



**Australian Government**

---

# **Wage and Allowances Review**

**2006**

**Commonwealth Submission**



## Table of Contents

	<b>Page</b>
Introduction	5
Section 2: Adjustment of Wage Rates and Allowances in Transitional Awards	7
Section 3: Filling Gaps in Supported Wage System Coverage for Employees with a Disability	15
Section 4: Filling Gaps in Coverage for School-Based Apprenticeships and Traineeships	25
Section 5: Adjustment of Allowances in Awards	45
Appendix A: Supported Wage System Model Clause	51
Appendix B: 'Model' School-Based Apprenticeship Clause	55
Appendix C: Federal Award Coverage – School-Based Apprentices	57
Appendix D: s. 552 of WorkChoices Act - Pay for School-Based Apprentices	59
Appendix E: s. 555 of WorkChoices Act – Pay for School-Based Trainees	61
Appendix F: Standard Provision adapting the National Training Wage Award	63



## Introduction

- 1.1 The Australian Council of Trade Unions (ACTU), on behalf of member unions, currently has applications before the Australian Industrial Relations Commission (AIRC) to adjust wage rates and allowances in transitional awards and allowances in awards.
- 1.2 The applications seek to flow-on the recent decision of the Australian Fair Pay Commission (Fair Pay Commission) to wage rates in transitional awards with a commensurate adjustment to allowances in both awards and transitional awards. The applications seek an operative date of 1 December 2006.
- 1.3 As discussed in section 2 of this submission, the Commonwealth encourages the AIRC to give effect to the union applications. The Commonwealth supports both the quantum of the flow-on and an operative date of 1 December 2006.
- 1.4 The Commonwealth is also asking the AIRC to adopt a policy to provide access to the Supported Wage System (SWS) in all transitional awards, and to fill gaps in coverage of minimum wages and conditions for school-based apprentices and trainees. Specifically, the policy would require the AIRC, when considering applications to implement any decision of the Full Bench to increase wages, to insert provisions for the SWS in transitional awards wherever they are absent, and similarly, to insert provisions for school-based apprentices and trainees where there is potential for employees to be engaged under the provisions but the award does not include such provisions already.
- 1.5 The provisions that the Commonwealth seeks the AIRC to insert in transitional awards are based on model clauses that have already been endorsed by the key industrial parties and the AIRC. The Commonwealth's position in relation to the SWS is detailed in section 3 of this submission. The section includes background material to assist the AIRC in its deliberations and substantiates in detail the arguments in support of the Commonwealth's position.
- 1.6 Section 4 outlines the Commonwealth's proposal to fill the gaps in coverage for school-based apprentices and trainees, and demonstrates the very strong case for the AIRC to adopt a policy which will ensure that

existing gaps are removed. In particular, this initiative would assist in addressing skill shortages and provide valuable training opportunities for young people.

- 1.7 Section 5 of this submission outlines some specific issues that the AIRC should be mindful of when adjusting allowances in awards. These issues relate to the creation of Australian Pay and Classification Scales (Pay Scales) which have been adjusted by the Fair Pay Commission and their relationship to awards.

## SECTION 2: ADJUSTMENT OF WAGE RATES IN TRANSITIONAL AWARDS

### Introduction

- 2.1 The *Workplace Relations Amendment (Work Choices) Act 2005* (WorkChoices) amendments to the *Workplace Relations Act 1996* (WR Act) created a new minimum wage setting body – the Australian Fair Pay Commission. The Fair Pay Commission has responsibility for conducting wage reviews and for setting and adjusting minimum and classification wages, predominantly for employees of constitutional corporations and employees of businesses in Victoria and the Territories (refer to s.5 and s.6 of the WR Act). The Fair Pay Commission is the body primarily responsible for the fixation of minimum wages for employees covered by the federal workplace relations system.
- 2.2 However, the federal system maintains a transitional system for employers and their employees who were covered by federal awards on 27 March 2006 but who are otherwise not covered by s.5 and s.6 of the WR Act. These employees do not fall within the jurisdiction of the Fair Pay Commission. Employees in this group are referred to as ‘transitional employees’, and will be covered by ‘transitional awards’ until 27 March 2011 unless their award ceases to be in force before that date.<sup>1</sup> This provides employers with the option to incorporate within five years. If they do not incorporate within that time, they will transfer into the relevant State system.
- 2.3 The AIRC has the responsibility to fix minimum wages for transitional employees.

### AIRC to have regard to the Fair Pay Commission’s decisions

- 2.4 When adjusting the minimum wages of transitional employees, the AIRC must have regard to the Fair Pay Commission’s decisions and the desirability of consistency with those decisions.

---

<sup>1</sup> Clause 6 of Schedule 6 of the WR Act.

2.5 Clause 8 of Schedule 6 of the WR Act sets out these considerations as follows:

*“(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.”*

- 2.6 In summary, the AIRC is obliged (among other things) to have regard to the principle that the wages of transitional employees should not place them at a disadvantage compared with employees within the rest of the federal system, and that the costs to transitional employers of wages should not place them at a disadvantage in relation to employers in the rest of the federal system.
- 2.7 The AIRC is also required to have regard to the wage-setting decisions of the Fair Pay Commission and any relevant economic statements by that body.

### **Safety Net Review Case 2006**

- 2.8 In October 2005, unions filed applications seeking a 4 per cent increase in all award rates of pay.
- 2.9 On 17 November 2005, the AIRC issued a statement and provisional directions in relation to the applications. The applications were called on for a further directions hearing on 19 December 2005 following the passage of the WorkChoices legislation on 8 December 2005.
- 2.10 The Commonwealth, supported by employer groups, submitted that the AIRC should defer the hearing of the applications until after the Fair Pay Commission made its first wage decision. This was based upon three main public interest grounds.
- 2.11 The first ground was that under the WorkChoices amendments, the AIRC was to have regard to the statements and decisions of the Fair Pay Commission, and the desirability of consistency with those decisions. The legislation established that the Fair Pay Commission should be the 'lead body' in determining any increase in minimum wages.
- 2.12 The second ground was that while the WorkChoices legislation had been passed by Parliament, and certain parts had commenced to operate, it would not commence to operate fully until March 2006. As a consequence, the Commonwealth submitted that the AIRC proceedings would straddle two systems, being governed until March 2006 by the terms of the unamended WR Act, and thereafter by the quite different terms of the WR Act as amended by WorkChoices. The Commonwealth

argued that it was undesirable that parties should be subject to such uncertainty.

- 2.13 The third public interest consideration was based on the fact that after the relevant amendments commenced to operate the AIRC would have wage-fixing powers in relation to transitional employees only. It was said that under those arrangements there would be a number of implications for the nature and conduct of the proceedings, including the possibility of additional parties and interveners. The Commonwealth argued that if the AIRC were to grant an increase before the Fair Pay Commission, it would be highly likely that workers in the same industry with the same skills working in businesses sometimes situated on the same street would be paid different amounts as minimum award wages.
- 2.14 The AIRC agreed with the Commonwealth, holding that it would be undesirable to pre-empt the Fair Pay Commission's role. It ordered the provisional directions to be vacated and that the proceedings be adjourned until the Fair Pay Commission made its first wage-setting decision.

### **Fair Pay Commission Decision**

- 2.15 The Fair Pay Commission handed down its first minimum wage decision on 26 October 2006. The Fair Pay Commission announced an increase of<sup>2</sup>:
- \$27.36 per week in the standard Federal Minimum Wage (FMW);
  - \$27.36 per week in all rates in Pay Scales up to and including \$700 per week; and
  - \$22.04 per week in all rates in Pay Scales above \$700 per week.
- 2.16 The increases flow-on to junior employees, employees to whom training arrangements apply, employees with a disability and piece workers.

---

<sup>2</sup> These increases are based on a 38-hour week.

- 2.17 The decision was reached unanimously by the five commissioners. It represents a balanced judgement with a clear focus on the Fair Pay Commission's legislative parameters, as set out in s. 23 of the WR Act.
- 2.18 The decision takes into account the requirement to provide a safety net for the low paid, and:
- the fact that the economy and labour market have continued to perform strongly;
  - the importance of productivity to the future competitiveness of the Australian economy;
  - movements in consumer prices; as well as
  - the potential impact on unemployment and inflation.
- 2.19 The Fair Pay Commission made its decision informed by more than 115 stakeholder and public consultation meetings, more than 180 submissions from organisations and individuals, and detailed research conducted both by the Fair Pay Commission Secretariat and by expert, external organisations and academic institutions.
- 2.20 In summary, the decision was reached after analysis and consideration of the best available evidence gathered through research, submissions and consultation. For all of these reasons outlined above, the Commonwealth commends the Fair Pay Commission's decision as a thoroughly fair decision.
- 2.21 In the Commonwealth's view, it is clearly open to the AIRC to adopt the Fair Pay Commission's decision in the confident knowledge that, in doing so, it will fully satisfy the criteria that the AIRC is required to have regard to in Clause 8 of Schedule 6 of the WR Act.
- 2.22 The Commonwealth supports the flow-on of the Fair Pay Commission's decision to the wage rates and allowances contained in transitional awards.
- 2.23 This should be achieved as follows:

- an increase of \$27.36 per week for transitional award wage rates up to \$700 per week; and
- an increase of \$22.04 per week for transitional award wage rates of \$700 per week and above.
- increases to the minimum rates of junior employees, employees to whom training arrangements apply, employees with a disability and piece workers in the manner specified in the Fair Pay Commission's decision.

