

13. The Wage Fixing Principles

[13.1] Following the Commission’s decision to retain its statement of principles in 1998⁷⁴, the Commission and parties appear to have settled into a process where the making of the principles is largely straightforward, unless specific concerns or proposals are raised by parties. This extended on the last occasion to the Commission describing various of the established principles as “the usual conditions” it attaches to the awarding of minimum wage increases.⁷⁵

[13.2] The Commission should again make principles in the same terms as the 2001 principles, save for:

- a. Consequential amendments to give effect to any 2002 increase (e.g. changes to principles 8 and 9).
- b. Proposals from parties to amend the principles, where merited and consistent with the Commission’s wider considerations.

[13.3] Three specific issues should be considered on this basis:

- a. Special Cases (Principles 2 and 10)
- b. The ACTU Retrospectivity Claim (Principle 8)
- c. Economic Incapacity (Principle 12)

Special Cases

[13.4] Some recent cases have suggest the Commission may need to revisit the operation of the Special Case principle (Principle 10, and as relevant, Principle 2) to remove some uncertainties which appear to have emerged.

⁷⁴ See *Safety Net Review - Wages April 1998 Decision* [Print Q1998], [Section 11.1]

⁷⁵ See *Safety Net Review - Wages May 2001 Decision* [Print PR002001], [143]

[13.5] This includes in particular concerns regarding:

- a. When an award may or may not be varied without being deemed to be above or below the award safety net, and
- b. How members of the Commission are to determine matters allocated to them after a decision of the President not to constitute a Full Bench under s.107.

[13.6] This later concern is illustrated by a recent decision of Commissioner Cargill⁷⁶, which contained the following passage on determination in such circumstances:

In the ordinary course of events the Principles would constrain my role as a single Member of the Commission in determining the applications. However, in the light of the rejection of the section 107 applications referred to earlier in this decision, it would appear that I am required to proceed to deal with the applications in accordance with industrial principles and the general industrial merits of the case. I note that there is no test case standard as to how a loading is to be calculated or what such a rate should be. Instead a case-by-case approach has been adopted in the light of circumstances of particular industries.

[13.7] Parties would be assisted by amendments to the principles to better clarify the determination of matters by single members when referred back from the President following his consideration under s.107.

The ACTU's Retrospectivity Claim

[13.8] The principles were varied on the last occasion to allow for more than one safety net adjustment to be awarded at the same time. No party opposed this amendment.⁷⁷

[13.9] The Commission determined that a member should be able to waive the requirement for twelve months to have elapsed between wage adjustments allowable under previous safety net decisions, provided that

⁷⁶ Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union re Country Printing Award 1959 and Graphic Arts - General - Award 2000 - re Casual loading - PR913088 - 9 January 2002 - Cargill C [26]

⁷⁷ See *Safety Net Review - Wages May 2001 Decision* [Print PR002001], [151]

each party to the award consents to the variation and there is no cost to any employer party to the award. In any other case where a party seeks to vary an award for more than one safety net adjustment that party needs to apply for and justify the variation as a special case.⁷⁸

[13.10] The ACTU now argues that “in a similar vein”, principle 8(a) should be modified to prevent increases from being more than 12 months apart.⁷⁹

[13.11] This is not in a similar vein. The ACTU seeks to have the Commission break with many years of established practice and apply retrospective increases in national wage/safety net proceedings. The ACTU’s proposal would also permit retrospective application of variations in the absence of agreement between the parties. The ACTU’s proposed change to the principles is strongly opposed.

[13.12] The ACTU’s proposed amended principle will allow for safety net increases to have effect prior to the date the particular award is varied by the Commission. Prima facie, this is a claim for retrospective increases.

[13.13] It has been the longstanding practice of the Commission only to grant retrospectivity in exceptional circumstances. In an application for a retrospective variation of a safety net adjustment by the ALHMWU⁸⁰ Wilks C determined the following as matters relevant to the granting of a retrospective safety net increase:

- The Safety Net Review decision;
- Relevant provisions of the Act;
- Adjustments to rates of pay in this Award in the recent past;

⁷⁸ See *Safety Net Review - Wages May 2001 Decision* [Print PR002001], [152]

⁷⁹ (C2001/5719 and ors) ACTU Written Submission [Section 8, p.165]

⁸⁰ RE: ALMHWU, Print No. P5290

- The impact upon industry participants if retrospective applications of the variation were granted;
- The procedural delays in dealing with this matter.

