

2002

SAFETY NET REVIEW

CASE

Reply

Submission to the

Australian Industrial Relations Commission

by

The Australian Industry Group

and

Engineering Employers' Association, South Australia

28 March 2002

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2002 SAFETY NET REVIEW CASE

Reply Submission

1 OVERVIEW

- 1.1 The ACTU’s reply submission fails to address many of the key points arising from Ai Group’s original submission, including:

- there is considerable uncertainty surrounding the outlook for the global and Australian economy, with significant risks of a decline in growth levels post mid-2002;
- Australia's economic growth levels are now well below past experience and our optimal growth potential;
- underlying productivity trends in the Australian economy remain uncertain, and there is no guarantee that the higher productivity growth path of the 1990s will continue into the new century;
- the key sectors of manufacturing and construction are still in the early stages of recovery, with forecasts only for moderate growth in 2002;
- there is a need for wage caution arising from Australia's slower economic performance and incipient economic recovery, together with the considerable uncertainty about prospects over the year ahead.

1.2 Further, none of the new material relied upon by the ACTU in its reply submission fundamentally alters or shakes the above propositions. On the contrary, the latest National Accounts data and other material used by the ACTU confirm the need for a cautious approach to be adopted in adjusting safety net wages in the context of the present proceedings.

1.3 The ACTU reply submission also continues to misapply certain ABS data which are relied upon to assess how award dependent employees have fared under previous safety net adjustments. The ACTU's assessments in this regard should continue to be treated with caution. In addition, the ACTU's submissions in reply overlook the indirect cost impact of safety net

adjustments, in particular how they interact with bargaining outcomes and other overaward arrangements, and thereby lead to increased labour costs for employers.

- 1.4 The ACTU reply submission also misunderstands the nature of Ai Group's arguments concerning the purpose of the safety net review proceedings and the need for adjustments in the broader social safety net to be taken into account when determining the quantum of safety net adjustments. Further, the ACTU does not seriously engage with the underlying proposition that safety net wage adjustments are a blunt and ineffective instrument when it comes to improving the position of low income households.
- 1.5 Finally, the ACTU submissions do not question Ai Group's proposal for a conference to be convened in order that the important issue of award rationalisation may be explored and then moved forward.

2 PURPOSE OF THE SAFETY NET REVIEW PROCEEDINGS

- 2.1 In Ai Group's original submission, it was pointed out how safety net adjustments are a "*blunt equity device*" which often fail to adequately address the needs of low income earners whilst coming at the cost of reduced employment levels (especially for the low paid).
- 2.2 It was also highlighted how the ultimate responsibility for meeting the needs of the low paid rests with government (via the tax transfer system), and that the Commission should formally recognise that changes in social security and taxation arrangements need to be taken into account in determining the quantum of safety net adjustments. This would assist in creating a climate in which governments might develop concrete proposals in order to better assist

the low paid, confident in the knowledge that such proposals would be taken into account by the Commission in adjusting safety net wage levels.

- 2.3 To that end, the ACTU criticism in paragraph R6.35 of its reply submission that there is no concrete proposal being put forward by Ai Group (or the Commonwealth) for improving the position of low income earners misses the point. By recognising the link between safety net reviews and the broader social safety net in the present proceedings, an important first step will have been achieved in moving forward on the issue. Such recognition would allow concrete proposals to emerge.
- 2.4 If the Federal Government is ultimately convinced of the merits of making significant modifications to tax and/or social security arrangements as a trade-off for lower safety net wage increases, then such arrangements could only be implemented with the support and involvement of the Commission.
- 2.5 In paragraph R6.43 of its reply submission, the ACTU suggests that Ai Group is seeking to shift the responsibility for the needs of the low paid to government, and that this is neither fair nor appropriate. However, it is obvious that government, rather than the Commission, does have the ultimate responsibility to address the unmet needs of its constituent citizens, including the low paid. For example, it is often said that the Commission is “*an industrial tribunal and not a social welfare agency*”. This is because the Commission does not have ultimate responsibility for addressing the needs of the low paid, via the wages system. Although the Commission is required under the Act to have regard to the needs of the low paid in adjusting the safety net, final responsibility for addressing their needs rests with government.
- 2.6 In addition, government has control of the essential policy levers - social security and taxation - to deliver the most effective relief for low income households. Delivering high safety net adjustments will not necessarily serve

to improve the position of the low paid. Rather, it will only increase the risk of causing significant damage to both employers and employees (eg, reducing employment opportunities for low skilled employees and/or reducing other elements of household disposable income for low income families via the tax transfer system) for very little benefit.

