

## **FAIR WORK AUSTRALIA**

**Matter No: AM2010/16**

**Matter No: AM2010/17**

**Matter No: AM2010/36**

## **ACCI SUBMISSION**

**25 March 2010**



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## 1. INTRODUCTION

1. The Australian Chamber of Commerce and Industry (ACCI) was granted permission to intervene in Matter Numbers **AM2010/16** and **AM2010/17** filed by the National Retail Association and Master Grocers Association respectively on 25 February 2010.
2. ACCI seeks permission to intervene in Matter Number **AM2010/36** (collectively referred to as the applications) upon the same basis as outlined in Form F1 filed by ACCI on 23 February 2010 and seeks to rely upon those written submissions with respect to permission to intervene.
3. ACCI supports the applications made under s.158 of the *Fair Work Act 2009* (the Act) to vary the *General Retail Industry Award 2010* (M000004) (the modern award) and provides these written submissions in support of the applications.
4. The submissions are without prejudice to ACCI or ACCI members' further consideration of these matters.

## 2. SUBMISSION

5. ACCI supports the applications and urges Fair Work Australia (the Tribunal) to exercise its discretion under s.157 of the Act to vary clause 13.4 of the modern award accordingly.
6. ACCI submits that Parliament has clearly envisioned the types of circumstances whereby it is necessary to vary modern awards outside of the 4 yearly review period. The circumstances which have now materialised, as outlined by the applicants, following the commencement of the modern award on 1 January 2010, is precisely the types of circumstances that warrant the Tribunal to exercise its powers under s.157.
7. ACCI's primary submission is that the evidence and submissions advanced by the applicants meets the key threshold test: that the Tribunal must be satisfied that making the determination outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.
8. ACCI's role as intervener in these matters is to outline the statutory context of the relevant provisions of the Act and illustrate why they weigh heavily in favour of the Tribunal exercising its discretion.

### STATUTORY CONTEXT

9. The applications are governed by Part 2-3 of the Act.
10. It is uncontroversial that the Act repealed the *Workplace Relations Act 2009* (WR Act) subject to the preservation of certain rights, entitlements and instruments by transitional legislation.<sup>1</sup>
11. Modern awards were created under Part 10A of the former WR Act and specifically, by way of the Award Modernisation Request under former s.576(c).
12. ACCI submits that as a general principle, the purpose of s.158 is not to re-litigate matters that were already agitated and concluded during the award modernisation process. A separate process for applications to vary was available for affected persons who lodged applications by 31 December 2009.
13. It is relevant that the Australian Industrial Relations Commission (AIRC) Award Modernisation Full Bench stated in [2009] AIRCFB 800 the following:

[60] The process of award modernisation is dealt with in the relevant statutory provisions and in the consolidated request. It is the Commission's

<sup>1</sup> Mainly by virtue of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (TPCA Act)

responsibility to establish the way in which the process will be conducted, to publish exposure drafts and then awards, with provision for consultation at each step along the way. The process does not include arbitration in the traditional sense. While the Commission makes every endeavour to ensure that all material submitted is taken into account, it is impossible to deal with all of it in written reasons for decision. Where employers (or any parties) are dissatisfied with the outcome there are statutory provisions for variation. There are also opportunities to raise matters in the context of a review of the operation of the modern award.

14. Parliament has indicated that there should be a number of avenues available, subject to varying thresholds, by which the Tribunal has the power to vary or make modern awards. They can be generally summarised as follows:
  - a. Following the 4 yearly review;<sup>2</sup>
  - b. Outside of the 4 yearly review upon an applicant satisfying the tribunal that it is “*necessary to achieve the modern award objectives*”;<sup>3</sup>
  - c. In the case of minimum wages in a modern award, following an Annual Wage Review<sup>4</sup> or for work value reasons (and satisfying the Tribunal that it is necessary to achieve the modern award objectives);<sup>5</sup>
  - d. Minor or technical minor or technical problem with a modern award that is attributable to the fact that the Part 10A award modernisation process started before the enactment of the FW Act,<sup>6</sup>
  - e. A mandatory review of all modern awards within 2 years of commencement, including transitional provisions;<sup>7</sup>
  - f. At any time, to update or omit name of employer, organisation or outworker entity, remove an ambiguity or uncertainty or to correct an error.<sup>8</sup>
  - g. When a modern award if the award is referred to it under section 46PW of the *Human Rights and Equal Opportunity Commission Act 1986* (which deals with discriminatory industrial instruments).<sup>9</sup>

15. Section 3 outlines the objectives of the Act as follows:

<sup>2</sup> Section 156.

<sup>3</sup> Section 157(1).

<sup>4</sup> Section 284.

<sup>5</sup> Section 157(2).

<sup>6</sup> Item 5, to Schedule 5 of the TPCA Act.

<sup>7</sup> Items 6 and 7 to Schedule 5 of the TPCA Act.

<sup>8</sup> Sections 159 and 160.

<sup>9</sup> Section 161.

### 3 Object of this Act

The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:

(a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and

(b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and

(c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and

(d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and

(e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; and

(f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action; and

(g) acknowledging the special circumstances of small and medium-sized businesses.

16. Section 134 outlines the modern awards objective:

#### **Division 2—Overarching provisions**

##### **134 The modern awards objective**

*What is the modern awards objective?*

(1) FWA must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the **modern awards objective**.

