

WAGES AND ALLOWANCES REVIEW 2007

Outline of Submission



August 2007

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WAGES AND ALLOWANCES REVIEW 2007

Outline of Submission

1. Summary of Ai Group's position

1. Ai Group submits, that the decision of the Australian Fair Pay Commission (AFPC) in its *2007 Minimum Wage Review* was reasonable and appropriate in the light of Australia's current economic climate and the previous increase provided by the AFPC in its *2006 Minimum Wage Review*.
2. The AIRC in accordance with the terms of the *Workplace Relations Act 1996* is conferred with power to vary:
 - Wage rates in transitional awards;
 - Wage related allowances in transitional awards;
 - Expense related allowances in transitional awards.
 - Wage related allowances in pre-reform awards; and
 - Expense related allowances in pre-reform awards.
3. In exercising its powers the Act requires that the AIRC does not vary the terms of awards in a manner that is inconsistent with the decision of the AFPC.
4. Ai Group is not opposed to the AIRC flowing on the increase to rates in transitional awards and the consequential increase in allowances in transitional and pre-reform awards as a result of the decision of the AFPC.
5. Ai Group strongly opposes any retrospectivity in the operative date of the variations. Ai Group further submits that any general order or principle from the AIRC granting retrospectivity would be inconsistent with the terms of the Act and the decision of the AFPC.

6. Ai Group endorses a process for the variations in which applications are referred to Commission members via the panel system. Should the Unions file their applications in a timely fashion the issue of retrospectivity will not arise.

2. Approach that the Commission should take in dealing with the applications

7. In the *Wages and Allowances Review 2006* the AIRC had before it hundreds of applications and sought to settle the terms of variation to the awards subject to those applications via the Commission's Registry.
8. Ai Group respectfully contends that the experience gained from the process adopted last year in which the Australian Industrial Registry was conferred with the responsibility of settling the terms of the specific variations in hundreds of awards in conjunction with the parties, was clearly not ideal.
9. In particular, there were a number of significant awards to which Ai Group is a party including the *National Building and Construction Industry Award 2000* and the *Metal, Engineering and Associated Industries Award 1998*, that were significantly delayed in settlement of their orders as a result of the process. This had the consequential effect of member companies being exposed to significant back-pay calculations.
10. Ai Group submits that the sensible approach to be adopted in respect of the *2007 Review* is to revert to the longstanding approach that was previously applied by this Commission in its *Safety Net Review Decisions* of utilising a small number of Awards (namely the 26 Awards that are currently before the Commission) as vehicles for the Full Bench proceedings, with other awards being dealt with by individual members of the Commission via the panel system.
11. Such an approach we submit is in the interests of all parties as:
 - The parties to individual awards are better able to address issues relating to their awards;
 - Adequate time and attention can be paid to service and notification

requirements;

- Should the applicant Unions be diligent in filing their applications, ample time will be available for the settlement of orders prior to 1 October 2007;
 - Applications are able to be heard and determined by members of the Commission assigned to the relevant panel who have knowledge about the relevant industry and award; and
 - It avoids the wastage of resources which results from having several members of the Commission engaged in handling matters best dealt with by one member of the Commission.
12. The above approach we note is consistent with the proposal advanced by the ACTU in its submission.¹
13. Should the above approach be adopted, Ai Group would also submit that the operative dates for variation should be 1 October 2007 for any applications in respect of which orders are issued by that date. For any other applications, the date of variation should be no earlier than the date the order is issued.

Rounding

14. In respect to the question of rounding of the increase, Ai Group supports the rounding of wage increases in transitional awards to the nearest 10 cents. That is, the AIRC should grant the following wage increases:
- An increase of \$10.30 per week to the Federal Minimum Wage;
 - An increase of \$10.30 per week to all adult weekly rates up to \$700 per week; and
 - An increase of \$5.30 per week to all adult weekly rates above \$700 per week.

¹ ACTU Submissions – Wages and Allowances Review 2007 pg6

15. In relation to the rounding for allowances, Ai Group submits that no general principle should be adopted for the rounding of allowances and rather the method by which individual parties to various awards have historically approached the question of rounding should be adopted.

3. Relevant legislative provisions

16. The terms of the *Workplace Relations Act* serve to prescribe the manner in which the AIRC can perform its functions with respect to varying both transitional awards and pre-reform awards.
17. In the *2006 Allowances and Wages Review Decision* [Print PR002006] the AIRC considered the legislative framework in which it was required to perform its functions noting:

“[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."

.....

[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;

.....

[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;

....."

18. In respect of the power to vary pre-reform awards the Commission's ability to make an order varying an award is also limited by the operation of s.553(4) which relevantly provides:

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

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

(b) all of the following conditions are met:

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

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

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

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

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

19. The terms of the Act make it clear that whilst the AIRC is not required to replicate the decision of the AFPC it must ensure that its decision is not inconsistent with the AFPC's decision.