3 ECONOMIC ANALYSIS

- 3.1 Relying upon the recent December quarter 2001 National Accounts data, the ACTU argues in its reply submission that the economic outlook has “*improved significantly*” and that a \$25 per week increase in all award rates is thereby justified. However, Ai Group submits that its economic assessment stands despite the ACTU’s new material.
- 3.2 On page 18 of Ai Group’s original submission, we had forecast GDP growth in trend terms of 3.7% for the December quarter 2001 National Accounts. This was the exact figure published by the ABS, and now relied upon by the ACTU. Our view is that this was expected as part of the cyclical upturn, but that conditions post mid-2002 would be softer and considerable uncertainty still remains. There has been nothing new presented by the ACTU to change this assessment of the economic outlook.
- 3.3 Further, as we predicted on page 18 of our original submission, the actual level of growth recorded by the December quarter 2001 National Accounts is still well below past experience and our optimal growth potential. Lower growth means that we cannot sustain the wage increases proposed by the ACTU.
- 3.4 Apart from relying upon the most recent National Accounts data and some private sector survey results, the ACTU does not attempt to counter the fundamental propositions that the Australian economy faces considerable uncertainty, and that there is a significant risk that the pace of our domestic

advance will decline in the second half of 2002. Further support for these propositions is gained from a recent Ai Group report, *“Economic and Fiscal Overview”* prepared by Dr Barry Hughes¹ which highlights:

- the considerable uncertainty surrounding the outlook for the international economy – in the words of Dr Greenspan, Chairman of the US Federal Reserve, *“an array of influences unique to this business cycle seems likely to moderate the speed of the anticipated recovery”*,²
- the risk that the banking/finance sector problems affecting the Japanese economy will reduce global growth;
- there are significant risks that the pace of both global and domestic advances could falter in the second half of 2002, by remaining relatively subdued though positive;
- Australia’s recent economic performance has been underpinned by relatively high levels of consumer spending and confidence aided by a very strong housing revival. However, *“there are question marks over the shelf life of both contributions to growth”*,³
- Australia’s underlying productivity trends remain far from certain, and *“it is unsafe to assume that the higher productivity growth path of the 1990s continued into the new century”*.⁴

3.5 On this last point, it is noteworthy that the ACTU does not appear to dispute the findings of the *“How Fast Can Australia Grow? Mark II”* report, which are

¹ Annexure A. This report has been prepared as part of Ai Group’s March 2002 Submission to the Federal Government in the lead-up to the Federal Budget 2002/2003. It was not available at the time of filing Ai Group’s original submissions in the present matter.

² Above n1 at p1.

³ Above n1 at p7.

⁴ Above n1 at p12.

set out at pages 19 and 20 of Ai Group's original submission. This study highlights that Australia's productivity acceleration in the 1990s might well be behind us, curbing our future growth potential and capacity to afford wage increases.

- 3.6 At paragraph R2.23 of its reply submission, the ACTU suggests that Ai Group has incorrectly characterised "award only" employees under the ABS Employee Earnings and Hours May 2000 Survey. This is not correct. Despite the fact that the ABS adopts some filter questions (see Q24 and Q25 of the EEH May 2000 survey), these are mainly designed to separate out enterprise agreement employees. The ABS has verbally advised us that the base pay of employees under an award can include more than award pay. This is because respondents may be unclear in filling out the relevant question: see Q25 of the survey.
- 3.7 Ai Group maintains that "award only" data most likely includes non-award pay. The ACTU's assertion to the contrary simply cannot be relied upon.
- 3.8 At various parts of its reply submission, the ACTU attempts to downplay the "spillover" effects of its \$25 per week claim, in particular those additional costs which might flow-on into informal overaward payments and more formalised bargaining outcomes. Many employers choose not to absorb any increase into existing overaward or agreement-based arrangements, thereby leading to increased labour costs. Moreover, in Ai Group's view, there can be little doubt that safety net adjustments have an influential effect upon wage negotiators at the enterprise level, including union negotiators. In this regard, it is timely to recall the words of the majority decision in the April 1997 Safety Net Review Decision:⁵

“ . . . we do accept that the attitudes of negotiators will be more strongly

⁵ (1997) 71 IR 1 at 22

affected by larger than by smaller safety net increases. This is a reason for caution in determining the amount of any increase in award rates.”

