

3. VARIATION OF WAGES AND ALLOWANCES

3.1 INTRODUCTION

- 3.1 Combined with the issue of the operative date, and indivisible from it, is the mechanics of varying awards, and the practicalities of the alternative approaches proposed by the ACTU and ACCI.
- 3.2 ACCI submits that considerations of practicality in the variation of awards, and in particular ensuring awards are varied accurately in the wake of the 2006 AFPC decision support the approach to varying awards we commend to the commission.
- 3.3 This wage and allowance review is as much about practicality and properly managing the business of the Commission in applying a 2006 wage and allowance increase as it is about the level of increase or the operative date.
- 3.4 If we stop to consider what is being asked of the Commission, how award wages and allowances are actually varied, and some of the issues raised in 2006, we see that the course proposed by ACCI is the right one.
- 3.5 ACCI's proposed approach offers the best assistance to the Commission in managing the variation of its awards, and in managing the variation of the hundreds of applications before the AFPC.

3.2 RELEVANCE TO PRINCIPAL ISSUE IN THIS MATTER

- 3.6 The practical considerations raised in this section are directly relevant to the determination of how awards are to be varied to give effect to the 2006 AFPC decision.
- 3.7 Awards need to be varied individually, and orders properly settled for each award, to address precisely the type of practical considerations outlined in this section. This section shows that the variation of awards is not so straightforward that a standardised date of effect could be applied. It shows that the ACTU approach is impractical and fraught with dangers.

3.3 PREVALENCE OF ERRORS / HARD CASES

- 3.8 It is a matter of industrial experience and record that errors are made in applications to vary awards, year in and year out. Whilst for some awards wage and allowance arrangements are comparatively straightforward, for many awards there are complexities, embedded calculations, pitfalls etc which must be correctly negotiated.
- 3.9 We all know as industrial practitioners that each year's safety net increases experience difficulties in the settlement of orders, relating to issues such as calculation, transcription, rounding, complex formulae etc. These are picked up in exchanges between parties, are picked up by members of the Commission and their associates, and in the worst case scenarios are picked up in correction orders.
- 3.10 Feedback from ACCI members is that there is considerable scope for errors to be made from both sides in relation to award wage and allowance calculations – and this is more regular than may be observable from formal decisions of the Commission (with most issues dealt with by discussion and with the assistance of the Commission prior to the variation of awards).
- 3.11 This is not a criticism of any party, nor of the award system. Errors are inevitable in the complex award wage system we operate in – the point is that they need to be picked up in any award variation process.
- 3.12 This is the basis of the established approach of this Commission which ACCI supports in this matter. Awards are varied individually, rather than on a general order basis, to ensure they are varied correctly and accurately. We know this process is relevant and works because errors are picked up and dealt with year in and year out.

3.3.1 An example

3.13 An example of the difficulties that can arise from the variation of complex instruments in an adversarial context is illustrated by the following example from 2004¹.

PN22

THE SENIOR DEPUTY PRESIDENT: Could you all have a look at the level 4 Professional Engineer classification please where the annual salary is to be 52,826. My associate, who never makes a mistake, added \$988 to the award rate of \$51,858 and came up with \$52,846; is that right? Or has she made a mistake?

PN23

MR BUTLER: I haven't got my calculator here but - - -

PN24

THE SENIOR DEPUTY PRESIDENT: Try the old fashioned way, Mr Butler. I will give you a moment.

PN25

MR BUTLER: Your Honour, could I just ask what was the current rate?

PN26

THE SENIOR DEPUTY PRESIDENT: 51,858 I am told. I don't have it in front of me. I am sure she checked.

PN27

MR BUTLER: Yes, I will have to concur with your associate, your Honour.

PN28

THE SENIOR DEPUTY PRESIDENT: Are you short-changing your members by \$20 a year.

PN29

MR BUTLER: Yes, yes, it is an indictment on myself personally, yes.

PN30

THE SENIOR DEPUTY PRESIDENT: You had better off her a job, Mr Butler. Do the employers agree with the calculation, do you?

PN31

MR MORLEY: I agree with the calculations, your Honour.

¹ Transcript, Senior Deputy President Kaufman, C2004/3562, Technical Services Professional Engineers (General Industries) Award 1998, Section 113 application re Safety Net Review - Wages May 2004, 29 June 2004, <http://www.airc.gov.au/documents/Transcripts/290604c20043562.htm>

PN32

MS PASCALIS: Yes.

PN33

THE SENIOR DEPUTY PRESIDENT: Yes. So we will make the level 4 Professional Engineer 52,846, shall we? If I don't hear any dissent, the award will be varied in the terms of exhibit APESMA2 save that the rate for the level 4 Professional Engineer will be 52,846. It will operate from 3 July 2004. Thank you, adjourn the Commission.

- 3.14 The point of raising this is that it illustrates the daily work of the Commission (both members and associates) and parties in cooperatively quality checking orders to ensure award wages and allowances are properly varied. These are the difficulties that arise every day in relation to varying awards, and the Commission has evolved an efficient process for dealing with them.
- 3.15 ACCI asks nothing more than a process in the wake of the 2006 AFPC decision that maintains this approach, and allows for the proper, prospective variation of all awards of the Commission.

3.3.2 Hard Cases

- 3.16 Some award rates and allowances may be comparatively straightforward, although even the apparently simplest cases require checking and errors are made in relation to even comparatively straightforward wages tables.
- 3.17 There are however quite complex wages scales in a quite a number of AIRC awards, and quite complex allowances calculations. This includes:
- a. Rates adjusted to reflect particular patterns or types of work.
 - b. Casual, hourly and other rates which are derived using embedded formulae not apparent from reading the award.
 - c. Piecerates, derived using calculations not apparent from reading the award.
 - d. Annualised salaries.
- 3.18 The complexity required to uprate these awards means errors are more likely and the application of increase is more complex than in many other cases. This favours the ACCI approach of examining each award individually and allowing a proper opportunity to vary awards accurately.

This includes a proper opportunity to work with the expert and experienced members of the Commission familiar with each industry (which is the *raison d'être* for the panel system).