20. In considering applications to vary allowances, the Commission will also need to ensure that elements of remuneration which are now incorporated within Pay Scales are not varied in awards and hence would be subject to a double increase. It is not always clear what is and what is not an “allowance”.
21. Section 178 of the Act gives some guidance on this issue. In this section the term “basic periodic rate of pay” is defined as follows:
- “Basic periodic rate of pay means a rate of pay for a period of work (however the rate is described) that does not include incentive-based payments and bonuses, loadings, monetary allowances, penalty rates and other similar separately identifiable entitlements”.*
22. Basic periodic rates of pay are included in Pay Scales and hence the AIRC has no jurisdiction to vary any elements of such rates of pay in pre-reform awards.
23. The uncertainty which can arise regarding what elements of remuneration have remained in an award as allowances and what elements are now incorporated within the relevant Pay Scale requires that the Commission ensure that careful consideration is given to the draft orders prepared by the unions in respect of all applications to vary Awards. This careful consideration is best assured through the approach which Ai Group has proposed in Section 2 of this submission.

4. Wage-setting decision of the Australian Fair Pay Commission

Quantum of increase

24. The AFPC handed down its second wage-setting decision on 5 July 2007. The key elements of the decision are:

- The Federal Minimum Wage was increased by \$0.27 per hour (bringing the rate to \$13.74 per hour);
- Minimum wage rates up to and including \$700.00 were increased by \$0.27 per hour;
- Minimum wage rates over \$700.00 were increased by \$0.14 per hour..

25. The increases in all Australian Pay and Classification Scales will be operative from the commencement of the first pay period applying to the employee on or after 1 October 2007.

26. In arriving at its decision the AFPC identified a range of matters that it took into account, including:

- “
- *the ten month period since the last pay increase for the standard FMW, special FMWs and the Australian Pay and Classification Scale (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 employment;*
 - *the fact that the economy and the 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...*²

27. Ai Group is of the view that in the context of the above factors the increase provided by the AFPC is both fair and appropriate.
28. The AFPC in its *2007 decision* also delayed the implementation of the wage increase for certain employees of primary producers. The special arrangements only apply to employers in receipt of the primary producers' Exceptional Circumstances Interest Rate Subsidy who are operating in an Exceptional Circumstances Declared Area.
29. Ai Group supports the flow on of this aspect of the decision in the AIRC's variation of wages and allowances.

Other relevant aspects of the AFPC decision

30. The AFPC in handing down its 2007 decision provided for a lead time of almost 3 months between the date of decision and the implementation of the decision. This can be compared with the approximate 5 weeks lead time that it afforded in accordance with its 2006 decision.
31. Ai Group, in its submissions to the AFPC for its 2007 Wages Review, strongly urged the AFPC to provide a greater lead time than that which was provided for the 2006 decision. The following extracts from the submission are relevant:

"30. Whilst Ai Group has identified that an operative date five weeks in advance of the AFPC's 2006 decision was an encouraging step in recognising some of the practical issues which arise in implementing a decision to increase minimum wage rates, we submit that in 2007 a longer period of prospectivity is required.

² Australian Fair Pay Commission – *Wage Setting Decision July 2007 – Executive Summary* pg8

31. *This view is based upon three important issues:*

- *Firstly, the very short amount of time which has elapsed between the operative date of the AFPC's 2006 Decision and its current Review of Minimum Wages;*
- *Secondly, the need for employers to plan for the cost increases; and*
- *Thirdly, the linkages which exists between the roles of the AFPC and the AIRC in adjusting remuneration for employees...*

.....

35. *The third issue identified above in support of a greater amount of prospectivity in 2007 relates to the fact that the role of adjusting remuneration for employees is now split between the AFPC and the AIRC and there is a need for coordination between the remuneration adjustment processes of the two tribunals.*

36. *The AFPC is responsible for adjusting wage rates for employees other than transitional employees, whereas the AIRC is responsible for adjusting wage rates for transitional employees, wage-related allowances for transitional employees and wage related allowances for other employees.*

37. *The Workplace Relations Act links the two processes. Clause 8 of Schedule 6 of the Act identifies that it is the AIRC that is responsible for adjusting the wage rates of transitional employees and requires that, in performing this function, it take into account decision of the AFPC.*

38. *In its Wages and Allowances Review 2006 decision, the AIRC complied with this requirement, and in so doing decided to grant a retrospective operative date of the first full pay period to commence on or after 1 December 2006. This operative date applied not only to the wage increases for transitional employees but also to the wage-related*

allowance increases in hundreds of awards applying to both transitional and other employees.

39. *During the hearings in the case, Ai Group and other employer representatives vigorously opposed any retrospectivity regarding the operative date. The ACTU supported that the operative date be consistent with the AFPC's decision.*

40. *The AIRC's rationale in granting a retrospective operative date is set out in the following extract from the Full Bench's Wages and Allowances Review 2006 decision:*

"[37] All federal system employees engaged on minimum rates were entitled to receive an increase in rates on 1 December 2006. In light of the Commission's statutory duty in cl.8 of Schedule 6 to the WR Act, in particular the terms of cl.8(3) and (4), there is no reason that employees under transitional awards should be disadvantaged by a later operative date than will apply to federal system employees. Those clauses read:

"(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."

*[38] It would be inequitable, particularly in light of the universal application of the AFPC decision to federal system employees reliant on rates in APCs, if we were to order a later operative date in the applications before us than the first pay period on or after 1 December 2006.*³

41. *The decision of the AIRC to award a retrospective operative date has caused widespread problems for employers....*

.....

48. *Such a result would clearly be avoidable in respect of the 2007 decision should the AFPC allow for greater prospectivity between the date of the decision and the operative date of the increase.*

49. *Ai Group submits that with these significant problems in mind, the shortest period of prospectivity that will allow for efficient and sensible implementation of the decision is a period of three months.*⁴

32. We submit that in granting the additional lead time sought by Ai Group, the AFPC were clearly mindful of the importance of the AFPC and AIRC remuneration adjustment processes working in a mutually reinforcing and co-ordinated manner.

