

1. INTRODUCTION

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1. It is common ground between the parties that a number of wage-setting decisions were announced by the Australian Fair Pay Commission (AFPC) on 5 July 2007 arising out of the second general AFPC Wages Review,¹ thus triggering these proceedings.

1.1.1 What Happened Last Year

2. The 2006 AIRC W&A Review which followed the AFPC's 2006 inaugural decision. The AFPC announced its headline decision on 26 October with an effective commencement date of 1 December 2006², only allowing only 1 month after the announcement for employers to make the necessary arrangements.
3. A directions hearing was convened by the AIRC on 20 November and applications to vary over 400 pre-reform and transitional awards were filed before, during and after the Full Bench announced its primary decision in on 8 December 2006 [PR002006]. The Full Bench subsequently handed down a number of other decisions dealing with other aspects of the flow-on proceedings, in relation to particular awards.
4. The Full Bench determined in PR002006 that those applications which were before it and were filed by 1 December 2007 should obtain a 1 December 2006 operative date, because exceptional circumstances existed at the time to justify retrospectivity³. All other applications were to be dealt with by the panel system and generally operated prospectively.
5. A cursory search of the Commission's website indicates that the majority of award variations arising from last year's AIRC W&A Review have been finalised, with some awards eligible for the 1 December 2006 commencement date only recently finalised. We raise this not as any criticism of the

¹AFPC Wage-Setting Decision 5/2007 was announced on Friday 20 July 2007, and signed on 6 July 2007.

² On a single operative date rather than first pay period commencing on or after basis.

Commission or Registry, but to reiterate that the process to generate orders takes time and is absolutely necessary to ensure that orders are correctly drafted and finalised.

6. We also raise last year's approach in support of a different approach on this occasion, and of referring matters in 2007 to individual members using the panel system and not centralising hundreds of applications to determination by a single Full Bench.

1.1.2 2007 AIRC W&A Review

7. Following the 2007 AFPC's wage-setting decisions, announced on 5 July 2007, the unions have once again lodged applications which seek to "flow-on" an equivalent quantum awarded by the AFPC in its 2007 Wages Review.
8. What is fundamentally different this year in terms of implementation, is that when the AFPC announced the outcome of its 2007 Wages Review on 5 July 2007, it determined that a three month implementation period was reasonable and appropriate. Therefore, its decision will come into effect on the first pay period on or after 1 October 2007.
 - a. ACCI has called for such a period of introductory notice of pending increases for many years, and welcomes this improvement in the system.
 - b. Greater notice of the pending implementation date (still more than a month away) provides more options in the these AIRC proceedings considering giving effect to the AFPC increases. In particular the urgency which led the bench to centralise matters before it on the last occasion is not pressing this year and there is clearly scope to utilise the AIRC's panel structure and individual members of the Commission this time.
9. **The ACTU and applicant unions have, in ACCI's opinion, sensibly asked this Commission to return to the practice utilised in pre-*WorkChoices* National Wage Cases of requesting a central determination which is then relied upon for subsequent variations before individual panel members.**
 - a. This is the same process ACCI requested last year.

³ Under s.572 of the *Workplace Relations Act 1996*.

- b. This is the process ACCI and the ACTU both advocate to the bench this year, and one which we say the bench has even greater scope to adopt in the absence of the exceptional circumstances found in 2006.

1.1.3 Where We Differ from ACTU/ACCER

10. While the ACTU and union applicants are seeking to flow-on the 2007 AFPC headline decision to the 25 pre-reform and transitional awards before it, they are asking the AIRC to depart in two fundamental ways from the 2007 AFPC decision(s).
 - a. They are asking this Commission to not adopt the 12 month deferral determined by the AFPC for a limited subset of the pastoral industry.
 - b. They are asking the Commission to create / amend an existing, or create a new principle which would allow retrospective orders, no matter when the applications are lodged, where those application are to flow-on decisions of the AFPC. In effect they are asking this Commission to grant exceptional circumstances indefinitely and as of right.
11. Similarly, ACCER is also asking this Commission to depart from the decision of the AFPC, by inviting this Commission to re-open the AFPC decision making process and asking the Commission to find that the AFPC strayed into jurisdictional error by not taking proper account of the *Family Responsibilities Convention*. Extraordinarily ACCER is attempting to argue in this matter that unless this Full Bench applies an increase more than 2½ times higher than the AFPC decision it will join the AFPC in the jurisdictional error ACCER believes it made.

