

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1996

s.113 Application to vary awards

s.108 references of applications to vary awards

Australian Liquor, Hospitality and Miscellaneous Workers Union

**THE HOSPITALITY INDUSTRY – ACCOMMODATION, HOTELS,
RESORTS AND GAMING AWARD 1998**

(ODN C. No. 00389 of 1975)
[Print P9138 [AW783479]]

(C2001/5719)

(and others)

**SUBMISSIONS OF THE AUSTRALIAN HOTELS ASSOCIATION AND THE
MOTOR INN, MOTEL AND ACCOMODATION ASSOCIATION**

INTRODUCTION AND OUTCOMES SOUGHT

1. The Australian Hotels Association (“AHA”) and the Motor Inn, Motel and Accommodation Association (“MIMAA”) are each registered organisations under the *Workplace Relations Act 1996 (Cth)* (“Act”). The AHA is respondent to *The Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998* (“Award”) and this submission applies only to that Award.
2. With respect to all except those accommodation and hotel businesses designated by the AAA Tourism Pty Ltd Guide as Four or Five Star that are members of either the AHA or MIMAA and subject to the right of non-gaming hotels within the metropolitan area of Hobart in the State of Tasmania and non-gaming hotels outside the metropolitan area of Melbourne in the State of Victoria, the AHA and MIMAA support the submissions of the Australian Chamber of Commerce and Industry (“ACCI”) in relation to the application to vary made by the Australian Council of Trade Unions (“ACTU”).
3. AHA and MIMAA submit that the “Incapacity to Pay Principle” (“Incapacity Principle”) should be reviewed pursuant to s. 106 and varied as follows:

“12. ECONOMIC INCAPACITY

Any respondent or group of respondents to an award may apply to, temporarily or otherwise, reduce, postpone and/or phase-in the application of any increase in labour costs determined under this Statement of Principles on the ground of ~~very serious or extreme~~ economic adversity factors including adverse impacts on the level of employment. The merit of such application will be determined in the light of the particular circumstances of each case and any material relating thereto shall be rigorously tested in accordance with fairness, equity and the substantial merits of the case. The impact or potential impact on employment ~~at the enterprise level~~ of the increase in labour costs is a significant factor to be taken into account in assessing the merit of any application. A party making such an application must make and justify an application do so pursuant to s.107. ~~do so pursuant to s.107.~~ It will then be a matter for the President to decide whether it should be dealt with by a Full Bench.

Any decision to temporarily reduce or postpone an increase ~~will~~ may be subject to a further review, the date of which will be determined by the Commission at the time it decides any application under this Principle.”

4. The AHA and MIMAA seek the postponement of any increase that may be awarded as a result of these proceedings for a period of six (6) months from the date of operation determined by the Commission in relation to those members of the AHA or MIMAA being respondents to the Award that are classified as Four Star and Five Star accommodation hotels in capital cities and major resort centres. The grounds of the application are that:
 - The effect of the terrorist attack on the World Trade Centre on 11 September 2001 and the collapse of Ansett Airlines on 12 September 2001 (“Events”) resulted in an immediate and significant economic downturn in the tourism industry in Australia.
 - Four and Five Star accommodation hotels rely significantly on Inbound leisure and business travellers and domestic business and leisure travellers for maintenance of profitability and employment levels.

- Casual employment in the accommodation industry for this group was reduced by 9.8% to 31 December 2001 and will be further reduced in the short term if additional labour costs are imposed.
- Full-time and part-time employment in the accommodation industry for this group has been reduced by 4 % to 31 December 2001 and will be further reduced in the short term if additional labour costs are imposed.
- The industry is anticipated to recover from the worst effects of the Events identified over a period of approximately 2 years from September 2001 although this is dependent to some extent on the maintenance and development of reliable transport services in the aviation sector to facilitate increasing demand and access particular by Inbound travellers.
- Employees of Ansett Airlines Limited have been stood down without pay and without access to social security benefits since 14 September 2001 as a result of the appointment of Administrators of the airline. On application by the Administrators and with the consent of the ACTU the Commission has ordered the insertion of stand down clauses in awards and agreements of the Commission applicable to employees of Ansett Airlines Limited to facilitate the standing down of employees without pay.
- The establishments that will make the application for deferral of any living wage increase awarded as a result of this application rely significantly upon a reliable and consistent aviation transport sector for business. The failure of the Ansett business and its purchase by the Tesna consortium will exacerbate existing difficulties facing these establishments.
- The impact of the Events on the Four Star and Five Star accommodation hotels is significant and equity good conscience and the substantial merits of the case support a deferral of any increase that may be awarded for a period of 6 months from the operative date otherwise awarded or permitted as a result of this case. The standing down of Ansett employees indefinitely without pay recognises the

significance of the Events in the tourism industry and that employees may bear some of the cost of such occurrences. The flow-on effect of the Events to the Four Star and Five Star accommodation hotels is significant and a deferral of any adjustment that may be awarded recognises that the effect must reasonably be borne (at least to a limited extent) by employers and employees jointly to the extent that it may impact detrimentally on employment. This is consistent with the approach of the ACTU and the Commission that has endorsed Ansett employees being stood down without pay for indefinite periods without access to social security benefits or accepting conversion to part-time employment arrangements as part of the burden of the Ansett collapse.