33. Such a submission is also supported we contend from the additional processes proposed by the AFPC of publishing pay scales and establishing a timetable for future minimum wage increases.⁵

³ PR002006 at [37] and [38]

⁴ Ai Group Submissions – Australian Fair Pay and Commission – 2007 Minimum Wage Review

⁵ Australian Fair Pay Commission – *Wage Setting Decision July 2007 – Executive Summary* pg73 & pg 105

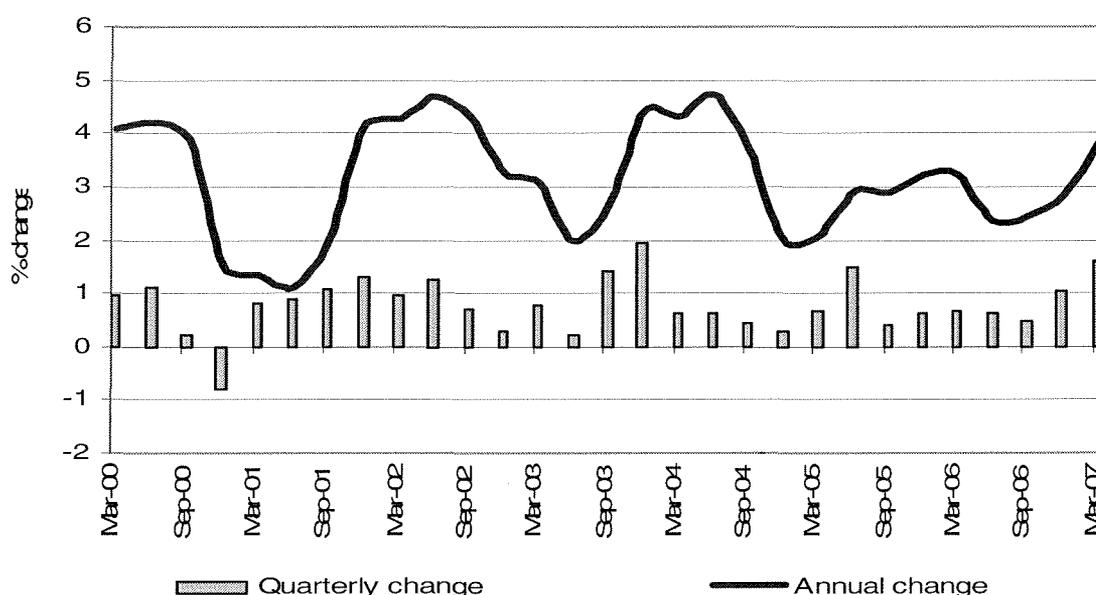
5. Economic conditions and outlook

34. In performing its functions, the Commission must have regard to the objects of the Act and “*the state of the national economy and the likely effects on the national economy of any order the Commission is considering, or is proposing to make, with special reference to the likely effects on the level of employment and on inflation*” (s.103).

The Australian economy

35. As **Chart 1** highlights, the economy picked up some momentum in the later part of 2006 and into the first quarter of 2007, but continues to under-perform relative to the early part of this decade. Average annual GDP growth (seasonally adjusted, chain volume terms) between March quarter 2000 and December quarter 2004 averaged 3.3%, compared to an average of 2.9% over the period March 2005 to March 2007.

Chart 1 - Annual and quarterly change in GDP growth



36. While the commodity boom has delivered solid returns to the resources sector and some states, for the majority of industry sectors and states, growth has been moderate to weak.

37. Looking at industry sectors, and using Australian Bureau of Statistics data on sales volumes, highlights that outside the mining sector, industry performance has been considerably less than strong (**Charts 2 – 5**).

