

Australian Council of Trade Unions Outline of Submission to the Australian Industrial Relations Commission

Wages and Allowances Review 2007

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Introduction

There are 26 applications before the AIRC to vary rates of pay and monetary allowances contained within transitional awards and monetary allowances contained within pre reform awards.

These applications follow the decision of the Australian Fair Pay Commission (AFPC) to adjust minimum rates within pay and classification scales on 1 October 2007. This decision was announced on 5 July 2007 and are intended in large part, to reflect the decision of the AFPC.

The ACTU urges the Commission to differ from the AFPC's decision in one respect. The applicant unions and the ACTU do not support a deferral of any increase that would otherwise apply to workers in the agricultural, horticultural and pastoral industries.

The ACTU and union claims are consistent with the Act and are economically responsible and affordable.

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

The ACTU argues that it is appropriate that the AIRC continue to adopt, where not barred by statute, the wage setting principles previously applied by the AIRC.

Notwithstanding, the ACTU submits that any reluctance on the part of the Full Bench to grant an increase in wages or allowances within a 12 month period should be overcome by the weight of the exceptional and unusual circumstances that apply to these proceedings.

Nature of these submissions

These brief submissions, where appropriate, will be expanded upon at hearing. The ACTU will also take the opportunity at hearing to reply to the respondent's outline of submissions and any submissions they put on the day.

What the applicants are seeking to vary

With the exception of a deferral of any increase in the agricultural, horticultural and pastoral industries, the ACTU is seeking to flow on the July 2007 wage-setting decision of the AFPC which comes into effect from the first pay period on or after 1 October 2007.

The applications before the AIRC reflect the AFPC decision to increase rates of pay below \$700 per week by \$10.26 per week and rates of pay over \$700 per week by \$5.30 per week with consequent increases in allowances. The applications also seek to adjust reimbursement and other allowances in accordance with previous agreed or arbitrated formulas.

The ACTU's claim before the AFPC was for a \$28 per week increase. The ACTU considers the decision of the AFPC to be woefully inadequate and ensures a real wage decrease for the majority of Australia's pay scale reliant workers. This is demonstrated by Table 2.

Given the AIRC's expressed view that the new legislative environment requires the AIRC to flow on the decision of the AFPC, the ACTU has not sought to revisit this issue. Notwithstanding this, the ACTU opposes the decision by the AFPC to defer any increase applicable to employers who are in receipt of an Exceptional Circumstances Interest Rate Subsidy (ECIRS). The ACTU's deals with this matter later in these outline of submissions.

On 5 July 2007 the AFPC handed down its 2007 Wage-Setting Decision No 3/2007. In that decision the AFPC increased:

- the Federal Minimum Wage by \$0.27 per hour from \$13.47 to \$13.74;

- preserved pay scales that provide for a basic periodic rate of pay up to and including the level for \$18.42 per hour by \$0.27 per hour; and
- preserved pay scales that provide for a basic periodic rate of pay of more than \$18.42 per hour by \$0.14 per hour.

In its Executive Summary the AFPC indicated that when expressed in weekly rates the effect of its decision was to increase:

- the Federal Minimum Wage by \$10.26 per week to a weekly rate of \$522.12;
- all pay scales up to and including \$700 per week by approximately \$10.25; and
- all pay scales above \$700 per week by approximately \$5.30.¹

The AFPC decision does not apply to transitional awards. The AIRC retains the power to vary these awards. Unions have made applications to vary the rates of pay and monetary allowances contained within transitional awards in accordance with clause 20 of Division 2 of Schedule 6 of the WRA.

The AIRC also retains the power to vary allowances in pre-reform awards. Unions have also made application to vary monetary allowances contained within pre reform awards in accordance with Part 10, Division 5, clause 553 of the WRA.

For the purposes of convenience the applicants have requested that the same full Bench of the AIRC deal with the applications relating to pre reform and transitional awards.

Insofar as they are capable of being applied the Wage Fixing Principles previously established by the AIRC should continue to apply. At some stage in the future, new principles may be established to deal with the variation of transitional awards in accordance with clause 40 of Part 3 Subdivision D, Division 3 of Schedule 6 of the Workplace Relations Act 1996 (the Act).

¹ Australian Fair Pay Commission July 2007 Decision, pp 28-29, .9.

On 6 July 2007 the AFPC made Wage-Setting Decision No 5/2007. In this decision the AFPC increased to \$66 per week the minimum weekly amount payable under Pay Scales or instruments which give effect to the Supported Wage System. The decision takes effect from the first pay period on or after 1 October 2007. The ACTU on behalf of the applicant Unions requests that the AIRC consider increasing the minimum amount payable under the SWS model clause in Transitional Awards to \$66 per week.

Proposed Process

ACTU vehicle awards

Under the auspices of the ACTU a number of affiliates to the ACTU have made application to vary their respective awards. We seek to have these awards treated as vehicle awards. Following a decision of the AIRC in this matter the ACTU proposes that subsequent applications be directed to the appropriate panel member.