## **Monetary Allowances in Transitional Awards**

2.24 Under the pre-reform WR Act, 'allowances' were generally allowable under paragraph 89A(2)(j). Particular award allowances that were held to be allowable included accident pay, meal allowance where an employee is required to work overtime without notification, first aid allowance, clothing and equipment allowances, travelling allowances where an employee is required to work late or early and the provision of transport by an employer.

2.25 The scope of what is allowable has been narrowed by the WorkChoices amendments to the WR Act. Paragraph 17(1)(j) of Schedule 6 makes allowable in transitional awards monetary allowances that provide for:

- (i) expenses incurred in the course of employment - for example, travel, accommodation, uniform, motor vehicle, meal or telephone expenses incurred in the course of employment;
- (ii) responsibilities or skills that are not taken into account in rates of pay for employees – for example, a monetary allowance for the performance of additional duties at a higher level or for holding a particular qualification; or
- (iii) disabilities associated with the performance of particular tasks (for example handling hazardous materials) or work in particular conditions (for example work in cold rooms) or locations (for example work in remote locations).

- 2.26 Some matters previously categorised as allowances, such as accident make up pay and the provision of non-monetary allowances, are no longer allowable.

### **Operative Date**

- 2.27 The Fair Pay Commission determined that its decision will take effect on 1 December 2006. This provided a notice period of approximately five weeks from the day the Fair Pay Commission announced its decision.
- 2.28 The ACTU is seeking an operative date of 1 December 2006 for each of its applications. The Commonwealth supports an operative date as close as possible to 1 December 2006 for the following reasons.
- 2.29 Firstly, it would be desirable if all businesses in the federal workplace relations system were to pay an increase from the same date.
- 2.30 Secondly, neither transitional employees nor employees within the rest of the federal system have received a minimum wage increase since at least the 2005 Safety Net Review. As employees within the rest of the federal system will be receiving an increase on 1 December 2006, the Commonwealth supports the AIRC in handing down a decision as soon as possible so that transitional employees are not disadvantaged.
- 2.31 To minimise the inconvenience for employers and employees, the Commonwealth further supports the expeditious handling of these matters so that any period of retrospectivity will be minimal.



## SECTION 3: FILLING GAPS IN SWS COVERAGE FOR EMPLOYEES WITH A DISABILITY

### Introduction

- 3.1 This section proposes that the AIRC adopt a policy to provide access to the Supported Wage System (SWS) in all transitional awards. The policy would require the AIRC, when considering applications to implement any decision of the Full Bench to increase wages, to insert provisions for the SWS in transitional awards wherever they are absent. This action would be taken whether or not the application for wage increases specifically sought the inclusion of SWS provisions.
- 3.2 The provisions to be inserted in each award would be the SWS model clause endorsed by a Full Bench of the AIRC in 1994.
- 3.3 The key points made in support of the proposal to adopt such a policy are:
- The inclusion of SWS provisions in awards is essential to enable the employment of workers with a disability who are unable to earn the full minimum wage for the job. In the absence of SWS provisions such employees would have to be paid the full wage, and would therefore be uncompetitive in the labour market.
  - The AIRC has endorsed the SWS and an associated model clause, and has repeatedly supported the need for the inclusion of the model clause in awards generally.
  - The WR Act requires the AIRC when making a transitional award-related order to include terms for the SWS, where appropriate.
  - The Fair Pay Commission's recent decision filled all gaps in the coverage of the SWS in Pay Scales. An object of the WR Act in

relation to transitional awards is to ensure that wage arrangements are not inconsistent with Fair Pay Commission decisions.

3.4 Each of these points is substantiated in detail in the remainder of this section. The section begins by providing background material about:

- the SWS;
- industrial relations arrangements and the arbitral history of the SWS;
- the recent Fair Pay Commission wage-setting decision; and
- legislative requirements in relation to the AIRC's functions.

## **Background**

### **The SWS**

3.5 Employees with a disability in open employment who are unable to work at the full minimum rate of pay for their job because of the effects of disability are generally employed under the SWS. The SWS assesses the relative capacity of an employee in their job and uses this assessment to pro-rate the full minimum rate that would otherwise apply to the work the employee is performing.

3.6 The availability of pro-rata wages under the SWS is necessary to ensure that employees with a disability are competitive in the labour market. This is because if full minimum rates are applied to employees with a reduced productive capacity due to disability, these employees are likely to be priced out of the labour market.

3.7 A person is eligible to participate in the SWS if the person:

- cannot work at full minimum rates because of a disability; and
- meets the impairment criteria for the Disability Support Pension (DSP).

## **SWS Evaluation**

- 3.8 The operation of the SWS has been evaluated and found to be operating effectively. In 1999, the Department of Family and Community Services commissioned KPMG Consulting to conduct an evaluation of the SWS. The resulting report found that the SWS provided employment opportunities that would not otherwise exist by enabling access to employment for people with disabilities through the use of productivity based wages.<sup>3</sup>
- 3.9 The report recommended that the Australian Government, in conjunction with the ACTU, further encourage the provision of the SWS for employees with a disability in open employment.<sup>4</sup>

## **Industrial relations arrangements for the SWS**

- 3.10 In order to facilitate the SWS, industrial instruments must include enabling provisions that apply SWS rates in lieu of full minimum rates. Where an industrial instrument does not provide access to the SWS, an employee with a disability must be paid the full minimum rate prescribed by that instrument.
- 3.11 In 1994, a consent application for endorsement of model award provisions for the SWS was made to the AIRC by the ACTU, the Australian Chamber of Commerce and Industry (ACCI) and the Commonwealth. The AIRC approved the SWS model clause (Appendix A) to be inserted in federal awards. It provides the legal basis for the assessment and payment of pro-rata wages based on an assessment of the employee's skills and productive capabilities using the SWS.<sup>5</sup>
- 3.12 Since 1994, SWS provisions have been included in awards on an award-by-award basis. This has generally been a slow and uneven

---

<sup>3</sup> KPMG Consulting, *Supported Wage System Evaluation*, 1999, p.1.

<sup>4</sup> *Ibid*, p.3.

<sup>5</sup> Australian Industrial Relations Commission, *Supported Wage System for People with a Disability*, Decision 1831/94, S Print L5723.

process.<sup>6</sup> As a result, many transitional awards have gaps in SWS coverage because they do not include SWS provisions. An analysis of pre-reform federal awards containing wage provisions conducted by DEWR in 2006 found that around 55 per cent of those awards did not provide access to the SWS.

***The SWS was always intended to be extended to all areas of open employment***

3.13 When the Full Bench of the AIRC approved the SWS model clause, it expected that those provisions would eventually be extended to all areas of open employment. In its decision, the Full Bench stated:

*We confidently expect ... that the model clause will be implemented in workplaces to assist those people with disabilities who may have previously found it difficult or impossible to compete for jobs in the open labour market. We hope that other awards of the Commission will be varied to include the model clause and that the parties to those awards will implement its provisions. The Commission congratulates the parties on their co-operation and considerable efforts in developing the "Supported Wage System" which, we hope, will encourage industry to employ workers with disabilities and assist the integration of disabled workers in the general workforce.<sup>7</sup>*

3.14 This statement is a reflection of the joint submission by the parties to the case (the ACTU, ACCI and the Commonwealth). They submitted:

*... that it would be appropriate for the Commission to vary an award to insert the provisions contained in this application, if the award has not*

---

<sup>6</sup> An exception to this approach arose in July 2004, when the AIRC approved applications to include the SWS model clause in all Victorian minimum wage orders. Australian Industrial Relations Commission, s.501 applications to adjust minimum wage orders, s.501A Supported Wage System - minimum wage, Print PR949450.

<sup>7</sup> Australian Industrial Relations Commission, Supported Wage System for People with Disability, Decision 1831/94, S Print L5723.