Chart 2 - Mining sales volume

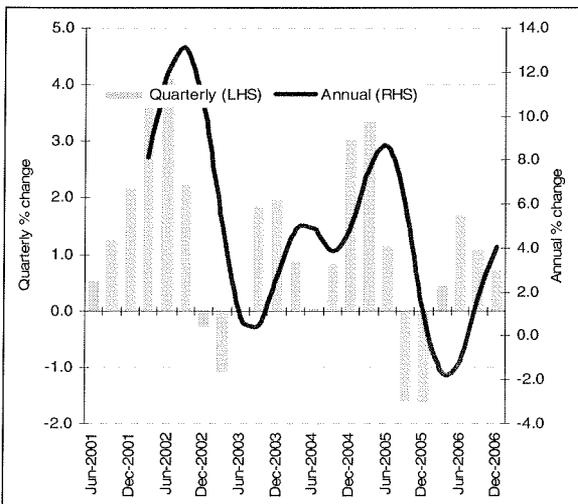


Chart 3 - Construction sales volume

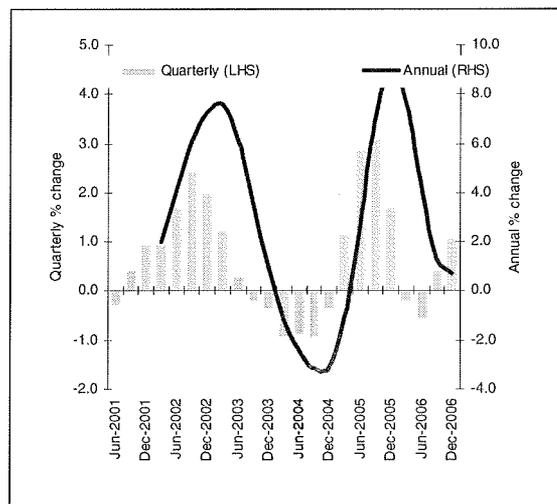


Chart 4 - Manufacturing sales volume

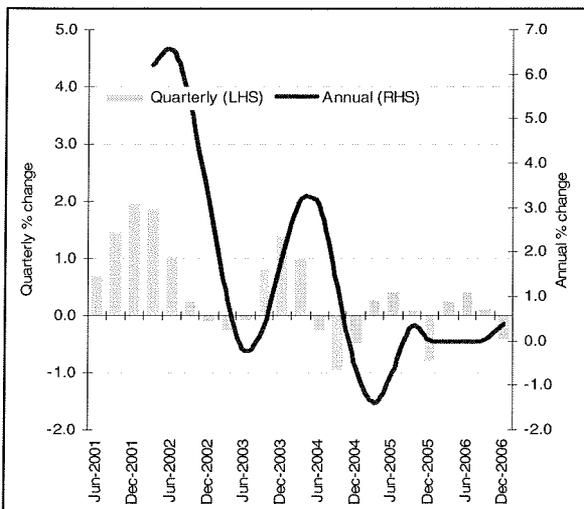
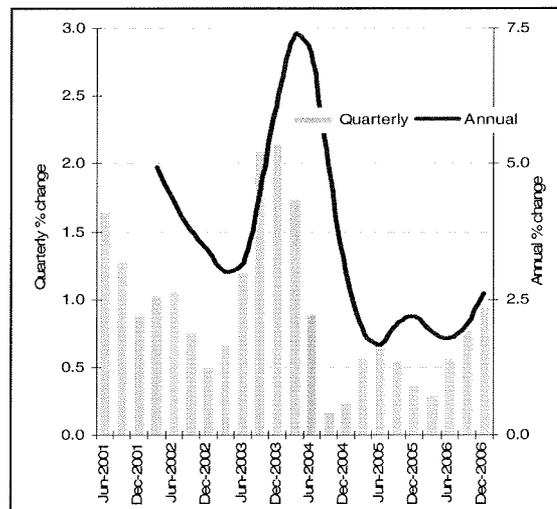
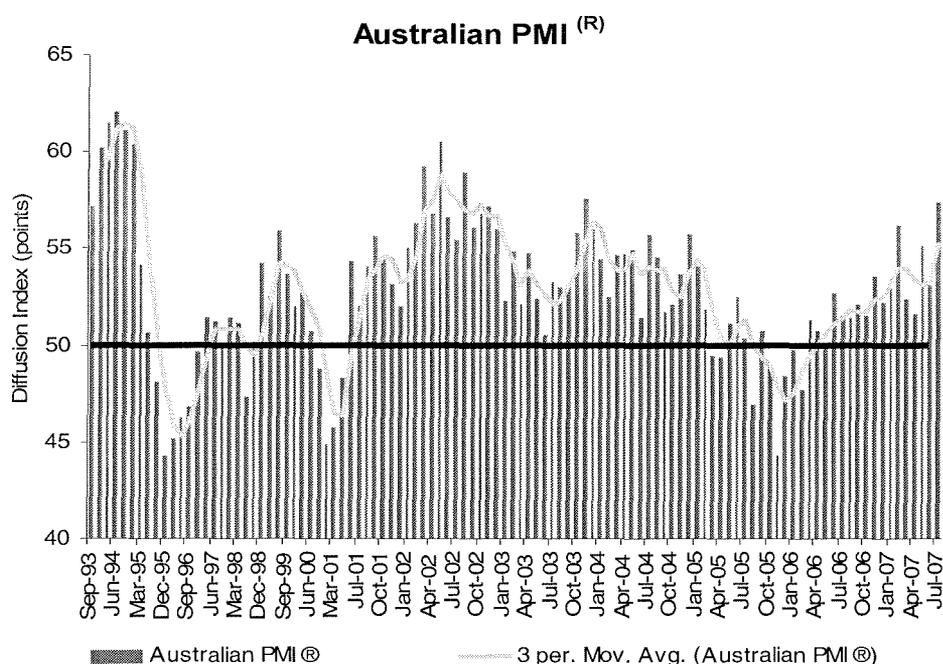