“INCAPACITY TO PAY” PRINCIPLE

Overview

5. The “incapacity to pay” principle developed and was included in wage fixing principles of the Commission with the introduction of centralised wage fixation and the requirement that in order to access increases granted as a result of National Wage Cases, union respondents to awards were required to provide commitments to compliance with the principles of wage fixation that established the framework within which those wage increases were granted. The “incapacity to pay” principle was included to apply in extremely limited circumstances and within that framework it was intended to, and did, operate as a deterrent to employers seeking exemption from national wage increases.
6. Prior to the development of wage fixing principles within the framework of National Wage Case increases, the Commission dealt with applications relating to incapacity to pay on the basis of “equity, good conscience and the substantial merits of the case”.
7. The maintenance of the “incapacity to pay” principle in its current form is inconsistent with the framework of wage fixation established by the Act.
8. The setting of an evidentiary onus that is higher than that prescribed by the Act is beyond power and inconsistent with the objects of the Act.

Application of “incapacity to pay” prior to National Wage Case: 1983

9. Prior to 1983 the Commission would hear and determine claims relating to incapacity to pay on the basis of equity good conscience and the substantial merits of the case pursuant to the provisions of the *Conciliation and Arbitration Act 1904* (“1904 Act”).
10. In the *Engineering Oil Industry Case 1970* (134 CAR 159) the Full Commission where the applicants sought increases in wages based on two grounds (p.163):
 - (a) the rates payable elsewhere including movements in average weekly earnings, and
 - (b) the profitability or capacity of the industry.
11. The Commission in that case affirmed the *GMH Employees Case* (115 CAR 931) that had discussed situations where the adverse financial position of an industry had influenced arbitral tribunals. The Commission in the Oil Industry Case confirmed that “...*nothing we say in this case should be read as affecting the right of an employer or an industry to plead incapacity to meet a claim.*”(page 167).
12. The GMH Employees Case (1966) involved a case where the union claimed a prosperity loading based on the company’s increased productivity and profitability. The Commission rejected the claim preferring a national approach to productivity rather than applying it to separate employers or industries appearing to regard the advocated approach as incompatible with the principles of comparative wage justice. Some confusion had subsequently arisen about the right of an industry or employers to plead incapacity to pay following some comments in that case regarding the perceived difficulties that would arise if individual employers were able to enter into arrangements outside of national wage cases. The right of employers to plead incapacity to pay was then reaffirmed in the *Engineering Oil Industry Case* (supra).
13. In June 1983 a Full Bench heard an application in the *Pastoral Industry Award 1965* ((1983) AILR ¶307) that the second instalment of the metal industry

standard by way of a mid-term \$14.00 per week adjustment be deferred on the basis of the state of the pastoral industry. The Commission found:

- (a) There was no dispute between the parties regarding the right of an industry or employer to plead incapacity to meet a specific claim, even where there were general increases in line with national economic capacity (p.565);
- (b) Where a National Wage Increase occurs, employers have the onus of rejecting the application in a particular industry or enterprise (p.566);
- (c) The Full Bench contrasted this application with that made in the food preserving industry before Justice Maddern (Print F1239) noting that in that case he was able to consider individual employers while in the present application there were some 10000 operating units covered by the award in various locations and of varying types, size, operation and profitability. The Commission stated (p.566) : *“The approach to incapacity to pay in such an industry must necessarily be different from that where there are a small number of operating units. Each case must be looked at on its own merits.”*
- (d) That there must be a stringent approach to any consideration of incapacity (p.566) citing the *Musicians Hotels Award Case* ((1983) 289 CAR 351); *“‘An argument based on industry or establishment incapacity to pay a wage increase, which is otherwise warranted, or an argument based on industry or establishment disemployment if the increase is awarded, requires oral and/or documentary evidence capable of analysis and evaluation.’ It is, moreover, important to distinguish incapacity to pay from an unfavourable economic environment. For example, in the Journalists case ((1983)288 CAR 356) the Full Bench observed that although the material indicated that newspaper publishers like other employers were feeling the effects of the economic situation, the information ‘does not demonstrate that the granting of the claim would seriously affect the public interest or the national levels of employment and inflation.’ (our underlining).*
- (e) The employer submission (p.567) was; *“Given then the clearly demonstrated incapacity to pay in the pastoral industry, ..., they said that the task of the Commission was to distribute the burden of that incapacity between employers and employees in accordance with equity, good*

conscience and the substantial merits of the case. *The increase of \$22 granted by Mr Commissioner McKenzie was clearly more than might have been thought appropriate in the context of a claim for \$39 increase but it had been accepted by the employers as their share of the burden.*” (our underlining).

(f) The parlous condition of the industry based particularly on material prepared by the Bureau of Agricultural Economics justified a deferral for further consideration in six months (p.569); “... *There are indications for a better outlook for the industry, with the recent rains which have markedly improved pastures and the prospects for grain crops, devaluation of the Australian dollar and signs of some improvement in world economies. Accordingly, we propose not to reject the claim but to defer further consideration of it for six months from the date of our decision.*”

14. It is clear from a consideration of the cases and approach of the Commission in the cases referred to that the following principles applied in relation to incapacity to pay cases in an environment where national wage case increases were being granted but not as part of the centralised and regulated framework that was to follow shortly after the *Pastoral Industry Case*. The principles were that:

- Incapacity to pay could be argued by an employer or industry;
- Such an application would be heard in accordance with equity, good conscience and the substantial merits of the case;
- Where such an application was made by an industry oral and/or documentary evidence capable of analysis and evaluation must be provided;
- Incapacity should be distinguished from an unfavourable operating environment being experienced alike by the employer or industry applying and other employers;
- The burden of incapacity should be distributed between employers and employees in an industry and the task of the Commission was to determine how that should occur.

