growth in output, incomes and jobs in 2016-17

The ACTU asserts that "the Australian economy has proved more resilient than expected following the dissipation of the resources boom" (para. 144). We agree that the Australian economy performed better than might have been expected in 2016 on some - but certainly not all - measures. However, we caution that Australia's economy – and especially the non-mining industries that generate a livelihood for the majority of Australians – continues to grow unevenly and sporadically. This ongoing fragility and the failure to generate new investment, incomes or jobs in 2016-17 was documented in our initial submission (pp. 4-22). It is especially evident in:

- **Weak GDP growth of 2.4% in 2016**, which included one quarter of shrinkage (-0.5% q/q in Q3) and is well below Australia's long-run average or 'trend' growth rate of 3.25%. Recent RBA research suggests that 'trend' growth (that is, the GDP growth rate at which the economy can grow without generating undue inflationary pressures on the upside, or rising unemployment on the downside) may have moved lower over the past decade, to around 2.75% to 3.0%, instead of the previous estimates of 3.25%. Even at this new lower 'trend' rate, real GDP needs to grow by at least half a percentage point higher than current growth to generate a sustained fall in the unemployment rate.

  A further complication in the outlook is that even at these slower growth rates, Australian real GDP is being supported by resources exports and especially by growth in LNG output and exports (which is expected to occur through 2017 and 2018 as the newest LNG export facilities in Queensland come onstream). These sources of growth however, are not conducive to stronger local incomes or employment, due to LNG exports' low labour usage, high capital intensity and international ownership structures. In February 2017, the RBA noted that although employment growth is expected to pick up a touch in 2017, from a very weak 0.8% p.a. as of early 2017:

  "*Employment growth is then expected to remain broadly steady over the next couple of years, which is slightly lower than forecast at the time of the November Statement. This [lower] forecast takes into account the expectation that LNG production, which is less labour intensive than the investment phase of the mining boom, will make a contribution of around ½ percentage point to year-ended GDP growth over each of the next few years. The unemployment rate is expected to edge lower over the forecast period, suggesting only a modest reduction in the degree of spare*

*capacity in the labour market from current levels*. (RBA, Feb 2017, *Statement on Monetary Policy*, p. 58)

- **Weak growth in key measures of aggregate national income** in 2016, with four consecutive quarters of improvement in real net national disposable income (up 6.8% p.a. in 2016) breaking the disturbing 'income recession' of 2012-15, in which key measures of aggregate income fell. The distribution of this income recovery is problematic however, since most of it is in the form of (volatile and probably temporary) mining company profits, rather than in the form of higher wages and profits across the board. Higher mining industry profits are likely to benefit Australian households indirectly and in the longer term, through their shareholdings and especially superannuation holdings, rather than directly in the form of higher current disposable incomes.

- **Weak labour demand**, with headline employment up just 0.8% p.a. to Feb 2017 and aggregate hours worked up just 0.9% p.a. (trend data). All employment growth has been in part-time work (up 3.3% p.a.), while full-time work has declined (-0.3% p.a. to Feb 2017). Part-time work is now at a record high proportion of 32.0%. The unemployment rate is relatively stable at around 5.8% but underemployment has risen to around 9%. The underutilization rate has remained over 14% since 2014 and the participation rate has fallen to 64.6%. This means there are currently around 740,000 unemployed people, 1.1 million underemployed people and at least 200,000 'discouraged' jobseekers, adding up to more than 2 million people who would like to work. As noted above, the RBA expects "*only a modest reduction in the degree of spare capacity in the labour market from current levels … ongoing spare capacity in the labour market is expected to limit the recovery in wage growth*" (RBA Feb 2017, *Statement on Monetary Policy*, p. 58).

- **Unemployment and underemployment for youth (aged 15 to 24 years) is especially elevated**, with the underemployment rate at a record high of 18.0% and the total underutilization rate for this age group at a record high of 31.5% (trend data). This is of grave concern to business and to the wider community due to the high risk of long-term unemployment and disengagement.

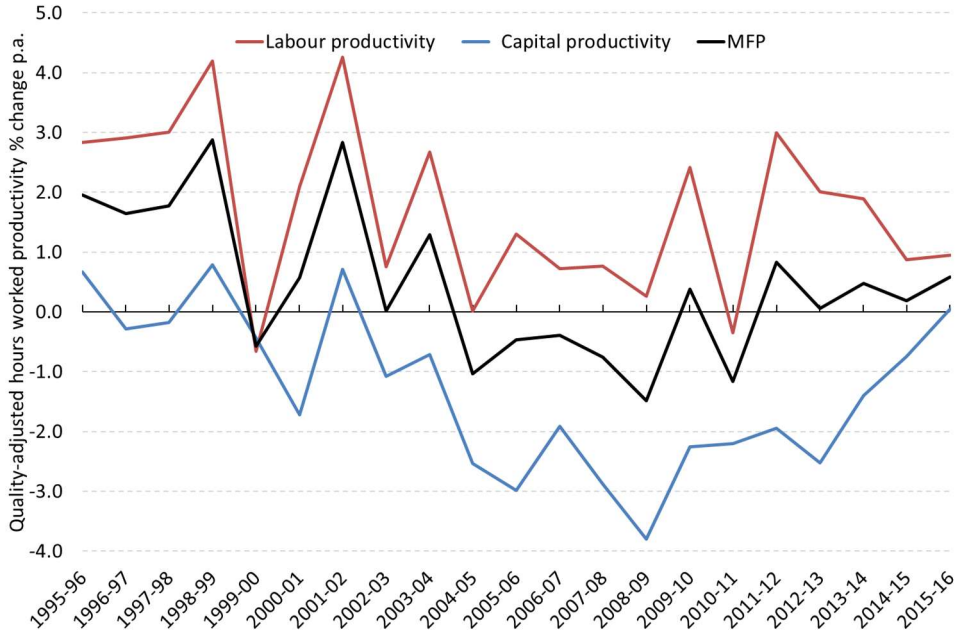
# 3. Trends in productivity growth in Australia

Multifactor productivity (MFP) is the most comprehensive measure of observable productivity that is currently available. MFP includes observed productivity changes from labour, capital and all other intermediate and less readily quantifiable sources. It is not productivity growth "from sources other than capital or labour inputs" as stated by the ACTU (para. 184).