- 3.19 Once again, this is not a recipe for deliberately delaying the variation of awards. The system (in particular parties and the Commission using the panel structure) has proven itself quite capable of varying awards even in these hard cases quite expeditiously using an application based, award by award variation approach.

3.3.3 ACTU Acknowledges Complexity

- 3.20 The ACTU acknowledges scope for uncertainty and confusion and (presumably) the importance of avoiding this². However, the ACTU course in this matter would deliver an unacceptable level of complexity and uncertainty, at odds with sound administration of the safety net under the *Workplace Relations Act 1996*.

- 3.21 The only course which can avoid the complexity and uncertainty the ACTU acknowledges is a genuine concern is that proposed by ACCI.

3.4 CENTRAL GUIDANCE IS NEEDED ON CALCULATIONS

- 3.22 It is simple enough to find that the AFPC decision (\$27 and \$22) should be given effect to at the headline level. There are however key questions and matters of detail raised by the application of increases to awards which then need to be tackled.

- 3.23 The relevance of these matters is twofold:

- a. They favour ACCI's proposed course over that of the ACTU. Calculation is not blindingly straightforward, and the chance to address the variation of awards at the individual award level provides the essential avenue for members of the commission and parties to ensure these issues are resolved correctly.

² ACTU Submission, *2006 Wages and Allowances Review*, ¶41, p.22

- b. This bench needs to know about these issues and perhaps address them in its decision – regardless of the approach taken to varying awards.

3.4.1 Hourly Increases

- 3.24 There is an added complication this year in that the basis for calculation has changed from weekly increases to hourly based formulae. ACCI submits that this creates even more scope for error in the variation of individual awards in 2006 than in preceding years – which further mitigates in favour of the status quo approach to the variation of awards (based on individual variations) advocated by ACCI.
- 3.25 ACCI understands the correct approach under the AFPC decision to be as follows:
- a. Step 1: Take the pre-reform weekly wage rate.
 - b. Step 2: Divide by the hourly divisor under the award (generally 38 hours).
 - c. Step 3: Add \$0.72 or \$0.58 per hour in accordance with Item C of the AFPC decision³.
 - d. Step 4: Round up to the nearest cent using the formula in Item E of the AFPC decision⁴.
 - e. Step 5: To reincorporate into an award pay table on a weekly basis, multiply by the award's hourly divisor (generally 38 hours).
- 3.26 Looking at the example of the C14 classification in the Metal Industry Award⁵
- a. Step 1: Take the pre-reform weekly wage rate. = **\$484.40 per week**
 - b. Step 2: Divide by the hourly divisor under the award (generally 38 hours). = **\$12.7474 per hour**

³ AFPC 2006 Decision, 26 October 2006, p.20

⁴ AFPC 2006 Decision, 26 October 2006, p.22

⁵ See p.9 of the ACTU Submission, Table 1.

- c. Step 3: Add \$0.72 or \$0.58 per hour in accordance with Item C of the AFPC decision⁶. = **\$13.4674 per hour**
- d. Step 4: Round up to the nearest cent using the formula in Item E of the AFPC decision⁷. = **\$13.47 per hour**
- e. Step 5: To reincorporate into an award pay table on a weekly basis, multiply by the award's hourly divisor (generally 38 hours). = **\$511.76 per week**

3.27 A particular issue is rounding, and at what point award increases are rounded. It can be seen from the above example that this is terribly easy to get wrong. The reversions to and from hourly rates are also very complex and potentially confusing. Discrepancies can rapidly emerge which need to be resolved.

3.28 This is precisely the level of complication which leads ACCI to support the status quo process inherited from the AIRC's safety net system of varying each award individually. Individual proceedings will allow parties to jointly check the variation of awards and access the assistance of the Commission.

3.29 The ACTU process also allows this bench to provide central guidance to individual members and parties for the variation of each award. This bench can address these calculation matters and guide the variation of particular awards under the model ACCI advocates.

3.30 This is particularly important in 2006 as the system has changes in important regards with the new AFPC decision.

3.4.2 Rounding

3.31 Another issue raised by rounding is the former practice of this Commission is handing down weekly increases rounded to the nearest 10 cents. Despite the active representations of ACCI, the AFPC declined to continue this approach and reverted to single cent amounts on both a weekly and hourly basis.

⁶ AFPC 2006 Decision, 26 October 2006, p.20

⁷ AFPC 2006 Decision, 26 October 2006, p.22

- 3.32 This is now a material part of the AFPC decision and must be given effect to in the variation of individual awards using the formula outlined above. The ACTU's approach on p.9 of its submission (Table 1) has it right in regard to this issue, with the weekly rates now ending in 4 cent amounts.
- 3.33 However, ACCI understands that some union applicants have attempted a final rounding of their proposed level of increase up to the next ten cent increment. Some applicants have erroneously rendered the weekly rates to amounts ending in 10 cent increments (i.e. the pre-2006 approach which would have been valid prior to the AFPC decision).
- 3.34 This would be a double rounding and would be inconsistent with the AFPC decision. It is not an accurate approach and to the extent it has been sought in draft orders, they are wrong and need to be revised.
- 3.35 This of course supports the general approach sought by ACCI. This is precisely the type of error which is unavoidable in the current matter (and the flow of union applications), and which can best be resolved in properly settling orders for each award.

3.4.3 Annualised Increases

- 3.36 There are also complications for annualised salary calculations in awards. Formulae are needed to annualise weekly salaries into annual amounts, which are often either inherently complex, or not actually included in the text of awards.
- 3.37 Annualised wage arrangements need to be particularly carefully checked. The above example from the variation of the professional engineers award illustrates that even in a year in which the increase was in simple dollar terms, errors could be made.
- 3.38 There is also an added complication in 2006, with the AFPC converting its increases into an hourly basis. This has to be factored back up to an annualised increase.

3.4.4 Juniors, Apprentices etc

- 3.39 Nothing has been said to date in this matter about the variation of subsidiary and derived rates for juniors, apprentices, casuals etc. In some

cases clear formulae appear in an award, however in many others the approach is less clear.

- 3.40 Again, there is considerable scope for errors both of application and of calculation with such rates. They add a level of complexity to the determination of award wage arrangements which supports a proper chance for orders to be finalised prior to coming into effect (i.e. the ACCI approach).