*already been varied by the parties to do this, at the time of renewing the award.*<sup>8</sup>

### *2003 and 2004 Safety Net Reviews*

3.15 In the 2003 Safety Net Review case, the Disability Employment Action Centre, a Commonwealth funded community legal centre, and the National Council on Intellectual Disability, a national body representing people with disabilities (jointly DEAC), urged the AIRC to “*ensure that the safety net be strengthened by ordering that all awards be varied to include the amended Supported Wage System model clause.*”<sup>9</sup>

3.16 DEAC argued that the absence of SWS provisions in all awards “creates a barrier for workers with disability having access to a fair system of pro-rata award wage assessments and in many cases renders workers vulnerable”.<sup>10</sup>

3.17 In its decision, the AIRC maintained its support for full SWS coverage in open employment but acknowledged that the inclusion of the SWS model clause in awards could only be achieved upon application of the parties to each award. The AIRC stated:

*In particular we are concerned that there appear to be a significant number of federal awards which do not include the supported wage model clause.*<sup>11</sup>

and

*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.*<sup>12</sup>

---

<sup>8</sup> *Supported wage system for people with disability*, Joint submission by the ACTU, ACCI and Commonwealth Government, p.25.

<sup>9</sup> DEAC submission to the 2003 Safety Net Review, paragraphs 3 and 4, p.56.

<sup>10</sup> *Ibid*, paragraph 2, p.57.

<sup>11</sup> Australian Industrial Relations Commission, Safety Net Review – Wages, May 2003, Print PR002003, p.73, paragraph 235.

<sup>12</sup> *Ibid*, p.74, paragraph 238.

- 3.18 DEAC made a similar submission in the 2004 Safety Net Review case. In its 2004 Safety Net Review decision, the AIRC restated its position from the 2003 decision.

### **Fair Pay Commission Minimum Wage Determination 2006**

- 3.19 In its decision, the Fair Pay Commission acknowledged that gaps in SWS coverage impair employment opportunities for employees with a disability:

*Employees with a disability in open employment who are covered by a preserved Pay Scale but are without access to the SWS model clause are subject to full adult, junior or trainee rates of pay. This represents a gap in coverage, since employees with a disability that affects their productive capacity are required to be paid full rates of pay, potentially impairing their competitiveness in the labour market.<sup>13</sup>*

- 3.20 In response, the Fair Pay Commission decision filled gaps in SWS coverage in all existing federal wage instruments within the Fair Pay Commission's jurisdiction. The Fair Pay Commission filled gaps in SWS coverage by establishing a new special Pay Scale that extends SWS coverage to preserved Pay Scales derived from federal and State awards that did not provide for the SWS.
- 3.21 The Fair Pay Commission also introduced new special Federal Minimum Wages to ensure that award-free employees with a disability are entitled to a statutory minimum wage, and are able to access the SWS if they are unable to earn the full minimum rate for their job.

### **Legislative requirements in relation to the AIRC's functions**

- 3.22 The key object of the WR Act in relation to minimum wages for transitional employees with a disability is to ensure that "*the Commission's functions and powers to vary transitional awards are*

---

<sup>13</sup> Fair Pay Commission Wage-Setting Decision, 2006, p.114.

*exercised so that wages and other monetary entitlements are not inconsistent with wage-setting decisions of the AFPC*.<sup>14</sup>

- 3.23 This object is reinforced by the additional WR Act requirement for the AIRC to have regard to the desirability of its decisions being consistent with those of the Fair Pay Commission.<sup>15</sup>

### ***Provisions in the WR Act that guide the exercise of its powers***

- 3.24 When exercising its powers, the WR Act requires the AIRC to ensure that any order made in relation to transitional awards provides for the SWS where appropriate. Schedule 6, clause 62 of the WR Act states:

*(1) The Commission must, when making a transitional award-related order, if it considers appropriate, ensure that the order:*

...

*(c) if appropriate, provides for the employment of workers with disabilities in general employment by including terms for the Supported Wage System; and...*

- 3.25 The anti-discrimination provisions of the WR Act also require it to have regard to the need to provide pro-rata disability pay methods for transitional employees with a disability.<sup>16</sup>

### ***Providing for the SWS***

- 3.26 As previously discussed, wherever full minimum rates are applied to employees with a much reduced productive capacity, those employees are likely to be priced out of the labour market. Therefore, it is necessary to fill these gaps in SWS coverage to remove significant barriers to the employment of people with a disability.

---

<sup>14</sup> *Workplace Relations Act*, Schedule 6, clause 1.

<sup>15</sup> *Ibid*, clause 8.

<sup>16</sup> *Ibid*, clause 9.

- 3.27 The WR Act enables the AIRC to fill gaps in SWS coverage by varying transitional awards to provide for the payment of wages at a lower rate to transitional employees who are unable to earn the full minimum rate.<sup>17</sup> This lower rate can only be paid to a transitional employee if the employee is certified as unable to earn the full minimum rate – a pre-requisite of the SWS.
- 3.28 Furthermore, the list of allowable transitional award matters under schedule 6, clause 17 of the WR Act specifically includes “*rates of pay for transitional employees under the supported wage system*”. Schedule 6, clause 40 of the WR Act enables a Full Bench of the AIRC to establish principles about varying transitional awards in relation to each allowable transitional award matter.<sup>18</sup>

## Conclusion

- 3.29 The employment of people with a disability who are unable to earn the full minimum rate is effectively prevented wherever a transitional award does not make provision for the SWS. 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 gaps only appear in transitional awards under the AIRC’s jurisdiction, following the Fair Pay Commission’s recent decision.
- 3.30 Therefore, 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. This would be consistent with the requirements of the WR Act to:
- ensure that any order made in relation to transitional awards provides for the SWS where appropriate;

---

<sup>17</sup> Ibid, clause 50.

<sup>18</sup> Ibid, clause 40.

- have regard to the need to provide pro-rata disability pay methods, such as the SWS, for transitional employees with a disability; and
- achieve consistency with the recent Fair Pay Commission wage-setting decision.

3.31 Such a policy would also be consistent with the AIRC's unwavering support for the inclusion of SWS provisions in awards generally.

3.32 The minimum amount payable prescribed in the SWS model clause should also be increased to \$64. This increase would maintain its equivalence to the Income Test Free Area for the DSP and further achieve consistency with the Fair Pay Commission's wage-setting decision.



## **SECTION 4: FILLING GAPS IN COVERAGE FOR SCHOOL-BASED APPRENTICESHIPS AND TRAINEESHIPS**

### **Introduction**

- 4.1 This section proposes that the AIRC adopt a policy to fill gaps in the coverage of minimum wages and conditions for school-based apprentices and trainees in transitional awards. The policy would require the AIRC, when considering applications to implement any decision of the Full Bench to increase wages, to insert provisions for school-based apprentices and trainees, where there is potential for employees to be engaged under the provisions but the award does not include such provisions already.
- 4.2 The proposed provisions to be inserted into awards for school-based apprentices were originally drafted by the ACCI and the ACTU. They were adapted from and based on the model clause for school-based apprentices endorsed by a Full Bench of the AIRC in 2000.<sup>19</sup> The proposed provision was also used by Commissioner Smith as part of the AIRC's systematic process of reviewing key awards of its own motion to include arrangements for school-based apprentices.
- 4.3 Where an award contains provisions for apprenticeships, the AIRC would vary the award to include the provisions for school-based apprenticeships if they are not already included.
- 4.4 For school-based traineeships, it is proposed that the standard provision that is currently in many awards that adopts the National Training Wage Award 2000 (NTW Award)<sup>20</sup> be inserted in any award where a

---

<sup>19</sup> Australian Industrial Relations Commission, Part-time Apprenticeships – Endorsement of Model Clauses, Decision, 6 March 2000, Print S3850.

<sup>20</sup> See for example: subclause 4.2.8 of the Metal, Engineering and Associated Industries Award 1998, AW789529CRV.

traineeship can potentially be undertaken in relation to the work covered by the award, but the award does not currently adopt the NTW Award.

4.5 If this is not feasible in a particular award, an alternative provision that adopts only the school-based trainee provisions of the NTW Award could be inserted into the award instead.

4.6 The key reasons supporting the Commonwealth's submission to fill gaps in the coverage of minimum wages and conditions for school-based apprentices and trainees include that:

- The AIRC has previously endorsed the inclusion of standard provisions in its awards for both school-based apprenticeships and school-based traineeships;
- The WR Act requires the AIRC to include wage arrangements for school-based apprenticeships and traineeships when making a transitional award-related order, where appropriate;
- 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; and
- 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.