*When does the modern awards objective apply?*

(2) The modern awards objective applies to the performance or exercise of FWA's **modern award powers**, which are:

(a) FWA's functions or powers under this Part; and

(b) FWA's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: FWA must also take into account the objects of this Act and any other applicable provisions. For example, if FWA is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).

17. Section 138 relevantly provides:

**138 Achieving the modern awards objective**

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

18. Division 5 is headed *“Exercising modern award powers outside 4 yearly reviews and annual wage reviews”*.

19. Section s.157 as set out in sub-division A is set out in full:

**Subdivision A—Exercise of powers if necessary to achieve modern awards objective**

**157 FWA may vary etc. modern awards if necessary to achieve modern awards objective**

(1) FWA may:

(a) make a determination varying a modern award, otherwise than to vary modern award minimum wages; or

(b) make a modern award; or

(c) make a determination revoking a modern award;

if FWA is satisfied that making the determination or modern award outside the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

Note 1: FWA must be constituted by a Full Bench to make a modern award (see subsection 616(1)).

Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 3: If FWA is setting modern award minimum wages, the minimum wages objective also applies (see section 284).

(2) FWA may make a determination varying modern award minimum wages if FWA is satisfied that:

(a) the variation of modern award minimum wages is justified by work value reasons; and

(b) making the determination outside the system of annual wage reviews and the system of 4 yearly reviews of modern awards is necessary to achieve the modern awards objective.

Note: As FWA is varying modern award minimum wages, the minimum wages objective also applies (see section 284).

(3) FWA may make a determination or modern award under this section:

(a) on its own initiative; or

(b) on application under section 158.

20. It is common ground that competent applications have been made by persons outlined in item 1 of s.158(1).

**EXTRANEOUS MATERIALS**

21. There are a range of relevant extraneous materials which assist the Tribunal in understanding the policy intention under Part 2-3 of the Act and the correct approach to s.157.

22. The Regulatory Analysis to the Fair Work Bill 2008 illustrates the general policy intention for varying modern awards:

r.104. Fair Work Australia (FWA) will undertake four yearly reviews of each modern award to maintain a relevant and fair minimum safety net. This will be the main vehicle for varying modern awards (except minimum wages). The first review will take place in 2014, four years after modern awards commence on 1 January 2010.

r.105. FWA will be guided by criteria which take into account public, social interest and economic aspects when considering whether and how to vary the content of modern awards. Outside of the four yearly review, FWA will have limited power to vary awards. FWA will be able to vary an award to remove ambiguity, uncertainty and discriminatory terms. To ensure awards provide a fair minimum safety net for employees, anyone covered by an award will be able to apply to have the award varied in exceptional circumstances. FWA will be able to adjust awards for work value' reasons.

23. ACCI notes that Parliament did not include the words "*exceptional circumstances*" in the context of varying awards under s.157. Should the Tribunal be concerned that exceptional circumstances must exist for the purposes of s.157, then ACCI submits that the evidence of the applicants on the impact of the modern award clause points to clear exceptional circumstances, for the reasons outlined by the applicants and in this submission.

24. The explanatory memorandum (EM) to the Act states with respect to s.138:

**Clause 138 – Achieving the modern awards objective**

527. Clause 138 provides that a modern award may include terms that it is permitted or required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective. That is, the scope and effect of permitted and mandatory terms of a modern award must be directed at achieving the modern awards objective of a fair and relevant safety net that accords with community standards and expectations. (emphasis added)

25. The term "*...that accords with community standards and expectations*" is not a material consideration under s.157, and is a general expression of no precision. However, ACCI submits that community standards and expectations should include the consideration of the following:

- a. A fair safety-net is one that provides an appropriate level for employees, but does not do so at the cost of other objectives (such as employment).

- b. It should encourage job creation and the promotion of employment opportunities for both a particular community and for the nation as a whole;
  - c. It should not threaten the capacity for junior employees, persons undergoing training, and persons with a disability to obtain and remain in employment.
  - d. It should encourage persons to gain a foothold in employment for the first time;
  - e. It should not threaten skill formation by limiting employment opportunities, particularly for junior employees.
26. The EM provides some detail on how ss.156 and 157 of the Act are intended to operate:

**Division 4 – 4 yearly reviews of modern awards**

**Clause 156 – 4 yearly review of modern awards to be conducted**

600. Clause 156 establishes a system of 4 yearly reviews of modern awards. These reviews are the principal way in which a modern award is maintained as a fair and relevant safety net of terms and conditions.

...

***Subdivision A – Exercise of powers if necessary to achieve modern awards objective***

**Clause 157 – FWA may vary etc. modern awards if necessary to achieve modern awards objective**

610. Clause 157 provides FWA with the power to vary modern awards outside the system of 4 yearly reviews in limited circumstances.

611. FWA may vary a modern award (other than in relation to modern award minimum wages), make a modern award or revoke a modern award outside the 4 yearly reviews if it is satisfied that to do so is necessary to achieve the modern awards objective (subclause 157(1)).

612. The modern awards objective requires FWA to take account of a number of matters, including the need to ensure a stable modern award system. It is intended that in deciding whether to vary, make or revoke a modern award outside the 4 yearly reviews, FWA will balance the considerations contained in the modern awards objective to determine whether it is necessary to exercise the power outside the system of 4 yearly reviews.

27. There is nothing inherent in the explanatory materials that would preclude the Tribunal exercising its discretion to vary the modern award as sought by the applicants.

