

11 November 2014

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Dear Sir/Madam,

#### 4 Yearly Review of Modern Awards – Additional Common Issues

ACCI makes these submissions in response to the [1 October 2014 Statement](#) issued by the President regarding the 4 yearly review of modern awards (AM2014/196, AM2014/197 and others).

These submissions address the request that parties submit an outline of their proposed provisions in relation to the casual employment and part time common issues including:

- casual minimum engagement;
- casual conversion (including the requirement to notify);
- restrictions on casual engagement;
- part-time minimum engagement;
- part-time rostering provisions and patterns of hours;
- part-time overtime provisions.

These submissions also address the question of whether the following matters should be dealt with as 'common issues' and if so, how the matter should be dealt with and any timeframes:

1. the proposal by Australian Business Industrial and the New South Wales Business Chamber (together ABI/NSWBC) as set out in their [correspondence dated 26 September 2014](#) seeking the inclusion of a Small Business Schedule in approximately 108 of the 122 modern awards specifically directed to the needs of micro business employers employing fewer than 5 employees;
2. the issues raised by The Association of Payroll Specialists (TAPS) regarding motor vehicle allowances and method of calculating monthly wages as set out in [correspondence dated 11 June 2014 and 8 July 2014](#);
3. the ACTU's proposal to include terms relating to domestic violence leave and 'family friendly work arrangements' across all awards.

Since the conference on 29 September 2014 ACCI has carried out extensive consultation with ACCI members to ascertain the extent to which a collective position on the various questions is possible. ACCI makes these submissions following initial and continuing discussions with interested parties.

## Assessing whether the particular claims meet the character of a ‘common issue’

In considering whether particular claims meet the character of a ‘common issue’, ACCI has reflected on various statements made during the initial stage proceedings and conferences.

The [Draft Statement published on 15 November 2013](#) provided a preliminary outline of the process of for the 4 yearly review of modern awards (the review) to be undertaken in accordance with section 156 of the Act. Paragraph 4 of that statement provided:

*In early 2014 a Full Bench of the Commission will convene a conference then hold hearings to identify any legislative issues and determine the scope of the Review. At the conference parties may also identify any claims they wish to pursue which affect multiple or all modern awards. These ‘common issues’ will be dealt with during the award stage, with the scheduling determined by the Full Bench in consultation with the parties.*

The [Draft Statement published on 15 November 2013](#) also stated at paragraph 7:

*The Commission will encourage parties to confer in order to present a joint position or agreed set of facts in relation to a particular issue. Members of the Commission will be available throughout the process to facilitate any such discussions upon request.*

The [Draft Statement published on 15 November 2013](#) suggested that in order to meet the character of a common issue a claim would need to impact multiple awards. An [Issues Paper](#) published by the Full Bench on 24 January 2014 reinforced this assumption as it also identified ‘common issues’ as any claims which parties wished to pursue which affected multiple or all modern awards.

At the conference on 5 February 2014 the President stated:

*...I can indicate that I intend to proceed cautiously in relation to these common issues and to ensure that all interested parties are fully consulted. A draft statement would be issued after the conference on 26 February to provide anyone interested with a further opportunity to comment about how we are proposing to deal with those issues. The second and final observation I would make about the common issues is that flexibility will also be important. It is difficult to predict the range of matters that may arise during the course of the review and we need a process that is flexible enough to cope with issues as they emerge ([PN 119](#)).*

ACCI agrees that flexibility is important. A uniform position will not always be possible nor is one desirable in all circumstances. Some aspects of award regulation still require industry/occupational specific considerations to be reflected. As was noted Full Bench (see PN 33-34 [\[2014\] FWCFB 1788](#)):

*There is a degree of tension between some of the s.134(1) considerations. The Commission’s task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.*

*Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.*

The Commission is interested in parties exploring a uniform position however some aspects of award regulation are not conducive to this outcome due to industry and occupational specific considerations.

On 24 February a further [Issues Paper](#) was published by the President ahead of a 26 February 2014 conference intended to identify any agreement between the parties about the matters which should be dealt with as 'common issues'.