4.7 The Commonwealth does not propose that the AIRC review wage arrangements for other classes of apprentice or trainee at this time. The Fair Pay Commission noted in its inaugural wage-setting decision of 26 October 2006 that a number of complex issues had been raised by parties in submissions; for example, gaps in part-time apprenticeships

arrangements, competency-based provisions and adult apprentice pay rates. It decided that it would be premature to establish any new Pay Scales, and that instead it would initiate a wage review in 2007 of Pay Scales for employees to whom training arrangements apply to inform itself more fully on these issues.<sup>21</sup>

- 4.8 An object of Schedule 6 of the WR Act in relation to transitional awards is to ensure that wages and other entitlements in awards are consistent with wage-setting decisions of the Fair Pay Commission. Consistent with this object, the Commonwealth submits that the AIRC should not take any action on these additional issues until after the Fair Pay Commission's 2007 wage review.
- 4.9 Relevant background material for the AIRC is now provided, together with detailed substantiation of the course of action proposed.

## Background

- 4.10 Apprenticeships and traineeships are part of the Australian Government's 'Australian Apprenticeships' initiatives (known as New Apprenticeships prior to 1 July 2006).<sup>22</sup>
- 4.11 Australian Apprenticeships are forms of employment that combine structured training as well as work and lead to a recognised vocational qualification. They are supported by a training agreement between the employer and the apprentice or trainee that is registered with the relevant state or territory training authority. Australian Apprenticeships are industry focused and demand-driven.
- 4.12 An important feature of Australian Apprenticeships when introduced in 1996 was the availability of a greater range of options for employers and employees as to how their training needs could be met. This included having access to part-time Australian Apprenticeships. However, before

---

<sup>21</sup> Australian Fair Pay Commission, Wage-setting Decision and Reasons for Decision, October 2006, page 8.

<sup>22</sup> The Hon Gary Hardgrave MP, 'Australian Apprenticeships', media release, 19 June 2006.

employers and employees could take advantage of the new flexible training arrangements, appropriate wage arrangements and conditions of employment needed to be made available.

- 4.13 Australian School-based Apprenticeships are a class of part-time apprenticeships or traineeships which combine ordinary school studies with practical work and structured training during later school years. This enables students to work towards a national vocational qualification while continuing school studies to complete their senior secondary schooling. Typically a student combines periods of time on-the-job with their employer, time with a registered training provider for off-the-job training aspects of the apprenticeship or traineeship, and the balance of time at school pursuing their normal school studies. A variety of models have been developed to ensure an appropriate mix of school, training and work is achieved.

### **Development of school-based apprenticeship award provisions**

- 4.14 In 2000 the AIRC endorsed 'model' award clauses for part-time and school-based traditional apprenticeships that had been developed by the ACCI, the ACTU and the Commonwealth.<sup>23</sup> The model clauses provide appropriate arrangements for part-time junior and adult apprentices (including school-based) and scope of apprenticeship provisions.
- 4.15 Following endorsement by the AIRC of the model clauses for part-time and school-based apprentices, the ACCI and the ACTU drafted a set of provisions which dealt only with school-based apprentices. The provisions were adapted from and based on the endorsed clause. A copy of the 'model' provisions developed by the ACCI and the ACTU is provided at Appendix B.
- 4.16 Key elements applicable to school-based apprentices embodied in the clause include:

---

<sup>23</sup> Australian Industrial Relations Commission, Part-time Apprenticeships – Endorsement of Model Clauses, Decision, 6 March 2000, Print S3850.

- That the rates applicable to part-time apprentices follow the same principles as the rates applicable to full-time apprentices. The rates for full-time apprentices apply for all time spent by the apprentices in off-the-job training as well as for all time spent in actual work.
- Because the time spent in off-the-job training by school-based apprentices is not as clearly defined as for full-time apprentices, their wages do not apply to the actual time that they spend in off-the-job training. Instead, they are deemed to spend 25 per cent of their time in off-the-job training. As a result, school-based apprentices are paid the hourly rates applicable to the corresponding full-time apprentices for all hours spent working on-the-job, and 25 per cent extra for the time deemed to be spent in off-the-job training. The end result is consistent with the rates paid to full-time apprentices.
- School-based apprentices progress through the wage scale applicable to full-time apprentices at the rate of 12 months progression for each two years of employment. This takes account of the fact that school-based apprentices are part-time and are acquiring skills at a lower rate than a full-time apprentice.
- All other conditions of the relevant award apply on a pro-rata basis to school-based apprentices.

### ***Building and Construction Industry – arbitrated settlement***

- 4.17 Following endorsement of the model school-based apprenticeship clause, the AIRC commenced a systematic process of reviewing key awards of its own motion to include the model clauses. The model school-based apprenticeship provisions drafted by the ACCI and the ACTU formed an integral part of this process.
- 4.18 Proceedings commenced in relation to the National Building and Construction Award 2000 (NBCI Award) in March 2003, however the

Construction, Forestry, Mining and Energy Union (CFMEU) strongly opposed the variation citing concerns about occupational, health and safety and training quality issues.

- 4.19 In August 2004, following a lengthy but unsuccessful process of conciliation, Commissioner Smith arbitrated the matter deciding that the NBCI Award should be varied to include school-based apprenticeship provisions. Commissioner Smith's decision emphasised the importance of facilitating the employment of young people through award provisions enabling their employment as school-based apprentices. The decision stated:

*The important initiative, commenced by the peak councils, to provide more educational opportunity and flexibility for young people was seen by the president of the Commission, Justice Giudice, to be an important matter to which the Commission should direct attention.*

*To that end, His Honour asked me to examine the matter.*

*Having conferred with ACCI and ACTU, I decided to list, on my own motion, a number of awards to consider the inclusion or otherwise of a school-based apprenticeship clause.*

And further:

*This leads to the final consideration as to whether or not provision should be made for school-based apprentices.*

*I am satisfied that there is an overwhelming case to provide young people with as many pathways to sustainable employment as possible. Providing award recognition is not compelling either employers or young people to tread this path, but it will provide opportunities. To the extent that school-based apprenticeships assist young people to make the transition from school to work, that is in the public interest; to the*

*extent that school-based apprenticeships facilitate an extension of secondary education, that is in the public interest; to the extent that school-based apprentices enhance the skill base of young people and better prepares them for productive employment, that is in the public interest; to the extent that a school-based apprenticeship will increase the pool of skilled employees in the important area of building and construction in the Australian economy, that is in the public interest; and finally, to the extent that a school-based apprenticeship contributes to the employment rate of young people, that is in the public interest.*<sup>24</sup>

### ***Existing coverage - school-based apprenticeship provisions in transitional awards***

4.20 Despite the efforts of the AIRC to vary key awards on its own motion, the inclusion of school-based apprenticeship provisions in awards has been limited. An electronic search conducted by the Department of Employment and Workplace Relations (DEWR) in November 2006 revealed that only 25 federal awards had been varied to include provisions enabling the employment of school-based apprentices. A list of the awards is at Appendix C.

4.21 Some awards which contain school-based apprenticeship provisions do not apply them to the full range of apprenticeships covered by the award. For example, the school-based apprenticeship provisions in the Metals, Engineering and Associated Industries Award 1998 exempt their application to electrical, electronic and plumbing apprentices.<sup>25</sup> This exemption has the practical effect of creating a gap under the award in the coverage of minimum wages and conditions for school-based apprentices in these trades.

---

<sup>24</sup> Australian Industrial Relations Commission, School-based Apprenticeships, Decision, 5 August 2004, PR950423.

<sup>25</sup> See sub-clause 4.2.7(k) of the Metal, Engineering and Associated Industries Award 1998, AW789529CRV.

4.22 In particular, there are key awards in the skills shortage industries identified by COAG that do not include provisions enabling the employment of school-based apprentices. These awards have considerable potential for the employment of significant numbers of young people. The awards include:

- Brass, Copper and Non-Ferrous Metals Industry Award 1998 [AW769405];
- Vehicle Industry Award 2000 [AW801818];
- National Electrical, Electronic and Communications Contracting Industry Award 1998 [AW791396]; and
- Licensed Clubs (Victoria) Award 1998 [AW787060].

### **Development of school-based traineeship award provision**

4.23 In 1997 the ACCI, ACTU and the Commonwealth reached agreement on award provisions for part-time traineeships. This resulted in a consent variation to the National Training Wage Award 1994 (the NTW Award) on 8 July 1997<sup>26</sup> which allowed employment under part-time traineeships and included separate wage rates for school-based traineeships.

4.24 School-based trainees are currently paid at two wage levels only – one rate for trainees in year 11 and the second rate for those in year 12 – irrespective of the traineeship they are undertaking. School-based trainees may however, with the agreement of the trainee, be paid a 20 per cent loading on top of these rates in lieu of annual leave, sick leave, personal leave and public holidays.

