5. OTHER MATTERS

5.1 ACTU SUBMISSIONS – EXTRANEOUS MATTERS

5.1 The ACTU raises a range of matters in its submissions which are extraneous, irrelevant and of no material assistance to the Commission in the determination it much reach in this matter. These are generally matters upon which ACCI does not seek to make substantial rebuttal submissions. It is however relevant for ACCI to notify the Commission to the extent possible of these matters and to signal how ACCI views their status.

5.1.1 Policy Commentary on *WorkChoices*:

5.2 It is an established matter that this Commission pays little regard to extraneous criticism of legislative reform. There is in fairness very little of this in the ACTU submission, but where it does appear[1], it is irrelevant.

5.1.2 Extraneous Criticism of the AFPC:

5.3 The ACTU's gentle criticism of AFPC decision making[2] is not relevant to this matter, particularly as the ACTU is seeking to have this Commission apply the AFPC decision.

5.1.3 Updated Economic Data / ACTU AFPC Submission

5.4 ACCI is not seeking to advance a substantive economic argument in this matter, nor to engage the particular performance of the economy or labour market in support of what we say is the appropriate outcome. As such we have no further comment to make on the accuracy or otherwise of the data in Section 7 of the ACTU submission[3]. ACCI also declines to make any further response to the ACTU's AFPC submission which is appended to its submission in this matter[4].

[1] ACTU Submission, *Wages and Allowances Review 2006,* e.g. - ¶14 p.11, ¶20 and 21 p.13.
[2] ACTU Submission, *Wages and Allowances Review 2006,* ¶22 p.13.
[3] ACTU Submission, *Wages and Allowances Review 2006,* pp.36-38.
[4] ACTU Submission, *Wages and Allowances Review 2006,* Attachment B

5.1.4 Numbers of Award Reliant Transitional Employees:

5.5 Section 8 of the ACTU submission[5] purports to provide the Commission with information on numbers of employees covered by transitional awards (the wages considerations raised in this matter). Whilst this may potentially be relevant in a contested matter, ACCI in no way acknowledges that the ACTU has properly examined this issue, nor any veracity in the figures in Section 8 of the ACTU submission.

5.1.5 State IRC Decisions

5.6 ACTU information on state arbitration and the outcomes of state wage cases during 2006[6] is not relevant to the decision required in this matter.

a. The *Workplace Relations Act 1996* directs this Commission to have regard to the decision of the AFPC in a prescribed manner, according to prescribed considerations.

b. State decisions are not a relevant consideration identified in, for example, in Clause 8 of Schedule 6.

c. There is in particular no exhortation to have regard to the state decisions comparable to the direction to consider the AFPC decision in Clause 8(3)(a) or 8(4) of Schedule 6.

5.7 It is also very difficult for the ACTU to argue that the 2006 decisions of the State Commissions are consistent with the AFPC decision[7]:

a. The state decisions are not even consistent with each other – with variation in dollar outcomes between the jurisdictions. South Australia for example delivered a 15% lower increase than NSW and WA for the main cohort of employees to whom award rates apply.

b. These state cases were arbitrated on the basis of what ACCI understands to be heavily state focussed materials and evidence.

[5] ACTU Submission, *Wages and Allowances Review 2006,* pp.39-40.
[6] ACTU Submission, *Wages and Allowances Review 2006,* ¶31, pp.17-18.
[7] ACTU Submission, *Wages and Allowances Review 2006,* ¶31, pp.17-18.

5.8 The State proceedings were (as ACCI understands it) quite specifically run on the basis that each state's industrial legislation differs materially from the wage setting provisions of the amended *Workplace Relations Act 1996*. We understand this was, to a greater or lesser extent, the basis upon which state arbitration proceeded and was not adjourned pending the AFPC decision (as advocated by employers and the intervening Commonwealth in the state cases).

5.9 State industrial legislation has never been substantially amended to reflect the changed role of awards in the era of bargaining and safety nets. This includes for example no requirements to consider incentives to bargain at the workplace level comparable to that in Clause 8(4) of Schedule 6. This further weighs against any comparability between the state wage proceedings and the AFPC outcome as claimed by the ACTU.

5.10 The 2006 state wage cases and determinations are ultimately of absolutely no assistance to the AIRC in the determination it much make. The section of the ACTU submission on this is irrelevant.