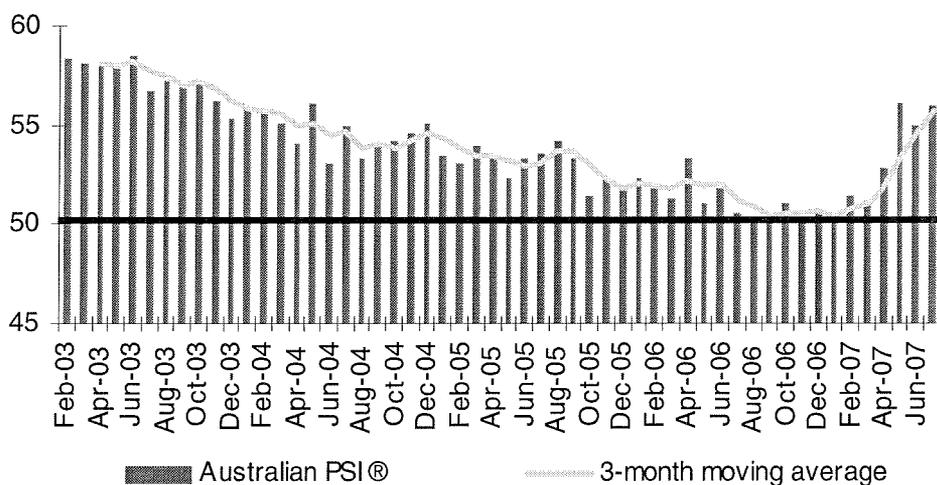
Chart 5 - Services sales volume



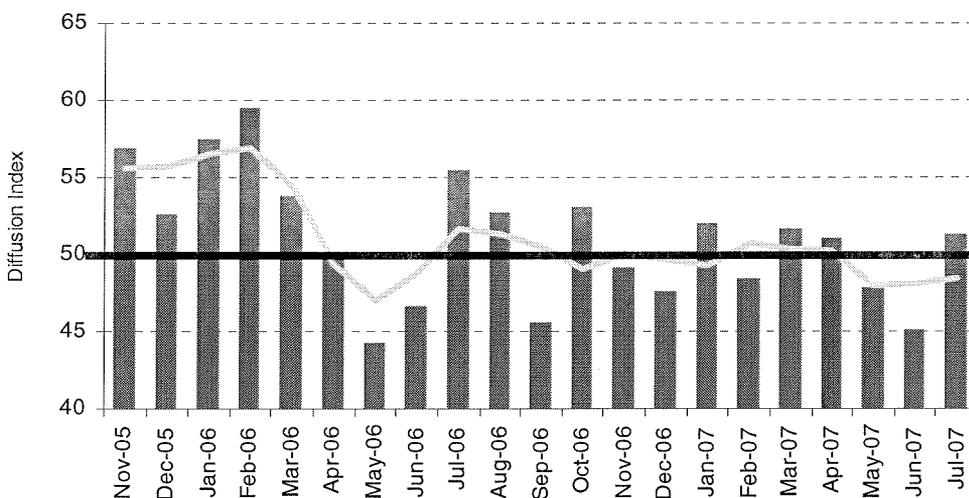
38. In mining, annual sales volumes were growing 4.1% at the end of 2006, with quarterly growth throughout 2006 averaging around 1.0%. In construction, sales volumes are weak, with annual growth of 0.7% in 2006, with quarterly growth averaging only 0.2%. In manufacturing, sales volumes actually fell by 0.4% in 2006, with quarterly growth averaging only 0.1%. Even with services, growth in sales volumes are well down on previous years, with annual growth of 2.1%, and average quarterly growth of 0.6%.
39. The official ABS data reinforces the findings of Ai Group's own business surveys (Australian PMI, PCI and PSI), covering manufacturing, construction and the services sector, that shows activity in these sectors are well down on previous years.



Australian PSI ®



Australian PCI ®



40. Indeed, slower growth across the economy is what the Reserve Bank has sought to achieve through raising interest rates, thereby lowering overall demand and taking pressure off wages. As Assistant Governor (Economics), Malcolm Edey has recently stated “the RBA has been pointing out for some time now, that we should not expect the economy to grow as quickly as it did a few years ago, when there was still a lot of surplus labour and capital to be re-

employed”⁶. Capacity constraints and lower productivity means slower growth and a cap on wage growth in order to contain inflationary pressure. The Commission similarly has a role to ensure its wage adjustments are consistent with the RBA’s overall goal of sustaining growth and keeping inflation within reasonable limits.

41. The performance of the economy and labour market are not uniform. The majority of employees and businesses reside in NSW and Victoria, and South Australia to a lesser extent. The weak growth performance of these states means that the impact of a wage adjustment in these states would be greater than in Queensland and Western Australia, where the state economies are growing significantly stronger.

42. While it is difficult to determine the extent to which national wage adjustments impact on employment at the state level, it is clear that employment opportunities are constrained in the non-resources states of NSW, Victoria, SA and Tasmania. Indeed, while Queensland and Western Australia account for 31% of the workforce, they were responsible for around 52% of the jobs created in the year to February 2007 (**Table 1**). These states have had among the strongest growth in state final demand, and appear to have absorbed wage adjustment with little impact on employment growth. However, whether this conclusion can be made about the other states, which are growing much slower, remains in doubt.

⁶ Malcolm Edey, Assistant Governor (Economic), Australia in the Global Economy, Address to the Australia & Japan Economic Outlook Conference 2007, Sydney - 16 March 2007

Table 1 Change in employment over last year (to February 2007)

State	No of full-time jobs (000)	Annual % change	No of part-time jobs (000)	Annual % change	Annual growth in state final demand (%)*
NSW	46.8	1.97	3.80	0.44	1.4
VIC	49.1	2.75	21.0	2.94	3.2
SA	4.3	0.84	2.5	1.07	2.6
TAS	3.2	2.11	-3.1	-4.49	-3.0
NT	3.1	4.00	2.7	14.54	1.0
ACT	5.4	3.93	2.4	5.77	6.5
QLD	92.9	6.42	22.8	4.20	6.1
WA	18.9	2.48	15.7	5.26	7.2