Paragraphs 10-12 of the Issues Paper suggest that for a matter to be characterised as a 'common issue', it will be necessary that the claim does more than merely attach to multiple awards, stating:

*[10] It is important to observe at the outset that a matter will not necessarily be regarded as a common issue, such that it requires some separate proceeding, just because a variation is sought to more than one award. For example, one of the submissions canvasses applications in prospect to vary a number of awards to provide for an annual closedown. It is unlikely that matter would be dealt with as a common issue. The same observation may be made about the proposed 'flow on' of the Apprentices Full Bench decision. It would be dealt with on an award-by-award basis*

*[11] In their submissions, HIA, Restaurant & Catering Australia and SDA submitted that 'common issues' should be restricted to matters and/or provisions which impact on, or are common to, all or most modern awards. There is considerable force in this proposition.*

*[12] 'Common issues' are likely to be proposals for significant variation or change across the award system, that is, those applications that seek to change a common or core provision in most, if not all, modern awards. A model term dealing with part-time work would satisfy this definition of a 'common issue'. I do not envisage that there would be many of those sorts of matters. As I said at the 5 February 2014 conference, it is intended that the Commission will proceed cautiously in relation to the identification of common issues to ensure that all interested parties are fully consulted.*

This suggested that a claim will only meet the character of a common issue claim if it:

- related to matters and/or provisions that impact on or are common to all or most awards; **and**
- involved proposals for significant variation or change across the awards system because it is seeking to change a common or core provision in most, if not all, modern awards.

This was reinforced in the [Draft Statement of 7 March 2014](#) at paragraphs 5-6:

*[5] A matter will not necessarily be regarded as a common issue just because variations are sought to more than one award. 'Common issues' are likely to be proposals for significant variation or change across the award system, such as applications which seek to change a common or core provision in most, if not all, modern awards.*

*[6] A matter identified as a common issue will be referred to a Full Bench for determination in a 'stand alone' proceeding, as distinct from having the issue determined on an award by award basis during the award stages of the review. The Full Bench will be responsible for managing the proceedings for the common issue. This may result in the Full Bench issuing determinations varying particular modern awards or issuing statements of principle that may be considered when reviewing individual modern awards.*

The Commission has taken a view that penalty rates will not be treated as a common issue because the claims proposed are not common to all or most awards.

The exchange at PN389-391 of the [Transcript of Proceedings from 26 February 2014](#) again suggested that claims would need to attach to multiple awards as a threshold issue. As was stated by the President:

*... The difficulty is, of course, that we do not know with any particularity what is proposed under each of these items. I would envisage, if you like, a three staged way of looking at the common issues. The first is the finalisation of the first stage would involve identifying by subject matter what are more likely the common*

*issues and when they would be dealt with on the timeframe. The next step, which would take place shortly after that is finalised, would be convening a conference in relation to each of these matters. There would be a process put in place where parties would be invited to identify what changes are they seeking that apply to multiple awards under these subject headings.*

*...Those matters that might only apply to one award and might be technical in nature to deal with a particular item in one award would be dealt with in the award phase. Something, for example, if a casual conversion clause was intended to apply in a standard form across all modern awards, that clearly falls into the common issue category. And no doubt there will be matters in-between. But I cannot really make any sort of sensible judgment about any of that until we deal with the first phase, then we go to clarifying what falls within it. And the third phase, if you like, will be later in the second half of this year I will convene another conference, more or less have a discussion about where we are going, and are there any other common issues, and to look at the two common issues that we have pencilled in for the first half of next year.*

Considering the comments made during the previous proceedings it would seem to ACCI that:

- claims seeking a 'common standard' across all awards would be a common issue;
- a claim could not be characterised as a common issue unless it applied to multiple awards;
- claims that sit somewhere between award specific claims and claims seeking a common standard across all awards would be subject to further discussion regarding their characterisation;
- award specific variations of a technical nature should be dealt with in the award stage and should not form part of common issue proceedings.