28. Clearly, there are a range of matters that must be considered by the Tribunal, the weight of which will be accorded by the Tribunal.
29. ACCI makes the following submissions on relevant provisions of the Act.

### Objectives of the Act

30. Section 3 sets out the principal object of the legislation. Consideration of these precepts reaffirms ACCI's position that the applications warrant the Tribunal to exercise its discretion to vary clause 13.4 of the modern award.
- a. **Section 3(a):** *providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations.* This emphasises the promotion of national economic prosperity and social inclusion, through higher productivity and economic growth. Without high employment, low unemployment, low inflation, and competitiveness, these objectives cannot be achieved. The key to each (and the simultaneous delivery of all) is a sound economy and not endangering jobs.
  - b. **Section 3(b):** *ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders.* This requires an economically sustainable safety net. This compels balance and not so called maintenance of the safety net at all costs, and in particular, not at the costs of jobs or economic sustainability.
  - c. **Section 3(f):** *achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.* This reiterates that the new emphasis of the Act, as indicated in the extraneous materials, is that higher productivity is achieved by collective bargaining. This leads to the conclusion that there must be sufficient incentive to bargain.
  - d. **Section 3(g):** *acknowledging the special circumstances of small and medium-sized businesses.* This is an important new objective which focuses specifically at small to medium sized businesses which requires an acknowledgement of "the special circumstances of small and medium-sized businesses". This is particularly pertinent to these proceedings. It is a strong signal by Parliament that this must be considered as a primary consideration when the Tribunal exercises any of its powers under the Act, including applications to vary modern awards under Part 2-3 of the Act.

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## Modern Award Objectives

31. Section 157 requires the Tribunal to only vary a modern award if necessary to achieve the Modern Award Objectives under s.134.
32. There are many objectives which appear to be cast in similar terms to those outlined in s.3.
  - a. **Section 134(c):** *the need to promote social inclusion through increased workforce participation.* This is dealt with in more detail below.
  - b. **Section 134(d):** *the need to promote flexible modern work practices and the efficient and productive performance of work.* This objective requires the Tribunal to consider the operational requirements of a business, including the normal trading hours, and the usual work practices in a business or industry. A modern award should allow sufficient flexibility so that it accommodates the needs and operational requirements of a business, and not the other way round. Where awards prohibit a range of work arrangements or practices, this will be consistent with this objective.
  - c. **Section 134(1)(f):** *the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.* This objective requires a modern award to not negatively impact upon on a firm's productivity, employment costs or regulatory burdens. This is dealt with in more detail below.
  - d. **Section 134(1)(g):** *the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards.* A sustainable Modern Award system is one that does not negatively impact jobs or business viability.
  - e. **Section 134(1)(h):** *the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.* Modern awards should not negatively impact these broad macro economic factors.

## Promoting social inclusion through increased workforce participation

33. ACCI interprets s.134(c) to simply reinforce ss. 3(a) and 134(1)(h) and that the Tribunal should enhance job growth job opportunities and reduce unemployment. It is very important that Parliament qualified the promotion of social inclusion with the words "*through increased workforce participation*". Workforce participation has a clearly understood common meaning.
34. Workforce participation refers to the share of the working age population, i.e. persons aged 15 and above, who are either in a job or actively looking for one. Workforce participation (or labour supply), population and

productivity are often referred to as the “three Ps” which are the three key factors that impact on economic growth.

35. If everything else remained unchanged, the higher the number of people participating in the workforce or the more hours worked, the higher the potential output can be produced. Higher labour force participation can also reduce the fiscal pressures associated with providing welfare support and promote social inclusion and equity goals.
36. Over the next 40 years, Australia’s labour force participation rate is expected to fall against the backdrop of ageing population. Recent projections by the Productivity Commission (PC) estimated that the aggregate workforce participation rate will fall from 63.5 per cent in 2003-04 to 56.3 per cent by 2044-4<sup>10</sup>.
37. Therefore to ensure the living standards of Australian, it is essential to further encourage workforce participation. While Australia’s aggregate workforce participation rate is above the OECD average, it lags behind some comparable countries such as Canada and New Zealand. In 2005, Australia’s participation rate of 65.4 per cent was 2.0 percentage points below New Zealand and 1.4 percentage points below Canada. This indicates that the potential for Australia to catch-up and achieve higher participation rates.<sup>11</sup>
38. According to Abhayaratna & Lattimore (2006):<sup>12</sup>

A 2.0 percentage point increase in Australia’s workforce participation rate in 2005 would have increased the size of the workforce by 322,000 persons, an overall increase of 3.1 per cent.
39. More importantly comparisons with New Zealand and Canada also highlighted large participation rate gaps for specific labour market segments. Using the data of 2005, if Australia were able to close the participation rate with these comparable countries in key labour market segments the participation rate for:<sup>13</sup>
  - a. Prime aged males (25 to 54 years) would have increased by 1.4 percentage points (to New Zealand’s rate), increasing the size of workforce by 60,000;

<sup>10</sup> PC (Productivity Commission) 2005, *Economic Implications of an Ageing Australia*, Research Report, Canberra.

<sup>11</sup> Abhayaratna, J. and Lattimore, R. 2006, *Workforce Participation Rates – How Does Australia Compare?*, Productivity Commission Staff Working Paper, Canberra, page 54.

<sup>12</sup> *Ibid*, at p.55

<sup>13</sup> *Ibid*, at p.56.