In the absence of any objection and subject to the necessary service requirements, applications reflecting the decision of the Commission could be processed on the books.

Rounding of increase

The ACTU requests that the AIRC round to the nearest 10 cents as has been its custom.

Adjusted Pay Scales

The ACTU is seeking an adjustment to rates of pay contained in transitional awards consistent with the decision of the AFPC. For illustrative purposes Table 1 reflects the Metal Engineering and Associated Industries Award rates prior to and after adjustment. The weekly rates in this table have been adjusted consistent with the approach adopted by the AIRC in its decision PR002006:

In this respect we have used as a base the weekly rates which the AFPC itself has indicated should be applied then rounded those figures to the nearest 10 cents.²

Table 1: The ACTU Wage Claim

Classification	Weekly Rate	Hourly Rate	New Weekly Rate Sought	New Hourly Rate Sought
C14	511.90	13.47	522.20	13.74
C13	528.50	13.91	538.80	14.18
C12	551.00	14.50	561.30	14.77
C11	571.90	15.05	582.20	15.32
C10	605.60	15.94	615.90	16.21
C9	626.50	16.49	636.80	16.76
C8	647.30	17.03	657.60	17.31
C7	666.20	17.53	676.50	17.80
C6	707.90	18.63	713.20	18.77
C5	723.40	19.04	728.70	19.18
C4	744.20	19.58	749.50	19.72
C3	785.90	20.68	791.20	20.82
C2(a)	806.80	21.23	812.10	21.37
C2(b)	844.50	22.22	849.80	22.36
C1(a)	928.00	24.42	933.30	24.56
C1(b)	1053.10	27.71	1058.40	27.85

The above classifications are derived from the Metal industry award and are used for demonstration purposes only.

² Australian Industrial Relations Commission Decision PR002006, p17

Consideration by AIRC of AFPC decision

In its 2006 decision PR002006 the AIRC stated:

[16] The Commission's powers to vary transitional awards are set out in cl.8 of Schedule 6 of the WR Act as follows:

"8 Performance of Commission's functions under this Schedule

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

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

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

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

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

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

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

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

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

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

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

[17] Clause 8(1) requires the Commission to carry out its functions in a way that furthers the objects of Schedule 6. The objects of Schedule 6 are to be found in cl.1(2) of the Schedule. So far as relevant that clause provides that:

"1 Objects of Schedule

.....

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

.....

(c) The Commission's function and powers to vary transitional awards are exercised so that wages and other monetary entitlements are not inconsistent with wage-setting decisions of the AFPC."

[18] The Commission's duty in relation to wage-setting decisions of the AFPC is also referred to in cl.8(3) and 8(4)(a). The terms of cl.8(2)(b), requiring the Commission to place emphasis on "*the principle*" that wages and other monetary entitlements of transitional employees should not place them at a disadvantage compared with the entitlements of federal system employees, is also important.

And

[21] Clause 17(1)(j) of Schedule 6 to the WR Act governs the Commission's power to deal with allowances in transitional awards. It reads:

*"(1) Subject to this Division, a transitional award may include terms about the following matters (**allowable transitional award matters**) only:*

.....
(j) *monetary allowances for:*

(i) expenses incurred in the course of employment; or

(ii) responsibilities or skills that are not taken into account in rates of pay for transitional employees; or

(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

.....”

And

[25]... The Commission’s power to vary pre-reform awards in relation to allowances is contained in s.513(1)(h) of the WR Act. It reads:

“513 Allowable award matters

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

.....

(h) monetary allowances for:

(i) expenses incurred in the course of employment; or

(ii) responsibilities or skills that are not taken into account in rates of pay for employees; or

(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

.....”

The AFPC is now the primary body responsible for minimum wage setting in Australia and the AIRC can be informed by their considered decision.

The ACTU does not argue that the AIRC is required to follow the decisions of the AFPC, only that they take these decisions into account. On this occasion the ACTU submits that it is appropriate that the Commission reflect the decision made by the AFPC.

ACTU Submissions to the AFPC

The ACTU's submissions to the AFPC are attached to these submissions as Annexure A.

The ACTU relies on these submissions in these matters. Some economic data is updated in the following pages. The ACTU's submissions to the AFPC are relevant although in some instances the ACTU's submission refers to data relating to employees employed by incorporated bodies.

Decision of AFPC

The AFPC is not charged with the responsibility of determining whether minimum wage rates are fair. It is the role of the AFPC to provide a safety net.

The AFPC describes its role as:

"The main wages-setting powers of the Commission are:

- adjusting the standard Federal Minimum Wage (standard FMW);
- determining or adjusting special FMWs;
- determining or adjusting basic periodic rates of pay and basic piece rates of pay; and
- determining or adjusting casual loadings.