For data analysis purposes, the ABS uses the following definition: "*Multifactor productivity (MFP) is defined as a ratio of a measure of output to a combined input of multiple factors, for example labour and capital. In empirical analyses, it is expressed in terms of growth rate; that is, growth rate of output minus the growth rate of inputs. At the aggregate and industry level, value added-based MFP is defined as the ratio of gross value added to the combined inputs of capital and labour. At an industry level, gross output-based MFP is also measured as the ratio of gross output to the combined inputs of capital, labour, and intermediate inputs*." (ABS, cat. No. 5260.0.55.002 - *Estimates of Industry Multifactor Productivity, 2015-16)*.

As noted in our March 2017 submission (and in the ACTU submission), productivity growth has been weak in Australia (and in many other advanced economies) over a very long period. For the market-sector industries for which productivity can be estimated, Australian MFP grew by just 0.6% p.a. in 2015-16 on a quality-adjusted hours-worked basis. MFP growth has been weakly positive since 2011 (partly reflecting the statistical effect of the mining investment cycle) but it remains weak across all market-sector industries (see **Chart 1**).

## Chart 1: Annual change in productivity, all market sectors

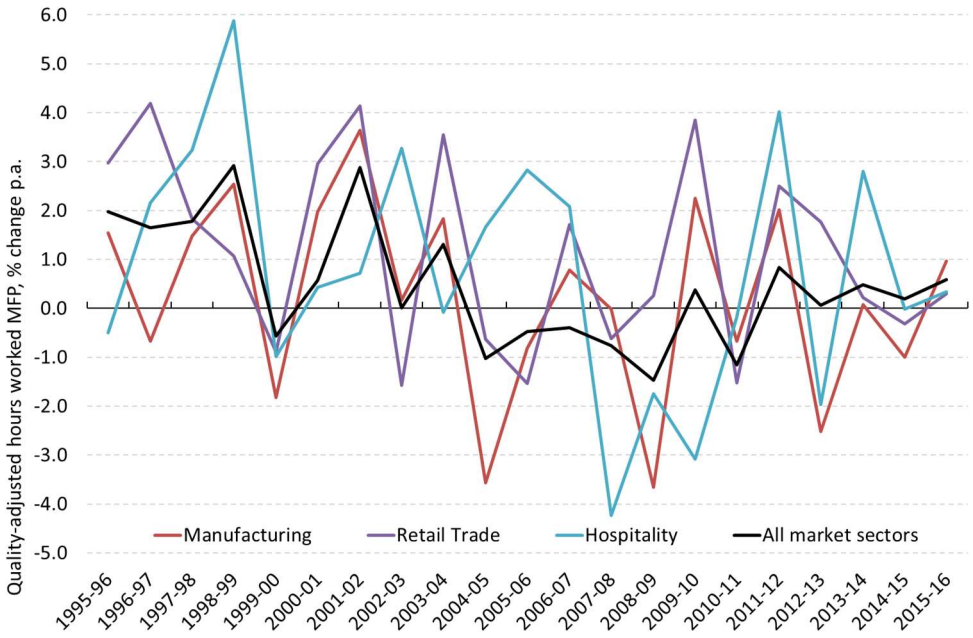



Source: ABS *Estimates of Industry Multifactor Productivity, 2015-16*.

In practice, productivity estimates for labour and capital are inter-connected (for example, any change in capital intensity per worker tends to show up in both measures). This relationship can be seen in the annual growth rates, which tend to track each other closely (see **Chart 1**). In Australia's case, this normally close relationship has been somewhat distorted by the huge capital injections of the mining investment boom over the past decade. The lengthy time lag between capital investment and its resulting real output growth in mining caused capital productivity growth to turn negative for many years. This cycle appears to be over for now, with capital productivity growth for all market sectors finally turning positive again in 2015-16 (see **Chart 1**).

Outside of the mining sector (and largely unaffected by it), MFP continues to improve only weakly across a range of key industries. As noted in our initial submission for example, MFP improved by just 0.3% in retail trade and hospitality (food and accommodation services) in 2015-16, following a drop in MFP for retail in 2014-15 (-0.3% p.a.) and no change in hospitality (zero). In manufacturing, MFP improved by 1.0% p.a. in 2015-16 after dropping by 1.0% the previous year (see **Chart 2**). This failure to improve MFP is a sustainable manner and over a longer time frame hampers these industries' ability to raise real incomes for businesses (real profits) and workers (real wages) alike.

### Chart 2: Annual change in MFP, selected market sectors




Source: ABS *Estimates of Industry Multifactor Productivity, 2015-16*.

## 4. Relationship between low-wage employment and household income inequality

After our March 2017 submission was filed, new research was released by the Australian National University's Centre for Social Research and Methods (as reported in the AFR on 6 April 2017) which shows that the relationship between low-wage employment and income inequality is more complex than is commonly realized. This research suggests that raising the minimum wage to address legitimate concerns about poverty and/or income inequality is likely to be less than effective in Australia for two reasons:

1. The complex interaction between Australia's taxation and welfare transfer systems means that **up to 43% of any wage increase for low income earners is lost to the employee due to offsetting increases in taxation and reduced welfare payments**. The ANU research indicates that in the lowest household income quintile, each dollar of additional wage income leads to a loss of 20 cents in tax plus 23 cents in welfare transfers for households that are a couple with children. The exact amounts vary depending on each household's composition and circumstances, but the ANU found that the structure of family welfare payments means that households with children tend to lose more of their pay rise than childless households. This tax

and welfare interaction significantly blunts the effectiveness of even a relatively large increase in the minimum wage as a method of increasing disposable incomes for low-income households.

Interaction with the welfare transfer system is especially significant for individuals in low income households, since the income and asset tests for many welfare benefits are calculated on a household basis and not just on the individual's own income or wealth.

The ANU research also notes that many households at the very lowest income levels include only non-working adults and so wage increases are ineffective in raising incomes for these households. This supports the notion that measures to boost workforce participation and employment for non-working individuals in low-income households will be more effective in improving their incomes and wellbeing than a wage rise for those already in work.