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- b. Child-bearing aged females (25 to 44 years) would have increased by 7.1 percentage points (to Canada's rate), increasing the size of the workforce by 209, 000; and
    - c. Mature-aged (55 to 64 years) participation would have increased by 15.2 percentage points (to New Zealand's rate), increasing the size of workforce by 331, 000.
  40. While workforce participation outcomes are a reflection of individual work preferences, they are generally influenced by cultural and social attitudes, as well as government policies and institutional arrangements, such as tax and transfer system and labour market regulations.
  41. Therefore the challenge for policy makers is to ensure that government policies and regulations do not artificially discourage workforce participation.
  42. The human capital stream of the COAG's *National Reform Agenda* (NRA) comprises three distinct sub-streams, that is, health promotion and disease prevention, education and training, and work incentives, directed at improving workforce participation rate. Amongst the top-ten high level outcomes and associated indicative progress measures under the work incentives sub-stream are to:<sup>14</sup>
    - a. Improve workforce participation in a manner consistent with the long-term interests of individuals and the economy, giving due regards to productivity; and
    - b. Increase the provision of flexible working arrangements within the workforce, in a manner consistent with the long term interest of individuals and the economy.
  43. Therefore it is essential to ensure that any decision by the Tribunal should not jeopardise the ability of businesses to create jobs.
  44. ACCI strongly submits that this is what is intended by the statutory objectives in s.134(1)(c).
  45. "Social inclusion" in the context of the work of this Tribunal must be about creating employment opportunities. It therefore must maintain a safety-net that does not have the effect of discouraging or excluding people from gaining employment or remaining in employment, particularly vulnerable groups of workers.

<sup>14</sup> PC 2006, *Potential Benefits of the National Reform Agenda*, Report to the Council of Australian Government, Canberra.

46. It is clear that to minimise social exclusion, a job is paramount, and modern awards should not negatively impact the objective of increasing workforce participation.
47. The former Australian Fair Pay Commission (AFPC) also highlighted the nexus between having a job and social exclusion as follows:
- For most people, an adequate living standard depends on having sufficient paid work. Unemployment is the chief cause of relative poverty and social exclusion in Australia ... The social consequences of extended joblessness, especially for families, are considerable and well known. The Commission considers that its decisions should not exacerbate the risk of unemployment for the most vulnerable groups of workers.<sup>15</sup> (emphasis added).
48. The observations by the AFPC on the impact of unemployment on vulnerable groups, including juniors and those with less skills, is amplified in the context of these proceedings.
49. The Commonwealth Government has previously canvassed the economic theory of minimum wages for particular cohorts of employees, such as juniors and persons with a disability. Those submissions highlight why these categories of employees are more sensitive to minima employment conditions in the labour market and why caution is warranted when adjusting or setting the safety-net.
50. ACCI concurs with the conclusions reached with respect to juniors and persons with a disability, extracted below:

### **Conclusion**

9.104 If young people are to be competitive in the labour market, their minimum wages should reflect the fact that, on average, they do not have the skills, experience and maturity of adults. Unless the minimum wages of young people reflect these factors, they will not be competitive with adults for employment opportunities.

9.105 The majority of economic evidence suggests that youth employment is more sensitive to wage increases than employment in general. The Australian studies and the international evidence are consistent in this view.

9.106 The youth labour market has particular characteristics which makes the employment of young people relatively precarious. Increasing the relative cost of employing young people risks damaging the fragile youth labour market.<sup>16</sup>

...

<sup>15</sup> AFPC 2009 Wage Setting Decision and Reason for Decision, July 2009, at p.9.

<sup>16</sup> Australian Government Submission, 2006 AFPC Minimum Wage Review, Chapter 9, p.181

<<http://www.fwa.gov.au/sites/afpc2006wagereview/submissions/AustralianGovernmentSubmission2006Chapter9Minimumwagesforjunioremployees.pdf>>

## How minimum wages for employees with a disability need to be set to ensure they are competitive in the labour market

- 11.45 If full minimum wages are applied to employees with a much reduced productive capacity due to their disability, those employees are likely to be priced out of the labour market. If an employer is faced with the choice of hiring an employee with a disability with reduced productive capacity, or an employee with full productive capacity at the same wage rate, an economically rational employer will select the fully productive employee.
- 11.46 Therefore, the key determinant of the competitiveness in the labour market of people with a disability is the relative cost of employing such a person as opposed to an employee with full productive capacity. To ensure competitiveness, minimum wages for employees with a disability must have an appropriate relativity to the applicable minimum wage that covers the same type of work. An appropriate minimum wage for an employee with a disability would be one that reflects the lesser capacity of the employee relative to other employees doing the same job. Such a minimum wage would pro-rate the full minimum wage for the job in proportion to the relative capacity of the employee.
- 11.47 This is what the SWS and the tools used by business services are designed to do. They assess the relative capacity of employees with a disability in the job in question and use this assessment to pro-rate the full minimum wage applicable to the job. In this way, they ensure that employees with a disability are competitive in the labour market.
- 11.48 The importance of minimum wage relativities is illustrated by the employment barriers faced by those categories of employees with a disability whose vulnerability in the labour market is multiplied by other factors, such as the lesser experience and maturity associated with youth, or time spent in training as an apprentice. For example, an employer hiring an apprentice at the apprenticeship rate of pay is unlikely to employ a person with a disability if the employee has a reduced productive capacity due to their disability. In this instance, the employer would be burdened with an extra cost of decreased productivity in addition to the costs of employing an apprentice. Therefore, it is necessary that the employer receive a further incentive to provide employment to this particular employee, by being able to pay a rate that pro-rates the apprenticeship rate of pay in proportion to the relative productivity of the employee. A similar process is also necessary for junior employees with a disability. It will ensure that the employment of people with a disability seeking employment in other sub-minimum wage categories is not further impaired.
- 11.49 Therefore, to ensure that adequate employment opportunities are offered to people with a disability, it is necessary that their wages be set at a level which will make certain they are competitive in the labour market. This also necessitates the payment of wages that are pro-rated against those rates of pay that already reflect factors that reduce productive capacity, such as rates for apprentices, trainees and juniors. These requirements are already reflected in the SWS for

open employment and in the other wage tools that are being used in business services.<sup>17</sup>