The Commission has given due consideration to its over-arching objective 'to promote the economic prosperity of the people of Australia'. More specifically, in performing its wage-setting function, the Commission has considered the impact of its decision based on the criteria set out in the legislation:

- the capacity for the unemployed and the low paid to obtain and remain in employment;
- employment and competitiveness across the economy;

- providing a safety net for the low paid; and
- providing minimum wages for junior employees, employees to whom training arrangements apply and employees with disabilities that ensure those employees are competitive in the labour market.”³

The AFPC has considered much the same evidence that was previously investigated in a more open and transparent process by the AIRC.

What the AFPC found

- Australia’s economic growth picked up towards the end of 2006 and this stronger growth is expected to continue thorough 2007-08. Employment continues to grow strongly, wages growth (although higher) has been contained, and inflation remains within the BBA’s target range.⁴
- The labour market has remained strong.⁵
- On average, therefore, low-paid employees who benefit from the Commission’s 2007 wage-setting decision will retain around three-quarters of their gross pay rise.⁶
- Minimum wages therefore influence the extent to which unemployed and low-paid Australians share the economic prosperity of the wider community.⁷
- High EMTRs and the possible loss of concessions are an outcome of tax/transfer arrangements, which nevertheless in Australia affect only a small proportion of families. In the Commission’s view, that fact that some families may experience such losses is not a strong argument for limiting a pay rise that will benefit the majority of low-income earners.⁸

³ Australian Fair Pay Commission Wage-Setting Decision and Reasons for Decision. July 2007 page 8.

⁴ AFPC Wage Setting Decisions and Reasons for Decisions, July 2007, p11

⁵ Ibid

⁶ Ibid., p13

⁷ Ibid., p48

⁸ Ibid., p56

- Over the year to May 2007, the unemployment rate fell in all States and Territories ... ⁹
- The tightness of the labour market is evidenced by the near record high participation rate, low unemployment rate and the fact that, in recent years, the majority of jobs created have been full time. This shift has occurred in industries other than those in which full-time jobs dominate, for example in Retail trade.¹⁰
- ABS estimates for the levels of job vacancies by industry were at or near record levels for the four most Pay Scale reliant industries.¹¹
- The commission does, however, consider that statutory minimum wages, along with the tax/transfer system, have a significant role to play in providing a safety net for the low paid.¹²
- In arriving at its decision the AFPC (sic) has taken into account:
 - the ten month period since the last pay increase for special FMWs, the standard FMW and Pay Scale reliant employees;
 - the sensitivity of low-paid employment to changes in wage levels, as well as the incentives for individuals to seek and remain in paid employment;
 - the fact that the economy and labour market have continued to perform strongly, although not uniformly;
 - movements in consumer prices; and
 - the requirement to provide a safety net for the low paid.¹³

⁹ Ibid., p58

¹⁰ Ibid., p61

¹¹ Ibid., p63

¹² Ibid., p68

¹³ Ibid., p72

Decision of AFPC not generous

On 23 July 2007 the AFPC published a Minimum Wage Decisions July 2007 Fact Sheet entitled *A real wage increase for Australia's lowest paid workers*.¹⁴ The Fact Sheet reveals that the AFPC has assumed a 1.6 per cent increase in CPI from December Quarter 2006 to October (1) 2007, based on ABS published data and forecasts.

ABS CPI (Cat No 6401.0) data published for the March Quarter 2007 and the June Quarter 2007 measure an increase in inflation from December Quarter 06 to the June Quarter 07 of 1.3 per cent. The September Quarter CPI (covering the months July, August and September, i.e. up to 1 October) will be released by the ABS on 24 October 2007.

Inflation appears to be running at a much higher rate than the rate used by the AFPC to justify an excessively moderate wage outcome. When all these facts are considered the ACTU's request that the AIRC flow on the decision of the AFPC is not unreasonable.

¹⁴ See <http://www.fairpay.gov.au/fairpay/MinWageDecisionJul2007/FactSheets/>

Table 2: Real Value of AFPC Minimum Wage determination 2006/07

	2006		2007		2007 FPC decision	
	\$ per hour	\$ per week	New \$ per hour	New \$ per week	nominal increase	real* increase
					%	%
C14	13.47	511.86	13.74	522.12	2.00	0.00
C13	13.91	528.58	14.18	538.84	1.94	-0.06
C12	14.50	551.00	14.77	561.26	1.86	-0.14
C11	15.05	571.90	15.32	582.16	1.79	-0.21
C10	15.94	605.72	16.21	615.98	1.69	-0.31
C9	16.49	626.62	16.76	636.88	1.64	-0.36
C8	17.03	647.14	17.30	657.40	1.59	-0.41
C7	17.53	666.14	17.80	676.40	1.54	-0.46
C6	18.63	707.94	18.77	713.26	0.75	-1.25
C5	19.04	723.52	19.18	728.84	0.74	-1.26
C4	19.59	744.42	19.73	749.74	0.71	-1.29
C3	20.68	785.84	20.82	791.16	0.68	-1.32
C2(a)	21.23	806.74	21.37	812.06	0.66	-1.34
C2(b)	22.22	844.36	22.36	849.68	0.63	-1.37
C1(a)	24.42	927.96	24.56	933.28	0.57	-1.43
C1(b)	27.71	1052.98	27.85	1058.30	0.51	-1.49

* based on 10 month equivalent of annual CPI of 2.4 per cent

Updated Economic Data

The ACTU relies on the economic data submitted to the AFPC and shown at Annexure B.

