

1. INTRODUCTION

- 1.1 It is common ground between the parties that there is a decision of the AFPC¹ under the amended *Workplace Relations Act 1996*, and that this triggers (following applications from unions to vary individual awards) a consideration of variations to wages and allowances for transitional awards, and allowances in the pre-reform awards for trading corporations.
- 1.2 ACCI believes it is important for all decision makers in the system to implement the new and revised provisions of the post *WorkChoices* legislation in a manner which appropriately balances relevant considerations, maximises clarity for users of the system, and provides for orderly and efficient implementation. This was a key tenet of ACCI's AFPC submission and we repeat it now in relation to the AFPC's implementation of that decision.
- 1.3 ACCI understands that this bench has over 400 applications before it, a number which we understand continues to rapidly expand on a daily basis. Whatever course is taken, this presents the Commission with a major and now unavoidable logistical challenge. This is a problem of the ACTU's making, and there would in future years be options to render this process far more orderly, pending the determination of this matter.
- 1.4 Regardless, the Commission has 400 plus applications before it and needs to determine how to address them and ensure awards are varied to up-rate the safety net in late 2006.
 - a. Within the overall framework of issues raised, ACCI acknowledges the general importance of disposing of this matter expeditiously.
 - b. ACCI has considered this issue carefully, and proposes an approach which will balance the interests of all concerned and ensure awards are varied rapidly during December 2006². This is an approach which maintains the status quo – and utilises (rather than seeking to

¹ AFPC Decision, 26 October 2006.

² Where applications have been lodged.

overturn), the established approaches of this jurisdiction evolved across decades.

- c. In contrast, the ACTU proposes a course which would overturn the established practices and processes of this Commission, which demands extraordinary action of this Commission which is not justified or justifiable, and which will create substantial confusion and compromise both enforceability and the role of the award safety net. The ACTU's proposed approach is inconsistent both with the statutory requirements, and with good practice and sound administration of law.

- 1.5 For the reasons set out throughout this outline and to be developed before the Full Bench, we say the course ACCI recommends for this matter represents the appropriate, practical and balanced course and should be preferred to that sought by the ACTU.

1.1 ACCI POSITION

1.1.1 Giving Effect to the AFPC Decision

- 1.6 To the extent these proceedings ask of parties the direct question of whether the AFPC decision should be supported or not supported, ACCI's position is the later.
- 1.7 ACCI, like the ACTU, has appended our detailed AFPC submission to this outline. ACCI's AFPC submission makes clear that ACCI supported a genuinely moderate outcome from the 2006 AFPC process. In particular, our written AFPC submissions make clear that minimum wages should not have been factored upwards on the assumption that minimum wages must increase annually, and to the extent that inflation was a consideration, underlying rather than headline CPI was the more valid measure (excluding in particular short run pricing fluctuations relating to oil and bananas).
- 1.8 On this basis, ACCI does not as a matter of formality directly support the application of the 2006 AFPC decision to wages in transitional awards. We advocated another outcome and maintain another conclusion should have been reached by the AFPC.

1.9 However:

- a. ACCI does not seek to add to or extrapolate upon the detailed matters in our AFPC submission.
- b. ACCI specifically does not seek to advance an oral argument in support of an outcome other than flowing on the 2006 AFPC decision. We do not seek to advance this headline position beyond the formal level.
- c. ACCI does not seek to enliven or explore the provisions of Schedule 6 to the Act in regard to giving effect to, or not giving effect to, the decision of the AFPC in these proceedings.
- d. ACCI anticipates the proceedings on 4 December will rapidly progress to a discussion of how effect is given to the 2006 AFPC decision, rather than whether effect should be given.

1.1.2 Primary Issue - Date of Effect and Variation of Awards

- 1.10 The primary issue in these proceedings is the operative date for increases in wages and allowances consistent with the AFPC decision, and how awards should be varied to give effect to the 2006 AFPC decision.