5.1.6 AFPC - Generosity or Miserliness

5.11 The ACTU spends a little time in its submission arguing that the decision of the AFPC is "not generous"[8].

5.12 Parties relative value judgements on minimum wage outcomes are inherently extraneous and irrelevant to proceedings such as these – most particularly where the party making the criticism is actually seeking to apply the decision critiqued.

5.13 The AIRC acts according to statute in considering giving effect to the AFPC decision. A value based formulation cannot be fitted into this statutory assessment.

5.14 There is no value in a debate about the effect of the AFPC outcome on real wages, about its relative generosity or miserliness, or its "reasonableness" – and ACCI declines to enter into one.

[8] ACTU Submission, *Wages and Allowances Review 2006,* ¶32-34, pp.18-19.

5.1.7 Other Matters

5.15 To the extent that matters are not addressed in this section or this submission generally, ACCI is not in any way conceding the relevance or accuracy of the ACTU's information or perspectives.

5.2 VICTORIA AND THE TERRITORIES

5.16 ACCI understands that the intention of *WorkChoices* was to provide transitional operation of awards for Victorian employers and employees in a similar way it operates to "*excluded employers*" under Schedule 6. Clause 85 of Schedule 6 treats a variation of a transitional award which underlines a common rule award to be a variation of the common rule.

5.17 In relation to Victorian awards, the explanatory memorandum to the Act states:

> 3007. In respect of transitional employers and their employees in Victoria, a similar transitional system will apply, but with some differences flowing from the fact that the Parliament of Victoria has referred legislative power for certain workplace relations matters to the Parliament of the Commonwealth in the CP(IP) Act and the terms of the referral legislation.
>
> 3008. The differences include that:
>
> • because of the operation of proposed section 492, transitional employers and their employees in Victoria will, with some limited exceptions, be covered by the Standard and their transitional awards will be underpinned by the Standard;
>
> • common rule declarations made by the AIRC in respect of industries in Victoria will continue to apply to transitional employers and their employees in Victoria;
>
> • because of the operation of proposed section 500, transitional employers and employees in Victoria may enter into workplace agreements under Part VB, that will displace transitional awards; and
>
> • at the end of the five year transitional period, transitional employers and their employees in Victoria that are still covered by a transitional award or common rule award will cease to be covered by those instruments, and they will revert to the Standard.

5.18 It appears that the Commission may need to be specifically addressed on specific awards as they apply in Victoria, because it is not clear whether the Victorian common rule awards, insofar as they apply to constitutional

corporations, gave rise to APCSs and on-going awards. This is an issue for parties on an award by award basis.

5.19 The situation for common rule awards for Victoria and the Territories seems to have been confused some unions in making their applications, and there may need to be amendments to (or even re-service of) some applications.

5.20 It is ACCI's understanding that pre-reform awards which applied specifically to the NT or ACT are not captured by Schedule 6 of the Act, as they are not an *"excluded employer"* as defined in clause 2 of that Schedule and s.6 of the Act. Section 6(e) and (f) specifically captures:

> *a body corporate incorporated in a Territory, so far as the body employs, or usually employs, an individual; or*
>
> *a person or entity (which may be an unincorporated club) that carries on an activity (whether of a commercial, governmental or other nature) in a Territory in Australia, so far as the person or entity employs, or usually employs, an individual in connection with the activity carried on in the Territory.*

5.21 There are numerous applications before the Commission which purport to vary NT and ACT "transitional awards" under Schedule 6. Clearly, these applications must be invalid insofar as they apply to employers in the ACT or NT.

5.22 This is another example of where caution should be applied by the Commission before varying all of the applications it has before it in these proceedings and why the Commission should allow the opportunity for parties to address each award as it applies to them (i.e. the ACCI approach).

5.3 SCHOOL BASED APPRENTICES

5.23 The Commonwealth has proposed that gaps be filled in the coverage of minimum wage arrangements for school based apprenticeships[9].

5.24 ACCI has consistently supported the training reforms which have given rise to school based apprenticeships. ACCI has also consistently

[9] Commonwealth Submission, *Wages and Allowances Review 2006,* ¶4.1-4.65, pp.25-43.

supported the variation of minimum wages to properly support the evolving training system and provide a minimum wages floor for all evolving training options.