The economic circumstances and outlook remain consistent with the submissions of the ACTU. In some instances the economic conditions have improved or new data has subsequently become available.

Employment

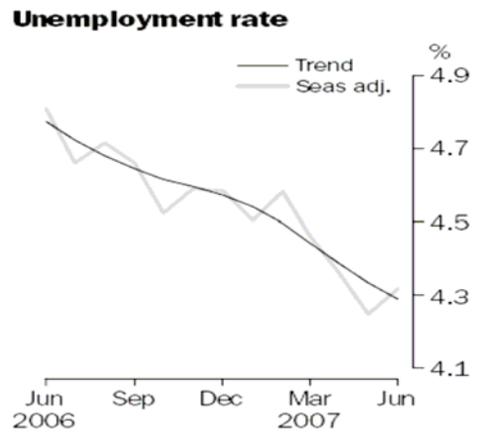
Employment data can be updated for the May and June 2007. Seasonally adjusted employment increased by 39,400 persons in May 2007 and 2,500 in June 2007.



Source: ABS Cat No 6202.0 Labour Force June 2007

Unemployment

The seasonally adjusted level of unemployment in Australia fell to 4.2 per cent in May 2007, increasing slightly to 4.3 per cent in June.



Source: ABS Cat No 6202.0 Labour Force June 2007

Inflation

The June Quarter CPI figures were released by the ABS on 25 July 2007. They show a 1.2 per cent increase in the June quarter, a sharp increase in inflation from the 0.1 per cent increase in the March quarter. Inflation is running at 2.1 per cent through the year to the June Quarter 2007. [ABS Cat No 6401.0]

Wage Movements

The Department of Employment and Workplace Relations estimates that average annualised wage increases (AAWI's) per employee for all sectors for the March quarter 2007 are 3.7 per cent. Over the four quarters to March 2007 the AAWI for agreements certified in each quarter has averaged 3.9 per cent.¹⁵

¹⁵ Department of Employment and Workplace Relations. Trends in Enterprise Bargaining, March Quarter 2007.

Number of Award Reliant Transitional Employees

There remains considerable uncertainty regarding the number of employees who are the subject of transitional awards. There is simply no definitive analysis of the numbers involved. There is no available estimate of the number of award reliant employees who are covered by federal awards.

The Australian Fair Pay Commission in its Press Release of 5 July 2007 estimates that 850,000 plus 350,000 totaling 1,200,000 employees rely on the AFPC's decisions.

In its Reasons for Decision the AFPC Table 1.7 estimates 1,087,100 employees are pay scale reliant.

The Australian Government submission estimates that of 1,577,700 award reliant non-managerial employees in May 2006 the AFPC jurisdiction covers 65.8 per cent or 1,038,900 employees with 34.2 per cent or 538,800 employees covered by other jurisdictions – the AIRC and State IRCs.

It is reasonable to estimate that a maximum of 50 per cent or approximately 1 million workers working within unincorporated businesses remain within the federal jurisdiction. EEH data shows that approximately 35.5 per cent of these workers have their pay and conditions set by an award. Therefore a maximum of 350,000 employees are involved across Australia. To this figure we can add an unknown, but not inconsequential number of farm based employees who are the subject of transitional awards.

Supported Wages

On 6 July 2007 the AFPC made Wage-Setting Decision No 5/2007, in this decision the AFPC increased to \$66 per week the minimum weekly amount payable under Pay Scales or instruments which give effect to the Supported Wage System. The decision takes effect from the first pay period on or after 1 October 2007.

The ACTU on behalf of the applicant Unions requests that the AIRC consider increasing the minimum amount payable under SWS model clause in Transitional Awards to \$66 per week.

Applicant Unions have varied Draft Orders, as applicable, to reflect this request.

Decisions of the State Industrial Relations Commissions

The 2007 decisions of the State Commissions are included in Table 2. The decisions of the State Commissions relate to unincorporated businesses of a similar size and nature to those the subject of these proceedings.