2. The **presence of minimum wage workers in households with middle and high income levels** means that the benefits of any increase in the minimum wage flows to households at all income levels and not just to the poorest households. The ANU research estimates that as of 2013-14:

    - 13.5% of minimum wage workers were in households that are in the top income quintile (that is, the top 20% of all households, when categorized by total household income),
    - 24.4% were in households that are in the second highest quintile;
    - 31.0% were in households that are in the third highest quintile;
    - 24.1% were in households that are in the second lowest quintile; and
    - 7.0% were in households that are in the lowest income quintile.

This distribution is very similar – but not identical – to the distribution of award-reliant employees across household income brackets that was reported in a recent FWC research report (Jiminez and Rozenbes Feb 2017) and based on HILDA survey data. For award-reliant employees, the equivalent proportions across all households are:

- 12% of award-reliant workers were in households that are in the top income quintile (that is, the top 20% of all households, when categorized by total household income),
- 23% were in households that are in the second highest quintile;

- 30% were in households that are in the third highest quintile;
- 23% were in households that are in the second lowest quintile; and
- 11% were in households that are in the lowest income quintile.

This distribution - with 35% to 38% of minimum wage and award wage workers living in the top 40% of the household income distribution - blunts the effectiveness of across-the-board minimum wage rises in addressing income inequality between Australian households.

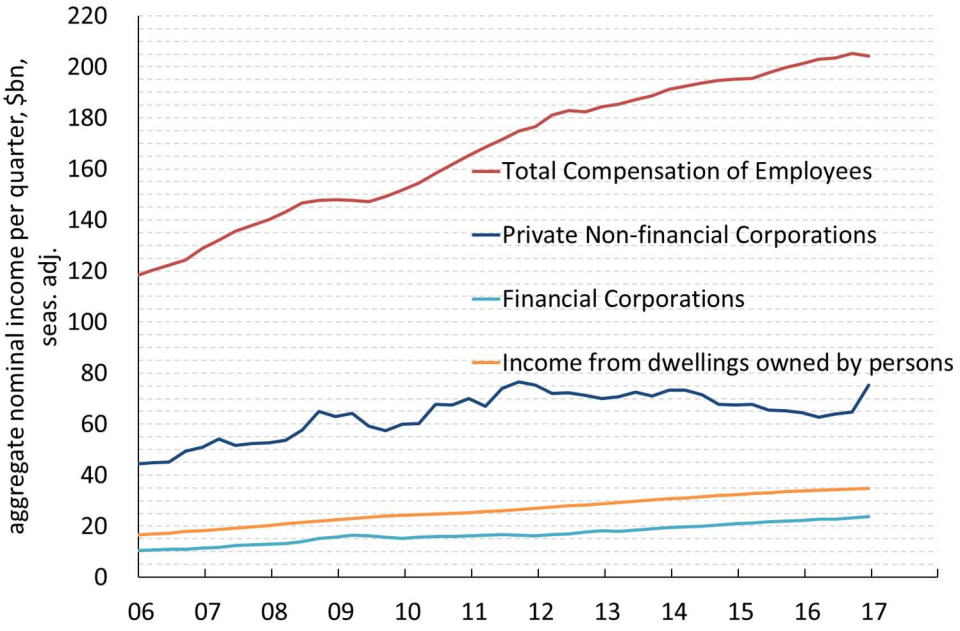
# 5. Trends in income growth and distribution

The ACTU calculates that the share of total factor income going to labour (in the form of wages of salaries) fell by 2% in the year to Dec 2016 and is back to the same share of total factor income as it was five years ago. (para. 202). At the same time, the ACTU calculates that profits for industries outside mining didn't rise in 2016: "without mining they [annual real gross operating profits] fell 0.9% in real terms for the year 2016" (para 212).

We agree with the ACTU that outside of the mining sector, there is no income growth going on for Australian companies. As noted in our March 2017 submission (page 10), even when mining profits are included, the recovery in gross profits (gross operating surplus) for non-financial corporations in 2016 came after four years of outright decline and was only enough to bring the total level of aggregate profits back to the income level that was reached in 2011, in nominal terms (see **Chart 3**).

As noted in our March 2017 submission (p. 11), this lack of growth in nominal aggregate profits for non-financial corporations over the past five years (since 2011) is to be contrasted with a rise of 15.3% in aggregate nominal wages over the same period (see **Chart 3**). In real terms (as favoured by the ACTU), this means that aggregate profits for all companies was lower in 2016 than it had been in 2011, even when this most recent (and possibly temporary) recovery in mining profits is included.

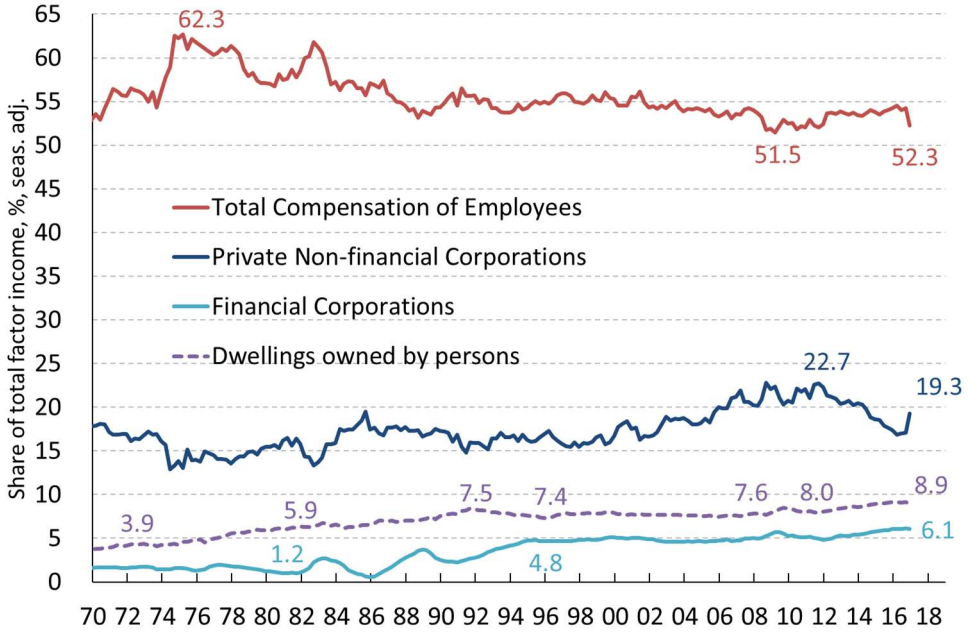
## Chart 3: Major components of total factor income, nominal dollars per quarter




Source: ABS *National accounts*, to 2016.