* As at December quarter 2006

43. Ai Group holds the view that the Commission needs to be more mindful of Australia's current poor productivity record which could impact on the capacity of employers to absorb such increases.
44. There is a growing consensus that Australia's non-inflationary growth potential (or 'trend' GDP growth) has slipped in the current decade. The Australian Treasury has recently revised down its estimate of trend growth from 3.25% to 3.0%.
45. The source of this new consensus is the continuing weak growth in both labour productivity (GDP per hour-worked) and multi-factor productivity (the growth in GDP that is not attributable to either labour or capital inputs and which is basically due to the effects of new technology and new organisational practices). Indeed, Treasury's new estimate of trend growth incorporates annual labour productivity growth of 1.75% (revised down from 2.0%), and which is broadly in line with the long-run average Australian growth rate.
46. The Productivity Commission has recently published a summary of recent growth in labour productivity by industry, drawn from the 2005/06 annual National Accounts. The estimates are presented in **Table 2**.
47. Annual growth in labour productivity in the 'so-called' market sector averaged 0.9% in 2004/05 and 2005/06, compared with long-term annual average

growth of 2.2%. However, two sectors - mining and electricity, gas & water – accounted for much of the overall weakness in this period, reflecting relatively strong employment growth in both industries. Nevertheless, average annual growth in labour productivity was zero in the manufacturing sector during these two years, and compared with a long-run average growth rate of 3.2%. Through this period, manufacturing output growth was comparatively weak, while growth in capital inputs remained strong.

Table 2 Annual change in industry productivity (per cent)

Industry Sector	Labour Productivity			Multifactor Productivity		
	Long-term average	2004-05	2005-06	Long-term average	2004-05	2005-06
Agriculture, forestry & fishing	3.5	2.6	9.4	2.8	-1.2 (-0.1)	4.1 (0.2)
Mining	2.6	-3.6	-19.1	0.4	-0.3 (0.0)	-12.1 (-1.1)
Manufacturing	3.2	-2.3	2.3	1.9	-3.4 (-0.6)	-0.5 (-0.1)
Electricity, gas & water supply	4.0	-1.9	-8.2	1.9	-1.9 (-0.1)	-4.1 (-0.2)
Construction	1.7	-0.3	3.1	1.1	-0.3 (0.0)	3.2 (0.4)
Wholesale trade	2.0	6.0	2.8	0.9	1.8 (0.2)	-0.1 (0.0)
Retail trade	1.6	0.7	1.3	0.9	-0.4 (0.0)	-0.5 (0.0)
Accommodation, cafes & restaurants	0.1	-0.2	6.8	-0.7	0.2 (0.0)	4.4 (0.2)
Transport & storage	2.8	2.4	1.5	2.2	1.3 (0.1)	-0.7 (-0.1)
Communication services	6.6	-5.1	9.1	3.9	-2.6 (-0.1)	5.9 (0.3)
Finance & insurance	2.0	-0.9	1.1	0.6	-1.7 (-0.2)	1.3 (0.2)
Cultural & recreational services	-0.2	-1.4	-2.7	-0.7	-0.3 (0.0)	-2.4 (-0.1)
Market sector	2.2	-0.4	2.2	1.2	-1.1	0.0

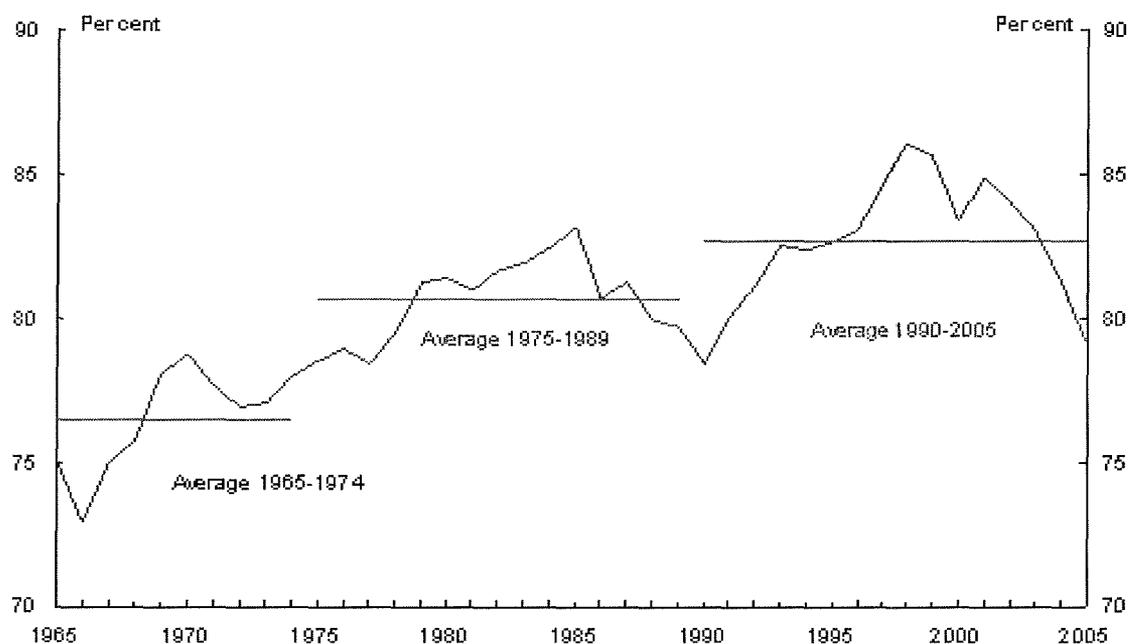
Numbers in brackets refer to industry contributions to market sector productivity growth. They are only approximate. The long term in this table refers to the period 1974-75 to 2003-04. Market sector numbers differ slightly from the average presented in the Aggregate Estimates, where the long term figures commence in 1964-65.