Table 3

State	Date of Decision	Case Number	Amount
NSW	8 June 2007	3608; 3613 of 2006	\$20 per week
WA	26 June 2006	APPL 1 OF 2007	\$24 per week
TAS	16 July 2007	T12940 of 2007	\$22.70 per week
SA	20 June 2007	1722 of 2007	Two stage process First agreed adjustment • \$10.40 per week for adult award wages up to and including \$587.00; • \$9.40 per week for adult award wages above \$587 and less than \$718; • \$4.00 per week for adult award wages of \$718.00 and above. Second stage (flow of AFPC decision) yet to be determined.

Principles

Clause 40 of Schedule 6 of the Act provides the power to a Full Bench of the AIRC to establish principles which the Commission can apply when application is made to vary transitional awards. The Principles are to apply and are limited to those safety net matters dealt with in clause 29(2) of Schedule 6.

In exercising its functions under sub clause 29(2) the Commission is required to have regard to clauses 8 and 9 of schedule 6 which state:

8 Performance of Commission's functions under this Schedule

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

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

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

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

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

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

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

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

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

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

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

9 Anti-discrimination considerations

(1) Without limiting clause 8, in exercising any of its powers under this Schedule, the Commission must:

(a) apply the principle that men and women should receive equal remuneration for work of equal value; and

(b) have regard to the need to provide pro-rata disability pay methods for transitional employees with disabilities; and

(c) take account of the principles embodied in the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004* relating to discrimination in relation to employment; and

(d) take account of the principles embodied in the Family Responsibilities Convention, in particular those relating to:

(i) preventing discrimination against workers who have family responsibilities; or

(ii) helping workers to reconcile their employment and family responsibilities; and

(e) ensure that its decisions do not contain provisions that discriminate because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

(2) For the purposes of the Acts referred to in paragraph (1)(c) and paragraph (1)(e), the Commission does not discriminate against a transitional employee or transitional employees by (in accordance with this Schedule) determining or adjusting terms in a transitional award that determine a basic periodic rate of pay for:

(a) all junior transitional employees, or a class of junior transitional employees; or

(b) all transitional employees with a disability, or a class of transitional employees with a disability; or

(c) all transitional employees to whom training arrangements apply, or a class of transitional employees to whom training arrangements apply.

The ACTU submits that the AIRC should take its lead from the AFPC when performing its functions under 8(2). The matters dealt with within sub clause 8(2) have been the subject of extensive submissions to the AFPC by the ACTU and other parties. On this occasion the AIRC can be informed by the decision of the AFPC on these matters.

Sub clause 8(4) requires the AIRC to have regard to the desirability of its decisions being consistent with the decisions of the AFPC. The ACTU believes that it is in the public interest and consistent with the objects of the Act that on this occasion the AIRC consider and adopt the June 2007 decision of the AFPC With the exception of the decision to defer increases to certain employees.

Uniformity and consistency of wages

The ACTU submits that it is in the public interest that there be uniformity of wage entitlements for those persons undertaking the same or similar work. As a result of the ending of former process where State Commissions would flow on the AIRC's Safety Net Review decision, there are no longer nationally consistent minimum pay and classification scales.

It remains with the Commission's power to ensure consistency with the decisions of the AFPC so as to reduce confusion and possible resultant disruption and cost.

The ACTU submits that there remains considerable uncertainty and confusion concerning the scope of the AFPC's Pay and Classification Scales which apply to those subject to pre reform awards and those subject to the rates of pay contained within transitional awards.

In the event that the AIRC does not adjust wages in the same manner as that adopted by the AFPC and does not make such an adjustment operative on and from the first pay period to

commence on or after 1 October 2007, each employer will have to make a clear determination that they are or are not a constitutional entity. For the purposes of wages, this is a moot point where the wage scales are consistent. Consistent pay and classification scales will avoid confusion, inequity and additional cost to employers.

Operative Date

The ACTU is hopeful that many of the applications which will seek to flow the anticipated decision of this Full Bench will be able to be dealt with by the AIRC Panel system prior to the operative date sought, the first pay period to commence on or after 1 October 2007.

This proposition assumes the AIRC has before them an application in an appropriate form prior to 1 October 2007 and the application and draft orders have been served on respondents, directly or by way of substituted service.

Proposition

Notwithstanding, the ACTU proposes that the operative date for awards and transitional awards varied as a result of applications and Draft Orders filed with the Commission before 1 October 2007 should be first pay period on or after 1 October 2007.

Orders made in respect of applications to vary awards and transitional award filed after 1 October 2007 should generally have effect from the date on which the order is made. This is subject to the general proviso that, where an applicant can satisfy the Commission that there are new or additional exceptional circumstances, the Commission should be able to exercise its discretion to grant back-pay, subject to Principle 10 of the Commission's Statement of Principles.

Contentions in support

The Act permits a retrospective date of effect

Subsection 572(2) provides that orders and awards should not take effect earlier than the date of the order or award unless there are exceptional circumstances. A similar provision is found in clause 66 of Schedule 6 of the Act, dealing with transitional awards. These two provisions effectively mirror former s.146 in the pre-reform Act.