3.5 EXACTLY WHEN INCREASES APPLY

- 3.41 An unresolved issue in this case, is exactly when award wage and allowances increases should come into operation.
- 3.42 This Commission should retain its proven approach of many years in applying increases in wages and allowances on the basis of the first pay period commencing on or after a particular date set in the decision to vary each award.
- 3.43 This is a superior approach to commencing a pay or allowances increase from a particular hour of a particular day. It aids compliance and reduces confusion.
- 3.44 There would be considerable difficulties in pro rating increased allowances mid shift, and of varying wages for some hours and not others. This is the justification for the “first pay period commencing on or after” approach of this commission, and continues to be relevant.

3.6 ALLOWANCES

- 3.45 A consideration of the practicalities involved in the variation of allowances also favours the course proposed by ACCI.
- 3.46 It is only at the award level that the key classification can be determined according to Principle 5(d) of the 2005 Statement of Principles⁸. There is no *a priori* way to determine this, and the expertise and corporate knowledge necessary to ensure this is done accurately is best accessed by

⁸ Safety Net Review—Wages 7 June 2005, Decision [PR002005], p.124

the members of the Commission with a history of award responsibility under the panel structure.

- 3.47 There is a further complication in 2006 which also supports having some checks and balances on the calculation of allowance increases. Principle 5(d) is predicated on an weekly basis, but the AFPC increase is in fact an hourly one. Either the numerator in the equation provided for would be \$27.36, or it would be the hourly increase multiplied by the number of hours in the award. It is not clear what relevance this may have, but there are complications which should be examined in relation to the variation of allowances in particular awards.
- 3.48 The best way to resolve these issues is for allowances variations to be undertaken at the award level, based on applications, as has been the case in previous years.

3.7 TWELVE MONTH RULE – WAGES AND ALLOWANCES

- 3.49 A particular issue which is not taken into account in the ACTU proposal is ensuring that not less than 12 months elapses between increases in wages and allowances.
- 3.50 A period of not less than 12 months between increases is a quite fundamental tenet of the basis upon which previous increases in wages and allowances were granted. This should be continued.
- 3.51 ACCI's proposed approach would allow parties and the Commission to ensure that 12 months has elapsed between increases. The ACTU's blanket proposal for a 1 December 2006 operative date would preclude this being checked, and would (it appears) deliver increases less than 12 months apart.
- 3.52 There are three dimensions to this:
- a. Some award allowances were varied between 1 December 2005 and 26 March 2006. 12 months have not elapsed between increases as would have been required under the principles and should still be required in the increase of the safety net.
 - b. Other award allowances have been varied after 27 March 2006 (presumably in pre-reform awards) on the basis of CPI or other non-

wage based factors. This includes awards previously varied for the 2005 safety net increases. Care need to be taken that there is not an unmerited double counting or over increasing of allowances.

- c. Some award wages were varied between 1 December 2005 and 26 March 2006. 12 months have not elapsed between increases as would have been required under the principles and should still be required in the increase of the safety net.
 - i) ACCI has looked at the variations to awards for December 2005 to March 2006. Awards were being varied for safety net increases well into March 2006⁹ – which is only 9 months ago.

3.53 ACCI's proposed approach would ensure that parties can properly argue for a period of 12 months to elapse between increases.

3.7.1 Not more than annually, not required annually

3.54 The Full Bench has previously rejected the suggestion advanced union applicants in previous cases that the Statement of Principles requires that a Safety Net increase be granted every 12 months, rather, the Bench observed that *"there be at least 12 months between increases"*¹⁰

3.8 UNION COMMITMENTS – ABSORPTION

3.55 Principle 8(d) requires the following for the awarding of a safety net increase:

- (d) At the time when the award is to be varied to insert the safety net adjustment, each union party to the award will be required to give a specific commitment as to the absorption of the increase. In particular, the union commitments will involve the acceptance of absorption of the safety net adjustment to the extent of any equivalent amount in rates of pay which are above the wage rates prescribed in the award. Such above-award payments include wages payable pursuant to certified agreements, currently

⁹ **Australian Municipal, Administrative, Clerical and Services Union** - re Safety net review - wages June 2004 and the Safety net review - wages June 2005 decision - [PR970088](#) - 20 March 2006 - Cribb C, **Liquor, Hospitality and Miscellaneous Union** - re Safety net review - wages May 2004 decision and June 2005 decision - [PR970073](#) - 17 March 2006 - Foggo C, and **Finance Sector Union of Australia** - re Safety net review - 2002, 2003, 2004 and 2005 and Full Bench Decision August 2005 and Supported Wage - [PR967629](#) - 13 February 2006 - Lawler VP.

¹⁰ Ibid, at 21.

operating enterprise flexibility agreements, Australian workplace agreements, award variations to give effect to enterprise agreements and overaward arrangements. Absorption which is contrary to the terms of an agreement is not required.

- (e) The following clause must be inserted in the award:

"The rates of pay in this award include the arbitrated safety net adjustment payable under the Safety Net Review-Wages June 2005 decision [PR002005]. This arbitrated safety net adjustment may be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this award which are above the wage rates prescribed in the award. Such above-award payments include wages payable pursuant to certified agreements, currently operating enterprise flexibility agreements, Australian workplace agreements, award variations to give effect to enterprise agreements and overaward arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases made under previous National Wage Case principles or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated safety net adjustments."

- 3.56** This is an established part of the way this Commission has determined increases in wages and allowances will be applied to its awards. It has been part of the statement of principles for some years and reflects the established view of this body on the necessary pre-requisites for awards to be varied.
- 3.57** In supporting the retention of the statement of principles¹¹, the ACTU would appear at least in the broad to support retention of this threshold requirement for award variations. ACCI certainly continues to support the retention of these commitments on absorption prior to any increases to the safety net.
- 3.58** However, this consideration is not properly taken into account in the course sought by the ACTU. How are these essential commitments to be secured if there is a mass variation of awards from a standardised date of 1 December 2006?
- 3.59** The importance of these commitments and the continuance of them is a further factor in support of the course ACCI proposes for the variation of

awards. ACCI's application based approach, rather than general order/standard operative date approach (of the ACTU), will allow for these commitments to continue to be made. Our proposal is consistent with maintaining the established approaches of this Commission.