Centralised Wage Fixation – The National Wage Case 1983

15. This case (Print F2900, (1983) 4 IR) was determined under the 1904 Act in an environment that had been preceded by a wage pause on 23 December 1982 in response to the most serious economic situation to be facing the Australian economy since the 1930s. The situation had arisen from the combined effect of a prolonged and significant world economic recession, a serious drought and a substantial increase in labour costs. The Federal Government and all State Governments supported a return to a centralised system. A Statement of Accord (“Accord”) between the Australian Labor Party (“ALP”) and the ACTU had been announced in February 1983 and had featured in the subsequent election that resulted in the ALP being elected to Government in March 1983. The 1983 National Wage Case was preceded by a President’s Conference at which there was general agreement between all parties of the desirability to return to centralised wage fixation. Against that background the National Wage Bench was required to consider the nature of the system of wage adjustment that should be adopted. It stated (p.14): *“The Commission has noted in the past that in the Australian industrial context, centralisation or decentralisation is a matter of degree. The wage fixing arrangements before 1975 were less centralised than those which prevailed from 1975 – 1981. The special feature of the latter period is that the whole area of wage fixing was subject to a coherent set of principles under which national wage adjustments were the predominant source of pay increases. The consensus referred to above is for a centralised system of this highly structured type. This is the sense in which we use the term centralised system. Our task is to decide whether there should be a return to a centralised system, the principles on which such a system should operate and the time for it to come into operation.”*(our underlining).

16. The Commission determined that it was in the public interest that a centralised system of wage fixation based prima facie on full indexation should operate on the basis that it would review the system at the end of two years. In so deciding it noted that for full indexation to be sustainable economically and industrially, a number of requirements must be met including that increases outside national wage increases must constitute a very small addition to

overall labour costs (p.19). On that basis the Commission decided to require undertakings from unions on an award by award basis that they would not seek increases outside the wage fixing principles. The ACTU sought in turn that employers be denied any opportunity to be excluded from national wage adjustments. In dealing with this aspect of the matter the Commission stated (p.21): *“While we would not debar argument being advanced on economic incapacity we would emphasise not only the long established principle of wage fixation that those seeking to argue incapacity must present a strong case, but also that the fundamental basis of a centralised system is uniformity and consistency of treatment. In particular in cases involving the adjustment of rates in line with national wage decisions the Commission should not refuse an increase except in extreme circumstances.”*

17. It is in this first enunciation and consideration of incapacity to pay in the context of a centralised system of wage fixation that is to be highly regulated that the Commission first moved beyond the tests that had applied to incapacity to pay cases in the past. In the context of centralised wage fixation where increases outside national wage cases were strictly controlled, that the conditions attaching to such a case were established. On that occasion no specific principle applying to incapacity to pay was included in the principles. Instead, the Commission formulated principles that were in essence consistent with those terms of the Accord relating to wage fixation (p.24j).

18. The 1983 National Wage Case principles were reviewed in 1986. The National Wage Case June 1986 ((1986) 14 IR 187) considered whether centralised wage fixation should be continued as the basis for fixing wages and conditions of employment. The Commission concluded (p.189) that it should be continued as it provided the best prospect for maximum labour cost restraint and industrial stability which were both required for economic recovery.

19. In response to a submission by some employer parties for a return to a more decentralised system of wage fixation the Commission rejected it (p.190): *“The perceived advantages of a decentralised system so eloquently argued by its proponents on the basis of the experience of selected countries, is illusory and at best transient in the context of the current Australian labour market. This is so clearly exposed in the experiences of the late 1960s and early 1970s*

and more recently during 1981/82, that it is surprising that the proponents of decentralisation should continue to ignore the lessons of history and their underlying institutional basis. Despite the submission of CAI and other employers suggesting that the experiences of 1981/82 would not be repeated in the current environment, we believe that substantial evidence exists of the likelihood of a wage break-out in some sectors if we abandoned the centralised system. This would have inevitable consequences on other sectors of industry. We are not prepared to take the risk at this difficult time for the economy especially as the system has worked reasonably well since 1983. It is easily forgotten that our legal power extends only to fixing award rates and conditions, and that in the absence of the kind of strictures contained in the Principles, the 'labour market' by overawards may be expected to raise the standards of pay and conditions above those which would prevail within the Principles, with damaging effects on the economy. We see our task under the centralised system as avoiding such an outcome." The basis of the system within which the issue of a centralised system was being debated was considerably different to that currently established by the Act.

- 20.** The principle that was eventually introduced in the 1986 National Wage Case was foreshadowed by the Commission in the *Pastoral Industry Award 1965* (Print G1298) in December 1985 where it considered an application alleging incapacity to pay and stated at p.3; *"The September 1983 National Wage Decision stated ...' that in cases involving the adjustment of rates in line with National Wage Decisions the Commission should not refuse an increase except in extreme circumstances'. It was common ground that the employers had the onus of demonstrating extreme circumstances warranting a refusal to flow to the pastoral industry the increases granted in the April 1985 National Wage decision."*
- 21.** In the 1986 National Wage Case the Commission referred to the submissions of the employer groups regarding the inflexibility of the system established in 1983 in not considering economic incapacity of individual employers or industries (p.210). At pp.230 –232 the Commission dealt with the introduction of a new Principle 12 – Economic Incapacity, and in decided to introduce such a principle stated: *"In its decision of September 1983, the Commission referred to the ACTU's submission that: 'The thrust of a*

centralised system is to provide an orderly and rational system of wage fixation in which all groups are treated equally. To allow employers to opt out of that system and to deny the application of a centralised system to some section of the workforce would completely undermine the essential features of a centralised system. If, as the CAI suggests, the no extra claims provision does not apply to employers, it applies to no one. If employers are free to deny the centralised system on the grounds of incapacity, that is to pursue sectional claims, it follows that employees must be free to pursue their sectional claims in excess of increases arising out of that centralised system in cases where capacity for additional wage increases exists.’ (1983) 4IR at 443;291 CAR at 20). The Commission said in this connection: ‘We believe that the ACTU’s argument has considerable force. While we would not debar argument being advanced on economic incapacity we would emphasise not only the long established principle of wage fixation that those seeking to argue incapacity must present a strong case but also that the fundamental basis of a centralised system is uniformity and consistency of treatment. In particular in cases involving the adjustment of rates in line with national wage decisions the Commission should not refuse an increase except in extreme circumstances.’(1983) 4 IR at 443;291 CAR at 21.”