51. The impact of a modern award should not discourage types of employment, including casual employment, which would be contrary to multiple statutory objectives. With respect to the importance of casual work opportunities and wage transitions, ACCI agrees with the Commonwealth Government's submission to the 2010 Annual Wage Review that "*research also shows that casual workers have good prospects of moving to higher paid and non-casual jobs*".<sup>18</sup>
52. Linked to jobs of course is the vulnerability of businesses themselves. Jobs start and end with employer demand, and the capacity and sustainability of commercial entities to offer employment on a sustainable basis.
53. Following the preceding economic downturn, the solvency and sustainability of many businesses are still vulnerable. Many are finely geared and face threats to their sustainability. An additional labour cost can threaten their viability.
54. Any labour cost increase, not contingent upon additional productivity or customer demand will, along with other factors, threaten the viability of many businesses. ACCI remains concerned that businesses, especially small and medium sized enterprises, are continuing to face difficulties accessing finance, with many of those that are successful, subject to the application of unreasonable margins. Recent ACCI small business survey results confirm that raising loans from financial institutions, and associated charges, remain a constraint on overall business investment.
55. The Tribunal is required under s.3(g) to specifically consider the special circumstances of small business.

#### Employment Costs

56. ACCI interprets the term "*employment costs*" in s. 134(1)(f) broadly. This should encompass all associated employment costs, not limited to minimum wages and associated penalty, loadings, leave, long service leave, payroll tax, workers compensation premiums, FBT, superannuation and associated administrative costs. Therefore the impact of clause 13.4 must be considered within broader labour costs.

<sup>17</sup> Ibid, Chapter 11 at p. 354

<<http://www.fwa.gov.au/sites/afpc2006wagereview/submissions/AustralianGovernmentSubmission2006Chapter11Minimumwagesforemployeeswithadisability.pdf>>

<sup>18</sup> Australian Government Submission, 2010 Annual Wage Review, paragraph 4.48 – 4.49.

57. Whilst is it difficult to quantify administrative costs, it is a burden which is required to be taken into account by the Tribunal under s.134(1)(f).
58. On-costs have been considered by the AIRC in the context of previous Safety Net Reviews. For example, in its 2004 decision [PR002004], the Full Bench of the AIRC acknowledged the effect of on-costs on any decision to increase minimum wages and considered it to be larger than \$1 for every \$1 increase to the minimum wage:
- [308] As noted in the May 2003 decision, the Commission acknowledges that increases in award wages are a blunt instrument in addressing the needs of the low paid in employment. We accept that a significant number of households with minimum wage earners lie in the middle or high income bands. Moreover, we recognise that adjustments to award wages are a relatively inefficient means of increasing the disposable income of the low paid. On-costs mean that for every dollar awarded by the Commission, employers must spend more than \$1, whereas the impact of tax and tax transfer arrangements means that, in many cases, the employee receives substantially less than \$1 as additional disposable income ...(emphasis added)
59. Measures: There are limited contemporary official measures for labour on-costs. The ABS Labour Costs, Australia, 2002-03 (Cat 6348.0.55.001) is the most recent release of labour cost measures across Australia.<sup>19</sup>
60. This publication contains statistics on the main costs incurred by employers as a consequence of employing labour in 2002-03. The statistics are based on the Major Labour Costs Survey (MLC) conducted in July 2003. The survey provides information on various components of labour costs, including: employee earnings; employer payments for superannuation; workers' compensation costs; payroll tax and fringe benefits tax.
61. Employee earnings accounted for 86.6% of total labour costs. Superannuation was the next largest component at 7.6%. Payroll tax and workers' compensation costs were 2.9% and 2.2% respectively, while fringe benefits tax was the smallest component at 0.8% of total labour costs.
62. Using the data in the ABS Labour Costs 2002-03 Survey superannuation, payroll tax, workers compensation and fringe benefit tax costs for Australia economy as a whole were 15.5% of earnings.
63. The next Labour Costs Survey will only be released in May 2011 with 2009-10 reference year. Therefore, given the lack of official labour on-costs data, we have estimated the forward projections of labour-on costs for 2009-10 for three minimum wage-reliant industries, based on the average annual growth of on-costs and earning between 1993-94 and 2002-03:

<sup>19</sup> <http://www.abs.gov.au/ausstats/abs@.nsf/mf/6348.0.55.001>

### Labour On-cost Estimates

Minimum wage-reliant industry	2002-03(a)	2009-10(e)
Retail Trade	14.1% of earnings	21.2% of earnings
Accommodation, Cafés and Restaurants	14.8% of earnings	26.5% of earnings
Health and community services	12.6% of earnings	21.8% of earnings

(a) Actual figures from ABS, *Labour Costs 2002-03 Survey* (Cat. No. 6285.0.055.001)

(e) Forward projections

64. Therefore for every \$1 dollar paid by employers pursuant to the safety-net, an extra 21.2 cents increase is required to be paid for labour on-costs in the retail trade sector in 2009-10.