When considering the current composition of Australia's total factor income, it may also be worth noting that a change in the share that is paid as wages will not necessarily be wholly mirrored in a commensurate change in the share paid as profits, as asserted in the ACTU submission (para. 203). The traditional 'binary' relationship between these two measures has become more complicated due to the increasing share of total factor income going to 'financial corporations' and to 'income derived from housing' (see **Charts 3 and 4**). These two other components represent an increasing share of national income being derived from (or paid to) the banking and superannuation funds (financial corporations) and from property investment (dwellings owned by persons, which includes actual and 'imputed' rent). As of December 2017, 6.1% of national total factor income came from 'dwellings owned by persons' (actual and imputed rent), compared to 4.7% one decade earlier, while 8.9% came from financial corporations, compared to 7.6% one decade earlier. Both of these income streams are providing income sources to households other than wages or profits, and both will affect the observable 'share' of income that is going to wages or profits respectively.

## Chart 4 – Shares of total factor income (trend)




Source: ABS *National accounts*, to 2016.

We agree with the ACTU that the distribution of income – in the form of profits as well as wages - across industries is an important consideration (paras 208 to 213). The contrast between mining and non-mining industries (and to a lesser extent, the finance industry which includes banks, insurance and superannuation funds) is particularly pertinent at present. As noted briefly in our March 2017 submission (p. 11), aggregate nominal profits recovered from previous troughs in Dec 2016 in manufacturing, construction, professional services and transport services but aggregate profits in these key industries remain lower than their previous peaks, in nominal terms. Nominal profits in wholesale trade and retail trade remained flat in nominal terms in Dec 2016, despite a weak recovery in their nominal sales turnover and employment in 2016 (see Chart 3, p. 12 in our initial submission).

We reiterate that this lack of income growth (real or nominal) for Australia's non-mining companies is a major constraint on their ability to fund a large real rise in the national minimum wage, that cannot be matched by offsetting real productivity improvements.

# 6. Estimating the macroeconomic effects of a large increase in the minimum wage

The ACTU asserts that a rise in the minimum wage will increase employment and spending across the economy. It values this net increase at a minimum of $2.2bn and 35,000 jobs, based on an estimated macroeconomic multiplier of 0.4 (paras 302 to 315).

We offer the following observations on the ACTU's attempt to quantify the effect of an outsized rise in the minimum wage:

- As noted by the ACTU, ***"the size of the multiplier depend[s] on where the increase (or decrease) in demand comes from"***. Indeed, the nature and incidence of the stimulus is indeed crucial to estimating its effect. The Treasury multiplier of 0.4 that is quoted by the ACTU, and the Treasury modelling undertaken in relation to it, was based on a situation in which macroeconomic stimulus comes from a fiscal expansion in *current public spending* that is wholly funded by reduced Government savings and/or increased Government debt. That is, it is an expansion in *current* spending that is paid for from *future* savings. This means that the expansion is not at the expense of other types of spending across the economy that would have occurred at the same time (e.g. public or private sector spending or investment). Instead, it effectively brings forward future spending (in this case future public sector consumption and investment), which will need to be reduced from what it otherwise would have been.

- A large increase in the minimum wage is very different to the stimulus package that was modelled by Treasury, in both the location of the stimulus and the source of its funding. Unlike the example of a public sector stimulus package, almost all of the rise in the minimum wage will be paid for by *private sector businesses from their current cash flow* and not by public sector savings that will ultimately come out of future cash flows (the only exception would be in the case of businesses that increase their debts in order to pay the increase). This means that **the macroeconomic benefits of a large rise in the minimum wage will be offset by reductions in other types of concurrent spending (that is, concurrent consumption or investment) to a greater degree than is the case in the example of a public sector fiscal stimulus package**. These offsetting reductions in spending will reduce the net 'multiplier' benefits of the wage increase that might flow from increased spending by the employees that receive the wage increase.

To take an individual example, if small business must fund a large real wage increase for some or all its employees, it has several options to pay for the pay rise. It can do a combination of:

- Reduce its own net profits and net profit margin (that is, reduce the pay of the owners);
- Reduce the number of employees or the hours that they work;
- Reduce the amount spent on other business inputs (e.g. rent, energy, raw materials, IT);
- Reduce the amount of gross profits set aside for future investment and expansion;
- Increase debt in the short term, in the hope that increased productivity and/or sales allows it to pay it off later. In the meantime, debt servicing costs will rise for the business and cash flow will be weakened for other purposes.

These options (or combination of options) mean that each business is spending less on other inputs than it would have. If it chooses to reduce the number of employees or their work hours, then the wage rise amounts to a redistribution of income from those who lose work hours or their job, to those who can keep theirs. In terms of timing, all of these options must occur immediately in order to fund the pay rise, whereas any benefits that might flow through later in the form of increased turnover will take longer to materialize. Smaller businesses tend to have limited short-term cash flow options, so they will find it harder to manage a large and sudden cost shift and will be more likely to reduce other cost inputs (that is, their other business or investment spending) in order to fund it. Their ability to pay a large wage rise, in terms of the size and timing of the rise, will be limited. If this situation is replicated over a large number of businesses, then it will limit the aggregated 'multiplier' benefits of the pay rise.

For these reasons, the aggregate 'multiplier' effect of a large increase in the minimum wage that is funded by private sector businesses is very likely to be significantly smaller than a similar-sized macroeconomic stimulus that is funded from future public sector spending and savings.

# 7. Statutory considerations

In its submission (at pages 63 and 126), the Australian Catholic Council for Employment Relations (**ACCER**) urges the Expert Panel to treat the provisions of the *Fair Work Act 2009* (**FW Act**) that deal with the setting of the National Minimum Wage as beneficial legislation, and for the provisions to be construed accordingly.