---

<sup>26</sup> Australian Industrial Relations Commission, Traineeship Wages – Safety Net Review, Consent Order, 8 July 1997, No277CR V018 Print P2738.

### ***Existing coverage - school-based traineeship provisions***

- 4.25 While the variation to the NTW Award has relatively broad coverage and many other federal awards bring up the provisions of that award,<sup>27</sup> there remain gaps in coverage for school-based traineeships.
- 4.26 The vast majority of awards that do not make reference to the NTW Award potentially have significant areas of gaps in coverage of minimum wages and conditions for not only school-based trainees. This is because, in the main, responsiveness to the NTW Award is achieved through membership of one of the named employer organisations in the award. Where an employer is respondent to a transitional award which does not include a reference to the NTW Award, and that employer is not a member of one of the organisations named in the NTW Award, then the employer is not able to employ school-based trainees on minimum rates of pay specifically established for trainees.
- 4.27 An analysis of pre-reform federal awards containing wage provisions conducted by DEWR in 2006 found that around 65 per cent of those awards did not include any provisions relating to the national training wage.
- 4.28 Examples of awards which do not include provisions for school-based traineeships include:
- Australian Paint Industry Award 2000 [AW765560];
  - Glass Industry – Glass Production – Award 1998 [AW782190];
  - Horse Training Industry Award 1998 [AW783476];
  - Pastrycooks (Victoria) Award 1999 [AW792620]; and
  - National Fast Food Retain Award 2000 [AW806313].

---

<sup>27</sup> See for example, subclause 4.2.8 in the Metal, Engineering and Associated Industries Award 1998, AW789529CRV.

## **Legislative requirements in relation to the AIRC's functions**

4.29 Schedule 6 of the WR Act sets out the provisions which govern transitional arrangements for parties bound by federal awards. There are three key legislative provisions which are particularly relevant to the exercise of the AIRC's powers in this matter:

- Requirements for transitional award-related orders [clause 62];
- Provisions relating to the variation of transitional awards when dealing with an industrial dispute [clause 29]; and
- Provisions governing the performance of the AIRC's functions under Schedule 6 [clause 8].

### ***Requirement for transitional award-related orders***

4.30 The WR Act places certain requirements on the AIRC in relation to transitional award-related orders. One such requirement is that when making a transitional award-related order the AIRC must ensure that the order includes wage arrangements for the full range of apprenticeships, traineeships and other training arrangements that are relevant to the work covered by the transitional award to which the order relates, including for part-time and school-based apprenticeships and traineeships, where appropriate.<sup>28</sup>

4.31 The implementation of any decision of the Full Bench in this matter to increase wages presents the AIRC with an opportunity to take action under this clause. When considering applications on an award-by-award basis individual Commissioners will be in a position to include in the transitional award under consideration provisions for school-based apprentices and trainees where there is potential for employees to be engaged under the provisions and the transitional award does not already include such provisions.

---

<sup>28</sup> Ibid, subclause 62(1)(d).

### ***Variation of transitional awards***

- 4.32 Clause 29 of the WR Act sets out provisions relating to the variation of transitional awards when the AIRC is dealing with industrial disputes. Among other things, the clause provides that if the AIRC considers it appropriate to vary a transitional award in respect of rates of pay for transitional employees to whom training arrangements apply (including the inclusions of school-based apprentice or trainees rates), the AIRC may also vary the application of the terms of the award to those employees in accordance with the Workplace Relations Regulations 2006.<sup>29</sup>
- 4.33 A regulation has been made for the purpose of this provision which is applicable to a part-time employee to whom training arrangements apply.<sup>30</sup> The regulation applies in those circumstances where the AIRC is for the first time introducing rates of pay into the transitional award for a class of part-time transitional employee, and the award does not already specify the basis on which the conditions of the award are to apply to the class of part-time transitional employee.
- 4.34 The regulation provides an example of a variation to a transitional award to assist in understanding its application in practice. The example states:

*The Commission, for the first time, introduces rates of pay for school-based apprentices (which would be a class of part-time transitional employees), and school-based apprentices are not provided for in the transitional award.*

*In this circumstance, the Commission would be entitled to determine the rates of pay for school-based apprentices and then vary any of the allowable transitional award matters in the transitional award so as to provide a basis on which the conditions of the transitional award would apply to the school-based apprentices on the basis of hours worked.*

---

<sup>29</sup> Ibid, subclause 29(3).

<sup>30</sup> Workplace Relations Regulations 2006, Chapter 3, Part 3, Division 2, Regulation 3.1.

### **Performance of AIRC's functions**

- 4.35 A key object of Schedule 6 is to ensure that during the transitional period the AIRC'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 Fair Pay Commission.<sup>31</sup>
- 4.36 To further this objective, the WR Act provides that in performing its functions the AIRC must have regard to the principle that the wages and other monetary entitlements of transitional employees should not place them at a disadvantage compared with the entitlements of other employees; and conversely that the costs to transitional employers of wages and other monetary entitlements should not place them at a competitive disadvantage.<sup>32</sup> The AIRC must also have regard to the desirability of its decisions being consistent with the wage-setting decisions of the Fair Pay Commission.<sup>33</sup>
- 4.37 We discuss later the provisions that the Australian Government has set in place for constitutional corporations which filled any gaps in coverage of minimum wages and conditions of employment for school-based apprentices and trainees. If similar provisions are not included in transitional awards, employers and employees covered by those awards may be unnecessarily disadvantaged compared to other employers and employees. This is because employers will effectively be unable to engage school-based apprentices or trainees because their award will not contain appropriate rates of pay for them. Similarly, young people may not be able to secure employment as a school-based apprentice or trainee and so will be denied the clear benefits of such positions.

### **Council of Australian Governments**

- 4.38 On 10 February 2006, COAG reached agreement on a package of measures designed to underpin a new genuinely national approach to

---

<sup>31</sup> *Workplace Relations Act 1996*, Schedule 6, clause 1(2)(c).

<sup>32</sup> *Ibid*, subclauses 8(2)(b) and (c).

<sup>33</sup> *Ibid*, subclauses 8(4).

apprenticeships, training and skills recognition and initiatives to alleviate skill shortages currently evident in some parts of the economy. In preparing the measures, COAG officials consulted with industry bodies and unions. COAG also agreed on a set of measures to make sure Australia's training and apprenticeship systems offer more flexible pathways into skills shortage areas.

4.39 A key measure included that by 31 December 2006, legislative, regulatory and educational barriers will be removed so that school-based apprenticeships are nationally available as a pathway for school students where there is industry demand. Industrial barriers will also be removed to enable school-based apprenticeship participation in skills shortage industries where there is industry demand. This will include the removal of industrial barriers, in collaboration with industry, for school-based apprenticeships in metals and engineering, automotive, building and construction, electrotechnology, and commercial cookery.

4.40 The minimum wage provisions and conditions of employment which were established by the Government's workplace relations reforms to fill gaps in coverage of minimum wages and conditions for school-based apprentices and trainees meet the COAG agreement in respect to employers covered by the new workplace relations system, including constitutional corporations. However, without comparable provisions being included in transitional awards the agreement cannot be fully met in the federal jurisdiction. Earlier existing award provisions for school-based apprentices were discussed and it was demonstrated that there are significant gaps in coverage of minimum wages for these classes of employee, particularly in relation to skills shortage industries.

### **WorkChoices filled the gaps in coverage for school-based apprentices and trainees for constitutional corporations**

4.41 An important element of the Australian Government's workplace relations reforms was the inclusion of provisions in the WR Act which filled gaps in

the coverage of minimum wages and conditions for school-based apprentices and trainees. These provisions were inserted into the WR Act by Schedule 3 of the WorkChoices Act.

- 4.42 The provisions filled the gaps in coverage for school-based apprentices and trainees in federal and state awards insofar as they applied to employees covered by Schedule 3 of the WorkChoices Act, including employees of constitutional corporations. Schedule 3 of the WorkChoices Act came into effect on 14 December 2005 to ensure that provisions for minimum wages and conditions for school-based apprentices and trainees were available from the beginning of the 2006 school year.
- 4.43 The minimum wage provisions contained in Schedule 3 for school-based apprentices and trainees were set out in ss. 552 and 555 respectively of the WR Act immediately before reform commencement on 27 March 2006. On reform commencement these minimum wage provisions became preserved Pay Scales. The Pay Scales apply only where there are no provisions for school-based apprentices or trainees in another preserved Pay Scale that covers the particular apprentice or trainee. A copy of ss. 552 and 555 are at Appendices D and E respectively.
- 4.44 The minimum conditions of employment for school-based apprentices and trainees inserted into the WR Act by Schedule 3 are set out in Part 23, ss. 914 to 919 inclusive of the Act. These provisions apply only where an award or Notional Agreement Preserving a State Award do not cover the employment of the school-based apprentice or trainee or do not specify additional conditions for the school-based apprentice or trainee.