5.25 On this basis, ACCI supports the variation of awards as proposed by the Commonwealth in Section 4 of its submission[10]. A standard provision adopting the National Training Wage Award wage model could usefully appear in additional awards to fill gaps in minimum wage coverage in this important area. ACCI supports the reasons identified by the Commonwealth for such an approach[11]:

a. The AIRC has previously endorsed the inclusion of standard provisions in its awards for both school-based apprenticeships and school-based traineeships.

b. The *Workplace Relations Act 1996* requires the AIRC to include wage arrangements for school-based apprenticeships and traineeships when making a transitional award-related order, where appropriate.

c. It would meet measures recently agreed to by the Council of Australian Governments (COAG) to ensure the availability of school-based apprenticeships, and is an important component of the strategy of all governments to address skill shortages.

d. In respect to constitutional corporations, gaps in existing coverage of minimum wages and conditions for school-based apprentices and trainees were filled by the Australian Government's workplace relations reforms. It is highly desirable that there be consistency between these arrangements and those available in transitional awards.

5.26 Further, the model clauses proposed to be applied where there are currently gaps:

a. Are drawn from major national test case decisions of this Commission.

[10] Commonwealth Submission, *Wages and Allowances Review 2006,* ¶4.1-4.65, pp.25-43.
[11] Commonwealth Submission, *Wages and Allowances Review 2006,* ¶4.6, p.26.

b. Are drawn from test case decisions of long standing[12].

c. Are test cases settled by consent with strong ACTU and ACCI support.

5.27 There is no legitimate basis for industries to purport to sit outside this process, as proposed by the ACTU.

5.28 In addition, the operation of the *WorkChoices* amendments has closed off the comparable gaps for in minimum wage coverage for trading corporations[13]. Thus, even within particular industries, no more is being asked in this matter than ensuring consistency between pre-reform/APCS and transitional award arrangements (cleaning up the minority of cases to ensure appropriate minimum wage arrangements apply comprehensively).

5.4 SUPPORTED WAGE

5.29 The Commonwealth has proposed that gaps be filled in the coverage of the Supported Wage System (SWS) for persons with a disability[14].

5.30 ACCI was recently a party to discussions with the AFPC, the ACTU and the Commonwealth towards closing comparable gaps in SWS coverage in the AFPC decision. This gave rise to the 2006 AFPC decision for persons with a disability[15]. These provisions have the effect of extending access to the SWS for persons with a disability employed by trading corporations[16].

5.31 This consent, agreed approach, follows the long history of ACCI, ACTU and Commonwealth actively working together on minimum wage arrangements to support the employed of persons with a disability.

5.32 ACCI agrees with the Commonwealth that:

> 3.29 .... The AIRC should ensure that the SWS is available to facilitate the employment of people with a disability within its jurisdiction. The AIRC could achieve this by varying transitional awards to fill all remaining gaps in SWS coverage. In the federal jurisdiction, these

[12] Commonwealth Submission, *Wages and Allowances Review 2006,* ¶4.14*,* p.28.
[13] Commonwealth Submission, *Wages and Allowances Review 2006,* ¶4.41-4.44*,* pp.37-38.
[14] Commonwealth Submission, *Wages and Allowances Review 2006,* ¶3.1-3.32*,* pp.15-23.
[15] AFPC Wage Setting Decision No.1/2006, Items G and H, pp.23-34.
[16] See Commonwealth Submission, 2006 Wages and Conditions Review, ¶3.19-3.21, p.20

gaps only appear in transitional awards under the AIRC's jurisdiction, following the Fair Pay Commission's recent decision.

3.30 …the AIRC should adopt a policy to vary transitional awards to include SWS provisions wherever they are absent, when considering applications to implement any decision of the Full Bench to increase wages…

5.33 ACCI also agrees to the variation of the minimum payment provisions in SWS model clauses to $64 per week, which is consistent with the amount in the recently issued AFPC decision[17].

5.5 ACTU POSITION – SCHOOL BASED APPS & THE SWS

5.34 The ACTU states the following in its outline of submissions:

100. The Commonwealth has proposed model clauses be inserted into transitional awards. The ACTU does not oppose the assumption that such clauses be inserted into transitional awards.