In *4 Yearly Review of Modern Awards - Pastoral Award 2010*[1] a Full Bench of the Fair Work Commission made the following comments about an AWU submission that ss.136, 139 and 142 are beneficial provisions:

> *"**[40]** The AWU submits that the proposed 'one in four' term can be included in the Pastoral Award 2010 because it is a term 'about':*
>
> - *career structures (s.139(1)(a)(i));*
> - *a type of employment (s.139(1)(b)); and/or*
> - *piece rates (s.139(1)(a)(ii)).*
>
> ***[41]** The AWU contends that ss.139 and 142 are beneficial or remedial provisions and should be construed accordingly. It also submits that s.15AA of the Acts Interpretation Act 1901 supports the construction for which it contends.*
>
> ***[42]** The argument advanced in support of these contentions is set out at paragraphs 46-71 of the AWU's written submissions of 5 February 2016. In the alternative, the AWU submits that the proposed 'one in four' term is 'incidental' to a permitted matter and 'essential' for the purpose of making a particular term operate in a practical way. On this basis the AWU submits that the proposed 'one in four' term can be included in the Pastoral Award 2010, pursuant to s.142.*
>
> ***[43]** Australian Business Industrial and the NSW Business Chamber Ltd (ABI) submits that the 'one in four stands' aspect of the AWU's proposed variation is not permitted by s.139 or s.142. ABI does not contest the proposition that ss.139 and 142 are to be characterised as beneficial provisions, but do submit that:*
>
> > *'The requirement to interpret a provision consistently with a beneficial intent does not mean that an interpretation which is not borne out by the ordinary meaning of the words can be preferred, merely because of the beneficial effect it may have for those who are affect by its operation.'*
>
> *…*

[1] [2016] FWCFB 4393.

***[50]*** *As we have mentioned, the jurisdictional issue turns on the meaning of the word 'about' in s.139(1).*

***[51]*** *Ascertaining the legal meaning of a statutory provision necessarily begins with the ordinary grammatical meaning of the words used, having regard to their context and legislative purpose. Context includes the language of the Act as a whole, the existing state of the law, the mischief the provision was intended to remedy and any relevant legislative history.*

***[52]*** *Section 15AA of the Acts Interpretation Act 1901 requires that a construction that would promote the purpose or object of the Act is to be preferred to one that would not promote that purpose or object (noting that s.40A of the Act provides that the Acts Interpretation Act 1901, as in force at 25 June 2009, applies to the Act). The purpose or object of the Act is to be taken into account even if the meaning of a provision is clear. When the purpose or object is brought into account an alternative interpretation may become apparent. If one interpretation does not promote the object or purpose of the Act, and another does, the latter interpretation is to be preferred. Of course, s.15AA requires us to construe the Act, not to rewrite it, in the light of its purpose.*

***[53]*** *The literal meaning (or the ordinary grammatical meaning) of the words of a statutory provision may be displaced by the context and legislative purpose. As the majority observed in Project Blue Sky:*

> *'..the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.'*

***[54]*** *Sections 139 and 142 are in Chapter 2 of Part 2-3 of the Act. The purpose of Chapter 2 is to prescribe minimum terms and conditions of employment for national system employees. We accept that it is appropriate to characterise ss.139 and 142 as remedial or beneficial provisions. They are intended to benefit national system employees.*

***[55]*** *The proper approach to the construction of remedial or beneficial provisions was considered by the Full Bench in Bowker and others v DP World Melbourne Limited T/A DP World; Maritime Union of Australia and others ('Bowker'). In Bowker the Full Bench said:*

> *'The characterisation of these provisions as remedial or beneficial has implications for the approach to be taken to their interpretation. As the majority (per Gibbs CJ, Mason, Wilson and Dawson JJ) observed in Waugh v Kippen:*
>
> > *"...the court must proceed with its primary task of extracting the intention of the legislature from the fair meaning of words by which it has expressed that intention, remembering that it is a remedial measure passed for the protection of the worker. It should not be construed so strictly as to deprive the worker of the protection which Parliament intended he should have."*
>
> *Any ambiguity is to be construed beneficially to give the fullest relief that a fair meaning of its language will allow, provided that the interpretation adopted is 'restrained within the confines of the actual language employed that is fairly open on the words used.' As their Honours Brennan CJ and McHugh J put it in IW v City of Perth:*
>
> > *"...beneficial and remedial legislation, like the [Equal Opportunity] Act, is to be given a liberal construction. It is to be given 'a fair, large and liberal' interpretation rather than one which is 'literal or technical'. Nevertheless, the task remains one of statutory construction. Although a provision of the Act must be given a liberal and beneficial construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural."*
>
> *If the words to be construed admit only one outcome then that is the meaning to be attributed to the words. However if more than one interpretation is available or there is uncertainty as to the meaning of the words, such that the construction of the legislation presents a choice, then a beneficial interpretation may be adopted.'*

***[56]*** *We adopt the above remarks and propose to apply them to matter before us.*

If Ai Group had been involved in the above proceedings relating to the *Pastoral Award 2010*, we would not have simply accepted the proposition referred to in paragraphs [41], [43] and [54] above, that ss.139 and 142 of the FW Act are entitled to a beneficial or remedial construction. At the very least we would have sought to make detailed arguments about the approach that Courts have taken to interpreting beneficial provisions in legislation (like the FW Act) which strikes a balance between competing interests.

The decision of the Full Bench in the *Pastoral Award 2010* matter, appears the extend the concept of beneficial or remedial construction principles beyond any previous decisions of the Fair Work Commission, including arguably the decision of the Full Bench in *Bowker and others v DP World Melbourne Limited T/A DP World; Maritime Union of Australia and others ('Bowker')*[2] as referred to in paragraphs [55] and [56] of the above decision). Work Health and Safety (**WHS**) provisions have been commonly regarded as beneficial or remedial provisions, and therefore it was perhaps not surprising that the Full Bench in *Bowker* regarded the bullying provisions in a similar light given that bullying is a topic also covered by WHS laws.

