

## 4. PRINCIPLES

### 4.1 INTRODUCTION – RETAIN THE PRINCIPLES

- 4.1 ACCI supports the retention of the Commission’s statement of wage fixing principles, most recently issued as Attachment A to the 2005 Safety Net Review decision<sup>1</sup>.
- 4.2 The principles provide an important source of continuity, clarity, and order across the period of transition between the pre and post *WorkChoices* legislation. They continue to be relevant to both the discharge of the Commission’s responsibilities, and how users approach the Commission seeking particular outcomes. Such guiding principles continue to offer scope to materially contribute to the Commission furthering its aims under both the objects of the *Workplace Relations Act 1996*, and Part 3 of the Act.
- 4.3 Consistent with this approach, ACCI understands no party is proposing that this bench not issue principles, nor any substantial or material revision to the legacy principles inherited from the pre-*WorkChoices* system (the June 2005 Principles). The ACTU states for example<sup>2</sup>:
5. The ACTU argues that it is appropriate that the AIRC continue to adopt, where not barred by statute, the wage setting principles previously applied by the AIRC.

### 4.2 AMENDMENTS TO THE PRINCIPLES

- 4.4 Notwithstanding ACCI’s general support for the retention of the statement of principles essentially unchanged it may be necessary to make some revisions in this initial post-*WorkChoices* case and to give effect to a 2006 decision in this matter.

#### 4.2.1 Principle 1

- 4.5 The formulation of the introductory Principle 1 from the 2005 statement appears a product of a different system, and of the pre-*WorkChoices* role

<sup>1</sup> Safety Net Review—Wages 7 June 2005, Decision [PR002005], Attachment A, p.123

<sup>2</sup> ACTU Written Submission, 24 November 2006, ¶5, p.5

of awards. This includes, for example, references to the pre-*WorkChoices* no disadvantage test, certification of agreements, pre-*WorkChoices* award simplification, and now deleted, moved or revised provisions of the legislation.

4.6 On re-examination, as a temporary measure pending a re-articulation of the purpose of the principles in due course, ACCI proposes either:

- a. The temporary deletion of introductory Principle 1, and the issuing of all remaining principles as an attachment to the decision in this matter, or
- b. The issuing of the principles as an attachment to the decision in this matter with Principle 1 retained but struck through.

4.7 In addition to either approach some generic wording would need to be added, perhaps in the terms such as the following:

Principle 1, Role of Arbitration and the Award Safety Net, reflected the nature and function of awards under the *Workplace Relations Act 1996* prior to the commencement of the *Workplace Relations Amendment (Work Choices) Act 2005* (No. 153), 2005. Revisions to this principle are under consideration to reflect the nature and variation of awards under Part 10 and Schedule 6 of the amended Act.

### 4.3 PRINCIPLES FOR PROSPECTIVITY

4.8 A particular area of disagreement between ACCI and the ACTU will lie in the formulation of the principles providing for increases in wages and allowances.

- a. ACCI seeks a formulation of the principles which reflects the prospective variation of particular award wages and allowances, essentially as it has occurred in preceding years. This will be a formulation of key principles such as Principles 5, 8 and 9 (the ones that have varied to give effect to each safety net decision in recent years) reflecting the existing, prospective approaches.
- b. However, if the ACTU is successful in this matter, these key principles would need to be formulated in very different terms, applying a standardised operative date to the extent determined by this bench. The ACTU approach demands substantial disturbance to the established formulation of the principles. For the reasons set out

throughout this submission, this would create a great deal of confusion and inequity in relation to the variation of particular awards, and potential confusion and conflict in the role of the principles during this important transitional period.

#### **4.3.1 ACTU seeks to overturn key principles**

4.9 It is relevant to note that the ACTU's proposed course in this matter is arguably at odds with its stated commitment to the retention of the principles.

4.10 Changing from an approach under which awards are varied on application to one under which there is some central and catch all determination of operative date would require substantial revisions to various of the principles:

- a. Principle 2(c) would need to be revised to take into account that award allowances would not be varied upon consideration of particular applications, but by some other process.
- b. Principle 2(f) would need to be revised to take into account that award wages would not be adjusted upon consideration of particular applications, but by some other process.
- c. Principle 2(h) would need to be revised to take into account that the federal minimum wage would not be adjusted upon consideration of particular applications, but by some other process.

4.11 This would appear to demand a substantial revision not just to the formulation of the principles, but to various material provisions, controls and balances included in the statement of principles for some years. Section 3 of this submission outlines merit and practical arguments against disturbing key requirements in areas such as union commitments to absorption.

#### **4.3.2 Amendments to Give Effect to the ACCI Position**

4.12 Consistent with the practice of preceding years and within an approach which does not embark upon substantial principles revision at this time, amendments will be needed to some principles to implement the prospective, application based approach commended to you by ACCI.