- 22.** The Commission then decided to introduce the incapacity to pay principle as Principle 12 to “dispel the popular fallacy about the rigidity of the centralised system.” It said (p.232): “*In the light of experience, we would expect a limited role only for the incapacity principle in relation to national wage increases, especially in view of the widespread existence of overaward payments in minimum rates awards.*” The principle then introduced was in the following terms (p.232): “Any respondent or group of respondents to an award may apply to reduce and/or postpone the application of a national wage increase or any other increase in labour costs determined under the Principles on the ground of very serious or extreme economic adversity. The merit of such application shall be determined in the light of the particular circumstances of each case and any material relating thereto shall be rigorously tested.” (our underlining). In essence, despite considerable changes to the basis of determination of wages and conditions of employment since 1986 and the circumstances in which those wages and conditions were determined (see for

example, p.233 Concluding Observations) the incapacity to pay principle has remained largely unchanged and subject to conditions that are no longer relevant or applicable.

- 23.** In 1986 the Commission considered an application under the incapacity to pay principle in the *Pastoral Industry (Wages and Allowances) Award 1985* (Print G5732) where it noted at p.6 that: “*We have no doubt that a significant downturn which has occurred in prices for our major exporting earners has had a serious effect, not only on the rural sector, but also on the whole Australian economy. However, this factor has already been considered in the National Wage Case proceedings and the conclusions reached in that case owed much to the clearly disastrous situation currently faced by the rural sector and the prospects for the future. In effect, the factors referred to have already had a significant impact on wages in other industries such as transport, distribution, fuel, chemical and storage industries or sectors; a matter of particular significance having regard to the significantly higher indirect labour cost in the rural industries than the direct labour cost.*” In the current case, the circumstances relating to the particular sector of the accommodation industry is not an area that is having a demonstrable impact on the economic material before the Commission. In any event, the group affected is discrete and facing difficulties that are directly referable to the Events and are thus in a situation that is clearly distinguishable from other groups and employers.
- 24.** The approach to wage fixation commenced in 1983 and endorsed in 1986 was further affirmed in 1989 when the Commission noted with concern the propensity of parties to seek avenues for circumventing the Principles. In the *National Wage Case 1989* ((1989) 30 IR 81 at 90) the Commission stated: “*We have particular concern about the wages drift which has increased in recent months. While annual growth in award rates remains below 5% average weekly earnings growth is currently running at just under 7%. ... This practice is contrary to both the spirit and purpose of the wage fixation principles and encourages workers to break the commitments to those principles made by their unions on their behalf.*” This decision was concerned with the application of the structural efficiency principle and the minimum rates adjustment. It maintained the requirement for unions to give no extra

claims commitments before being able to access the benefits of the National Wage Case decision. It also retained the incapacity to pay principle in its original form still operating within a framework of restraint in growth of wages and conditions.

- 25.** In March 1990 the Full Commission heard an argument based on economic incapacity in the *Pastoral Industry Award 1986* ([1990] 216 IR CommA). At p.9 of that decision the Commission noted that a strong case would need to be argued that would allow departure from the National Wage Case 1989 and that it required a demonstration of serious or extreme economic adversity. It noted that on 24 November 1996 a Full Bench had rejected a similar claim on the basis that; “.... *Nor are we able to identify any respondent or group of respondents whose existing or future employment requirements would be adversely affected by us granting the claim. Furthermore, we are satisfied that the marked diversity of experience in the industry sectors covered by the Award ... makes it inappropriate to exempt all sectors of the rural industries covered by The Pastoral Industry (Wages and Allowances) Award 1985 and/or all respondents to that Award from the National Wage Case decision of 26 June 1986. As no realistic alternative is available, having regard to the nature of the submissions made and the material presented, we therefore grant the increase in wages claimed.*” (our underlining) They then noted at p.10: “*In these proceedings there was no substantial challenge to the basic reasoning in that case and the employers did not press for a decision which distinguished between sectors of the industry and/or respondents to the award.*” (our underlining). This case demonstrates the significant shift in approach to incapacity to pay submissions that had occurred between 1983 and 1990. The fundamental reason for that shift was simply to preserve, insofar as it was able, the central tenets of and multi-party commitment to centralised wage fixation and the principles. In the current environment, the AHA and MIMAA submit that the approach developed during a period of highly regulated wage fixation where there was no independent capacity for parties to enter into arrangements external to the wage fixation principles, is no longer relevant to the current industrial relations framework.
- 26.** The approach of the Commission to incapacity to pay continued consistently with the cases referred to. In 1993 Commissioner Oldmeadow noted in a

decision addressing an incapacity to pay claim made in the *Pastoral Industry Award 1986* ([1993] 461 IR CommA) at p.11 that: “*It is well established that application of the incapacity to pay principle requires that there be extreme circumstances and that material in support of the claim is available for rigorous testing. Further that the material in support of a claim must be capable of analysis and evaluation that is distinguishable from general arguments about an unfavourable economic environment. In my view in addition to these considerations also of relevance is the observation of the National Wage Bench in the 1983 decision in respect of the application of the incapacity to pay principle.*” The Commissioner then referred to the Commission’s statement indicating that departure from a centralised wage fixation system where uniformity and consistency of treatment was a feature required a strong case demonstrating extreme circumstances before a wage increase should be refused.