Ai Group submits that the decision of the Full Bench in the *Pastoral Award 2010* matter, needs to be considered in the context that the AWU's submissions on the beneficial construction issue were unchallenged by ABI (see paragraph [43] above). Also, despite accepting the submission of the AWU that ss.139 and 142 are beneficial provisions, the Full Bench decided to adopt a consistent interpretation of ss.139 and 142 as was adopted by the Full Bench in the *Modern Awards Review 2012 – Apprentices, Trainees and Juniors Case*[3] (see paras [58] and [59] of the Pastoral Award decision).

In the current Annual Wage Review proceedings, the following issue is relevant: Even if the provisions of the FW Act that relate to the setting of the National Minimum Wage are beneficial provisions (as asserted by ACCER), what is the effect of this when construing the provisions?

As stated in Pearce and Geddes' *Statutory Interpretation in Australia, Seventh Edition* (at p.292):

> *A provision which on its face may appear to have a beneficial purpose may need to be limited in its operation because it in fact represents a compromise between competing interests:*

[2] [2014] FWCFB 9227.

[3] *Modern Awards Review 2012 – Apprentices, Trainees and Juniors* [2013] FWCFB 5411 at [95].

*Kennedy v Australian Fisheries Management Authority (2009) 182 FCR 411 at 426-9.*

This issue was recently the subject of detailed consideration by the Court of Appeal of the Supreme Court of Victoria in *Baytech Trades Pty Ltd v Coinvest Pty Ltd*.[4] The case concerned the interpretation of the *"Electrical Trades Work"* definition in the coverage Rules of the *Construction Industry Long Service Leave Act 1997* (Vic) (**CILSL Act**) which imported by reference certain terms of the *Electrical Contracting Industry Award 1992*. CoINVEST, the administrator of the portable long service leave scheme, argued that the provisions of the CILSL Act should be interpreted beneficially. On behalf of Ai Group member Baytech Trades, Mr Stuart Wood QC, briefed by Ai Group Workplace Lawyers, opposed CoINVEST's interpretation of the relevant provisions.

In a unanimous judgment, Maxwell P, Tate JA and Dixon AJA of the Court of Appeal decided that because the relevant beneficial provisions in the CILSL Act represent a compromise of purposes between the interests of employees and employers, their interpretation must be constrained. The following extract from the judgment is relevant (emphasis added):

> *Generalprinciples: approach to interpretation*
>
> ***55.*** *As already noted, the trial judge identified the purpose of the Act as being to provide portable long service leave benefits to workers in the 'construction industry' who would otherwise be unable to qualify by reason of the itinerant nature of their employment. In her Honour's view, given that this purpose was beneficial for a category of the workforce, the scheme was generally entitled to a beneficial construction.*
>
> ***56.*** *With respect, her Honour's conclusion about the beneficial purpose of the legislation was undoubtedly correct. <u>But the Act also made clear that the beneficial purpose was to be achieved by imposing burdens on employers</u>. The purpose of the very detailed provisions in the Rules was to define, with some provision, the circumstances in which benefits were to be conferred and corresponding burdens imposed. It is by giving primacy to the text that the interpreting court fulfils its task of discerning how far the legislature deciding to go in effectuation of its purpose*

[4] [2015] VSCA 342.

***57.*** *We draw attention here to the caution expressed by Gleeson CJ in Carr:*[5]

> *That general rule of interpretation [that a construction that would promote the purpose of the Act is to be preferred to a construction that would not promote the purpose] may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is an uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.".*

***58.*** *In Victims Compensation Fund v Brown,*[6] *Spigelman CJ observed that it was not appropriate to apply the principle of liberal construction to a clause clearly intended to be one of limitation. His Honour said:*[7]

> *In a passage that has been frequently cited with approval, the Supreme Court of the United States said in Rodriguez v United States, at 525-526:*
>
> > *… No legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be law.*
>
> *In the present proceedings, the Respondent submitted that the purpose was to compensate victims. Even if we were to accept a legislative purpose stated at that level of generality, that would entail that any ambiguity must be construed in such a way as to maximise compensation (cf Favelle Mort Ltd v Murray). In any event, the very specificity of the provisions of the legislation indicate that the legislative purpose*

[5] (2007) 232 CLR 138 at 143.

[6] (2002) NSWLR 668.

[7] Ibid 671-2 [9]-[12].

*is to provide compensation in accordance with the and not otherwise.*

*The issue before the Court is the determination of the circumstances in which compensation is payable. The Court is not required to give the most expansive possible interpretation of such circumstances.*

*Specifically, the Court is not required to give words a meaning other than their primary meaning, unless the context indicates that that should be done.*[8]

***59.*** *In appeal to the High Court, Heydon J (with McHugh ACJ, Gummow, Kirby, and Hayne JJ agreeing) agreed with the approach adopted by Spigelman CJ:*[9]

*The question is a narrow one and it is possible to answer it briefly. It could be answered very briefly, merely by stating that the answer propounded by Spigelman CJ was correct for the reasons he advanced. In deference to the extremely careful judgments of the majority in the Court of Appeal, however, a longer answer is called for.*

***60.*** *In MyEnvironment v VicForests,*[10] *where one of the purposes of the relevant legislation was to protect the habitat of the Leadbeater's Possum, the Court of Appeal was invited to construe the relevant provisions expansively with a view to furthering this legislative purpose. Warren CJ said that, while there was no doubt that the authorities endorsed a purposive approach to statutory construction, the authorities also showed that caution was required before interpreting a particular provision expansively because of an underlying purpose of the legislation. The Chief Justice observed:*[11]

*In my view, the authorities can be seen as supporting two related propositions. First, that it is rarely, if ever, the case that legislation pursues a single purpose to the fullest extent possible. Rather legislation is typically the result of a carefully considered attempt at balancing multiple and sometimes competing objectives. To assume that the apparently confined words of a provision must be given an*

[8] Citations omitted.

[9] *Victims Compensation Fund Corporation v Brown* (2003) 201 ALR 260, 263 [12] (citations omitted).

[10] (2015) 42 VR 456.

[11] Ibid 462 [14].