- 3.60 It cannot be assumed that this consideration is simply abandoned as a function of the issuing of the 2006 AFPC decision. It is for the ACTU as the proponent of a course other than the status quo to show either that this consideration can continue to be properly taken into account under its approach, or that these union commitments should no longer be required. Once again, it must be the ACTU as the applicant seeking to disturb the status quo which bears the onus to show that this should occur.
- 3.61 It is a little unclear what the ACTU is advocating in regard to these commitments. Applying a standard operative date of 1 December 2006 would appear to overturn the concept of union commitments, or at very least offer unions the whip hand in the variation of awards (with employers then facing the challenge of ensuring the variation of awards as close as possible to the date of increased obligations).
- 3.62 The ACTU should clarify its position in regard to these commitments in the application of wages and allowances increases from late 2006. If it believes these commitments should be removed or downgraded, it should make out a case for this to occur.

3.9 CATCH UP INCREASES

- 3.63 Section 218 of the *Workplace Relations Act 1996* relevantly provides that:

218 Adjustments to incorporate 2005 Safety Net Review

- (1) This section applies in relation to a preserved APCS if:
 - (a) the APCS is derived from a pre-reform federal wage instrument referred to in paragraph (a) of the definition of pre-reform federal wage instrument in section 178; and
 - (b) either:

¹¹ ACTU Submission, *Wages and Allowances Review 2006*, ¶5, p.5

- (i) in accordance with the Commission's wage fixing principles that applied at that time, the Commission (before the reform commencement) adjusted the instrument in accordance with the Commission's 2004 Safety Net Review decision; or
 - (ii) the instrument took effect after the Commission's 2004 Safety Net Review decision; and
 - (c) the Commission did not, before the reform commencement, adjust the instrument in accordance with the Commission's 2005 Safety Net Review decision.
- (2) The AFPC must adjust the rate provisions of the preserved APCS to increase rates in accordance with the Commission's 2005 Safety Net Review decision (if applicable), except to the extent that the AFPC is satisfied it is not appropriate to do so because of the effect of subsection 208(4).
- (3) The adjustment must be made as part of the first exercise of the powers of the AFPC under this Division.

3.64 As a consequence, the AFPC included the following in its initial decision:

- B.1 Pursuant to section 218 of the Act all rate provisions within a preserved Pay Scale derived from a pre-reform federal wage instrument that the AIRC did not, before 27 March 2006, adjust in accordance with the AIRC's 2005 Safety Net Review decision and that:
- were adjusted in accordance with the AIRC's 2004 Safety Net Review decision; or
 - were not adjusted in accordance with the AIRC's 2004 Safety Net Review decision but received a safety net adjustment during the 12 months to 27 March 2006 ; or
 - took effect after the AIRC's 2004 Safety Net Review decision, are, except for the rates specified in Section D below, increased by \$17 per week expressed as an hourly rate worked out in accordance with the applicable method set out in sub-regulation 7.5(2) of the Workplace Relations Regulations 2006.

3.65 A question for this bench is whether this is a material part of the AFPC decision for transitional awards and whether it should be included in any wages variations.

3.66 ACCI understands some union applicants have sought not just the \$27 and \$22 AFPC increases, but also the additional \$17 included in the 2006 AFPC decision for awards not varied for the 2005 safety net increase.

- 3.67 ACCI has no objections to any industry awards being up-rated for outstanding increases provided this is undertaken accurately, equitably and transparently. The best way to achieve this is continuing to employ the status quo, and in particular Principles 3 and 8 of the Commission's statement of principles.
- 3.68 This is indeed the only way to achieve this outcome. ACCI argues that this element of the AFPC decision does not constitute a wage setting decision for the purposes of Clause 8(3) of Schedule 6. It is of a different character – being an automatic flow on of outstanding increases under the statute. Clause 8(3) of Schedule 6 concerns those parts of the AFPC decision which are discretionary and determined, not those which are automatic under the Act.
- 3.69 Importantly, there is an issue of differential treatment between the 2006 AFPC increase and the \$17 from 2005. The AFPC rise has to be assessed on an hourly basis as outlined above. However, the 2005 decision was for a flat \$17 increase, and would need to be applied to any awards prior to the calculations for the 2006 AFPC based increases.
- 3.70 This is precisely the type of consideration which favours the course ACCI proposes in this matter over than sought by the ACTU. Where award applications are considered on a case by case basis, this type of consideration can be dealt with, and orders varied accordingly.

3.10 INCAPACITY CLAIMS

- 3.71 It is a little unclear how the ACTU's proposed approach would allow parties to a particular award to argue any serious incapacity to pay. Whilst the ACTU claims to support the retention of the principles, this would be meaningless unless a proper chance is offered for parties to exercise their rights under them.
- 3.72 Scope to argue incapacity is the specific basis upon which the award safety net has been up-rated for some years – it is a concept which could not be excised from the system (either in toto or in effect) without substantial consideration.
- 3.73 ACCI's approach to this matter would allow parties to an award to run an urgent incapacity case at the award level if they wished to.

3.74 It is not clear how such concerns would be addressed under the ACTU model, with awards varying from a standardised operative date. Once again, the onus should be on the ACTU to show that its approach is consistent with the settings in the established principles.

3.11 ACTU WOULD OVERTURN THE PRINCIPLES

3.75 Principle 8(a) of the 2005 Statement of Principles¹² provides that:

8. ARBITRATED SAFETY NET ADJUSTMENTS

In accordance with the June 2005 decision awards may, on application, be varied to include an arbitrated safety net adjustment in this decision subject to the following:

- (a) The operative date will be no earlier than the date of the variation to the award.
- (b) That at least 12 months have elapsed since the rates in the award were increased in accordance with the Safety Net Review-Wages May 2004 decision (the May 2004 decision) [PR002004; (2003-2004) 129 IR 389].
- (c) ...
- (d) At the time when the award is to be varied to insert the safety net adjustment, each union party to the award will be required to give a specific commitment as to the absorption of the increase. In particular, the union commitments will involve the acceptance of absorption of the safety net adjustment to the extent of any equivalent amount in rates of pay which are above the wage rates prescribed in the award. Such above-award payments include wages payable pursuant to certified agreements, currently operating enterprise flexibility agreements, Australian workplace agreements, award variations to give effect to enterprise agreements and overaward arrangements. Absorption which is contrary to the terms of an agreement is not required.