- a. **Principle 5(c)** will need to be amended consistent with the practice of preceding years. ACCI supports the retention of this principle in its existing form, incorporating suitable amendments for a 2006 decision, perhaps in the following form:

(c) In accordance with the Wages and Allowance Review—December 2006 decision (the December 2006 decision) [PR002006] allowances which relate to work or conditions which have not changed and service increments will be adjusted as a result of the ~~arbitrated~~ safety net increase. (The method of adjustment is to be consistent with the Furnishing and Glass Industries Allowances decision [Print M9675; (1996) 40 AIRL 3–399].)

- b. **Principle 8** will also need to be amended consistent with the practice of preceding years. ACCI supports the retention of this principle in its existing form, incorporating suitable amendments for a 2006 decision, perhaps in the following form:

#### 8. ARBITRATED SAFETY NET ADJUSTMENTS

In accordance with the December 2006 decision transitional awards in force under Schedule 6 of the Act 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 June 2005 decision (the June 2005 decision) [PR002005; (2003–2004) 129 IR 389<sup>3</sup>].
- (c) In awards where the variation for a safety net adjustment arising from the April 1999, May 2000, May 2001, May 2002, May 2003, May 2004 or June 2005 decisions is by consent and does not result in an increase in the wage rates actually paid to employees or increase the wage costs for any employer, any applicable 12 months' delay between variations may be waived.
- (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

<sup>3</sup> Reference to be revised.

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.

- (e) The following clause must be inserted in any transitional award (in force under Schedule 6 of the *Workplace Relations Act 1996*):

“The rates of pay in this award include a safety net adjustment payable under the Wages and Allowances Review—November 2006 decision [PR002006]. This 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 collective agreements, 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.”

The above clause will replace the offsetting clause inserted into awards pursuant to paragraph 8(e) of the Statement of Principles determined in the June 2005 decision.

- (f) By consent of all parties to an award, where the minimum rates adjustment has been completed, award rates may be expressed as hourly rates as well as weekly rates. ~~In the absence of consent, a claim that award rates be so expressed may be determined by arbitration.~~
- (g) The safety net adjustment will only be available where the rates in the award have not been increased, other than by safety net adjustments, or as a result of the application of the Minimum Rates Adjustment or Work Value Changes Principles, since November 1991.
- (h) The implementation of an arbitrated safety net adjustment in a converted paid rates award is governed by the principles set out in the Paid Rates Review decision [Print Q7661; (1998) 123 IR 240].
- c. **Principle 9** will also need to be amended consistent with the practice of preceding years. ACCI supports the retention of this principle in its existing form, incorporating suitable amendments for a 2006 decision, perhaps in the following form:

## 9. FEDERAL MINIMUM WAGE

In accordance with the November 2006 decision awards may, on application, be varied to provide for the federal minimum wage for full-time adult employees of \$511.76 per week and, for junior, part-time and casual employees, proportionate amounts subject to the following:

- (a) The operative date will be no earlier than the date of the variation to the award.
- (b) The federal minimum wage is to be provided for in a separate clause as contained in *Re Textile Industry Award 1994* [Print P1741, 11 June 1997]. Where classification rates are below the federal minimum wage there should be an indication that the federal minimum wage applies to those classifications.
- (c) The separate clause referred to in (b) is as follows:

*“Federal Minimum Wage*

1. *The federal minimum wage*

*No employee shall be paid less than the federal minimum wage.*

2. *Amount of federal adult minimum wage*

2.1 *The federal minimum wage for full-time adult employees not covered by 4 [special categories clause], is \$511.76 per week.*

2.2 *Adults employed under a supported wage clause shall continue to be entitled to receive the wage rate determined under that clause. Provided that such employees shall not be paid less than the amount determined by applying the percentage in the supported wage clause applicable to the employee concerned to the amount of the minimum wage specified in 2.1.*

2.3 *Adults employed as part-time or casual employees shall continue to be entitled to receive the wage rate determined under the casual and part-time clauses of the award. Provided that such employees shall not be paid less than pro rata the minimum wage specified in 2.1 according to the number of hours worked.*

3. *How the federal minimum wage applies to juniors*

3.1 *The wage rates provided for juniors by this award continue to apply unless the amount determined under 3.2 is greater.*

3.2 *The federal minimum wage for an employee to whom a junior rate of pay applies is determined by applying the*

*percentage in the junior wage rates clause applicable to the employee concerned to the relevant amount in 2.*

4. *Application of minimum wage to special categories of employee*
  - 4.1 *Due to the existing applicable award wage rates being greater than the relevant proportionate federal minimum wage, this clause has no application to employees undertaking a National Training Wage Traineeship, an Australian Traineeship, a Career Start Traineeship, a Jobskills placement or an apprenticeship.*
  - 4.2 *[Leave reserved for other special categories]*
5. *Application of federal minimum wage to award rates calculation*

*The federal minimum wage:*

- 5.1 *applies to all work in ordinary hours;*
- 5.2 *applies to the calculation of overtime and all other penalty rates, superannuation, payments during sick leave, long service leave and annual leave, and for all other purposes of this award; and*
- 5.3 *is inclusive of the safety net adjustment provided by the Wages and Allowances Review—December 2006 decision [PR002006] and all previous safety net and national wage adjustments.”*