### ***Minimum wages for school-based apprentices***

- 4.45 The minimum wage provisions for school-based apprentices which fill the gaps in coverage for constitutional corporations are based on the wage

arrangements contained in the model clause endorsed by the AIRC for school-based apprentices in 2000.<sup>34</sup> The provisions provide a formula for calculating an hourly rate of pay for school-based apprentices. The formula takes the first year hourly rate that applies to the relevant full-time apprentice and increases it by 25 per cent. This increased rate applies only to the actual hours worked by the school-based apprentice on-the-job.

- 4.46 However, this produces exactly the same payment for school-based apprentices as the model clause endorsed by the AIRC. Under the model clause, school-based apprentices get paid the same hourly rate as full-time apprentices, and it applies to both approved training and actual work. But the approved training is deemed to be 25 per cent of the work time.

### ***Minimum wages for school-based trainees***

- 4.47 The minimum wage provisions for school-based trainees which fill the gaps in coverage for constitutional corporations specifies a monetary hourly amount for school-based trainees who are enrolled in either year 11 or year 12 at school. These rates were drawn from comparable hourly rates for school-based trainees under the NTW Award. The level of the rates reflects the fact that school-based trainees are only paid for hours they spend on-the-job.

### **Exercise of the AIRC's Powers**

- 4.48 The Commonwealth submits that the AIRC ought to adopt a policy position regarding the inclusion of school-based apprentice and trainee provisions in transitional awards. That policy position should require the AIRC, when considering applications to implement any decision of the Full Bench to increase wages, to include in those awards provisions for school-based apprentices and trainees, where there is potential for

---

<sup>34</sup> Australian Industrial Relations Commission, Part-time Apprenticeships – Endorsement of Model Clauses, Decision, 6 March 2000, Print S3850.

employees to be engaged under the provisions but the award does not already include such provisions.

- 4.49 In particular, if an award contains provisions for apprenticeships, it should be varied to include provisions for school-based apprentices, if they are not included already. If any traineeships can potentially be undertaken in relation work covered by the award, it should be varied to provide for school-based traineeships, if they are not covered already.
- 4.50 It would be appropriate to use the model clause drafted by the ACCI and ACTU, based on the clause endorsed by the AIRC in 2000 as the basis for school-based apprenticeship provisions in transitional awards. Similarly, the existing school-based traineeship provisions in the NTW Award should form the basis for variations to transitional awards for school-based trainees. These provisions have already been approved by the AIRC and were developed and agreed by the peak employer and employee bodies and the Commonwealth.
- 4.51 This can be achieved by inserting the standard provision that is currently in many awards that adopts the NTW Award in any award where a traineeship can potentially be undertaken in relation to the work covered by the award, but the award does not currently adopt the NTW Award.
- 4.52 If this is not feasible in a particular award, an alternative provision that adopts only the school-based trainee provisions of the NTW Award could be inserted into the award instead.
- 4.53 The standard provision currently contained in many awards that adapts the NTW Award is provided at Appendix F. The appendix also includes an example of a variation to the standard which adopts only the school-based trainee provisions.
- 4.54 The adoption by the AIRC of the Australian Government's proposed process is consistent with the obligation placed on the AIRC by the WR Act to consider whether transitional award-related orders ought to include wage arrangements for school-based apprenticeships and traineeships.

- 4.55 As noted above, the AIRC recognised the importance of such a pro-active approach when it initially endorsed the model school-based apprenticeship clause. In this instance the AIRC, of its own motion, took action to ensure that key awards were appropriately varied to include the clause. This approach has also been used by the AIRC to ensure the effective implementation of other important test cases decisions. For example, in the Personal/Carer's Leave Test Case – Stage 2, the Full Bench noted in respect to its Stage 1 decision that:

*The variation of federal awards to provide for Stage 1 of the November 1994 decision was initially slow. The pace of implementation accelerated following initiatives taken by the Commission to centralise the award variation process. In addition, the President directed the ACTU and ACCL to provide the Commission, by 2 June 1995, with a list of awards which had not been varied to provide for Stage 1 of the November 1994 decision. The Commission has acted on its own motion to vary these awards after providing the award parties with an opportunity to be heard. Approximately 140 awards have been varied by this means and a further 200 matters are in the process of being finalised.<sup>35</sup>*

- 4.56 The inclusion of school-based apprentice and trainee wages and conditions of employment in transitional awards is also consistent with other provisions contained in Schedule 6 of the WR Act relating to the AIRC's functions in respect of transitional awards. In particular, as outlined above such action will ensure that neither transitional employers nor employees will be put at a disadvantage compared to other employers and employees operating within the federal jurisdiction.
- 4.57 Clearly, arrangements which give rise to a situation which effectively discourages or restricts the employment of certain classes of apprentice or trainee under transitional awards, and those classes of employment are available under other types of industrial arrangement, has the

---

<sup>35</sup> Australian Industrial Relations Commission, Personal/Carer's Leave Test Case – Stage 2, Decision, 28 November 1995, Print M6700.

potential to place the affected employers and employees at considerable disadvantage. Adoption by the AIRC of the policy proposed would alleviate this disadvantage.

- 4.58 The adoption by the AIRC of the Australian Government's proposed process is also consistent with the obligation placed on the AIRC by the WR Act to consider whether transitional award-related orders ought to include wage arrangements for school-based apprenticeships and traineeships.
- 4.59 However, as noted earlier, the Commonwealth does not propose that the AIRC review wage arrangements for other classes of apprentice or trainee at this time. Rather, the Commonwealth submits that the AIRC should not take any action on these issues until after the Fair Pay Commission's 2007 wage review.

## **Conclusion**

- 4.60 Structured training arrangements such as those provided through apprenticeships and traineeships play an integral role in the Australian Government's strategy for providing training opportunities for employees and for meeting the skills needs of industry.
- 4.61 School-based apprenticeships and traineeships are an essential component of the flexible delivery of apprenticeships and traineeships in a modern economy. Furthermore, they are an essential pathway to employment for Australia's young people.
- 4.62 All governments, through COAG, have recognised the vital role that school-based apprenticeships can play in combating skills shortages and they are an important component of the strategy of all governments to address current skills shortages. That is why governments from all jurisdictions have agreed to the removal of industrial barriers in priority

industries to enable participation in school-based apprenticeships by the end of this year.

- 4.63 The adoption by the AIRC of an expeditious and streamlined procedure is the optimal way to ensure that the remaining gaps in coverage of minimum wages and conditions for school-based apprentices and trainees are filled. The process proposed is not inconsistent with the approach used by the AIRC when the model school-based apprenticeship clause was initially endorsed in 2000. Nor is it at odds with the process used by the AIRC to ensure that the benefits of other key test case decisions, such as personal/carers leave, are translated into award provisions.
- 4.64 To ensure there is universal coverage for school-based apprentices and trainees, to the greatest extent possible, these provisions should be included in transitional awards which do not currently explicitly provide for these classes of apprentice and trainee. The optimal way to ensure this happens is for the AIRC to adopt a policy requiring individual Commissioners, when considering applications on an award by award basis to implement any decision of the Full Bench to increase wages, to insert provisions for school-based apprentices and trainees, where there is potential for employees to be engaged under the provisions but the award does not include such provisions already.
- 4.65 The Australian Government's workplace relations reforms filled the gaps in coverage for minimum wages and conditions for school-based apprentices and trainees for constitutional corporations. The provisions introduced are consistent with those previously endorsed by the AIRC and already operating in some transitional awards. It could create unnecessary disadvantages for transitional employers and employees if employment of school-based apprentices and trainees is not made available under transitional awards.



## SECTION 5: ADJUSTMENT OF ALLOWANCES IN AWARDS

### Monetary allowances in awards

- 5.1 Under the pre-reform WR Act, ‘allowances’ were generally allowable under paragraph 89A(2)(j). Particular award allowances that were held to be allowable included accident pay, meal allowance where an employee is required to work overtime without notification, first aid allowance, clothing and equipment allowances, travelling allowances where an employee is required to work late or early and the provision of transport by an employer.
- 5.2 The scope of what is allowable has been narrowed by amendments to the *Workplace Relations Act 1996* by the *Workplace Relations Amendment (Work Choices) Act 2005*.
- 5.3 Under the current subsection 513(1)(h) the scope of allowances is restricted to being monetary and being payable only in certain circumstances. Paragraph 513(1)(h) makes allowable in awards monetary allowances that provide for:
- (i) expenses incurred in the course of employment - for example, travel, accommodation, uniform, motor vehicle, meal or telephone expenses incurred in the course of employment;
  - (ii) responsibilities or skills that are not taken into account in rates of pay for employees – for example, a monetary allowance for the performance of additional duties at a higher level or for holding a particular qualification; or
  - (iii) disabilities associated with the performance of particular tasks (for example handling hazardous materials) or work in particular conditions (for example work in cold rooms) or locations (for example work in remote locations).
- 5.4 Some matters previously categorised as allowances, such as accident make up pay and the provision of non-monetary allowances, are no longer allowable.