101. However, a number of affiliate unions of the ACTU have indicated that it is inappropriate to insert the clause in its current form or in any form within certain transitional awards.

102. The ACTU asks that the Commission adopt as model clauses the proposed clauses by the Commonwealth and that there be a presumption that such clauses will be inserted into transitional awards. Notwithstanding this, it is requested that the Commission provide the opportunity to parties to awards to request that an award not contain the model clause and that they be given the opportunity to state why it is not appropriate that such a clause be inserted at a date to set by the Commission.

5.5.1 General Comment

5.35 Minimum wage arrangements for persons with a disability and school based apprentices have been set by major test cases of this Commission for some years. These were major national consent test cases, enjoying the support of Australia's employers and unions at the highest levels. More importantly, they were specifically designed to provide universal minimum wage arrangements across the award system, with no gaps.

5.36 Various efforts have been expended over some years to ensure all awards contain these important test case standards for employees particularly in

[17] AFPC Wage Setting Decision No.1/2006, p.31.

need of minimum wage protection (the young and persons with a disability).

5.37 The initial test case decisions were designed to have universal application – but the system failed to deliver this.

5.38 Other things were tried to close the gaps in minimum wage coverage – including the Commission initiating the variation of awards for test cases provisions on its own motion, and reiterating the importance of extending SWS coverage in Safety Net Review Decisions. The conclusions of the Full Bench in the 2003 Safety Net review decision[18] are telling, and are now more than three years old:

> [235] …we are concerned that there appear to be a significant number of federal awards which do not include the supported wage model clause. The model clause deals with an allowable award matter. In performing its functions under Part VI of the Act the Commission is directed to have regard to "*the need to provide a supported wage system for people with disabilities*" (s.88B(3)(c)).
>
> [236] Further, s.143(1C)(e) provides that:
>
> *"The Commission must ensure that a decision or determination . . .*
>
> *(e) where appropriate, provides support to training arrangements through appropriate trainee wages and a supported wage system for people with disabilities."*
>
> [237] The supported wage system is also a matter to be taken into account in the award simplification process.
>
> [238] We think it is appropriate that during the hearing of applications for the implementation of the safety net adjustment provided for in this decision, parties give consideration to the inclusion of the model supported wage clause in the award. If the award already includes the model clause the level should be checked and if necessary varied to reflect the existing level of the supported wage - $56...

5.39 For all the goodwill of the Commission and parties, these efforts have floundered on precisely the attitudes of those instructing paragraph 101 of the ACTU submission. There remain gaps in access to supported wages and training wages.

[18] Safety Net Review May 2003 - 6/5/2003, [PR002003]

5.40 This is no longer acceptable – the system and all of us within it fail young people and people with disabilities if we continue to accept gaps in access to necessary minimum wages for a small minority of persons working outside corporations.

5.41 For too long industry intransigents have stood in the way of the will of this Commission at the highest level, and in the way of tripartite agreement on minimum wages for some of the most vulnerable employees in our community and some of those most in need of employment opportunities. This should not be allowed to continue.

5.5.2 Is this Disability or Apprenticeship Rates?

5.42 It is a little unclear from the wording of paragraphs 100-102 of the ACTU submission whether some affiliates take issue with the Commonwealth proposals regarding minimum wages for School Based Apprentices, with the SWS for persons with a disability, or both. This should be clarified by the ACTU.

5.5.3 There is no merit basis for perpetuating gaps in coverage

5.43 ACCI understands that the SWS has been successfully applied on a universal basis in both Queensland and Victoria. It is difficult to conclude that any industry union could successfully argue that its industry should be allowed to discriminate against persons with a disability, and effectively exclude them from opportunities to work.

5.5.4 Inconsistency in ACTU argument

5.44 The ACTU states at paragraph 4 of its submission[19] that

> It is good public policy that there be, insofar as is possible, uniformity of remuneration for work of a similar or the same nature.

5.45 This observation appears to be directed to ensuring consistency between wages and allowances for incorporated entities and those covered by the transitional award system.

[19] ACTU Submission, *Wages and Allowances Review 2006,* ¶100, p.41

5.46 However, at paragraph 100[20], the ACTU then tries to preserve for some of its affiliates, capacity to secure precisely the inconsistent outcomes it by implication would view as bad or unsound policy.