3.76 The ACTU's proposed course in this matter would specifically overturn various elements of Principle 8 in particular.

- a. ACCI believes the operative date for the 2006 increases should, as in previous years, be no earlier than the date of variation to the award. The ACTU would overturn this, variations would commence on 1 December prior to the dates upon which awards are actually varied.

¹² Safety Net Review—Wages 7 June 2005, Decision [PR002005], p.126

The ACTU is seeking to abandon long standing Principle 8(a) of this Commission.

- b. As pointed out above at least 12 months should continue to elapse between increases in wages and allowances. To not do this (as the ACTU appears to propose) would overturn Principle 8(b).
- c. As pointed out above, union commitments regarding absorption remain relevant and it is for the ACTU to prove otherwise. It is for the ACTU to prove that Principle 8(d) should be excised from the statement of principles.

3.77 This should not occur. The principles and approaches of the Commission should be maintained as they represent the best approach to the variation of awards to give effect to the 2006 AFPC decision.

3.78 If the ACTU thinks otherwise, it must convince this Commission to abandon long standing and fundamental elements of its statement of principles. Again, the onus is on the ACTU to tell us why this should occur beyond the importance to its affiliates of commencement as early as possible.

3.12 NO ORDERS

3.79 ACCI and other respondent parties have contacted the Commission in recent days indicating a concern that item 2 of the directions in this matter has not been complied with. A number of ACCI members have indicated to ACCI that either:

- a. Detailed draft orders were not received for some award applications before the commission by 24 November as required.
- b. Detailed draft orders were not received for some award applications as at the time of the lodgement of this submission.

3.80 ACCI acknowledges that with 400+ applications across multiple unions it is very difficult to properly ensure orders are made and served for each award.

- 3.81 This is precisely the point. The ACTU is attempting too much and is trying to bypass the proven and efficient processes of this jurisdiction for the variation of awards.
- 3.82 It is a material consideration that not all orders have been generated and lodged. The ACTU proposes to vary awards from 1 December where parties have had no opportunity to check the proposed variations and their consistency with the AFPC increase (let alone the decisions this bench must make on the proper application of those increases).

3.13 BACKPAY

- 3.83 It has long been recognised that it is very costly and problematic for Australian business to retrospectively adjust pay. The ACTU proposal carries the prospect of two levels of retrospective effect.
- a. There is an inherent retrospectivity and back pay in the course the ACTU proposes – with at least 5 or 6 days back pay in its proposal for a 1 December operative date.
 - b. If employers wait for properly made orders, as many will, this exacerbates backpay.
 - c. If errors are made through improperly made or rushed orders (what the ACTU apparently wishes) then corrections will be needed.
- 3.84 This is not only costly and complex for employers, but there are tax and payroll complications for employees. These type of complications can be very detrimental to workplace level relations between employers and employees completely at odds with the purposes of the *Workplace Relations Act 1996*. They should be avoided whenever possible, and ACCI proposes a course in this matter which will minimise scope for back-payment.
- 3.85 This is the basis on which this Commission has for many years awarded increases on the first pay period commencing on or after basis, rather than from some drop dead zero hour. This Commission has recognised that employers should not be subject to any inadvertent transactional back payments.

3.14 APCS SUMMARIES BEING ISSUED

- 3.86 The Commonwealth Department of Employment and Workplace Relations is in the process of issuing summary information on APCS derived from a number of awards.
- 3.87 ACCI strongly supports this information process. It supports ACCI's approach to this matter, with these external rate sources now providing an additional quality check and reference point on wage rates which needs to prudently be considered in assessing union draft orders.

3.15 STATUTORY CONSIDERATIONS

- 3.88 The course which ACCI proposes in this matter is more consistent with the requirements of the *Workplace Relations Act 1996* than that proposed by the ACTU.
- 3.89 Contrary to the ACTU's submission, ACCI does not believe that the considerations involved in varying allowable award matters under federal awards and matters under transitionally awards should be conflated.
- 3.90 This would be an erroneous approach which would have implications in any future proceedings. They are two distinct tracks that are underpinned by a different constitutional basis and have, although prima facie, similar appearances, nonetheless involve different statutory considerations. Again, an approach in which individual matters were addressed through individual listing and variations would best address this.
- 3.91 Therefore ACCI will set out the statutory provisions which are particularly relevant to the consideration of this Full Bench in these proceedings.

3.15.1 Federal Awards

- 3.92 Allowable award matters: It is necessary to reiterate the main objects of Pt 10 of the Act which specifically relates to the AIRC's functions in relation to federal awards.
- 3.93 Section 510 provides:

510 Objects of Part

The objects of this Part are:

- (a) to ensure that minimum safety net entitlements are protected through a system of enforceable awards maintained by the Commission; and*
- (b) to ensure that awards are rationalised and simplified so they are less complex and are more conducive to the efficient performance of work; and*
- (c) to ensure that the Commission performs its functions under this Part in a way that:

 - (i) encourages the making of agreements between employers and employees at the workplace or enterprise level; and*
 - (ii) protects the competitive position of young people in the labour market, promotes youth employment, youth skills and community standards, and assists in reducing youth unemployment.**

3.94 Section 511 provides:

511 Performance of functions by the Commission

- (1) The Commission must perform its functions under this Part in a way that furthers the objects of this Act and, in particular, the objects of this Part.*
- (2) In performing its functions under this Part, the Commission must have regard to:

 - (a) the desirability of high levels of productivity, low inflation, creation of jobs and high levels of employment; and*
 - (b) decisions of the AFPC, and, in particular, the need to ensure that Commission decisions are not inconsistent with AFPC decisions; and*
 - (c) the importance of providing minimum safety net entitlements that do not act as a disincentive to bargaining at the workplace level.**

3.95 Section 511(1) provides, *inter alia*:

- (1) Subject to this Part, an award may include terms about the following matters (allowable award matters) only:

 - ... (h) monetary allowances for:

 - (i) expenses incurred in the course of employment; or*
 - (ii) responsibilities or skills that are not taken into account in rates of pay for employees; or*
 - (iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations ...***

3.96 Section 552 provides, *inter alia*:

552 Variation of awards - general

(1) *The Commission must not make an order varying an award except:*

(a) *as a result of an award rationalisation process; or*

(b) *as a result of an award simplification process; or*

(c) *if the variation is essential to the maintenance of minimum safety net entitlements (see section 553); or*

(d) *on a ground set out in section 554; or*

(e) *to bind additional employers, employees or organisations in accordance with section 557; or*

(f) *under section 812; or*

(g) *in circumstances prescribed by the regulations for the purposes of this paragraph.*

Note: The variation that the Commission can make as a result of an award rationalisation process is affected by sections 533 and 550. ...