Ideally

- 1.11 Ideally, this Commission should follow all material elements of the AFPC decision and allow a comparable period between decision and implementation in these matters to that provided by the AFPC. Ideally there should be a period of five (5) weeks between the variation of an award for the AFPC increases, and that variation coming into effect. ACCI reserves the right to actively argue this proposition on a future occasion.
- 1.12 It is also important for ACCI to add a reservation at this point. ACCI has for many years sought to argue that increases should not take effect from the date an individual award is varied and there should, as a matter of merit and best meeting the *Workplace Relations Act 1996*, be a some notice or introductory period between variation (or date of decision) and commencement. Any countenancing of increases coming into effect from dates of variation during December 2006 under our proposed approach should not be interpreted as legitimising or accepting this as a general or valid course in other years.

1.13 ACCI does not legitimise or accept as generally valid that ACTU proposition that for award applications lodged after the date of a decision in this matter:

50. Orders made in respect of applications to vary awards and transitional award filed after the decision date should generally have effect from the date on which the order is made...³

Implementation

1.14 Where this course is not followed, ACCI proposes that the operative date for increases in allowances for pre reform awards, and wages and allowances in transitional awards to give effect to the AFPC decision, be determined using the established procedures of this Commission for varying awards to maintain the safety net.

1.15 That is, the operative date for any award should be a date not earlier than the date the award is varied, having allowed parties an opportunity to address the detailed application of the generally applied increase (the AFPC increases) to the detailed system of wages and allowances in each award.

1.16 Following a decision in this matter that the AFPC decision should be given effect to (i.e. a 'general' or 'headline' decision this Full bench that there should be increases in award wages of \$27.36 and \$22.04 and commensurate increases in allowances, consistent with the AFPC decision), individual awards should be subject to the settlement of orders and variation by individual members of the Commission.

1.17 ACCI essentially advocates a status quo approach to the variation of awards. The Commission and parties should approach the variation of award wages and allowances in the wake of the 2006 AFPC decision (and a guiding Full Bench decision in this matter) exactly as they approached the variation of individual federal awards in the wake of each national wage decision/safety net decision.

a. In the wake of the initial central Full Bench decision, individual award applications should be listed, using the panel structures of the Commission, and individual awards varied prospectively to the date of variation.

- b. Unions should draft orders to vary each award consistent with the centralised decision, respondent parties and the Commission should then work together to ensure awards are varied correctly/accurately.
 - c. This quality control process is vitally important. Year in, year out mistakes and miscalculations are made by both employer associations and unions (See Section 3). Members of the Commission and parties to awards will be more than aware on a daily basis of how common mistakes and misapplications are – and how many errors are addressed in discussions, phone calls, with the assistance of associates etc. This is not an indictment on anyone – awards are complex and often have complex embedded formulae, labyrinthine historical practices and approaches etc. The settlement of orders process, with the safety net of correction orders, offers an essential quality control process to ensure Australia’s employment laws are correct.
- 1.18 This should be able to be implemented very rapidly where applications and orders have already been lodged. There are options to expedite the variation of individual awards through addressing matters on the papers, in chambers, or through bulk listings at the panel level. ACCI supports variations of individual awards as rapidly as possible under our proposed approach, so long as awards are varied accurately and correctly.
- 1.19 What is the alternative? Is the ACTU proposing that this bench of 5 senior members of the Commission vary 400 or even 1700 awards and settle orders in each one? The ACTU needs to tell the Full Bench and parties on 4 December precisely the practical course it proposes – there is not enough in its outline in this regard.

Even quicker in some cases

- 1.20 In some cases, parties may be ready to settle orders even more rapidly. Orders may have been addressed by the date of the hearings in this matter, and be “ready to go”. If this is the case, union and employer parties wish it, and it suits the convenience of this Full Bench, then such files could remain with this Full Bench for the issuing of variations in coming days.