*expansive operation on the basis of what is perceived to be the legislation's primary purpose may frustrate rather than effectuate legislative intent.*

***61.*** *Tate JA said:*[12]

*When construing legislation that has a multiplicity of purposes, or seeks to strike a balance between competing interests, it is necessary to keep in mind the observation of Gleeson CJ in Carr v Western Australia that the purposive rule of statutory interpretation, embodied in Victoria in s 35(a) of the Interpretation of Legislation Act 1984, is of limited assistance in construing legislation, or regulatory instruments, that embrace numerous potentially conflicting objectives in relation to which the court has to determine from the language used where the intended balance lies. In that context, he expressly eschewed the adoption of a construction that furthered the pursuit of one of the competing objectives to the greatest extent possible while leaving the other objectives unfulfilled.*

***62.*** *Drawing on the passage from the judgment of Gleeson CJ in Carr set out above, Tate JA concluded that the complexity of the statutory scheme and the competing aims apparent in the regulatory context showed that there had been 'a compromise'. In the legislative scheme before the court, the 'purpose or object' identified did not compel any particular construction, nor was it possible to 'identify a single purpose or objective. The fact that the legislative scheme was directed at the fulfilment of multiple purposes meant that the 'correct construction...must depend on the words used', within the relevant context.*

***63.*** *Applying these principles, we would uphold Baytech's submission that the Rules provide, in precise detail, for the scope of their application and that some aspects of the Rules limit, rather than expand, the cover provided by the legislative scheme. The Act confers a benefit on some employees but a financial burden on some employers, and reflects a compromise of purposes. In ways relevant to the question at trial, the scope of the legislative scheme is constrained.*

[12] Ibid 497-8 [148].

In the light of the above authorities, we submit that even if the Expert Panel decides that the provisions of the FW Act relating to the National Minimum Wage are beneficial provisions (which we do not concede), the interpretation of such provisions must be constrained because:

- The provisions reflect a compromise of purposes; and
- The provisions strike a balance between competing interests.

The Objects of the FW Act in s.3, the Minimum Wages Objective in s.284 and the Modern Awards Objective in s.134 are directed at the fulfilment of multiple purposes. These objects clearly highlight the compromise of purposes and the balance between competing interests which is sought to be achieved. Issues of prime concern to employees and those of prime concern to employers are expressly addressed in ss.3, 134 and 284. Therefore, the correct construction must depend on the words used within the relevant context.

The overarching objective of s.3 is "*to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians*". There is nothing in this objective which gives the slightest indication that the interests of employees are to be elevated ahead of the interests of employers. Instead the objective emphasises a balanced approach.

Similarly, the overarching objective in s.134 is the achievement of a "*fair and relevant minimum safety net*". Again, there is nothing in this objective which gives any indication that the interests of employees are to be elevated ahead of the interests of employers. The objective emphasis fairness to employees and employers.

Further, the overarching objective in s.284 is to "*establish and maintain a safety net of fair minimum wages*". Once again, there is nothing in this objective which gives any indication that the interests of employees are to be elevated ahead of the interests of employers. The objective emphasis fairness to employees and employers.

The notion of 'fairness' is to be assessed from the perspective of employers and employees. This was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

> ***[109]*** *… It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide 'a fair and relevant minimum safety set of terms and conditions'. Fairness is to be assessed from the perspective of both employers and employees.*[13]

A similar point was made by Justice Giudice in *Shop, Distributive and Allied Employees' Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, in respect of the provision in the former *Workplace Relations Act 1996* which required the AIRC to *"ensure a safety net of fair minimum wages and conditions of employment…*":

> *In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups.…*[14]

In its *Annual Wage Review 2016–17 - Decision re Preliminary Hearing*,[15] the Expert Panel rejected the notion of elevating the needs of the low paid ahead of other considerations: (emphasis added)

> ***[66]*** *As we have mentioned, no particular primacy is attached to any of the considerations identified in the modem awards objective (s.134(1)(a)-(h)) or in the minimum wages objective (s.284(1)(a)(e)). The adoption of the proposed target would, in our view, have the effect of elevating one statutory consideration ('relative living standards and the needs of the low paid') above all others on an ongoing basis, rather than requiring consideration of that matter in the social and economic context of each review and weighting it accordingly relative to the other considerations. As we have mentioned while the relevant statutory considerations must be taken into account it is important to bear in mind that they inform the modem awards objective and the minimum wages objective, but they do not themselves constitute the relevant statutory objectives.*

Similarly, the approach to beneficial construction that ACCER appears to be urging the Expert Panel to adopt would lead to the needs of the low paid being elevated ahead of other considerations. Such an approach is inconsistent with relevant Court authorities and decisions of the Commission.

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[13] *4 yearly review of modern awards* [2015] FWCFB 3177 at [109].

[14] *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1 at [11].

[15] [2017] FWCFB 1931

Whether beneficial provisions or not, all of the relevant considerations in ss.284 and 134 need to be considered in the current social and economic context, without placing the interests of employees, ahead of the interests of employers and the broader community.

# 8. Penalty rates decision

The initial submissions of the Shop Distributive and Allied Employees' Association (**SDA**)[16], the Federal Opposition[17], the Victorian Government[18], and the South Australian Government[19] each identify their disagreement with the *Penalty Rates Decision*[20] and, on this basis, urge the Expert Panel to factor the decision into any increases in the National Minimum Wage and/or minimum award wages. These arguments are misguided. They overlook the scope of the *Penalty Rates Decision* and ignore the Full Bench's conclusion that the current Sunday penalty rate and public holiday rate in a small number of awards do not meet the modern awards objective in the FW Act.

In our March 2017 submission, Ai Group identified the importance of the Expert Panel not being influenced by the *Penalty Rates Decision* when determining any variation to the National Minimum Wage (and minimum award wages). We continue to hold this view and rely on our March 2017 submission.

The *Penalty Rates Decision* relates to only five awards of the 122 industry and occupational awards, and makes the following variations to the penalty rate provisions in those awards:

- Adjusts Sunday penalty rates in the *Fast Food Industry Award 2010*, *General Retail Industry Award 2010*, *Hospitality Industry (General) Award 2010*, and *Pharmacy Industry Award 2010*.
- Adjusts public holiday penalty rates in the above awards and in the *Restaurant Industry Award 2010*.

[16] Shop Distributive and Allied Employees' Association, *Annual Wage Review 2016/17*, 29 March 2017.