The Commission has held that whether exceptional circumstances exist is primarily a question to be determined on the facts of each case, and that "(t)he categories of exceptional circumstances allow room for the Commission to exercise a wide discretion in relation to the particular award" (*Re Mitsubishi Motors Australia Ltd (Vehicle Industry) Award 1998 Justice Munro, Senior Deputy President Harrison, and Commissioner Foggo, Sydney, 3 October 2000 Print T1300 at [39]*)

Retrospective application has been granted in a variety of situations, where to refuse the application would cause a manifest injustice.

The wage fixing principles permit a retrospective date of effect

The wage fixing principles do not constitute a barrier to retrospective operation of the adjustments.

Principle 8(b) is based on the assumption that rates of pay and allowances will be reviewed on an annual basis and will be available after a period of 12 months has passed since the previous adjustment.

While Principle 8(a) indicates that safety net adjustments are normally made no earlier than the date of the order, Principle 10 allows for a date of effect earlier than the order is made. This provision arose from an ACTU application in the 2002 Safety Net Review to vary Principle 8 to

allow for retrospectivity without the artifice of a special case. The Commission rejected the application, but instead varied Principle 10. In its decision the Bench said:

[184] We are not persuaded to amend Principle 8 in the manner sought by the ACTU. The circumstances referred to by the ACTU, which led to its proposed amendment, should be addressed through an application under Principle 10. We will amend that principle so far as it refers to applications for an operative date earlier than the date specified in Principle 8(a). We note that whether an application is dealt with by a single members or a Full Bench there is no power to make an award which comes into force on a date earlier than the date of the award unless the Commission is satisfied that there are exceptional circumstances. (Safety Net Review Wages May 2002 Justice Giudice, Ross VP, McIntyre VP. Watson SDP, Harrison SDP, Lewin C and Hoffman C, Melbourne 9 May 2002 PR002002)

Principle 10 makes clear that applications to adjust awards above or below the safety net “or for a date of operation of a safety net adjustment earlier than the date of the award” are available provided they are dealt with either by a Full Bench or by a single member following consideration by the President as to the need to constitute a Full Bench.

There is no suggestion that the exceptional circumstances that might justify retrospective application of a safety net adjustment are limited to delays caused by the workflow within the Commission. The Commission has specifically resisted arguments seeking to circumscribe the nature of the exceptional circumstances that it might consider. In the *Safety Net Review 2003* (Justice Giudice, Ross VP, Lawler VP, Watson SDP, Lacy SDP, Hoffman, C and Larkin C, Melbourne 6 May 2003 PR002003) the AiG argued that the Commission should include within its decision a statement to the effect that delays caused by the administration of the Commission should not constitute exceptional circumstances for the purpose of Principle 10. In rejecting this suggestion the Full Bench said:

[274] We think it clear enough that, in dealing with any application for the retrospective operation of any award, the Commission must be satisfied that there are exceptional circumstances warranting such a course. However, it remains a matter of statutory discretion for the Member dealing with such an application to determine whether special circumstances have been made out. We do not believe that we should endeavour to circumscribe that discretion in the manner described by AiG.

The ACTU acknowledges that Principle 10 is designed to apply where a single member of the Commission is determining an application to vary an award in circumstances where a Full Bench has determined the quantum of the increase. However, the Principle needs to be read in light of the changed legislative regime. As the Commission as presently constituted acknowledged in its decision of 21 December 2005 (PR966840) its wage-fixing role is now subordinate to that of the AFPC. With respect, the position that this Bench finds itself in is not dissimilar to the position of a single member of the Commission vis a vis the Full Bench under the Commission's statement of Principles, in that its discretion is curtailed by the decisions and reasoning of others. Viewed this way, Principle 10 should provide the Commission with the necessary discretion to award a retrospective date of effect.

If this view is not accepted then the Commission should vary the Principles to allow for common dates of effect for increases in the FMW and Pay and Classification Scales set by the Fair Pay Commission and adjustments in wages in transitional awards.

The delay between application and determination are exceptional

Delays between the making of applications and the determination of the matter have been held to warrant a retrospective date of effect. In *Re Victorian Shops Interim Award 2000* (PR922761) the Full Bench noted there will be delays between the making of an application and the hearing of the matter. The Commission noted "[21] ... In some cases such delays may justify a date of operation earlier than the date of the hearing."¹⁶

In exercising its discretion the overriding criteria is fairness

An often-quoted decision of (then) Deputy President Riordan in the Meat Industry [Print J0916] summarises the approach that the Commission and its predecessors have taken to retrospectivity.

¹⁶ Perversely in that case the delay was that occasioned by the requirement to consult with the President regarding retrospectivity (see also *Re Storage Services Steel Distributing Award 2000* PR919435 DP Ives, Melbourne 26 June 2002).