48. After some convergence during the previous decade, the gap between the levels of labour productivity in Australia and the United States has again widened in the past six years (i.e. labour productivity in the US has been growing faster than in Australia since 2000). The relative performance of the two economies is illustrated in **Table 3**. While industry composition appears to explain much of the deterioration in Australia's relative performance in the past

two years (and which could be expected to be reversed as mining sector output increases in the next few years), nevertheless it is generally agreed 'reform fatigue' is an additional factor at work.

49. In conclusion, Ai Group believes that weaker growth in the Australian economy, the soft business environment in the non-resources sectors, the differences in employment conditions in the states, and Australia's weaker productivity performance should imply caution in setting the level of minimum wages in 2007.

Table 3 Australia's productivity level relative to the United States



Source: Productivity Commission

6. Operative date and the importance of avoiding retrospectivity

50. The ACTU in its submissions has sought:

“...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 the first pay period on or after 1 October 2007.

Orders made in respect of applications to vary awards and transitional awards filed after 1 October 2007 should generally have effect from the date on which the order is made...”⁷

51. Ai Group concurs with the ACTU’s proposal that applications filed after 1 October 2007 should have effect from the date on which the order is made, however, strongly opposes the contention that there should be a general operative date of 1 October 2007 for any applications that are filed prior to that date irrespective of whether the matter has been determined and orders issued.

52. Paragraph (2) of section 572 – Commencement of awards, of the Act states that:

“Unless the Commission is satisfied that there are exceptional circumstances, the day specified in an award or award-related order for the purposes of subsection (1) must not be earlier than the date of the award or order”.

53. The approach proposed by the ACTU to grant all applications filed prior to 1 October 2007 an operative date from 1 October 2007 irrespective of whether orders have been issued we contend is inconsistent with the terms of s.572(2).

⁷ ACTU Submissions – Wages and Allowances Review 2007 pg25

54. The Commission has had a very longstanding approach of not granting retrospectivity unless there are compelling reasons for doing so. A similar provision to s.572(2) was contained within s.146 of the pre-reform Act. In considering the operation of that provision the Full Bench in a case relating to the *Hotels, Resorts and Hospitality Industry Award* (Print K6815, 26 February 1993) noted:

“The Commission has developed a clear approach of not granting retrospectivity unless there are compelling reasons, in the circumstances of a particular case, for so doing. No such compelling reasons were present in this case. Moreover, even that approach of the Commission must be considered against the requirements of the wage fixation principles. In our view, it is clear from the discussion of those principles in the relevant National Wage Case decisions - and the nature and basis of the increases made available under them - that they preclude the awarding of retrospectivity.”

55. This principle is further supported by another decision of a Full Bench relating to several award variations sought by employers to address an unusual interpretation which the Federal Court had placed on some long-standing shift provisions in various automotive industry awards (Print T1300, 3 October 2000), where the issue of retrospectivity was also considered. The following extracts we submit are distinctly relevant:

“[38] In the ordinary course, any such variation should operate prospectively. The Commission must weigh carefully the effect of any retrospective operation. The Commission’s capacity to grant retrospective operation must also be considered. Section 146 provides that:.....

[42] We are satisfied that the circumstances of the case are sufficiently rare and singular to justify a conclusion that they are exceptional for purpose of section 146. The main grounds of employers' applications have been made out. The intention of the Commission in making the primary antecedent award may be inferred from past history, from the decision in Jarrad and from the consistent application of an industrial standard approach prior to challenge in Federal Court. That finding is subject to Ford's minor departure from the general rule. However, that departure does not reflect an acceptance of what has been described as a "double dipping" principle to allow in effect a public holiday and a penalty rate for a full shift. We could find nothing in industrial arbitral precedent to support the introduction of such a principle in relation to any of the awards covered by the applications. The submissions of the AiG point to the desirability of acting to ensure that the scope of the award provision is consistent with the industry standard as it has been understood since at least 1952." (Emphasis added).

56. We submit that there is nothing "rare and singular" about the retrospectivity sought by the unions in these proceedings, quite to the contrary, the proposition as advanced by the ACTU seeks to inappropriately place all applications filed before 1 October 2007 on an identical factual background.
57. In the *2003 Safety Net Review* [Print PR002003] Ai Group sought in response to different approaches adopted by different members of the Commission on the issue of retrospectivity, for the Commission to make a statement to the effect that delays in settling orders for the safety net increase occasioned by delays in the conduct of the Commission's business did not constitute 'exceptional circumstances' warranting an order for retrospectivity.
58. In declining to do so the Commission stated:

[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.

(Emphasis Added)

59. We respectfully submit that the proposal advanced by the ACTU for applications filed prior to 1 October 2007 effectively seeks to circumscribe the discretionary nature of the Commission's decision in the same manner as the proposal advanced by Ai Group and rejected in the 2003 *Safety Net Review Decision*.