## **Interaction Between Australian Pay And Classification Scales And Awards**

- 5.5 The following information about preserved Pay Scales is provided to assist the AIRC identify any payments which should not be adjusted.
- 5.6 Under the WR Act, minimum wages are now protected under the Standard (Part 7). Division 2 of Part 7 sets out guarantees relating to minimum wages and casual loadings, and associated rules and definitions. The Standard also sets out other key minimum entitlements provided under the WR Act.
- 5.7 Under the Standard, employees are guaranteed minimum wages under an applicable Pay Scale, the Federal Minimum Wage (FMW) or an applicable special FMW.
- 5.8 On 27 March 2006, preserved Pay Scales were derived from the wages provisions of 'pre-reform wage instruments', including federal and State awards, and certain State laws (e.g. minimum wage orders). The term 'pre-reform wage instrument' is defined by section 178 of the WR Act.
- 5.9 One Pay Scale was created for each separate pre-reform wage instrument e.g. federal and State award.
- 5.10 The Fair Pay Commission is empowered to adjust preserved Pay Scales (sections 216 and 217), and may also determine and publish new Pay Scales (section 214).
- 5.11 Under section 208 of the WR Act, a preserved Pay Scale contains rate provisions derived from a pre-reform wage instrument (eg. pre-reform federal award).
- 5.12 'Rate provision' is defined in section 181 of the WR Act as follows:
- “(1) For the purposes of this Division, rate provisions, of a pre-reform wage instrument or an APCS, are provisions of the instrument or APCS that determine a basic periodic rate of pay, or basic piece rates of pay, payable to an employee, or an employee of a particular classification.*
  - (2) The means by which such provisions may determine a basic periodic rate of pay, or a basic piece rate of pay, include the following, or any combination of any of the following:*
    - (a) direct specification of a rate;*

- (b) *identification of a rate by reference to other provisions (whether or not of the same instrument or APCS);*
  - (c) *direct specification, or identification by reference to other provisions (whether or not of the same instrument or APCS), of a method for calculating a rate.*
- (3) *Subject to the regulations, a method referred to in subsection (2) may provide for a person or body to determine a rate in a particular way. For the purposes of this Division, a rate determined by the person or body in that way is taken to be a rate determined by the provisions that specify or identify the method.”*

5.13 The basic periodic rate of pay is defined in section 178 of the WR Act as:

*“... a rate of pay for a period worked (however the rate is described) that does not include incentive-based payments and bonuses, loadings, monetary allowances, penalty rates or any other similar separately identifiable entitlements.”*

5.14 These terms (e.g. “monetary allowances” etc for the purpose of s.178) are not further defined in the WR Act. However, there is a legislative note to this definition which provides that ‘most of the kinds of entitlements excluded from this definition are allowable award matters (see section 513).

5.15 A basic periodic rate of pay in a Pay Scale may only be adjusted by the Australian Fair Pay Commission. In accordance with section 516 of the WR Act, a matter for which provision is made by the Standard – in this case, wages - is not an allowable award matter.

5.16 It is important to note that the definition of “basic periodic rate of pay” is a rate of pay for a period worked “however the rate is described”. As such, the substantive nature of the payment may need to be examined, rather than merely rely on label given to it in the award.

5.17 In the vast majority of awards, separately identifiable monetary entitlements will not be in a Pay Scale, but rather will, subject to subsection 513(1)(h) remain in the relevant award from which the Pay Scale was derived.

5.18 However, the Commonwealth notes that in a small number of pre-reform federal awards some payments may now form part of the basic rate of pay, where those payments were treated in the award as part of the base rate. That is, certain allowances may not be treated, in the award, as payments that are ‘in addition to’ or ‘above’ the basic wage. In other

words, the fact that a payment is labelled as an “allowance” may not be determinative of the character of the payment. In some cases, an amount that was initially inserted into the award as an allowance, may have become, and treated, as part of the basic periodic rate of pay and have been adjusted accordingly.

5.19 Ultimately, the question is whether the pre-reform award treats the payment as a base rate or not – that is, whether the payment is genuinely an allowance. The pre-reform award needs to be interpreted to work this out. This involves taking into account all the indications given by the language and structure of the pre-reform award. There is no ‘one-size-fits-all’ approach.

5.20 In particular, the Commonwealth considers that some or all of the following features may indicate that some particular industry allowances are part of the basic wage:

- it is paid for all purposes;
- it applies to all employees;
- award wage increases apply to the aggregate rate of pay (if payments are increased under separate procedures or at different times to the basic wage, this may indicate the payment is not part of the basic periodic rate of pay);
- it is expressed to be part of the ‘minimum wage’ or ‘base’ wage;
- it is a flat rate that does not vary from week to week by reference to features peculiar to the hours worked or varying nature of the conditions of work; and
- its size.

5.21 However, no single criterion will be determinative. In the end, a common-sense approach should be taken to the entitlement in the context of the award, including the award’s history.

5.22 But if a payment is separately identifiable and is payable to a class of employees for an identifiable reason, the payment is likely not to be part of the basic periodic rate of pay. This likelihood is increased if the

payment can be seen as an add-on to the basic wage rate or is labelled as an allowance. The identifiable reasons could include working in a particular workplace or district, performing extra duties, or working overtime.



## **APPENDIX A:**

### **Supported Wage System Model Clause**

#### **1.1 Workers eligible for a supported wage**

(a) This clause defines the conditions which will apply to employees who, because of the effects of a disability, are eligible for a supported wage under the terms of this agreement/Award. In the context of this clause, the following definitions will apply:

(i) "Supported Wage System" means the Commonwealth Government System to promote employment for people who cannot work at full Award wages because of a disability, as documented in "[Supported Wage System: Guidelines and Assessment Process]".

(ii) "Accredited Assessor" means a person accredited by the management unit established by the Commonwealth under the Supported Wage System to perform assessments of an individual's productive capacity within the Supported Wage System.

(iii) "Disability Support Pension" means the Commonwealth pension scheme to provide income security for persons with a disability as provided under the Social Security Act 1991, as amended from time to time, or any successor to that scheme.

(iv) "Assessment instrument" means the form provided for under the Supported Wage System that records the assessment of the productive capacity of the person to be employed under the Supported Wage System.

#### **1.2 Eligibility criteria**

(b) Employees covered by this clause will be those who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged under this agreement/Award, because of the effects of a disability on their productive capacity and who meet the impairment criteria for receipt of a Disability Support Pension.

(The clause does not apply to any existing employee who has a claim against the employer which is subject to the provisions of workers' compensation legislation or any provision of this agreement/Award relating to the rehabilitation of employees who are injured in the course of their current employment).

The Award does not apply to employers in respect of their facility, program, undertaking service or the like which receives funding under the Disability Services Act 1986 and fulfils the dual role of service provider and sheltered employer to people with disabilities who are receiving or are eligible for a disability support pension, except with respect to an organisation which has

received recognition under Section 10 or under Section 12A of the Act, or if a part only has received recognition, that part.

**1.3 Supported wage rates**

(c) Employees to whom this clause applies shall be paid the applicable percentage of the minimum rate of pay prescribed by this Award/agreement for the class of work which the person is performing according the following schedule:

<b>Assessed capacity (sub-clause (d))</b>	<b>% of prescribed award rate</b>
10%*	10%
20%	20%
30%	30%
40%	40%
50%	50%
60%	60%
70%	70%
80%	80%
90%	90%

(Provided that the minimum amount payable shall be not less than \$64 per week).

\* Where a person’s assessed capacity is 10 per cent, they shall receive a high degree of assistance and support.

**1.4 Assessment of capacity**

(d) For the purpose of establishing the percentage of the Award rate to be paid to an employee under this Award/agreement, the productive capacity of the employee will be assessed in accordance with the Supported Wage System and documented in an assessment instrument by either:

- (i) the employer and a union party to the Award/agreement, in consultation with the employee or, if desired by any of these;
- (ii) the employer and an accredited Assessor from a panel agreed by the parties to the Award and the employee.