Why ACTU/ACCER Are Wrong

12. The propositions put forth by both the ACTU and ACCER are contrary to what the Full Bench determined in last year's *Wages and Allowances Review Decision* [PR002006], contrary to the statutory considerations this Commission must have regard to when varying pre-reform and transitional awards, and materially contrary to the determination of the AFPC (they would in fact not constitute giving effect to the 2007 AFPC decision).

1.2 ACCI POSITION

Quantum

13. ACCI does not oppose a flow-on of the quantum awarded by the AFPC in its 2007 Decision. ACCI does not seek to argue/oppose the quantum, timing or substance of the AFPC determination on this occasion.

Equivalent Weekly Rate Increase

14. However, and as the Full Bench observed last year, the AFPC does not award weekly rates, it only has the capacity to award increases to hourly rates of pay and as such, the AIRC must convert this quantum into an equivalent amount.
15. Therefore, ACCI does not oppose an equivalent increase in a quantum converted into a weekly rate (38 hours) and rounded to the nearest 10 cents of the following:
 - a. \$10.30 per week increase to rates of pay in transitional awards up to and including \$700.00 per week.
 - b. \$5.30 per week increase to rates of pay over \$700.00 per week.
 - c. Allowances in transitional and pre-reform awards adjusted in accordance with established practice.
16. This is not to say that the AIRC should not, in the future, consider moving to adopt hourly rates of pay in awards, equivalent to those observed by constitutional corporations.
 - a. There may be a growing disparity between the wage rates under pay scales and transitional awards due to rounding effects, and the rendering of rates into 10¢ multiples.
 - b. If this evolves over time into a significant difference between AIRC and AFPC rates, ACCI reserves its rights to argue that giving effect to the passage of AFPC decisions will involve a quantum that restores the aggregate level of increase to something more consistent with that awarded by the AFPC.

- c. ACCI also reserves a future right to argue that giving effect to the AFPC decision for transitional awards requires the expression of minimum wages in hourly form, equal to equivalent AFPC rates, rather than the AIRC's weekly rate approach. Participation in this case and the preceding one should be without prejudice to such a position if pursued by any party in the future.

Timing / Dates of Effect

17. Ideally and in the usual run of events, wage rates and allowances for both constitutional corporations and transitional employers should commence at the same time (where possible) and where applications are lodged and heard before 1 October 2007, on that date. The prospect of this occurring is more achievable this year with a longer implementation period and the timing of this Full Bench hearing.
18. ACCI does not oppose a 1 October 2007 date of effect for awards where applications are lodged and heard consistent with variations properly taking effect within that period of time. ACCI maintains this without prejudice to the right of our members or any respondent to argue for a prospective period of notice in relation to the variation of any particular award.

Prospective Effect - No Party Can Re-Write the Act

19. However, we do not argue this at the expense of accuracy, certainty and observing the requirements of the Act. This is why ACCI continues to maintain that orders for applications which are lodged and/or heard after 1 October 2007 must be prospective in effect (absent exceptional circumstances as may arise in any specific case) and that a general principle cannot be created in the manner sought by the ACTU.
20. As per ACCI's submissions in last year's AIRC W&A review, employers consider that, as a general rule, orders should have prospective effect. ACCI does not see any exceptional circumstances as the Full Bench determined in last year's case to exist this time round.
 - a. There is a three month period between the date of the AFPC decision and its commencement.

- b. There is at least 6 weeks between the hearing of this matter and the commencement of any 2007 increase.
21. ACCI apprehends that it will be quite possible for unions to lodge applications after these hearings and some weeks after this bench's decision in this matter, and still have a hearing convened by a panel member in due time to facilitate prospective effect prior to the first pay period commencing on or after 1 October 2007.
22. There can be no exceptionality arising from the macro dimensions of this matter – being perhaps the timing of the AFPC decision, of this matter, and this Bench's decision in this matter. There is no inherent or overarching excuse for unions not to have lodged matters in due time on this occasion.
23. This means:
 - a. ACCI opposes any retrospectivity where an application to vary is lodged after 1 October 2007, and unions argue for wages to increase from that date.
 - b. Similarly, ACCI opposes any retrospectivity of orders where the date of hearing or is on or after 1 October 2007.
 - c. Where exceptionality / retrospectivity is argued, proceedings should be subject to the established principles and precedents governing retrospectivity and exceptional circumstances in each individual case/matter (i.e. Schedule 6, cl.66(2) and ss.551 and 572 of the *Workplace Relations Act 1996*).