#### Evidence and Onus

65. ACCI accepts that the applicant bears the onus in providing material to warrant the Tribunal to exercise its discretion under s.157. There is no indication by Parliament as to the type of evidence or weight to be attached to such evidence.
66. The Award Modernisation Full Bench dealt with a number of arguments raised by ACCI and ACCI members' vis-à-vis draft modern awards objectives and corresponding statutory requirements. In response to arguments raised by parties to these matters, ACCI makes the following submissions.
67. Firstly in [2009] AIRCFB 800, the AIRC Full Bench stated:

[16] A number of parties urged us to have regard to current economic conditions including the global recession and the impact of each modern award on the area covered by it. ACCI, for example, proposed that the Commission should use its powers under s.576E(4) of the WR Act and conduct external research to "provide some indication of the likely effect that a modern award (or basket of awards) will have on employers and the economy in general."<sup>4</sup> It was suggested that such research might be conducted by the Productivity Commission or an economic modelling advisory firm.

[17] The impact of award modernisation on particular sectors of the economy and upon the economy overall is a matter of great significance in the award modernisation process. While this decision is concerned mainly with the transitional arrangements rather than the substantive terms of modern awards, the economic environment is still an important consideration. Some parties suggested that in some industries the operation of modern awards, or some parts of them, should be delayed for periods of up to five years on economic grounds. On the material presented to us concerning the national and international economy it is clear that we should take a cautious approach where cost increases are in prospect. We have decided that any cost increases resulting from the introduction of modern awards should be spread

over a lengthy period, as contemplated by s.576T of the WR Act, unless there is broad agreement that some other approach should be adopted in relation to a particular modern award. While this is our general approach there are some departures from it. We deal with the provisions to apply to each of the priority and Stage 2 modern awards later. (emphasis added)

68. It is clear that the material on the national economy were key considerations, in the AIRC taking a cautious approach, and thereby creating model transitional provisions for employers. This was to buffer the clear cost imposts that would arise as a result of award modernisation under some modern awards. The AIRC did not, nor could not, foresee the actual impact of modern awards until they commenced on 1 January 2010. It is noteworthy that minimum engagement clauses are not subject to phasing.
69. ACCI submits that where evidence is presented under s.157 to indicate that the effect of the modern award is having a prejudicial impact on employers and employees, contrary to the modern award objectives (and other relevant provisions) this should not only enliven the Tribunal's jurisdiction, but compel the Tribunal to vary the modern award accordingly.
70. Modern awards are not set in stone. Clearly Parliament anticipated that there should be some opportunity for employers to vary modern awards in particular circumstances. ACCI's main argument is that these applications are a case in point.
71. Secondly, in relation to [2009] AIRCFB 945, the Full Bench provided reasons for how particular arguments raised by employers and peak councils were considered:

[5] In a submission directed to economic considerations, the Australian Chamber of Commerce and Industry (ACCI) referred to item 2(5) of Schedule 5 to the Transitional Act and continued:

"81. Consistent with ACCI's previous submissions, we reiterate the following general recommendations for the final Stage IV process:

a. The Commission should provide detailed reasons for its decision in a statement to the modern awards addressing item 2(5) (in addition to considerations in the request and Part 10A that the Commission must take into account).

b. Where evidence is provided that indicates a modern award may increase labour costs, increase the regulatory burden on business or negatively impact upon jobs or productivity, these matters must be addressed by moderating provisions in the modern award as appropriate. ACCI notes that the Full Bench can vary a modern award on its own motion or deal with matters upon receiving an application to vary under s.576H.

c. When considering transitional provisions, these matters must also be taken into account.”

[6] ACCI advanced similar submissions in the consultations preceding the Commission’s decision on model transitional provisions. In that decision we dealt at some length with those submissions.<sup>4</sup> We add the following observations. Where we have been presented with economic material relating to costs, the regulatory burden or employment, we have taken it into account. Material of that kind has not been frequently provided and the material that has been provided has sometimes been incomplete. For example, the material might not deal with actual costs or might focus on provisions which increase costs without any allowance for provisions which reduce costs. This is not a criticism of those concerned, but may help to explain why particular submissions have not been acted on. At the general level, however, our decision, has been made with all of the statutory requirements firmly in mind and the evidence and other material presented to us has been examined in that context. (emphasis added)

72. ACCI submits that in relation to the above statements by the AIRC Full Bench, the circumstances presently confronting the Tribunal are different. As indicated by the Full Bench in paragraph [60] of [2009] AIRCFB 800, it was contemplated by the AIRC that employers would suffer some detriment and that there would be a process to deal with such matters accordingly.
73. Whereas the AIRC may have had concerns that it did not have actual evidence about the impact of a modern award on a firm or a sector, the Tribunal now has before it real and present concerns by employers that the effect of the modern award is having and will continue to have a negative impact on key objectives under the Act.
74. To drill down to the heart of the core concern, these are the capacity for employers to retain current and hire employees, particularly juniors and persons with a disability.
75. In ACCI’s submission and to the extent that these are relevant matters, these impacts cannot be cured by:
- a. A common law contract, as the contract must not conflict with the terms of a modern award;
  - b. An undertaking under s.329 (high income employee) as no employees under the modern award would be earning the prescribed amount;
  - c. An employer and employee agreeing to enter into an Individual Flexibility Arrangement (IFA). Firstly, it is unclear whether the issue could be dealt with by both sides entering into an IFA. For example, does an IFA which provides for an employment opportunity in circumstances where that opportunity would not otherwise have been available because of a minimum engagement clause satisfy the requirement that the IFA must

result in the employee being “better off overall”? On one view, it may satisfy the test if the employee is able to obtain work which suits their circumstances and where they would not ordinarily obtain work.. However, there may be contrary views which may cast doubt on the validity of the IFA. Secondly, there is also uncertainty as to whether a casual employee may need to enter into a fresh IFA on each engagement (based on a strict legal definition of a casual employee). If this is so, then this would make it impractical in reality.