- (d) At the time when the award is to be varied to insert the federal minimum wage clause, each party to the award will be required to give a specific commitment as to absorption of any increase arising from the insertion of the federal minimum wage clause. In particular, the union commitments will involve the acceptance of absorption of any increase arising from the insertion of the federal minimum wage clause 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.
- (e) The following clause must be inserted into the award:
 

*“The rates of pay in this award include the federal minimum wage payable under the Wages and Allowances Review—December 2006 decision [PR002006]. Any increase arising from the insertion of the federal minimum wage clause 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 the federal minimum wage.”*

- (f) Any disagreement as to the variation of an award to include the federal minimum wage (including whether the federal minimum wage should be phased-in) will be referred to the President to consider whether the matter should be referred to a Full Bench.
- (g) Federal minimum wage clauses may be inserted in awards in which the minimum classification rate exceeds \$511.76 per week.

Note: In determining whether an increase is payable because of the introduction of the federal minimum wage, the arbitrated safety net adjustment in this decision and all previous safety net and national wage adjustments are first to be taken into account.

### 4.3.3 Duration

4.13 It appears particularly important that Principle 13 on the duration of the statement of principles be issued in its established form. This will provide continuity and certainty across this period.

## 4.4 VICTORIA – TRANSITIONAL PRINCIPLE

4.14 ACCI and its Victorian members sought Principle 8A of the current statement of principles in the 2005 case<sup>4</sup>. This was sought on a transitional basis to ensure appropriate periodicity between increases for Victorian employers subject to common rule awards from 1 January 2005.

4.15 This principle was always designed to be transitional and to not form part of the principles on an ongoing basis. It has now done its work and should in essence be removed from the principles. Deletion was intended at the time the principle was created, as follows:

<sup>4</sup> Safety Net Review—Wages 7 June 2005, Decision [PR002005], ¶429-455, pp.115-122

To avoid confusion, these transitional rates of pay and allowances shall be deleted when they cease to have effect and in any event by no later than 12 months from the date of effect of the arbitrated safety net adjustment payable under the June 2005 decision.<sup>5</sup>

- 4.16 It appears to ACCI that the best, and perhaps only, way at achieve this, and to ensure neatness and accuracy in awards going forwards, particularly where wages remain part of transitional awards, will be retaining a principle 8A to implement the deletion of the 2005 transitional provisions for Victoria. Thus, ACCI requests consideration be given to replacing existing Principle 8A with the following:

8A. TRANSITIONAL ARRANGEMENTS FOR VICTORIA

Where a transitional award in force under Schedule 6 of the *Workplace Relations Act 1996* includes the following wording arising from the operation of Principle 8A, in Attachment A to the June 2005 decision [PR002005], that wording should be deleted from the award at such time as it is varied to give effect to any increase in wages in accordance with this, December 2006, statement of principles:

*“Transitional Wage Rates for Victoria—Application of Common Rule Award*

- 1.1 *This award contains the following transitional rates of pay and allowances for employers in the state of Victoria who were previously not bound by this award, but are now subject to the award by virtue of the award having been declared a common rule under s.141 of the Workplace Relations Act 1996.*
- 1.2 *These rates of pay and allowances apply only until 1 August 2005 or until the date that this award is varied to give effect to the Safety Net Review—Wages June 2005 decision.”*

## 4.5 FURTHER SUBMISSIONS

- 4.17 Notwithstanding the preceding, the statement of principles is a product of the former, pre *WorkChoices*, *Workplace Relations Act 1996* – indeed to some extent the expression of many principles remains a legacy of the pre-1996 legislation.
- 4.18 Consideration could be given in the wake of this matter, and prior to the next AFPC decision, to the Commission convening a conference of parties on the future formulation of the principles.

<sup>5</sup> Safety Net Review—Wages 7 June 2005, Decision [PR002005], p.128

4.19 ACCI understands that the next AFPC review will commence within a short time frame, and that the intention of the AFPC is to conduct its second review and deliver its second determination by mid-2007<sup>6</sup>. This would provide an appropriate time-scale for parties to these proceedings to consider revisions to the statement of principles prior to a comparable matter occasioning this Commission's consideration after mid-2007 (i.e. through a conference in perhaps April 2007, prior to the next AFPC decision).

#### 4.5.1 Issue for Consideration – Revision for Amended Statute

4.20 One particular issue for noting by parties for the future revision of the principles should be properly taking into account the altered statute in the wake of the *WorkChoices* amendments. This includes revising the cross references in the principles to reflect the amended legislation. As an example:

- a. Principle 2(i) may need to be revised to take into account the shift of the provisions concerned from Part VIA of the pre-*WorkChoices* Act, to Division 3 of Part 12 of the amended Act. ACCI presumes the reference in the principles relates to equal pay applications.

<sup>6</sup> AFPC (2006) *Wage Setting Decision and Reasons for Decision*, October 2006, p.6.