"It is well established that it is only in exceptional and unusual circumstances that an order will be made with retrospective effect. But where such circumstances have existed retrospective adjustments have been ordered in accordance with the requirements of justice and equity. (at p4)

Having summarised the various authorities his Honour said "*The principal consideration in the reasoning in all of these cases is the fairness of the date of effect proposed*".(at p 7).

In weighing competing considerations the Commission should have regard to the following:

- that the employers have been forewarned of the likely quantum and operative date;
- further delays will cause hardship to employees of transitional employers;
- a common operative date is essential to industrial equity and will avoid further complexity; and
- that the applicants have clean hands.

Employers have been alerted to the unions' applications for a 1 October operative date

The presumption against retrospectivity in respect to adjustments to the safety net is based, at least in part, on the disadvantage that employers face in being unable to plan for the quantum and timing of any wage increase.

However in the current case employers knew or ought to have known that wage increases not dissimilar to those awarded by the AFPC would be awarded by the AIRC, and will therefore not be unduly disadvantaged by a retrospective operative date. In light of the constraints placed upon the Commission under subclauses 8(2) and 8(3) of Schedule 6, it would be disingenuous for employers to argue that they have had insufficient notice of the quantum of increase likely to be payable. Reasonable employers could be expected to have anticipated the Commission awarding increases, including the operative date, comparable to those awarded by the AFPC.

It has been open to employer bodies concerned about the potential impact on firms of short notice regarding operative dates of awards to publicise the likelihood of upcoming award increases.

Employer associations have been forewarned since 5 July 2007 of the likely quantum and likely operative date of any flow on from the Fair Pay Commission decision.

There is some evidence that some employer bodies have done so.

On 5 July 2007 the NFF advised its members

The NFF notes that all aspects of the AFPC's decision will now flow-on to the Australian Industrial Relations Commission's (AIRC's) transitional awards, which cover most Australian farmers.

"The decision to implement the wage increase from 1 October 2007 should allow sufficient time to enable today's decision to flow-on to the transitional awards and provide a reasonable lead time for farm businesses to be advised of specific pay rates applicable to each workplace," Mr Crombie said.

This means that, in the event that the Commission accepts the submission of the ACTU and awards an identical quantum to that awarded by the AFPC, employers have had effective notice of the likely increase, and date of effect, since 5 July 2007. This is a longer period of notice than has traditionally been available to employers under the pre-reform wages decisions.

In the alternative, if the Commission does not accept that the decision of the Fair Pay Commission and the subsequent reporting of the decision did not constitute forewarning, then the Commission should have regard to the fact that the applicants advised the employer associations of the claim for an operative date of 1 October 2007 on 23 July 2007, 10 weeks before the proposed operative date. In effect employers have had greater forewarning, of the likely outcome than under the pre-reform regime where the date of decision was not announced and usually adjustments applied immediately.

The Commission has recognised that forewarning of the likelihood of an increase may constitute or contribute to "exceptional circumstances". In 1989 Deputy President Riordan awarded 12 months retrospective operation of a TCR clause. (Print J0916). Deputy President Riordan's order was

upheld on appeal. . (Justice Maddern, Keogh, DP and Mckenzie C, Melbourne, 20 December 1990, Print J6160). In the course of his decision DP Riordan said:

"In all of the circumstances of this case, which are highly unusual, and having regard to the fact that the benefits prescribed represent a standard of this Commission and are enjoyed by the great majority of persons in the Australian workforce, the exercise of the discretion to award retrospective operation is justified. The employer had full knowledge of the existence of the standard and would have been aware of the prospect of an award being made."

A common operative date is essential to ensuring industrial equity

In a decision of the South Australian IRC an Appeal Bench considered that for retrospectivity to be awarded there need to be one of three circumstances: a delay caused by the action of employer; a delay caused by the workflow of the tribunal; or, that:

"the matter before the tribunal be of general application (stemming for example from a National Wage Case decision of a Commonwealth Tribunal), that , as a matter of industrial equity, it is desired to give effect to the general adjustment as nearly as may be as of a common date."

The Bench continued:

This is particularly so where it is clearly understood by the commercial community at large that a particular type of decision emanating from the Commonwealth tribunal is inevitably given effect to throughout the general spectrum of State awards" (per Bleby J., President, Olsson, J., Deputy President, and Commissioner Marron 20 September 1972, 1972 AILR 523) .

A Common operative date will avoid further complexity

In the current environment there is benefit from simplifying wherever possible. A common operative date, as well as common quantum of increase, is desirable, particularly for employers that are in the "twilight zone" between a trading corporation and a non-trading corporation.

The applicants have clean hands

The Commission has, in a number of cases, had regard to the conduct of the applicants particularly where delay in the determination of matters is in issue (see for example Re Victorian Shops Interim Award 2000 PR922761).

AFPC Decision to Defer wage increase for Exceptional Circumstances Employees

In their Wage Setting Decision No 2/2007 the AFPC decided to defer for 12 months the pay scale increases for “Exceptional Circumstances Employees” – employees employed by farm businesses granted Exceptional Circumstances Interest Rate Subsidy.