4 AWARD STRUCTURES

4.1 We note that, unlike in last year’s proceedings, the ACTU has not questioned Ai Group’s proposal that the Commission should convene a conference to discuss the rationalisation of awards.

4.2 In last year’s submission, Ai Group highlighted the lack of progress which had been made in rationalising the many awards which exist in the manufacturing industry, including the metal manufacturing and printing industries. Another area where there has been a distinct lack of progress is the building and construction industry. There are a large number of federal awards which apply in this sector. This large number of awards creates administrative difficulties for employers, and such awards should be rationalised to significantly reduce the number of awards.

4.3 At the conclusion of the *Building Industry Inquiry* in 1989, a five member Full Bench of the Commission said:⁶

“Having regard to all the submissions and evidence in this case, we have decided that the objective of a single award in the building and construction industry has merit and, over time, could be pursued”.

4.4 Thirteen years later, virtually no progress has been made in rationalising the many awards which exist in the industry.

4.5 Now is the time for a conference to be convened in an endeavour to achieve progress on this important issue.

5 PRINCIPLES

- 5.1 Ai Group does not oppose the changes to the Wage Fixing Principles being put forward by the Commonwealth.
- 5.2 Ai Group opposes the change to the Principles proposed by the ACTU.
- 5.3 Under this proposal, a retrospective operative date for safety net increases could be awarded in circumstances where an application for an award variation is made a “*reasonable time*” before the date which falls 12 months after the increases arising from the May 2001 Safety Net Review decision. This is said to be necessary due to delays caused by “*the business of the Commission*” and through no fault of union parties: see paragraph 8.3 of ACTU original submission.
- 5.4 Even if this is correct (and there has been no evidence presented by the ACTU to support this proposition), then equally the delays have not been occasioned by any conduct on the part of employers. It is therefore wholly unfair to saddle employers with the burden of retrospective wage increases where the relevant delay has been due to circumstances purely outside the control of the employer.
- 5.5 The provision of back-pay (through any retroactive wage rate increases) imposes a considerable administrative burden upon employers. It may even result in hardship for some employers.
- 5.6 The Commission and its predecessors have been generally reluctant to make award variations retrospective in operation unless exceptional and strong reasons exist to the contrary and, generally speaking, such reasons must be

⁶ Print H7460 at p6 per Maddern P, Keogh and Riordan DPP, Leary and Smith CC.

based on some action by a party of which the tribunal does not approve.⁷ In the circumstances nominated by the ACTU, there can be no suggestion that the employer is at fault for the delay.

5.7 Section 146 of the Act reinforces the general presumption against retrospectivity. Recently, in a case concerning a retrospective variation to the Metals Award brought by Ai Group in order to extinguish any potential back-pay liability for an employer, a Full Bench of the Commission summarised the effect of s.146(2) of the Act as follows:⁸

“For an award to operate retrospectively, therefore, the Commission must find “exceptional circumstances”. Such circumstances must be “sufficiently rare and singular” to justify a conclusion that they are “exceptional”.”

5.8 Accordingly, it is open in any individual case for a union party to seek a retrospective variation in safety net wages where the circumstances are *“sufficiently rare and singular”* to justify the conclusion that they are exceptional. However, no blanket rule allowing for retroactivity of safety net wage increases should be imposed under the Principles, regardless of the individual circumstances. This includes those circumstances nominated by the ACTU where there is simply no offending conduct or fault on the part of the employer.

5.9 The ACTU’s proposal also raises the question of what is *“reasonable time”* before the end of the twelve month period? Is it one month, one week, or just one day prior to the end of the period? The potential for confusion and lack of consistency in approach is self-evident.

⁷ *Outline of Industrial Law Industrial Information Digest*, eds Cullen, Peterson, Shaw and Wright, 1976, Law Book Company at p111 citing *Gas Industry Case* (1941) 48 CAR 85 at 137.

⁸ *Re National Engineering Pty Ltd*, Print PR912582, 17 December 2001 per Munro J, Duncan SDP, Cargill C.

6 CONCLUSION

- 6.1 For the reasons set out in this reply and our original submission, Ai Group urges the Commission to adopt Ai Group's proposals in the present proceedings.