**1.5 Lodgment of assessment instrument**

- (e) (i) All assessment instruments under the conditions of this clause, including the appropriate percentage of the award rate to be paid to the employee, shall be lodged by the employer with the Registrar of the Industrial Relations Commission.
- (ii) All assessment instruments shall be agreed and signed by the parties to the assessment, provided that where a union which is party to the Award/agreement, is not a party to the assessment, it shall be referred

by the Registrar to the union by certified mail and shall take effect unless an objection is notified to the Registrar within 10 working days.

### **1.6 Review of assessment**

(f) The assessment of the applicable percentage should be subject to annual review or earlier on the basis of a reasonable request for such a review. The process of review shall be in accordance with the procedures for assessing capacity under the Supported Wage System.

### **1.7 Other terms and conditions of employment**

(g) Where an assessment has been made, the applicable percentage shall apply to the wage rate only. Employees covered by the provisions of the clause will be entitled to the same terms and conditions of employment as all other workers covered by this Award/agreement paid on a pro-rata basis.

### **1.8 Workplace adjustment**

(h) An employer wishing to employ a person under the provisions of this clause shall take reasonable steps to make changes in the workplace to enhance the employee's capacity to do the job. Changes may involve re-design of job duties, working time arrangements and work organisation in consultation with other workers in the area.

### **1.9 Trial period**

(i) In order for an adequate assessment of the employee's capacity to be made, an employer may employ a person under the provisions of this clause for a trial period not exceeding 12 weeks, except that in some cases additional work adjustment time (not exceeding four weeks) may be needed.

(ii) During that trial period the assessment of capacity shall be undertaken and the proposed wage rate for a continuing employment relationship shall be determined.

(iii) The minimum amount payable to the employee during the trial period shall be no less than \$64 per week.

(iv) Work trials should include induction or training as appropriate to the job being trialled.

(v) Where the employer and employee wish to establish a continuing employment relationship following the completion of the trial period, a further contract of employment shall be entered into based on the outcome of assessment under subclause (d) hereof.



## APPENDIX B:

### 'MODEL' SCHOOL-BASED APPRENTICESHIP CLAUSE

- (a) This clause shall apply to school-based apprentices. A school-based apprentice is a person who is undertaking an apprenticeship in accordance with this clause while also undertaking a course of secondary education.
- (b) The hourly rates for full-time junior and adult apprentices as set out in this award shall apply to school-based apprentices for total hours worked including time deemed to be spent in off-the-job training.
- (c) For the purposes of (b) above, where an apprentice is a full-time school student, the time spent in off-the-job training for which the apprentice is paid is deemed to be 25% of the actual hours each week worked on-the-job. The wages paid for training time may be averaged over the semester or year.
- (d) The school-based apprentice shall be allowed, over the duration of the apprenticeship, the same amount of time to attend off-the-job training as an equivalent full-time apprentice.
- (e) For the purposes of this sub-clause, off-the-job training is structured training delivered by a Registered Training Organisation separate from normal work duties or general supervised practice undertaken on the job.
- (f) The duration of the apprenticeship shall be as specified in the training agreement or contract for each apprentice. The period so specified to which the apprentice wage rates apply shall not exceed six years.
- (g) School-based apprentices shall progress through the wage scale at the rate of 12 months progression for each two years of employment as an apprentice.
- (h) These rates are based on a standard full-time apprenticeship of four years. The rate of progression reflects the average rate of skill acquisition expected from the typical combination of work and training for a school-based apprentice undertaking the applicable apprenticeship.
- (i) Where an apprentice converts from school-based to full-time, all time spent as a full-time apprentice shall count for the purposes of progression through the wage scale. This progression shall apply in addition to the progression achieved as a school-based apprentice.
- (j) School-based apprentices shall be entitled pro-rata to all of the conditions of employees under this award.



**APPENDIX C:****FEDERAL AWARD COVERAGE – SCHOOL-BASED APPRENTICES**

<b>AWARD CODE</b>	<b>AWARD</b>
AW765606	A.W.U. Miscellaneous Workers' (ACT) Award 1998
AW769420	Bakers (Australian Capital Territory) Award 1998
AW769688	Bread Trade (Victoria) Award 1999
AW772144	Clothing Trades Award 1999
AW779906	Dry Cleaning Industry Award 2000
AW782197	Gardening, Nurseries and Greenkeeping (Northern Territory) Award 1998
AW783479	Hospitality Industry - Accommodation, Hotels, Resorts and Gaming Award 1998
AW783872	Health and Allied Services - Private Sector - Victoria Consolidated Award 1998
AW787016	Liquor and Allied Industries Catering, Cafe, Restaurant, Etc. (Australian Capital Territory) Award 1998
AW787017	Liquor Industries Hotels, Hostels, Clubs and Boarding Establishments etc. (Australian Capital Territory) Award, 1998
AW787213	Liquor and Accommodation Industry - Restaurants - Victoria - Award 1998
AW789529	Metal, Engineering and Associated Industries Award 1998
AW790741	National Building and Construction Industry Award 2000
AW792620	Pastrycooks (Victoria) Award 1999
AW794740	Retail and Wholesale Industry - Shop Employees - Australian Capital Territory - Award 2000
AW796250	Shop, Distributive and Allied Employees Association - Victorian Shops Interim Award 2000

AW799036	Textile Industry Award 2000
AW812760	Sportsground Maintenance and Venue Presentation (Victoria) Award 2001
AW812953	Hotels, Motels, Wine Saloons, Catering, Accommodation, Clubs and Casino Employees (Northern Territory) Award 2002
AW816731	Pirelli Power Cables and Systems Australia Pty Limited, Liverpool Award, 2002
AW819699	Telecommunications Services Industry Award 2002
AW823689	Vehicle Industry (BTR Automotive) Award 2002
AW824308	Vehicle Industry - Repair, Services and Retail - Award 2002
AW830245	Postal Services Industry Award 2003
AW839407	Master Grocers' Association and the Shop, Distributive and Allied Employees Association Award 2005

## APPENDIX D:

### EXTRACT FROM WORKPLACE RELATIONS AMENDMENT (WORK CHOICES) ACT 2005 – S. 552 PAY FOR SCHOOL-BASED APPRENTICES

#### 552 Pay for school-based apprentices

*Rate of pay is an hourly rate for work on-the-job*

- (1) The rate of pay for a school-based apprentice is an hourly rate paid only for hours worked on-the-job and calculated using the formula:

$$\text{Full-time first-year apprentice hourly rate} \times \frac{125}{100}$$

where:

**full-time first-year apprentice hourly rate** means:

- (a) the hourly rate of pay specified, in the applicable wage instrument, for a full-time first-year apprentice doing the same kind of work, in the same location and for the same employer as the school-based apprentice; or
- (b) if the rate of pay specified in the applicable wage instrument is not an hourly rate—that rate converted into an hourly rate.

*This section does not limit pay*

- (2) To avoid doubt, this section does not operate to prevent the school-based apprentice from receiving a rate of pay more generous than the rate calculated in accordance with subsection (1).

*School-based apprentices not covered by this section*

- (3) This section does not apply to a school-based apprentice if:
- (a) a wage instrument covers the work of the school-based apprentice; and
  - (b) the wage instrument specifies the rate of pay for the school-based apprentice; and
  - (c) the wage instrument does so by making specific provision for school-based apprentices.



## APPENDIX E:

### EXTRACT FROM WORKPLACE RELATIONS AMENDMENT (WORK CHOICES) ACT 2005 – S. 555 PAY FOR SCHOOL-BASED TRAINEES

#### 555 Pay for school-based trainees

*Rate of pay is an hourly rate for work on-the-job*

- (1) The rate of pay for a school-based trainee is the rate as follows, paid only for hours worked on-the-job:
  - (a) for a calendar year in which the school-based trainee is enrolled in a Year up to and including Year 11—\$7.27 per hour;
  - (b) for a calendar year in which the school-based trainee is enrolled in Year 12 or a later Year—\$7.99 per hour.

*This section does not limit pay*

- (2) To avoid doubt, this section does not operate to prevent the school-based trainee from receiving a rate of pay more generous than the rate specified by subsection (1).

*School-based trainees not covered by this section*

- (3) This section does not apply to a school-based trainee if:
  - (a) a wage instrument covers the work of the school-based trainee; and
  - (b) the wage instrument specifies the rate of pay for the school-based trainee; and
  - (c) the wage instrument does so by making specific provision for school-based trainees.



## **APPENDIX F:**

### **Standard Provision adapting the National Training Wage Award**

#### Trainees

The parties to this Award shall observe the terms of the National Training Wage Award 2000, as amended.<sup>36</sup>

#### **Alternative Provision:**

#### Trainees

The parties to this Award shall observe the terms of the National Training Wage Award 2000, as amended in so far as they relate to school-based trainees.

---

<sup>36</sup> From subclause 4.2.8 in the Metal, Engineering and Associated Industries 1998, AW789529CRV.