The ACTU opposes the decision to defer pay increases to employees in farm businesses granted Exceptional Circumstances Interest Rate Subsidy. At Annexure C the ACTU attaches the submissions of the Australian Workers Union (AWU) to the AFPC regarding the proposal by the National Farmers Federation to have the agricultural, pastoral and horticultural industries exempted from any increase in minimum wages. The ACTU supports these submissions in full.

The decision by the AFPC to defer a wage increase to the lowest paid workers in the agricultural, horticultural and pastoral industries is in the view of the ACTU unjustified and motivated by factors other than those stated by the AFPC.

The deferral decision by the AFPC will inevitably result in considerable confusion and uncertainty regarding the rights and responsibilities apply to employers and employees. Given the secretive nature of the deliberations of the AFPC on this matter it is unclear if the practical implications of their decision to defer increases were considered fully or at all.

In the event that the AIRC does not accept the ACTU primary position the ACTU submits that the AIRC should require farm businesses granted Exceptional Circumstances Interest Rate Subsidy to show evidence of their eligibility.

The ACTU strongly argues that it would be highly inappropriate for the AIRC to grant a deferral of any increase in the manner sought by the NFF and other respondents within the agricultural, horticultural and pastoral industries. It is open the AIRC to not follow the decision of the AFPC regarding deferral.

In the event that the AIRC does decide to grant a deferral of any increase, it is submitted that it would be highly inappropriate for the AIRC to grant exemption to individual award respondents without some form of evidence being provided that individual respondents are entitled to such relief.

The ACTU submits that in the event of a dispute the AIRC should be capable of readily investigating the eligibility of a farm business to defer the increase. The ACTU proposes that those supporting a deferral who represent affected respondents supply to the Commission a list of respondents who are eligible for and receiving the Exceptional Circumstances Interest Rate Subsidy (ECIS). The ACTU does not believe that it is acceptable that employees should take the word of their employer that wage adjustments will not apply to them. The onus on these matters rests with those seeking the relief and can only be met by those in possession of the relevant information. It is submitted that there are no known privacy or other legislative barriers to the supply and application of this information.

The ACTU accepts that any list may need to be confidential. The ACTU does not have any objection to a list of respondents in receipt of ECIS being provided to the Commission on a confidential basis, to be accessed in the event that the Commission needs to properly inform itself. It is also suggested that such information should be provided to key employer and employee respondents to the relevant awards.

At paragraph 16 of the Commission's decision in the Wages and Allowances Review 2006 (PR002006) to flow on the AFPC's 2006 decision, the Commission said that:

"We would not refuse to follow the decision in relation to minimum wages without substantial reasons for doing so."

The ACTU is asking the Commission to follow the decision of the AFPC generally. The ACTU submits that it is open and proper in the circumstances for the Commission to not follow the AFPC's decision to defer an increase to certain employees for 12 months. This is an extremely harsh decision that applies to some of Australia's most vulnerable and lowest paid workers.

The ACTU's alternative position asks that appropriate evidence be supplied to the AIRC to support an employers' contention that they are not obliged to pay an increase to minimum wage workers in the agricultural, horticultural and pastoral industries.

The process of varying transitional awards involves the open and transparent submission of evidence and an opportunity for that evidence and submissions to be challenged. A very different process is followed by the AFPC.

It is understandable that the AIRC takes its lead from the AFPC as the statutory minima for the majority of workplaces and employees is set by the AFPC. This is reflected in the statutory regime.

For the industries in question there are a unique set of special and exceptional circumstances that must be considered. Not least of which is the fact that the statutory minima for the vast majority of employees and workplaces is established by the AIRC. It is hard to comprehend why the AFPC feels it is appropriate to grant a wage freeze to a small number of employers. The NFF claims that in excess of 90 per cent of workers in the agricultural, horticultural and pastoral industries are subject to transitional awards set by the AIRC. The AFPC appears to not deal with the fact that a small number of employers in the relevant industries are subject to its pay and classification scale determinations.

It is submitted that these unique circumstances allow the AIRC to arrive at a different conclusion to that of the AFPC.

At the very least it is submitted that the AIRC should require appropriate evidence to justify a deferral. The AFPC has not sought such evidence as the AFPC is not a body capable of receiving or evaluating evidence.

Conclusion

The ACTU and unions claims relating to increases in rates of pay within transitional awards and increases in monetary allowances for transitional and pre reform awards is reasonable, economically responsible and consistent with the objects of the Act.

To not award the claims sought would result in confusion, inequities and increased direct and indirect costs to both employee and employers.

ANNEXURE A

ACTU submissions to Australian Fair Pay Commission

ANNEXURE B

Updated Economic data provided to AFPC by ACTU

ANNEXURE C

Australian Workers Union Submissions to the AFPC