3.97 Section 553 provides:

553 Variation of awards if essential to maintain minimum safety net entitlements

(1) *An employer, employee or organisation bound by an award may apply to the Commission for an order varying the award on the ground that that the variation is essential to the maintenance of minimum safety net entitlements.*

(2) *If an application is made under subsection (1), the Commission must take such steps as it thinks appropriate to ensure that each employer, employee and organisation bound by the award, and any other interested persons and bodies, are made aware of the application.*

(3) *The Minister may intervene in relation to the application.*

(4) *The Commission may make an order under this subsection varying the award only if the Commission is satisfied that:*

(a) *the variation is essential to the maintenance of minimum safety net entitlements; and*

(b) *all of the following conditions are met:*

(i) *the award as varied would not be inconsistent with decisions of the AFPC;*

(ii) the award as varied would provide only minimum safety net entitlements for employees bound by the award;

(iii) the award as varied would not be inconsistent with the outcomes (if any) of award simplification and award rationalisation;

(iv) the making of the variation would not operate as a disincentive to agreement-making at the workplace level;

(v) such other requirements prescribed by the regulations (if any) for the purposes of this paragraph have been satisfied.

3.98 ACTU have not addressed 553: Interestingly, the ACTU in its submission has not addressed the Commission on any aspect of s.553, which the union applicants have used as the vehicle to vary allowances in federal awards.

3.99 The Commission must be satisfied that the requirements under s.553(4) are met before it can vary each award. This suggests that there must be a thorough examination of each consideration specified in (a) to (b) for each individual award. The ACCI approach would facilitate this, and the ACTU approach would be inconsistent to it and deny the Commission information it must receive to vary these awards.

3.15.2 Transitional Awards

3.100 Schedule 6 of the Act provides transitional arrangements for “transitional employers” that were bound immediately before 27 March 2006 to pre-reform federal awards.

3.101 Clause 1(2) relevantly provides:

The objects of this Schedule are to ensure that, during the transitional period:

(a) transitional awards continue in operation and are maintained by the Commission, within the limits specified in this Schedule; and

(b) transitional employers and their employees are able to cease to be bound by a transitional award in appropriate circumstances, including by making agreements under State laws; and

(c) the Commission’s functions and powers to vary transitional awards are exercised so that wages and other monetary entitlements are not inconsistent with wage-setting decisions of the AFPC; and

(d) appropriate compliance and enforcement mechanisms remain available.

3.102 Clause 4 provides:

4 Continuing operation of awards in force before reform commencement

(1) Despite the repeals and amendments made by the Workplace Relations Amendment (Work Choices) Act 2005, an award in force immediately before the reform commencement continues in force, on and from the reform commencement, in accordance with this clause.

(2) An award that is continued in force by this clause binds the following:

(a) all excluded employers that were bound by the award immediately before the reform commencement;

(b) any transitional employer bound by the award under Part 6A of this Schedule (transmission of business);

(c) all organisations that were bound by the award immediately before the reform commencement;

(d) all employees who, immediately before the reform commencement, were members of organisations that were bound by the award;

(e) each other entity that:

(i) is not an employer within the meaning of subsection 6(1) or an eligible entity within the meaning of Division 7 of Part 10; and

(ii) was bound by the award immediately before the reform commencement;

but only in relation to outworker terms.

(3) To avoid doubt, an award that is continued in force by this clause binds an excluded employer or other entity that was bound by the award immediately before the reform commencement, whether the employer or other entity was bound:

(a) in its own right or as a member of an organisation; or

(b) because of the operation of paragraph 149(1)(d), as in force immediately before the reform commencement.

Note: Clause 69 provides for who is bound by an order varying a transitional award.

(4) An award that is continued in force by this clause is called a transitional award. ... (emphasis added).

3.103 Applications for Varying ACT/NT Transitional Awards Invalid: Relevantly clause 4 states that transitional awards do not apply to excluded employers. The definition of excluded employer is, according to clause 2, “*an employer (within the ordinary meaning of the term) so far as the definition of employer in subsection 6(1) does not cover the employer.*” Accordingly, the union applications which seek to vary wages and allowances in territories specific awards have been erroneously lodged, and it is arguable that the AIRC does not have the power to vary them in such a capacity.

3.104 On 27 March 2004⁶ the wage rates would have become preserved APCs and adjusted as per the AFPC decision, with allowances forming allowable award matters under Pt 10 of the Act.

3.105 Clause 7 and 8 of Schedule 6 provide:

General functions of Commission

(1) *The functions of the Commission under this Schedule are to prevent and settle industrial disputes:*

(a) *so far as possible, by conciliation; and*

(b) *as a last resort and within the limits of the Commission’s powers under this Schedule, by arbitration.*

(2) *In performing its functions under paragraph (1)(b), the Commission may vary a transitional award as permitted by clause 29.*

(3) *However, the Commission must not make any new awards.*

8 Performance of Commission’s functions under this Schedule

(1) *The Commission must perform its functions under this Schedule in a way that furthers the objects of this Schedule.*

(2) *In performing its functions under this Schedule, the Commission must ensure that minimum safety net entitlements are maintained for wages and other specified monetary entitlements, having regard to:*

(a) *the desirability of high levels of productivity, low inflation, creation of jobs and high levels of employment; and*

(b) *the principle that the wages and other monetary entitlements of transitional employees should not place them at a disadvantage compared with the entitlements of employees (within the meaning of subsection 5(1)); and*

(c) the principle that the costs to transitional employers of wages and other monetary entitlements should not place them at a competitive disadvantage in relation to employers (within the meaning of subsection 6(1)).