[13.14] The ACTU claims at 8.3 that *‘because of the business of the Commission the date of the variation of the award has been after the 12 month period. This has caused a delay in workers under such awards receiving the safety net adjustments through no fault of the union parties to the award.’*

[13.15] We note that the ACTU is yet to provide any evidence to support this claim that the principle requires amendment. Further, with respect to the matter of Commission workload, we note that there have recently been several new appointments to the Commission. It is for the parties who seek variations to awards to incorporate safety net increases to apply for those variations promptly. ACCI also submit that ebbs and flows in Commission business do not constitute sufficient grounds for amending wage-fixing principles. Awards are legal instruments and require proper consideration before each variation.

[13.16] ACCI submit that it would be preferable for a greater degree of prospectivity to be introduced into safety net increases. The safety net is already increased relatively frequently (i.e. on an approximately twelve-monthly basis). Many employers are unfamiliar with the processes by which safety net increases are granted. As such, there may be some time lag before they become aware that a safety net increase has been granted and must be paid to their employees. Prospectivity would provide greater scope for employers to become aware that increases have been awarded and prepare to adjust their employees’ wages to accommodate these increases. Conversely, retrospective increases increase the amount of confusion that may be associated with the granting of Safety Net increases and will of necessity result in an increased wages burden with respect to employers back-paying their employees to the date of the increase and

confusion over the correct award rate of pay which employers are obligated to pay their employees.

[13.17] At the very least (and subject to our comments about prospectivity), safety net increases should operate, in all but exceptional circumstances, from the date that the variation of the award is granted. There may be some value in the Commission investigating measures to better publicise and inform employers of the granting of a safety net increase.

Economic Incapacity

[13.18] Scope to argue economic incapacity is an important element of the contemporary minimum wage fixing system, particularly in reducing any potential negative labour market and economic impacts of increases for particular workplaces.⁸¹

[13.19] The economic incapacity principle should operate relevantly and effectively on an ongoing basis. Workplaces that cannot viably accommodate increases in minimum wages should have a meaningful and effective capacity to seek reduction, postponement, deferral, and phasing in of minimum wage increases.

[13.20] ACCI has in the past put the submission that the economic incapacity principle should be broadened in its scope and application. ACCI notes that these submissions have not been adopted by the AIRC, although in its 1999 decision the AIRC did amend the principle to specifically recognise the impact of an increase in labour costs on employment at the enterprise level.

[13.21] ACCI has contacted its member organisations and sought their views on the operation of the incapacity to pay principle. In all cases, members have indicated that the incapacity to pay principles needs to be

⁸¹ See *Safety Net Review - Wages May 1999 Decision* [Print R1999], [89].

broadened and amended if it is to be of genuine assistance to employers whose businesses are in serious economic difficulty.

[13.22] The economic incapacity principle could be amended to better facilitate cases of genuine incapacity, consistent with:

- a. The *Workplace Relations Act 1996*.
- b. The importance of maintaining the safety net.
- c. Maintaining operational and employment capacities of enterprises.

[13.23] That the principle is currently little used should be interpreted as a signal that it is not meeting its intended role, and that employers with genuine cases of incapacity are not finding recourse to seek legitimate variation of increases. Either workplaces are suffering operating distress/risk of closure, or employment loss due to wage levels they cannot sustain, or they are not passing on required increases. Feedback from ACCI members indicates that employers who are seeking to make use of the principle find the tests involved in meeting the criteria established by the Commission too difficult.

[13.24] It is not the case that the lack of use of the existing principle indicates there is no incapacity problem. Enterprises continue to become insolvent, proprietors enter bankruptcy, and employees lose employment on a daily basis. In at least some cases, additional temporary wages stability rather than increases in award labour costs may have precluded these negative outcomes.

[13.25] Specific options for amendment lie in areas such as the following:

- a. Making avenues to argue incapacity more accessible to smaller enterprises experiencing operational challenges such that safety net increases cannot viably be awarded without detriment to ongoing operational viability and capacity to employ.
- b. Allowing incapacity arguments to be heard without a requirement to constitute a full bench.

- c. Allowing the deferment of a safety net increase once an application under this principle is made. If an application were ultimately unsuccessful, the Commission would then have discretion about how the safety net increase would be required to be applied to the business.
- d. Allowing greater scope to argue incapacity on an industry, regional, or sectoral basis, based on collective incapacity evidence.
- e. Re-examining the gravity of the tests applied under the present principle, which may be discouraging applications from enterprises experiencing significant difficulty in implementing increases. This includes considering whether there should be scope to address economic adversity prior to it becoming “very serious or extreme” (at which point relief in the form of application for deferral of a safety net increase through the incapacity principle is often too late to be of assistance).

[13.26] Any proposals to reconsider the operation and expression of this principle should be carefully considered by the Commission and parties. Options to better ensure genuine cases of incapacity may be argued will be supported by ACCI.