Safety Net Reviews

27. In April 1997 the first Safety Net Review Decision was handed down. The Economic Incapacity principle remained unchanged from the previous National Wage Decisions ((1997) 71 IR 1 at p. 77) and was not reviewed until the following year in the *Safety Net Review April 1998 Decision* ((1998) 79 IR 37) when the Commission considered applications from the Joint Governments to modify the Economic Incapacity Principle (pp.86-88). In that case the Joint Governments proposed a ‘freeing up’ of the incapacity principle to ensure that safety net adjustments did not put jobs at risk. They included in their submission the introduction of an additional alternative of phasing-in increased labour costs. On that occasion the Commission rejected the ‘freeing up’ of the Economic Incapacity principle on the basis that it was inconsistent with the ‘safety net’ aspect of the award system. The Commission then amended the principle to provide that in very serious or extreme economic adversity the application of an increase in labour costs may be capable of being temporarily reduced, postponed or phased in. Other than introducing an additional remedy that might be sought the Commission did not modify the Economic Incapacity principle.

Legislative overview

28. Until 1988, National Wage Decisions were determined pursuant to the provisions of the 1904 Act. The Objects of that Act (section 2) made no reference to economic circumstances and employment levels, but referred to preventing and settling industrial disputes with the maximum of expedition and the minimum of legal form and technicality (s.2(c)) and the Commission was required to hear and determine matters before it according to equity, good conscience and the substantial merits of the case (s.40(1)(c)).

29. Amendments to the 1904 Act led to the enactment of the *Industrial Relations Act 1988* (“1988 Act”) came into operation on 1 March 1989. The Objects of the Act changed to include, *inter alia*, in s.3(b): “*The principal object of this Act is to provide a framework for the prevention and settlement of industrial disputes which promotes the economic prosperity and welfare of the people of Australia by: ... (b) providing the means for:*

- (i) establishing and maintaining an effective framework for protecting wages and conditions of employment through awards; and*
- (ii) ensuring that labour standards meet Australia’s international obligations;”*

The emphasis of the 1988 Act shifted the principal objects from preventing and settling disputes to, relevantly, the establishment and maintenance of a framework for the protection of wages and conditions of employment through awards. The “incapacity principle” continued unchanged through the period of operation of the 1988 Act. The procedure of the Commission remained the same in its application of the requirement to act according to equity, good conscience and the substantial merits of the case (s.110(2)(c)). The 1993 amendments to the 1988 Act changed the focus of the system in that centralised wage fixing had an important role, but one that was increasingly subordinated to enterprise bargaining.

30. On 31 December 1996 the *Workplace Relations Act and Other Legislation Amendment Act 1996* commenced operation. It introduced substantial changes to the matters that the Commission is required to take into account when exercising jurisdiction under the *Workplace Relations Act 1996* (“Act”). In

particular it introduced a requirement that the Commission exercise its powers in a way that promoted the economic prosperity and welfare of the people of Australia by providing in s.3(a), *inter alia*; “*encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market;*”. Section 88B was also introduced to Part VIB and relevantly requires the Commission to take into account the desirability of attaining a high level of employment (s.88B(2)(b)), and the public interest (s.90).

31. The Commission’s procedures are also set out in Part VI. Section 98A requires the Commission to perform its functions in a way that avoid unnecessary technicalities and facilitates the fair and practical conduct of any proceedings while s.110 establishes the procedure of the Commission in the following terms:

“(1) Where the Commission is dealing with an industrial dispute, it shall, in such manner as it considers appropriate, carefully and quickly inquire into and investigate the industrial dispute and all matters affecting the merits, and right settlement, of the industrial dispute.

(2) In the hearing and determination of an industrial dispute or in any other proceedings before the Commission:

- (a) the procedure of the Commission is, subject to this Act and the Rules of the Commission, within the discretion of the Commission;*
- (b) the Commission is not bound to act in a formal manner and is not bound by any rules of evidence, but may inform itself on any matter in such manner as it considers just; and*
- (c) the Commission shall act according to equity, good conscience and the substantial merits of the case, without regard to technicalities and legal forms.”(our underlining)*

Interaction of the Incapacity Principle and the Commission’s Powers

32. The Incapacity Principle in its current form provides in part: “*Any respondent or group of respondents to an award may apply to, temporarily or otherwise, reduce, postpone and /or phase-in the application of any increase in labour costs determined under this Statement of Principles on the ground of very*

serious or extreme economic adversity. The merit of such application will be determined in the light of the particular circumstances of each case and any material relating thereto shall be rigorously tested.”