- d. Bargaining for an enterprise agreement. Employers in small to medium firms do not typically engage in formal bargaining and pay according to a combination of common law contracts and safety net standards. It would be a significant cost to expect SMEs to engage in formal bargaining, for the purpose of only addressing the minimum casual engagement clause. It is also uncertain whether the Tribunal would approve the agreement under the relevant test.
76. To reiterate, whilst the AIRC may not have accepted arguments during the drafting of the modern award that it would cause harm to employers or employees, either on a firm, geographic or macro level, the evidence and circumstances warrant a different conclusion in relation to the specific award subject to these proceedings.
  77. ACCI therefore submits that the applicants have satisfied the Tribunal that the variation is necessary to achieve the modern award objectives.

## **MINIMUM ENGAGEMENT CLAUSES**

78. The context of the applications before the Tribunal is about striking a balance for both employers and employees.
79. Evidence before the Tribunal indicates that employees place a high value on having a job, both from income perspective but also from a self-worth and self-esteem point of view. Parliament clearly intended that the Act encourage persons to obtain and remain in employment, whilst also providing a safety-net.
80. Whilst most employers will engage employees for more than two or three hours where work is required to be done, the current three hour minimum is too inflexible given the very diverse circumstances faced by retail employers and their employees. More flexibility is required so that retailers are not prevented from offering work.
81. The applications take a common sense approach to the issue and do not seek to reduce terms and conditions to a baseline of zero. Rather, they are to ensure that no person is refused work because of the minimum engagement rule.

82. ACCI has considered the minimum engagement clauses in safety-net award instruments applying in the retail and related industry sectors. The comparison data compiled by the AIRC during award modernisation indicates a range of terms in pre-reform federal awards and State awards. There is clearly no homogeneity between provisions in relevant instruments.
83. Whilst there may have been a dominant pre-reform federal award for other particular industries or occupations, there is no single federal award covering the general retail industry. This is made clear from the list of 20 pre-reform federal awards, 29 enterprise awards, and 70 State awards that were considered as part of award modernisation by the AIRC Full Bench.<sup>20</sup>
84. After conducting an audit of these instruments, it would appear that the minimum engagement clauses generally range from 3 hours<sup>21</sup>, 2 hours<sup>22</sup>, 2.5 hours<sup>23</sup>, 1.5 hours for particular employees (ie. juniors for a particular span of hours)<sup>24</sup> or no minimum (effectively an hourly rate derived from the relevant weekly rate).<sup>25</sup>
85. One example referred to above which requires further explanation is a clause tailored to junior employees in South Australian Retail Industry (South Australian) Award (AN150130 SA). It is a safety-net standard which has a long history and importantly, was strongly supported by the relevant union in South Australia, the SDEAA and ACCI member, Business SA.
86. The relevant provision in the South Australian Retail Industry (South Australian) Award (AN150130 SA), set out in full below.

### **AN150130 – Retail Industry (South Australia) Award**

#### **CLAUSE 4.4 CASUAL EMPLOYEES**

OP DATE 15:03:2006 1<sup>st</sup> pp on or after

4.4.1 Employees specifically engaged under a contract of hiring less than weekly shall be deemed to be casual employees hired by the hour.

4.4.2 Casual employees shall be paid a minimum rate higher by 20% than the appropriate weekly rate prescribed by Clause 5.2 Wages. In calculating the hourly rate for a casual employee, the weekly rate as increased by the

<sup>20</sup> <http://www.airc.gov.au/awardmod/fullbench/industries/awardmodlist.cfm?award=retail> . Extracted from [2008] AIRCFB 550, Attachment B.

<sup>21</sup> For example, clause 10.1.1 of the Shop, Distributive and Allied Employees Association – Victorian Shops Interim Award 2000.

<sup>22</sup> For example, clause 10 of the Shop, Distributive and Allied Employees’ Association – Hardware Retail Industry Award 1999; clause 10.4.1 of the Master Grocers’ Association and the Shop, Distributive and Allied Employees Association Award 2005.

<sup>23</sup> For example, clause 9 of the Video Industry (South Australia) Award 2000.

<sup>24</sup> For example, clause 4 of the Retail Industry (South Australia) Award (State award).

<sup>25</sup> For example, Retail Trade Industry Sector – Minimum Wage Order – Victoria 1997; the Shop Warehouse (Wholesale and Retail Establishments) State Award 1997 (State award); Community Pharmacy Award 1998;

20% casual loading shall be divided by 38 and the result rounded off to the nearest cent.