[17] Federal Opposition, *Submission to the Fair Work Commission Annual Wage Review* 2017, 29 March 2017, paragraphs 11, 27-32. See also paragraphs 54-65 which discusses the implementation of the *Penalty Rates Decision*.

[18] *Submission from the Government of South Australia*, 28 March 2017, paragraphs, 6, 36-38, and 65-65.

[19] *Victorian Government Submission to the Annual Wage Review 2016-17*, 29 March 2017, paragraphs 6-7.

[20] [2017] FWCFB 1001.

We re-emphasise the following paragraph of the *Penalty Rates Decision*, which outlines the confines of the decision:

> ***[76]*** *It is* important *to appreciate that the conclusions we have reached in relation to the weekend and public holiday penalty rates in the Hospitality and Retail Awards is largely based on the circumstances relating to these particular awards. The Hospitality and Retail sectors have a number of characteristics which distinguish them from other industries.*

We also re-emphasise the following points raised in our March 2017 submission:

- The variations arising out of the *Penalty Rates Decision* will be transitioned to ameliorate any adverse effects on employees.

- The Full Bench in the *Penalty Rates Decision* determined that the existing Sunday penalty rates in the four modern awards subject to the change do not achieve the modern awards objective, as they do not provide for a fair and relevant safety net.

- The statutory considerations required of the Expert Panel in the current proceedings were also considered by the Full Bench in the *Penalty Rates Decision*. For example, the Full Bench, in reaching its decision, considered the objects of the FW Act (s.3), the modern awards objective (s.134), special provisions relating to modern award minimum wages (s.135), and the minimum wages objective (s.284). Each of these are considerations for the Expert Panel for the purposes of the Annual Wage Review.

- Even though the *timing* of the adjustments has been sensibly aligned with the operative date of any minimum wage increase in Annual Wage Review decisions, it would be inappropriate for the *quantum* of any minimum wage increase to be any higher as a result of the *Penalty Rates Decision*.

**SDA's submission**

The SDA's submission argues at paragraph 3 that:

> *"… the Penalty Rates Decision will cause the General Retail Industry Award 2010, Fast Food Industry Award 2010 and the Pharmacy Industry Award 2010 (the **SDA Awards**) to no longer provide employees covered by these Awards (the **relevant employees**) with a safety net of fair minimum wages".*

The SDA's argument is contrary to the conclusions of the Full Bench in the *Penalty Rates Decision*; a case in which SDA was a major participant. As highlighted above, the Full Bench concluded that the existing penalty rates are not consistent with a fair and relevant safety net.

The SDA is seeking that the minimum wages within the SDA Awards (as defined in the extract above) be increased by an additional 10 per cent above any minimum wage increase provided generally by the Expert Panel in this Annual Wage Review. This claim must be rejected.

Firstly, we note that the SDA's submission does not seek to rely on subsections 287(2), (3), and (4) of the FW Act, that empowers the FWC to set and implement different wages or loadings in exceptional circumstances.

Secondly, we refer to our March 2017 submission (p.36) that reminds the Expert Panel that in past Annual Wage Reviews the Expert Panel has rejected claims by employers that 'exceptional circumstances' be considered for the *Fast Food Industry Award 2010* because of the significant increase to penalty rates imposed on employers following award modernisation. The following extract from our March 2017 submission is particularly relevant:

> *"Notably the argument advanced by Ai Group in the Annual Wage Review 2009-2010 was rejected on the basis that "increased costs resulting from award modernisation were taken into account by the Australian Industry Relations Commission in deciding upon the transitional provisions and operative dates in modern awards" (see above extract). Similarly, the variations arising out of the Penalty Rates Decision will be transitioned to ameliorate any adverse effects on employees."*

**South Australia Government's submission**

The South Australian Government has requested that the Expert Panel set a special national minimum wage for those workers effected by the *Penalty Rates Decision* to compensate for the amounts lost per hour when working or being required to work on Saturday, Sunday or Public Holidays.[21] Aside from the fact that the *Penalty Rates Decision* does not apply to 'Saturday work', the power of the Expert Panel to make a 'special national minimum wage' is limited to three classes of employees:

[21] *Submission from the Government of South Australia*, 28 March 2017, paragraphs, 36-38, and 65-65.

- all junior employees who are award/agreement free employees, or a specified class of those employees; or

- all employees to whom training arrangements apply and who are award/agreement free employees, or a specified class of those employees; or

- all employees with a disability who are award/agreement free employees, or a specified class of those employees.

The FW Act does not enable a 'special national minimum wage' to be set for the class of employees proposed by the South Australian Government.

# 9. The Decision re. Preliminary Hearing

Ai Group welcomes the *Annual Wage Review 2016–17 - Decision re Preliminary Hearing*,[22] and the rejection of the unions' proposal for the setting of a medium-term target for the National Minimum Wage.

The Decision also raised the issue of whether certain transitional instruments can be terminated during an Annual Wage Review. In this regard, the Expert Panel said:

> *[155] In the circumstances described, we consider that the appropriate step to take at this stage is to invite interested parties to make further submissions about whether the termination power in item 3 of Schedule 5 and/or the other powers of termination provided for in the Transitional Act are exercisable in the conduct of an Annual Wage Review.*

Ai Group agrees with the observation of the Expert Panel, set out in paragraph [147] of the *Decision re. Preliminary Hearing*:

> *[147] It may be observed that the categories of transitional instruments that are terminable under item 3 of Schedule 5 are not co-extensive with the categories of instruments which are reviewable in the conduct of an annual wage review. 'Modernisable instruments' includes all ABTis, which includes pre-Fair Work Acts awards as well State reference transitional awards or common rules and NAPSAs. It may also be observed that the termination power is to be exercised arising out of the modernisation of awards. Both these matters tend to suggest*

[22] [20 17] FWCFB 1931

*that the power is not intended to be exercised by the Expert Panel as part of the Annual Wage Review process.*

The task of terminating transitional instruments should not be undertaken by the Expert Panel. Rather this task should be undertaken outside of the Annual Wage Review process. This is consistent with the approach taken to date, regarding the termination of transitional instruments. A large number of transitional instruments have already been terminated by the Commission.

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