- 33.** The onus of proof required of parties to matters before the Commission is the balance of probabilities. There is no basis for imposing a greater onus of proof. The balance of proof required by the Incapacity Principle is that the case must be “rigorously tested.” This is a fundamental error of law. It applies a higher onus of proof than that required of an applicant for an increase in wages where the applicant for change who bears the burden of establishing the merits of the case is not required to submit evidence and material on the basis that it will be rigorously tested. It is only required to submit evidence and material that satisfies the balance of probabilities, namely the normal onus to make out the claim. The effect of the test imposed by the Incapacity Principle is to in effect require an applicant to bear a persuasive burden approaching beyond reasonable doubt rather than on the balance of probabilities. It is also a significantly different test to that required of other applicants to the Commission. There is no basis at law or within the Act for applying differing standards to applicants to the Commission – a party can either make its case on the balance of probabilities according to equity good conscience and the substantial merits of the case or it cannot.
- 34.** To require a higher onus of proof than the balance of probabilities is not only an error of law but also denies the parties seeking to access such a principle a fair hearing as they are required to meet a higher standard than an applicant for change and gives rise to a perception of inherent bias in the application of the Incapacity Principle.
- 35.** The procedure of the Commission requires that it deal with matters in accordance with equity good conscience and the substantial merits of the case. The test imposed by the Incapacity Principle demonstrates that a party who may wish to argue that there are particular circumstances prevailing that differentiate it from the generalist case of a living wage hearing is placed in the circumstance where the Commission is seen to:
- (a) predetermine the merits of a matter without having heard evidence or material in relation to a particular claim;

- (b) place a higher burden of proof on an applicant pursuant to the Incapacity Principle than in any other proceedings under Part VI of the Act;
 - (c) act in a manner that is inconsistent with the Commission's powers and procedures in Part VI.
- 36.** The Commission is required to act in compliance with the principles of natural justice. That is not to suggest that an evidential burden of proof does not lie on an applicant alleging incapacity to pay when answering a claim for an increase in wages or conditions that has been made in a generalist fashion. However, the Commission's powers and functions do not extend to endorse a higher onus of proof on an applicant under the Incapacity Principle than any other applicant in proceedings before the Commission under Part VI of the Act. In practice however, the effect of the Incapacity Principle has been to place a more rigorous test and set of criteria on an applicant that the Act contemplates.
- 37.** The Incapacity Principle should be varied to allow applications to be made in particular circumstances by respondents or groups of respondents on the basis that they have to make out a claim on the balance of probabilities and in circumstances where the language of the Principle does not demonstrate on its face an apparent predetermination of the application. To adopt such an approach is consistent with the approach of the Commission prior to 1983 when such applications were made and granted, albeit rarely, but on the basis of the procedures of the Commission that the matters were heard in accordance with equity good conscience and the substantial merits of the case.
- 38.** Such a departure from past practice is appropriate as the original Incapacity Principle was formulated in circumstances that differ substantially from those applicable under the Act. Firstly, it was formulated in circumstances where unions were required to individually commit to the Principles of Wage Fixation prior to accessing National Wage Increases and employers were limited in their capacity to obtain exemptions from that system. No comment is made regarding the legal standing of such an arrangement. Suffice it to say that it operated effectively for nearly a decade. Secondly, the Objects of the 1904 Act and its framework differ substantially from the current Act. Thirdly, the Principles of Wage Fixation underpinned a highly centralised system of wage fixation with limited capacity for agreements external to that system

while the current system encourages decentralisation and the Objects of the Act are focussed on the development of agreements at the workplace level.

- 39.** In considering applications made for living wage adjustments the Commission is required to consider such applications taking into account the Objects of Part VI (s.88B) and the public interest (s.90). Those matters may differ substantially in their application to a respondent or group of respondents. This difference was recognised in the *Pastoral Industry Award 1965* (Print F2458 supra) by the Full Bench at p. 565 where it stated: *“There was no dispute between the parties regarding the right of an industry or an employer to plead incapacity to meet a specific claim, even where there were general increases in line with national economic capacity. The CAI and the employers conceded that where a National Wage increase occurs, employers would have the onus of rejecting application in a particular industry or enterprise.”*
- 40.** Thus, if an application is to be made on the basis of incapacity the principle should not impose a benchmark above that contained in the Act. Consistent with the Full Bench decision, while there is an onus of proof on an employer or group of employers to reject application of a living wage case increase the Incapacity Principle should not limit those matters that may be the subject of an application to serious or extreme economic adversity. Sections 88B(2) and 90 do not set that standard for determining the applicability of a wage increase. They require a balancing of considerations that may be competing to a greater or lesser extent. However, in the case of a respondent or group of respondents they, as an applicant for a living wage case increase is, should only be required to demonstrate that those considerations the Commission is required to take into account do not balance in favour of the application of a living wage case increase in the particular circumstances of a respondent or group of respondents.
- 41.** In some case a respondent or group of respondents may identify an adverse impact on levels of employment or the compromise of the attainment of high levels of employment as an effect of the application of a living wage increase in their particular circumstances rather than a direct economic impact. It is a matter of fact and degree in the particular circumstances of each case. The current wording of the Incapacity Principle places the consequence of a living

wage case adjustment at prohibitive level. It is also prejudicial to an applicant that is a publicly listed company.

- 42.** For example, for a publicly listed company to complain of serious or extreme adverse economic adversity raises the issue of its interaction with obligations to inform the Australian Securities and Investments Commission of economic adversity with potentially serious consequences for share price. The language of the Incapacity Principle is prohibitive of a genuine claim for rejection of the application of a living wage adjustment as it implies economic consequences to the viability of a business that may be highly prejudicial to its commercial interests. Indeed the language of the principle operates as a deterrent to a commercial interest being prepared to consider an application even where it might otherwise be justified because of the inevitable commercial risks that arise and are exacerbated where a public perception develops of a commercial enterprise in difficulty. The most recent and obvious examples of this are Ansett, HIH and OneTel each of which was clearly in commercial difficulty for a period of time prior to collapse but in no case was an application made to the Commission for relief.
- 43.** The Incapacity Principle should be recognised in its terms that such applications can be made and proved on the balance of probabilities in accordance with the procedures of the Commission. Its current terms are prohibitive and prejudicial and do not reflect the powers and procedures of the Commission established by the Act. Further, as was recognised in the *Pastoral Industry Case 1965 (supra)* the burden of establishing that application of a living wage case should be rejected in relation to a respondent or group of respondents falls on the party seeking to establish the claim. In such circumstances, there is no evidence based on the historical data in relation to incapacity to pay claims that substantiates any argument that an Incapacity Principle in the terms suggested will lead to a greater number of exemptions from the application of living wage increases.
- 44.** The Incapacity Principle also applies to two different classes of circumstances and attempts to apply the same test to both. In its terms it provides for firstly, a permanent reduction or postponement of an increase and secondly, a temporary postponement or a phase-in. These are quite separate and distinct outcomes and confirm the earlier submission that the Principle should