(3) In having regard to the factors referred to in paragraph (2)(a), the Commission must have regard to:

(a) wage-setting decisions of the AFPC; and

(b) in particular, any statements by the AFPC about the effect of wage increases on productivity, inflation and levels of employment.

(4) In performing its functions under this Schedule, the Commission must have regard to:

(a) the desirability of its decisions being consistent with wage-setting decisions of the AFPC; and

(b) the importance of providing minimum safety net entitlements that act as an incentive to bargaining at the workplace level.

3.106 Relevantly, the explanatory memorandum to Schedule 6 provides the constitutional underpinnings.

3001. Proposed Schedule 13 would provide transitional arrangements underpinned by the conciliation and arbitration power set out in subsection 51(xxxv) of the Constitution for a transitional period of five years.

3002. The Schedule would provide for the continued operation of existing awards for employers (to be defined as transitional employers) bound by the award immediately before reform commencement that are not covered by the definition of employer in subsection 4AB(1).

3003. It will remain possible for parties to notify alleged industrial disputes, and the AIRC will continue to prevent and settle disputes. However, the manner in which the AIRC will be permitted to deal with those disputes will be amended to reflect the transitional nature of the system provided for by the Schedule.¹³

...

3014. Proposed clause 4 would provide for the continuing operation of awards in the transitional system.

3015. The Schedule would not create a new instrument in the same terms as the existing award (as with awards under Part VI), but rather provide that existing awards made to prevent or settle industrial disputes continue

¹³ Explanatory Memorandum to the *Workplace Relations Amendment (WorkChoices) Bill 2005*, House of Representatives, at p.444.

*to operate and continue to bind those employers and employees (as well as registered organisations) that are in the transitional system.*¹⁴

3.107 Therefore, it clear that the intention of Schedule 6 is to provide a continuing mechanism under the conciliation and arbitration powers of the Commission to prevent and settle industrial disputes. ACCI submits that as transitional awards are still underpinned by this power, the case law and precedent established in this area has continuing relevancy.

3.108 Central to this proposition, is that concepts such as “ambit” and the variation of awards to be confined to ambit continue to apply.

3.109 Ambit Mitigates Against Making Common Order: It is well settled jurisprudence that an arbitrated award made by the Commission in the settlement of an inter-state industrial dispute must be within the ambit of the matters in dispute between parties.¹⁵ This also applies to subsequent variations to awards. As Dixon J observed in *R v Kelly; Ex parte Australian Railways Union* (1953) 89 CLR 461 at 474:

Variations cannot go beyond what is appropriate to the general purpose of the settlement of the industrial dispute and continuing the settlement in force. That means that the limits set by the scope and nature of the original dispute cannot be transcended.

3.110 ACCI contends that, notwithstanding the power of the AIRC to formulate Principles which would apply to all award variations, the only way to properly address the current applications is on an award-by-award basis, upon which there is ample opportunity to ascertain the facts and nuances involved. This includes determining whether the variations sought fall within the ambit created by the original dispute.

3.111 As other commentators have observed:

Despite the need for an interstate industrial dispute under s.51(35), the AIRC has come to be the body that has a significant role in regulating wages and conditions of employment nationally. This is clearly highlighted in the National Wage cases that are held from time to time under a centralised wage fixation system which determines wage increases to be flowed on to all federal awards. To invoke jurisdiction of a National Wage case the ACTU makes its claim under a number of key industry awards and provided there is ambit under the dispute findings that found those

¹⁴ Ibid, at p.447.

¹⁵ *R v Commonwealth Court of Conciliation and Arbitration; ex parte Kirsch* (1938) 60 CLR 507 at 538.

awards, the Commission is able to vary those awards to accommodate any national wage increase. The dispute findings that the Commission and the parties rely upon may have been made years prior the National Wage decision.¹⁶

- 3.112 The Act still relies on the conciliation and arbitration power for varying awards and as such, the precedent and historical application of National Wage Decisions should still apply.
- 3.113 The Commission has never made a common rule order to vary all applications in the manner sought in this case by the ACTU.
- 3.114 Division 2 of Schedule 6 is of particular importance, clauses 28 and 29 provide, *inter alia*:

28 Variation of transitional awards—general

- (1) *The Commission may make an order varying a transitional award only:*
- (a) *as permitted by clause 29; or*
 - (b) *on a ground set out in clause 30.*
- (2) *The Commission must not vary a preserved transitional award term.*
- (3) *The Commission must not vary a facilitative provision within the meaning of clause 23 except on a ground set out in clause 30.*

29 Variation of transitional awards—dealing with industrial dispute

- (1) *In preventing or settling an industrial dispute, or maintaining the settlement of an industrial dispute, the Commission's power to vary a transitional award is limited to varying the award:*
- (a) *to provide minimum safety net entitlements about the matters referred to in subclause (2); and*
 - (b) *to do anything that the Commission is permitted to do by regulations made under subclause (3); and*
 - (c) *to include incidental and machinery terms, as permitted by clause 24, relating to the matters that may be varied.*

¹⁶ Geoff Bull, *Use (Abuse) of S.51(35) of the Australian Constitution*, Murdoch University Electronic Journal of Law, Volume 5, Number 3 (September 1998), p.13.

(2) For the purposes of subclause (1), the matters are:

(a) rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors and transitional employees to whom training arrangements apply, and rates of pay for transitional employees under the supported wage system;

(b) incentive-based payments, piece rates and bonuses;

(c) annual leave loadings;

(d) monetary allowances described in paragraph 17(1)(j);

(e) loadings for working overtime or for casual or shift work;

(f) penalty rates;

(g) pay for outworkers;

(h) any other allowable transitional award matter prescribed by the regulations. ...

3.115 ACCI submits that the Commission in these proceedings needs to vary transitional awards in a manner that maintains the settlement of an industrial dispute and must be confined to that basis. Accordingly, ACCI submits that the Full Bench does not have the power to issue any form of general or common rule order which would vary all of the transitional awards before it.