Certainty of Orders

24. ACCI reiterates the same considerations outlined before this Commission in 2006 with regard to ensuring that employers are properly able to check draft orders for errors or omissions.
25. Unions should draft orders to vary each award consistent with the (anticipated) centralised decision of this Full Bench, and respondent parties and the Commission should then work together to ensure awards are varied correctly/accurately.

26. As stated at p.5 in ACCI's 2006 W&A Review submission:

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.

27. ACCI maintains this position in support using the panel system this year to facilitate a 1 October commencement date⁴ in most instances.

No Exceptional Circumstances

28. ACCI argued in the last year's W&A Review that there were no exceptional circumstances pursuant to s.572(2) and cl.66(2) of Schedule 6 to the *Workplace Relations Act 1996* (the Act), that would warrant retrospective variations of transitional awards and pre-reform awards.

29. The Full Bench rejected these submissions, insofar as they applied to those applications which were lodged before 1 December 2006, being the operative date of the AFPC's 2006 decision, stating at para [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. The scheme of the legislation suggests that the only reason that minimum rates in transitional awards are not within the jurisdiction of the AFPC is the Commonwealth Parliament's lack of legislative power in relation to them. The term "transitional" confirms that conclusion. 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 should vary wages and allowances in its awards from the same operative date as the AFPC's decision regardless of when 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.

⁴ On a first pay period commencing on or after basis.

30. With regard to allowances in transitional and pre-reform awards, the Full Bench stated at para [41]:

In light of our decision that the operative date for the wage increases resulting from this decision should be the first pay period commencing on or after 1 December 2006, it is appropriate that the variation in allowances in transitional and pre-reform awards before us should also operate from the same date. In addition to the matters we have referred to there are significant considerations of cost and convenience which also support a common operative date for all variations in the applications before us.

31. Therefore, the Full Bench determined in the preceding 2006 W&A Review that there were exceptional circumstances to justify retrospectivity based on the circumstances as it existed at the time “in their totality”.

32. As the Full Bench refers to the timing of issues as a critical factor in finding the presence of exceptional circumstances, it is necessary to recall the circumstances which existed at the time of the AFPC’s 2006 decision:

- a. The AFPC announced its decision on 26 October 2006 with an effective commencement date of 1 December 2006.
- b. As a result of the AFPC’s 2007 determination, the unions filed with the Commission an unprecedented number of awards for variation. These became the subject of a Full Bench hearing on December 4 and 5, with a decision was handed down on 8 December 2006.

Why This Year is Different

33. Three Month Notice: The 2007 AFPC decision was announced on 5 July 2007 and effectively provides for a three month implementation period. For all pay scales, except a limited number of pastoral industry pay scales, the decision takes effect on the first pay period on or after 1 October 2007.

34. This implementation period is welcome, particularly in light of the administrative difficulties experienced by all parties during last year’s flow-on proceedings. ACCI contends that this should allow unions to lodge a large number of their applications to vary awards well before 1 October for the 1 October implementation date. Unions cannot rely on the same argument that exceptional circumstances exist again for reasons based on the circumstances in this year’s case and a proper construction of the Act.

35. Again, ACCI maintains that whatever timing issues existed last year do not exist this year, and that the circumstances in their totality do not justify exceptional circumstances this year.
36. Certainty with Prospective Date of Effect: Effectively, this means that for applications in before 1 October, this would provide for potential parity, insofar as date of effect is concerned, for those employers and employees covered by equivalent pay scales (while pay rates will not considering the effect of rounding). The extent to which specific industries can maintain parity very much lies with the actions of applicant unions, which will have substantial opportunity to deliver on a 1 October implementation date.
37. As parity should not come at the cost of certainty, ACCI maintains that any applications lodged and heard by the Commission, whether by way of this Full bench or panel members, should have a prospective date of effect.
38. Unions and employers have this time secured a three month implementation period to lodge applications and the onus should be on unions to duly file and serve draft orders and applications within a reasonable timeframe. We submit that should this not occur before 1 October 2007, there should be a prospective date of effect as the usual course of events.