recognise that the particular relief sought and the circumstances of each case should determine the outcome based on the balance of probabilities and determined be equity good conscience and the substantial merits of the case. This is consistent with authority already referred to that each case must be looked at on its own merits. It is also consistent with the approach of the Commission to stand-downs in the Ansett matter where in what were clearly serious and adverse economic circumstances employees were stood down without pay or converted from full-time to part-time employment for periods of up to 5 ½ months.

SUMMARY OF AHA POSITION REGARDING AN APPLICATION TO BE MADE UNDER THE INCAPACITY TO PAY PRINCIPLE

45. Subsequent to the hearing of the Living Wage Case and the submissions in relation to a review of the Incapacity to Pay Principle referred to earlier in this submission, the AHA and MIMAA will make application on behalf of a group of respondents to *The Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998* (“Award”) for a deferral of any increase determined by the Commission to be available as a safety net adjustment for a period of six months from the date of operation otherwise granted in relation to the Award.
46. The AHA and MIMAA accept that they have the onus of proof for the rejection of the application of the living wage increase. The application will be made in relation to a section of the industry only. It will be limited to those accommodation establishments designated as four and five star by the AAA Guide who are members of either of the AHA and MIMAA and whose businesses are located in Sydney, Melbourne, Brisbane, Adelaide, Perth, Darwin and Hobart and the following resorts and or regions being the State of Tasmania, island resorts previously provided with transport services by Ansett Airlines, Alice Springs, Uluru, Whitsundays, Cairns, Townsville and Broome.
47. The grounds of such application are:
 - (a) Four and five star hotels are heavily reliant on inbound tourism, domestic and business, for the maintenance of employment levels in the industry.

- (b) A significant percentage of employees in these establishments are employed as casual employees.
- (c) The effect of the Events led to an immediate downturn in the levels of business for these establishments both at a domestic and inbound travel level. There has been little improvement in the levels of business since the Events.
- (d) The failure of Ansett Airlines occurring with the withdrawal from purchase by the Tesna consortium of 27 February 2002 is a factor in the ongoing downturn and consequent effect on levels of occupancy and therefore employment in this section of the industry;
- (e) These establishments rely upon the regular and consistent inflow of inbound travellers and the supply of reliable aviation transport services for the maintenance of occupancy rates at a level that sustains employment and maintains profitability;
- (f) The failure of Ansett Airlines to be re-established as a viable airline with reliable international aviation carrier links compromises the capacity to these establishments to rebuild their business base to the levels applicable prior to the Events.
- (g) These establishments have commercial arrangements with tour operators and similar businesses for the provision of “package” arrangements for travellers and referral of business. The collapse of the “Star Alliance” network in Australia has led to the market for referral of business to these establishments being substantially reduced.
- (h) These establishments also rely on the business of international conference delegates and business travellers generally. Numbers of international delegates have reduced substantially as international travel has been impacted by the event of 11 September 2001 and the partial failure of reliable aviation services with the collapse of Ansett. Numbers of business travellers have reduced substantially due to reduced airline capacity and the event of 11 September 2001.

48. On 20 September 2001 the Prime Minister established the Tourism Industry Working Group (TIWG) to assess the impact on the tourism sector of the collapse of Ansett Airlines and of the terrorist attacks in the United States of

America. It reported on 19 October 2001. TIWG undertook the following research:

1. A survey of tourism businesses throughout Australia (Millward Brown);
2. An economic impact on the Australian economy (Econtech);
3. Consultations with more than 1000 members of the industry in regional areas of significance to tourism.

TIWG found that approximately half of the 5000 tourism businesses involved in the surveys had experienced a sharp decline of approximately 10% of revenue and that was predicted to continue for the medium term with an anticipated recovery for the industry generally over a period of approximately two years. At p. 24 of its *Report on the Implications of the Ansett Collapse and US Terrorist Attacks for Australia's Tourism Industry* (The Report is available at <http://www.tourism.gov.au>) it found: *"In general, larger businesses – those with 4 or more employees and with turnover of \$1million or more – had significantly more cancellations than smaller businesses. ... Overall, Western Australia and Tasmania appear to be the States worst hit. However, metropolitan areas in most of the States were also more badly hit than the average. The larger businesses tend to be located in the metropolitan areas. The fall in leisure travel bookings particularly hit the Gold Coast, Alice Springs/Petermann (Uluru), Tropical North Queensland, Sunshine Coast and Whitsunday Islands regions."*

The total number of retrenchments as at 19 October 2001 had amounted to a net of 3% of staff (p.28) with the casual and part time areas of employment experiencing the greatest effect.

Evidence in relation to the Report will be provided together with a witness statement in accordance with directions of the Commission following the listing of an AHA/MIMAA application.