3.116 Each application to vary a transitional award must be considered application per application. This is the only way to accord with the settlement of each industrial dispute. If this were not the case, we would have been using general orders in this jurisdiction for decades.

3.117 Principles for transitional federal award variation: In contrast to the absence of a principle making provision for federal award variations, there is a specific principle making provision in relation to award variations under Schedule 6. ACCI makes submissions as to the applicability of principles generally in Part 4 of this submission.

3.118 Clause 40 of Schedule 6 provides:

40 Principles for varying transitional awards

(1) A Full Bench of the Commission may establish principles about varying transitional awards in relation to each allowable transitional award matter referred to in subclause 29(2).

(2) After such principles (if any) have been established under subclause (1), the power of the Commission to vary a transitional award in relation to a matter referred to in subclause 29(2) is exercisable only by a Full Bench unless the variation:

(a) gives effect to orders of a Full Bench made after the reform commencement; or

(b) is consistent with principles established by a Full Bench after that day.

(3) The President or a Full Bench may, in relation to the exercise of powers under this clause, direct a member of the Commission to provide a report in relation to a specified matter.

(4) After making such investigation (if any) as is necessary, the member must provide a report to the President or Full Bench, as the case may be.

(5) To avoid doubt, principles established under subclause (1) must be consistent with, and cannot be such as to override, a provision of this Act that relates to the variation of transitional awards.

3.15.3 General Considerations

Enforceability:

3.119 Section 3(f) indicates that an object of the Act is:

(f) ensuring compliance with minimum standards, industrial instruments and bargaining processes by providing effective means for the investigation and enforcement of:

(i) employee entitlements; and

(ii) the rights and obligations of employers and employees, and their organisations; and

3.120 Section 510(a) provides that the objects for awards include:

(a) to ensure that minimum safety net entitlements are protected through a system of enforceable awards maintained by the Commission

3.121 Unclear and contested minimum wage and allowance obligations detract from rather than advance scope for enforcement. Enforceability of the system will be advanced by the ACCI rather than ACTU proposal, providing for accurate and stable variations to awards (i.e. less likely to be corrected).

Confusion Creates Paralysis:

3.122 Section 3(g) indicates that an object of the Act is:

- (g) ensuring that awards provide minimum safety net entitlements for award-reliant employees which are consistent with Australian Fair Pay Commission decisions and which avoid creating disincentives to bargain at the workplace level;

3.123 Section 510(c) includes the following role for awards:

- (i) encourage(ing) the making of agreements between employers and employees at the workplace or enterprise level

3.124 ACCI would make two points in regard to this.

- a. To be a valid and effective safety net, awards have to be varied properly, and not be subject to revision and correction. A safety net relies on accuracy, exactitude and minimising confusion. The ACCI proposal would deliver this, and the ACTU approach would diminish this essential role for awards.
- b. Where the safety net is confused or subject to revisions, it scarcely creates a springboard for bargaining. Not knowing with certainty the base one is working from appears a clear disincentive to bargain.

3.16 CONTINUATION OF S.113 PROCEEDINGS?

3.125 The *Workplace Relations Act 1996* was amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (referred to as *WR (WC) Act*). Certain schedules of the *WR (WC) Act* came into operation on 14 December 2005¹⁷ and 27 March 2006.¹⁸ Consequential amendments and Regulations to the amended *Workplace Relations Act 1996* (referred to as *WorkChoices*) also came into operation on 27 March 2006.

3.126 **History of Matter:** On 17 November 2005, the AIRC issued a statement and provisional directions in relation to twenty applications lodged under repealed s.113 to be used as vehicle awards for a second 2005 Safety Net Full Bench case. The effect of the decision by the AIRC on 21 December

¹⁷ s. 1-3, Sch 1A Sch 3, Sch 3A and Sch 4 Pt 1.

¹⁸ Sch 1, Sch 2, Sch 4 Pt 2, Sch 5.

2005 was to vacate those proceedings pending the outcome of the Australian Fair Pay Commission:¹⁹

[13] For these reasons we have decided to adopt the Commonwealth's proposal that the provisional directions be vacated and that these proceedings be adjourned until the AFPC has made its first wage-setting determination in the Spring of 2006. In doing so we make it clear that any party has liberty to apply for a reconsideration of this decision should there be a material alteration in the circumstances which we have taken into account.

- 3.127 On 26 October 2006 the AFPC handed down its Spring 2006 decision and from early-mid November 2006, various union's began to file numerous applications in the AIRC purporting to give effect to both increases to allowances in pre-reform federal awards, and allowances/wages in transitional federal awards.²⁰ The unions also applied to the Commission for the original twenty s.113 applications to be re-listed.
- 3.128 ACCI submits that in so far as the original 20 award variation applications are concerned, Ch 7, Pt 4, Div 4 of the regulations do deal with the continuation of those applications. However, we are uncertain as to whether they lapse or continue depending on which section(s) of the pre-amended Act it relied upon.
- 3.129 Notwithstanding, the ACTU, in its submissions have indicated that those original applications have been lodged under the current provisions of the Act.
- 3.130 As this may go towards the consideration of “*exceptional circumstances*” to granting retrospectivity, it could only be said that the original 20 award applications were brought to the attention of employers and organisations in November 2005. The other applications to vary awards, were only brought to the attention of employers in October 2006.
- 3.131 No Clarity on What Was Sought: Notwithstanding the preceding, as outlined in Section 2, employers were in no position to know what relief the ACTU sought in this matter prior to the ACTU lodging its submissions, or at best in the programming hearing (20 November).

¹⁹ PR966840, TWU and others, 21 December 2005.

²⁰ As of the time of writing, there appeared to be in excess of 1000 award variation (including federal and transitional awards), as indicated in the AIRC web site, (updated at 4.30 pm, 30 November 2006). It is not clear from the web site how many orders have been served for each application.

Even then, this was not a detailed notification of the precise wage rates and allowances sought, so could constitute no support for retrospective relief in relation to the 20 awards concerned.

3.132 Thus, there appears to be little relevance to the 2005 s.113 applications. They offer no support for the ACTU in seeking a retrospective operative date.