³ ACTU Submission, *2006 Wages and Allowances Review*, ¶150, p.25

- 1.21 ACCI would have no objection to this bench varying these awards as rapidly as possible – with the proviso that the operative date for any increase could not be any earlier than the date the award is varied. It may be that for a number of awards an operative date of perhaps 6 December 2006 is possible.

What this is not

- 1.22 Our proposed approach is not an attempt by ACCI to secure any material delay in the application of the AFPC increase, nor is it an attempt to move the dates of effect for increases in award rates and allowances any further from 1 December than they need to be⁴.
- 1.23 Experience with the safety net decisions and preceding national wage decisions is that the panel structure of the Commission and the listing of award variations before individual members of the Commission can be achieved very expeditiously. In previous years, a massive tranche of major awards were varied rapidly after each AIRC safety net decision using individual listings and the panel system. The AIRC's established mechanisms could be employed again to implement increases arising from this matter rapidly during December 2006.
- 1.24 There is no reason why the course ACCI supports in this matter would not see increases to wages and allowances in a large number of federal awards in the initial days of December. It would however achieve this without inherently unfair and confusing retrospectivity and with awards being settled on the basis of properly made and quality checked orders. Once again – what is the alternative? How does the ACTU say this could otherwise be achieved?

1.2 THE ACTU SUBMISSION

- 1.25 The ACTU submission does not make out the course it proposes for the hundreds of applications before the Commission. Indeed, the ACTU does not properly detail exactly what it proposes.

⁴ If our initial proposal for a comparable period between decision and commencement is not followed.

- 1.26 For the reasons outlined in this submission, we say the Full Bench should prefer the approach supported by ACCI to that sought by the ACTU. The ACTU could not, and has not, brought forward a sufficient basis to adopt the course it proposes for the variation of awards. This is the finding which ACCI will commend to the Full Bench on 4 and 5 December 2006.
- 1.27 The ACTU submission contains a great deal of extraneous and irrelevant material which is of no assistance to the bench in the determination which must be made in this matter. Some of these issues are noted in Section 5 of this outline. However – the ACTU also fails to address some essential matters it must address to even begin to be able to prosecute the outcome it seeks in this matter...

1.2.1 The ACTU Has Not Clarified How This Will Work

- 1.28 More fundamentally, whilst it has provided a fairly bald claim of what it wants (a 1 December operative date) the ACTU has failed to engage in any way how this would be implemented. The ACTU has told the Commission and other parties what it wants, but not how this can be achieved.
- 1.29 How does the ACTU say these awards should be varied? When? At what level of the Commission? Which members of the Commission will actually vary each award?
- 1.30 Issues of practicality are both unavoidable in this case, and are directly material to the determination of differences between the parties (i.e. determining operative dates and award variation arrangements). Sections 2 and particularly 3 of this submission demonstrate the importance of these considerations, attempt to provide the Commission with the practical assistance the ACTU has failed to provide, and demonstrate that unavoidable practical considerations favour the ACCI approach over that of the ACTU.
- 1.31 There are numerous other matters the ACTU has not properly addressed, as part of its wider failure to properly assist the Commission in advancing the course it is seeking. These are explored elsewhere in this submission.

1.3 ONUS

- 1.32 ACCI maintains this is essentially an ordinary matter for the Commission – directly akin to the determinations made in each of the pre-*WorkChoices* safety net reviews. The status quo can and should be applied. The established approaches to the variation of individual awards should be applied.
- 1.33 The ACTU does not change this by bombarding the Commission with hundreds of applications, nor by seeking to have them all brought before this bench. The fact that this bench has given the ACTU a fair hearing of its proposed course of action does not of itself determine that this course of action should be followed for the variation of awards.
- 1.34 If the ACTU is seeking to have this Commission take a different approach, it bears the onus to prove this is the best (indeed better) approach, is superior to the status quo, and is consistent with the *Workplace Relations Act 1996*. This cannot be presumed by the ACTU going into the hearing on 4 December, and remains a key hurdle for the ACTU on that day.
- 1.35 The ACTU has also caused confusion in this matter by lodging so many applications and seeking to have them heard concurrently by a single bench. It is beholden upon the ACTU to assist the Commission in managing the mess and overload its affiliates have handed the Commission.
- 1.36 In contrast to the ACTU, the course proposed by ACCI would naturally see awards varied in an orderly manner, including the hundreds of matters already lodged. This would be undertaken whilst also ensuring awards can be varied to give effect to the AFPC increase in December 2006.