4.4.3 Casual employees shall receive a minimum period of engagement of 3 hours for each engagement. Junior casual employees who work between 4.00pm and 6.00pm Monday to Friday shall be subject to a minimum period of engagement of 1.5 hours within the period specified in this paragraph. Should such an employee work between 6.00pm and 6.30pm, the employee shall be entitled to a minimum period of engagement of 2 hours for work performed between 4.00pm and 6.30pm.

4.4.4 With the exception of clause 4.11.3, clauses 4.11 and 4.12 shall not apply to casual employees.

4.4.5 Wages payable to casual employees who are paid pursuant to Schedule 3 (other than canteen employees) are governed by clause 4.8 and not by the provisions of this clause.

4.4.6 This clause does not apply to casual employees paid pursuant to Schedule 4. Such employees shall be paid the appropriate wages set out in column 3 of Schedule 4.

87. Of particular relevance is that the award was reviewed by the Industrial Relations Commission of SA in 2006, with the SDEAA and Business SA consenting to the final draft.
88. The transcript provides a background to the application, which was heard on 15 March 2006 in Adelaide:

**BARTEL DP:** Thanks, Mr Sheehan. I just note for the record that these proceedings represent the culmination of a review of the Retail Award pursuant to section 99 of the Fair Work Act and also its predecessor act, the Industrial and Employee Relations Act 1994. The parties have agreed a new draft which has been finalised by the registry. Now, that's a document that's marked as a 3 March 2006 document which I trust is the document the parties are working off.

89. Attachment ACCI-1 is a copy of the transcript.
90. ACCI submits that it is open to the Tribunal to consider safety-net standards when considering whether to exercise its powers under s.157 and vary the clause.
91. ACCI supports the submissions of the applicants as to the actual variation sought.

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## OTHER MATTERS

92. Other provisions that may be relevant to these applications concerns s.153, which provides that discriminatory terms must not be included

### **153 Terms that are discriminatory**

#### *Discriminatory terms must not be included*

(1) A modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

93. ACCI submits that the effect of clause 13.4 may be discriminating against a cohort of employees, based on physical or mental disability and age, by virtue of the negative effect it is having on these employees as indicated by the applicants.

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## ABOUT ACCI – LEADING AUSTRALIAN BUSINESS

ACCI has been the peak council of Australian business associations for 105 years and traces its heritage back to Australia's first chamber of commerce in 1826.

Our motto is "Leading Australian Business."

We are also the ongoing amalgamation of the nation's leading federal business organisations - Australian Chamber of Commerce, the Associated Chamber of Manufactures of Australia, the Australian Council of Employers Federations and the Confederation of Australian Industry.

Membership of ACCI is made up of the State and Territory Chambers of Commerce and Industry together with the major national industry associations.

Through our membership, ACCI represents over 350,000 businesses nationwide, including over 280,000 enterprises employing less than 20 people, over 55,000 enterprises employing between 20-100 people and the top 100 companies.

Our employer network employs over 4 million people which makes ACCI the largest and most representative business organisation in Australia.

### **Our Activities**

ACCI takes a leading role in representing the views of Australian business to Government.

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally.

- 
- Business representation on a range of statutory and business boards, committees and other fora.
  - Representing business in national and international fora including Fair Work Australia, Australian Industrial Relations Commission, Safe Work Australia, International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, the Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, the Confederation of Asia-Pacific Chambers of Commerce and Industry and the Confederation of Asia-Pacific Employers.
  - Research and policy development on issues concerning Australian business.
  - The publication of leading business surveys and other information products.
  - Providing forums for collective discussion amongst businesses on matters of law and policy affecting commerce and industry.

### **Publications**

A range of publications are available from ACCI, with details of our activities and policies including:

- The ACCI Policy Review; a analysis of major policy issues affecting the Australian economy and business.
- Issue papers commenting on business' views of contemporary policy issues.
- Policies of the Australian Chamber of Commerce and Industry – the annual bound compendium of ACCI's policy platforms.
- The Westpac-ACCI Survey of Industrial Trends - the longest, continuous running private sector survey in Australia. A leading barometer of economic activity and the most important survey of manufacturing industry in Australia.
- The ACCI Survey of Investor Confidence – which gives an analysis of the direction of investment by business in Australia.

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- The Commonwealth-ACCI Business Expectations Survey - which aggregates individual surveys by ACCI member organisations and covers firms of all sizes in all States and Territories.
  - The ACCI Small Business Survey – which is a survey of small business derived from the Business Expectations Survey data.
  - Workplace relations reports and discussion papers, including the ACCI Modern Workplace: Modern Future 2002-2010 Policy Blueprint and the Functioning Federalism and the Case for a National Workplace Relations System and The Economic Case for Workplace Relations Reform Position Papers.
  - Occupational health and safety guides and updates, including the National OHS Strategy and the Modern Workplace: Safer Workplace Policy Blueprint.
  - Trade reports and discussion papers including the Riding the Chinese Dragon: Opportunities and Challenges for Australia and the World Position Paper.
  - Education and training reports and discussion papers including ACCI's Skills for a Nation 2007-2017 Blueprint.
  - The ACCI Annual Report providing a summary of major activities and achievements for the previous year.
  - The ACCI Taxation Reform Blueprint: A Strategy for the Australian Taxation System 2004–2014.
  - The ACCI Manufacturing Sector Position Paper: The Future of Australia's Manufacturing Sector: A Blueprint for Success.

Most of this information, as well as ACCI media releases, parliamentary submissions and reports, is available on our website – [www.acci.asn.au](http://www.acci.asn.au).



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