- 49.** The significance of the impact of the Events on regional Australia has been recognised in part by the significant contribution made by the Federal Government to the maintenance of regional aviation services following the Ansett collapse.
- 50.** On 21 September 2001, the Deputy Prime Minister and Minister for Transport and Regional Services the Hon John Anderson MP, announced that the

Federal Government would provide a \$3.5million loan to enable Ansett's Western Australian subsidiary, Skywest to begin operations again. A \$3million loan was announced on 24 September 2001 to be provided to the Administrator of Hazelton Airlines to help the airline resume its services. Similarly, on 25 September 2001, a \$3.5million loan was provided to the Administrator of Kendall Airlines.

- 51.** On 8 October 2001 the former Minister for Tourism the Hon Jackie Kelly MP announced a \$20million tourism assistance package to assist small and medium sized businesses affected by the collapse of Ansett. We understand this measure to have concluded.
- 52.** On 10 October 2001, Econtech Pty Ltd provided a report "*Economic Effects of the Recent Tourism-Related Events on the Tourism Sector and The Economy*" ("Econtech report") (The Econtech report is at www.tourism.gov.au) to the TIWG. The Econtech report noted that tourism accounts for about 6% of employment of which 18% is accommodation (p.4). On its modelling it predicted an overall loss in tourism revenue of 10% with little variation between the market segments (p.6). It noted (p.7) that employment had fallen in all three categories of employment; -2.2% (full-time), -4.4% (part-time), -9.8% (casual) (see also Chart 11 (p.16) and Chart 13 (p.19)). The Econtech report confirmed that it was likely that the effects of the Events would be temporary with full recovery over a period of approximately two years. The effect of the announcement by the Tesna consortium made on 27 February 2002 on this estimate is unknown at this stage.
- Evidence in relation to the Econtech report will be provided by Mr Chris Murphy Proprietor Econtech Pty. Ltd together with a witness statement in accordance with directions of the Commission following the listing of an AHA/MIMAA application.
- 53.** The conclusions of the Econtech report have been endorsed by the Centre of Policy Studies Monash University in an article published in the Australian Bulletin of Labour (Volume 27, No. 4, December 2001) in which the authors (Phillip D. Adams, Peter B. Dixon and Maureen T. Rimmer) consider the implications of the Terrorism attack on 11 September 2001. The article, *The September 11 Shock to Tourism and the Australian Economy from 2001-02 to 2003-04* ("Monash report") notes the following:

1. Australia's tourism exports are likely to reduce by approximately 15% relative to the level they would have reached absent the terrorist attacks (p.241). We note that the Monash report does not take into account the collapse of Ansett Airlines or the recent developments regarding the announcement by the Tesna consortium that it is not proceeding with the purchase of the Ansett business.
2. With the forecast downturn in international tourism aggregate employment will reduce by 0.3% or 27,000 jobs in the 2001 December quarter and even if international tourism demand gradually recovers, tourism businesses are likely to continue making downward adjustments until mid-2002 with a forecast trend towards recovery after that time (pp.241, 248.8,250.1-5).
3. In the heavily tourist-dependent regions such as Kakadu, Petermann (NT), Lord Howe Island and Snowy River (NSW), Port Douglas and Whitsunday (Qld), Kangaroo Island (SA); Cairns and Magnetic Island (Qld); Tasman Peninsula (Tas) and Christmas Island (Other Territories) employment losses of up to 10% are predicted (p.241).
4. At the macro level, the effects of the tourism downturn will be barely noticeable (pp.242 and 247).

It is intended to call one of the authors of the Monash report and further material will be provided in accordance with any directions of the Commission. The conclusion of the Monash report is significant in two respects. Firstly, it does not include reference to the collapse of Ansett Airlines and secondly it notes that there will be no significant macroeconomic consequences.

- 54.** In the case of the four and five star establishments the subject of an application for deferral it is significant that the considerations that might have been included in a general consideration of the merits of a living wage claim are not recognised in the Monash report as having any significance in such a claim. The same report acknowledges the significant micro-economic impact of the September 11 event. The application by AHA and MIMAA is directed to

those areas within the industry affected where the effect has been significant and is ongoing.

- 55.** The Australian Tourism Commission in its Global Tourism Barometer notes that for the month of December 2001 there was a 10.7% reduction in arrivals when compared to the same period in 2000 (Source <http://atc.australia.com>) with an overall decrease for the 2001 year of 2.6% the first reduction in arrivals numbers since the Asian Economic Crisis (Research and Statistics).
- 56.** It is intended to call Mr Ken Boundy, Managing Director of the Australian Tourism Commission to provide information in relation to the current circumstances facing the tourism industry generally.
- 57.** It is also intended to call Mr Darryl Washington General Manager, Victorian Accommodation Division of the AHA to provide information in relation to the current circumstances facing Four and Five Star rated hotels generally. Mr. Andrew Burns, Chairman of the Australian Tourism Export Council will be called to give evidence regarding the impact of the Events on tourism in Australia.
- 58.** There is sufficient material to demonstrate that an application can be made under the Incapacity Principle in relation to four and five star establishments as defined for deferral of a living wage increase for a period of six months and that the circumstances of these establishments will not have been reflected in the considerations of the Commission in relation to the macroeconomic aspects of the living wage case.
- 59.** Subsequent to the Commission's review of the Incapacity Principle and conclusions in relation to it, the AHA and MIMAA are able to proceed to have the application in relation to four and five star establishments as defined heard and determined at short notice.

Dated the 1st day of March 2002.

EMA Legal
Per: Susan Zeitz
Solicitors for Australian Hotels Association
And the Motor Inn, Motel and Accommodation Association
Level 3
175 Flinders Lane
Melbourne Vic 3000
Ph. (03) 9650 7381

Fax. (03) 9650 5300