1.4 FAILURE TO COMPLY WITH DIRECTIONS?

- 1.37 Item [2] of the directions issued in this matter was as follows:
2. The union applicants are to file and serve draft orders for each application by 24 November 2006,
- 1.38 To meet this direction, the union applicants would need to have served draft orders each of the award applications lodged, and each of the matters before this Full Bench by Friday 24 November 2006.

- 1.39 This has not happened. Going into the hearings in this matter on 4 and 5 December 2006, various award respondents have not been provided with the detail of the variations sought to wages and allowances. There has been no capacity for respondents to a number of awards to validate union calculations nor to check the detailed application of the AFPC increases to individual awards of this Commission.
- 1.40 This places employer parties to awards and their representatives in an unacceptable position. This element of the directions was sought to ensure that awards could be varied as close to the date of hearing in this matter as possible, and that a speedy resolution could be available in these proceedings. This is not possible without the detailed draft orders.
- 1.41 Our concerns go beyond an apparent failure to properly comply with the directions of the bench.. It is a material consideration against the course sought by the ACTU and in favour of the approach proposed by ACCI (maintenance of the status quo in regard to varying the awards safety net). ACCI's proposed approach to this case would see awards varied where draft orders have been properly drawn up and served, and properly considered by parties and the Commission. This is an issue we shall return to elsewhere in this outline

1.5 STATUTORY CONSIDERATIONS

- 1.42 ACCI argues that our approach better meets the statutory precepts for this matter than the course proposed by the ACTU. Section 3 of this submission expands on this.

1.6 THIS OUTLINE OF SUBMISSION

- 1.43 The ACTU has indicated that its written submissions are brief in nature and will be expanded upon at hearing⁵. ACCI has in this submission endeavoured to meet the directions in this matter of 21 November 2006 – this is an outline in reply as required in those directions.

⁵ ACTU Submission, 2006 Wages and Allowances Review, ¶7, p.6

1.44 There are, as will be clear from this outline, essential and fundamental questions in this matter which the ACTU has failed to address. ACCI will be seeking to have these addressed in the hearing of this matter on 4 and 5 December 2006.

1.45 This outline is in five (5) parts:

- a. Part 1: Addresses a range of preliminary matters, including ACCI's headline position on giving effect to the AFPC increase, and key approaches we say should be taken to considering wages and allowances in the wake of the 2006 AFPC decision.
- b. Part 2: Addresses the proper date of effect for any increases in wages and allowances in the wake of the AFPC decision, for both pre-reform awards, and transitional awards (i.e. each of the awards listed before the Full Bench in this matter). This section addresses in particular the proper, prospective application of increases in this matter, and the reasons the Commission should not apply increases retrospectively as sought by the ACTU.
- c. Part 3: Addresses practical considerations raised by the application of the AFPC increases at the award level. These considerations further support the variation of awards individually at the panel member level, and mitigate against any attempt to vary awards from a common, retrospective operative date.
- d. Part 4: Addresses the status and continued application of this Commission's statement of wage fixing principles, and the principles that should issue from this review.
- e. Part 5: Addresses a range of other issues raised in this matter and in the submissions of other parties. This includes a range of further matters encompassed in the ACTU submissions, issues raised by the variation of Victorian and Territory awards, and the Commonwealth's proposed award variations to provide a proper wages safety net for school based apprentices and persons with a disability (which ACCI strongly supports).