5.47 The AFPC in issuing its decision has specifically, deliberately and comprehensively moved to close gaps in SWS coverage for persons with a disability. For those employed by trading corporations, ACCI understands there is now comprehensive access to supported wage arrangements.

5.48 Any ACTU affiliate seeking to make the arguments foreshadowed at paragraph 100 of the ACTU submission would be desperately trying to carve off a sliver of their industries, and to deny employees in that sliver of an industry access to the wages arrangements enjoyed by:

a. Employees covered by pre-reform awards in their industry.

b. Employees covered by state awards and general orders in their industry – e.g. all employees in Queensland[21].

5.49 This is simply no longer acceptable. It is discriminatory if not morally questionable. The Commission should reject any further prevarication in this area and close the gaps in minimum wage coverage as was undertaken by the AFPC.

5.5.5 The Union Approach Foreshadowed Would Not Give Effect

5.50 Further the preceding:

a. Gap filling is a material part of the AFPC decision. That is the specific purpose of Item G of the AFPC decision[22].

b. An ACTU affiliate arguing in the terms signalled in paragraph 101 of the ACTU submission would actually be arguing to not give effect to the AFPC decision.

5.51 These proceedings, or the referral of applications to specific members of the Commission if ACCI is successful, are the opportunity to address the AFPC decision and to give effect to it under Schedule 6 to the Act. There

[20] ACTU Submission, *Wages and Allowances Review 2006,* ¶100, p.41
[21] With some minor exemptions consistent with the established operation of the SWS.
[22] AFPC Wage Setting Decision No.1/2006, pp.23-34.

is no scope to refer matters off to further cases to avoid the operation of the decision and the operation of the principles.

5.5.6 The ACTU is now asking for an award by award approach??

5.52 There also appears to be a marked inconsistency in what the ACTU proposes in regard to minimum wages for school based apprentices and persons with a disability, and what it seeks for the variation of minimum wages and allowances more generally.

5.53 The ACTU is seeking a single date of effect in this mater, and to presumably compromise (if not preclude) scope for respondents to question or clarify the application of particular wage or allowance increases.

5.54 The ACTU's principal proposition in this matter seeks to overturn an approach in which applications are considered award by award under a presumption of applying the centrally accepted increase, but with opportunities to address its relevance and detailed application to particular awards.

5.55 It is fairly audacious for the ACTU to then seek to advance precisely the approach it would deny parties in the broader variation of award wages and allowances (where issues will inevitably arise), to allow its affiliates to cherry pick and deny minimum wage rates to some of the most vulnerable employees in our community – persons with a disability and young people seeking to enter training and improve their employability.

5.5.7 Enough Mucking Around – Put Your Case Now

5.56 In ACCI's view it is not satisfactory for persons with a disability or young people seeking to improve their training and skills to be locked out of work opportunities purely through industrial chicanery denying them access to appropriate minimum wage arrangements.

5.57 To the extent a function of minimum wages is to offer a wages safety net for the most vulnerable and least able to bargain, these are precisely the employees for whom the system should be providing minimum wages. If there are industry concerns regarding employment and training policy, they should be addressed directly and through the appropriate channels. Unions should not be allowed to fight their battles on training policy (for

example) by seeking to exclude some of the most vulnerable employees from any access to work by denying them appropriate and supportive minimum wage arrangements.

5.58 Let's be done with a decade of delay and prevarication in this area and do the right thing by persons with a disability and young people seeking training opportunities.

a. Where any industry union believes persons with a disability should be locked out of employment in their industry by denying them access to SWS wage arrangements, which are a long standing and jointly supported test case standard of this Commission, let them argue that in front of their employer and union peers in this matter. The Commission should give the union affiliates referred to in paragraph 101 of the ACTU submission a one off opportunity on 4 and 5 December to state why there should be no access to the SWS for transitionally covered employees in their industry.

b. Where any industry union believes young persons seeking to work under a school based apprenticeship should be locked out of employment/training in their industry by denying them access to the agreed wage arrangements, which are a test case standard of this Commission, let them argue that in front of their employer and union peers in this matter. The Commission should give the union affiliates referred to in paragraph 101 of the ACTU submission a one off opportunity on 4 and 5 December to state why there should be no access to minimum wages for school based apprentices in their industry.