60. Furthermore, in the Commission's decision in the *Wages and Allowances Review 2007*, the Commission also stated:

“[61] We note that there is no power to establish Full Bench principles for the variation of pre-reform awards where the variation is necessary to maintain the safety net. This may be because the legislation is already very prescriptive in relation to variations of that kind. Whatever the reason, it follows that this decision cannot have general effect in relation to applications to vary wage-related allowances in pre-reform awards based on the AFPC's October 2006 wage-setting decision...”

61. The ACTU's proposal we contend is predicated on the basis that any delay between the filing of an application and the date of orders being issued is sufficient to constitute exceptional circumstances.

62. We submit that such a contention cannot accord with either the express terms of s.572(2) nor the arbitral authorities on the question of retrospectivity. This submissions we say is further supported by the decision of the Full Bench in *Re: Victorian Shops Interim Award 2000* [Print PR922761] where the Bench

stated:

“[18] Mr Burke submitted that the operative date should be 2 June 2002. His reasons include the following:

.....

... - the application was filed on 9 May but not heard until 6 June 2002, through no fault of the SDA; ...

.....

[21] We have concluded that the operative date should be the first pay period on or after 6 June 2002, the date on which the application was heard... We do not attach much significance to the delay in listing the application. It is to be expected that there will be delays between the filing of applications and the hearing. In some cases such delays may justify a date of operation earlier than the date of hearing. When all things are considered this is not the case here.”

(Emphasis Added)

63. The decision of whether to grant retrospectivity is one that by its very nature involves a balancing of the individual circumstances of each case and making a determination whether they are so “rare and singular” so as to represent exceptional circumstances. The approach proposed by the ACTU effectively seeks to remove the ‘balancing’ aspect associated with the decision by reducing the test to a singular question, ‘Was the application filed before 1 October 2007?’
64. Ai Group submits that should the AIRC grant retrospectivity on the basis sought by the ACTU a very dangerous precedent would be set which would greatly disadvantage employers in the future.

65. Although the AIRC granted retrospectivity in its *2006 Wages and Allowances Review Decision*, such a scenario arose from specific circumstances that we submit are not present in the present application. The Full Bench in determining that retrospectivity was appropriate stated:

"[38]... The interaction between the two wage-fixation systems, timing considerations and the lead role given to the system administered by the AFPC, together constitute exceptional circumstances. We do not suggest that whenever the AFPC issues a wage-setting decision the Commission would vary wages and allowances in its awards with the same operative date as the AFPC's decision regardless of when the applications are lodged and dealt with. It is only necessary that we indicate that the circumstances before us on this occasion in their totality are exceptional and justify retrospectivity."

(Emphasis Added)

66. The most notable difference between the circumstances of the 2006 decision and the matters to be considered in the present matter is that amount of lead time that the AFPC has provided between the date of its decision and the date of implementation.
67. As previously outlined within these submissions, Ai Group made specific submissions to the AFPC on the need for greater prospectivity in its decision. Such submissions were based in large part on the difficulties experienced by our members as a result of the retrospective effect of the *2006 Wages and Allowances Decision*.
68. There are compelling and obvious reasons why retrospectivity in respect of operative dates for wage and allowance increases is inappropriate and should only be contemplated in very exceptional, ("rare and singular") circumstances. Such reasons include:

- There are substantial administrative and direct costs associated with back-paying employees to take account of retrospectivity of wage and allowance increases; and
 - These days a significant percentage of the workforce is employed by labour hire companies and in other contract labour situations. Typically, the employers in these situations have no ability to recover retrospective wage and allowance increases from their clients.
69. Ai Group submits that as a general principle, an operative date of 1 October 2007 should only apply in circumstances where the application has been filed and the orders have been issued by that date. For all other applications the date of operation should be no earlier than the date that the order is issued.
70. We submit that this proposal is consistent with the decision of the Fair Pay Commission, which determined that an operative date three months in advance of the decision was warranted. Accordingly, a retrospective operative date would not be consistent with the Fair Pay Commission's decision.

7. Formula for adjusting wage related allowances

71. For more than 10 years, the method of adjusting wage related allowances in accordance with Safety Net Review decisions has been derived from the Commission's *Furnishing and Glass Industries Allowances decision* [Print M9675; (1996) 40 AIRL 3–399].
72. The Statement of Principles arising from the 2005 *Safety Net Review Decision* explains the method of adjustment as follows:

“Such allowances and service increments should be increased by a percentage derived as follows: divide the monetary safety net increase by the rate of pay for the key classification in the relevant award immediately prior to the application of the safety net increase to the award rate and multiply by 100.”⁸

73. This method of adjustment was utilised by the AIRC in its 2006 decision. Ai Group submits that the same approach is workable and appropriate on this occasion because the AFPC has awarded an increase to all classifications.
74. In future years, this method of adjustment may or may not be appropriate on a given occasion, depending upon the approach which the Fair Pay Commission takes in awarding a wage increase on that occasion. For instance, if the Fair Pay Commission decided to only award a wage increase to those receiving the Federal Minimum Wage (and not all classifications) the formula might not be appropriate.

⁸ PR002005 *Safety Net Review – Wages June 2005* – Attachment A, Principle 5, pg. 124

8. Adjustments to expense related allowances

75. A well accepted formula tends to apply within each individual award in relation to the adjustment of various expense related allowances - typically based on movements in the relevant Consumer Price Index.
76. Ai Group can see no reason why the same approach should not generally apply in the present application.