ACCI submits that applications relating to part-time and casual employment and which attach to one or a small number of awards would be dealt with more efficiently during the award stage and understands that some parties with claims limited to one or a small number of awards or sectors do not consider their claims as 'common issues'.

ACCI recognises that the Commission is open to flexible approaches to maximise efficiency such as scheduling certain matters together (i.e. because there is shared evidence among the claims). ACCI encourages the Commission to extend such flexibility to the entitlement of award by award claims where it is most efficient to do so.

### **Casual and Part-time Employment Common Issues**

ACCI has engaged in consultation with members and other interested employer parties regarding their proposed provisions in relation to:

- casual minimum engagement;
- casual conversion (including the requirement to notify);
- restrictions on casual engagement;
- part-time minimum engagement;
- part-time rostering provisions and patterns of hours.

As the claims tend to relate to awards of specific interest and are not seeking a common standard across all or most awards, ACCI does not consider that they would meet the character of a common issue claim.

Some ACCI members may seek to address concerns relating to part-time and casual provisions within particular awards and it seems such applications would likely only address particular industry or occupational considerations. The form and incidence of casual and part-time employment and matters such as rostering arrangements and working patterns vary among industries and occupations and ACCI maintains these circumstances favour individual treatment. The award stage may still provide the most efficient way of dealing with such claims but if they are left as a part of the common issues proceedings, they may warrant discrete treatment.

ACCI notes that the ACTU has foreshadowed common claims of the nature stated at PN184 of the [29 September Transcript](#):

*We will have a claim in relation to casual conversion. We'll also have a claim in relation to minimum engagements for casuals and part-time employees and we'll also have a claim in relation to protections for part-timers around hours of work and rosters.*

ACCI will strongly oppose claims for a common standard that will curtail flexibility currently available in awards and result in an additional regulatory and cost impost for employers.

#### **Small Business Schedule**

ACCI notes that ABI/NSWBC in their [correspondence dated 26 September 2014](#) seek the inclusion of a new Small Business Schedule in modern awards. The schedule proposes provisions specifically directed towards the needs of micro business employers who employ a total of fewer than five employees. At the 29 September 2014 conference ABI/NSWBC stated that the inclusion of such a schedule in approximately 108 of the 122 modern awards should be dealt with as a common issue rather than being dealt with on an award by award basis.

As the claim relates to nearly all awards ACCI considers it meets the criteria outlined by the Commission and supports it being dealt with as a common issue.

There are continuing discussions involving ACCI, its members and ABI/NSWBC. The intention is to arrive at a settled position in relation to the nature of the claim. On this basis ACCI recommends that the matter be listed for mention in December 2014 to allow for further discussion and to enable parties to report back and then address matters relating to timetabling.

#### **Issues raised by The Association of Payroll Specialists (TAPS) regarding motor vehicle allowances and method of calculating monthly wages**

The technical payroll administration and taxation concerns outlined in the [correspondence dated 11 June 2014 and 8 July 2014](#) have not been raised with ACCI by its members. ACCI is concerned that attempts to change the quantum of expense-related allowances will enliven opposition relating to industry specific considerations and ACCI does not support the progression of this matter as a common issue. ACCI understands that the matters raised by TAPS relating to monthly pay calculation do not broadly impact the awards and ACCI does not support the progression of this matter as a common issue.

#### **ACTU proposal to include terms relating to domestic violence leave and 'family friendly work arrangements' across all awards**

ACCI foreshadows fundamental objections to both of these ACTU claims and suggests there would be merit in scheduling proceedings to deal with these objections as threshold matters in 2015 prior to any hearing involving the substantive claims. The objections may go to matters of jurisdiction.

The Commission has been acutely aware that many organisations that will be involved in these proceedings are also involved in the other common issues proceedings, the award stages and the annual wage review. ACCI acknowledges efforts the Commission is making to accommodate the competing demands in its programming of remaining common issues proceedings and the steps it is taking to ensure that proceedings are appropriately spaced to ease the burden upon interested parties.

Yours faithfully,

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