Implementation

39. As outlined in the introduction to this section, the AIRC's 2006 Wages and Allowances Review Case proceeded with the ACTU and its union affiliates lodging hundreds of applications to vary transitional and pre-reform awards. This was unprecedented and caused an enormous administrative burden for the Commission, Registry and all parties involved.
40. ACCI made submissions in last year's W&A Review that the best approach to facilitate any flow-on of the Australian Fair Pay Commission (AFPC) Decision would be a two stage process.
41. ACCI repeat's that submission here, and maintains that this the best approach going into this year's 2007 AIRC W&A reviews – ACCI also maintains that the reasons the Full Bench did not adopt this approach on the last occasion are not present this year.

- a. Full Bench Convened: Firstly, and in accordance with prior practice, a Full Bench of the AIRC is convened and determines the flow-on quantum of the AFPC decision for a small tranche of vehicle awards.
 - i) The main product of this hearing is a centralised decision which guides individual members in the subsequent variation of specific awards.
 - ii) ACCI expects that the resulting orders to vary the small tranche of vehicle awards would have a prospective date of effect (being settled either by panel members or members of the Full Bench).
 - b. Panel System Used: Secondly, the panel system of the AIRC is then utilised to hear and determine the vast bulk of transitional and pre-reform award applications that unions would lodge as per the usual (*pre-WorkChoices*) practice.
 - i) Using the panel system will ensure draft orders are correct, particularly with regard to rounding, application of formulae etc. The resulting orders issued by the AIRC would also operate prospectively from the date of hearing.
42. The above process is appropriate for this year's W&A Review. ACCI is pleased that the ACTU has considered this to also be an appropriate way of dealing with a flow-on of the AFPC's 2007 Wages decision.
43. Where the ACTU and ACCI differ is on the issue of principles providing for general retrospectivity in all cases.

1.3 OTHER MATTERS

Drought Relief

44. ACCI considers that to give effect to the AFPC wage-setting decisions also means to give effect to not only the quantum of any increase, but also to the exemptions or deferrals which forms part of an AFPC decision. The AFPC decision is to be regarded as a whole, and not a tableaux from which parties can ask the AIRC to selectively choose.

45. The AFPC determined that there shall be specific treatment of minimum wage increases for employers in receipt of specified drought relief from the Commonwealth. This is direct/automatic rather than mediated – employers in receipt of the government assistance automatically have a particular application of the AFPC's 2007 decision.
46. ACCI maintains that to not flow-on this material aspect of the AFPC's wage-setting decision would be contrary to the statutory criteria in the Act for reasons articulated further in these submissions. ACCI therefore supports the submissions of the NFF in this respect, and rejects the approach of the ACTU – which would not properly give effect to the AFPC decision in this regard. Section 3 of this submission expands upon this.

Catch Up Increases

47. Where unions seek the 2007 increase, plus any outstanding pre-2007 increases, employers should have scope to argue for appropriate introductory arrangements which take into account the economic impact upon an industry (particularly given the that the Commission held in PR002006 that the 12 month rule would not apply). Where appropriate this may see such matters referred to this Full Bench or another convened for the purpose.

1.4 OUTLINE OF SUBMISSION

48. In the directions hearing on 23 July 2007, ACCI agreed to a narrow time frame for the filing and exchanging of written submissions in this matter so as not to unduly extend this process, and to allow maximum opportunity for individual awards to be varied well prior to 1 October 2007.
49. The benefit of rapid Full Bench hearing and determination, will be to provide unions with sufficient time to lodge subsequent applications to vary and to provide individual Commission members with an opportunity to convene proceedings and finalise matters.
50. In that spirit, ACCI has therefore only provided the Commission with a brief outline of submissions in these proceedings.
51. This outline is in four (4) 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 2007 AFPC decision.
- b. Part 2: Addresses the implementation of the flow-on of the AFPC decision including a 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.
- c. Part 3: 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 and ACCER where not already addressed in Parts 1 or 2.
- d. Part 4: Addresses other matters such as rates of pay for trainee/apprentices and the supported wage system.