

2. VARIATION OF WAGES AND ALLOWANCES

2.1 INTRODUCTION

52. Part 2 outlines the AFPC's 2007 decision, the manner by which the AIRC is to have regard to the AFPC's decision, including the statutory scheme applying when the AIRC considers varying pre-reform and transitional awards.
53. Part 3 deals more specifically with submissions raised by the ACTU and ACCER in reply.

2.1.1 ACCI Position

54. ACCI submits that a proper construction of the *Workplace Relations Act 1996* indicates a strong presumption that the AIRC will follow decisions of the AFPC in a consistent way. This means that the onus rests on a party to rebut this presumption with "substantial reasons" should they ask this Commission to depart from a decision of the AFPC.
55. ACCI does not oppose an equivalent increase to transitional awards of \$10.30 (in classifications up to and including \$700) and \$5.30 (for those classifications above \$700) respectively. ACCI also does not oppose increases in allowances commensurate with those increases.
56. While the AIRC must do so in a consistent way, it must also operate according to other statutory duties, such as ensuring that orders operate prospectively, absent exceptional circumstances in individual cases.
57. ACCI does not agree that this Commission should be invited to effectively declare that the AFPC strayed into errors of fact or law. ACCI does not agree with submissions which invite the AIRC to re-open conclusions, findings, and decisions of the AFPC. This is contrary to what this Commission determined in PR002006 and what the post-*WorkChoices* Act requires.
58. ACCI strongly asserts that a presumption that the AIRC will flow-on decisions of the AFPC not only pertains to quantum, but also to applicable

exemptions/deferrals, conditions and implementation requirements contained in such decisions.

2.2 2007 AFPC DECISION

59. It is common ground that the AIRC must have regard to AFPC “wage-setting decisions”.
60. As evidenced during last year’s AIRC case, there appeared to be some lack of clarity in the publication of the 2006 AFPC decision and reasons. It appears that the AFPC has attempted to clarify and delineate more clearly what are its *decisions* and what are its *reasons* for its decisions in this year’s decision publication.
61. It is clear from the way the Act is structured, that a “wage-setting decision” of the AFPC is the primary consideration for the AIRC when it decides whether to exercise its discretion to grant applications to vary transitional and pre-reform awards.
62. The *AFPC Wage-Setting Decisions and Reasons for Decision, July 2007* appears at **Attachment A** of this submission. Whilst a total of three Wage-Settings Decisions appear at pp.23 to 45, the fourth wage-setting decision related to the SWS was issued subsequent to the main decision. For the sake of completeness, it appears as **Attachment B** of this submission. We say it should be considered in this matter as an indivisible part of the 2007 decision, and (unless there is a reason not to) deemed to be included in all applications for the 2007 wage and allowance increases).
- a. Wage-Setting Decision 2/2007: This decision adjusts a number of federal and state pastoral industry pay scales listed in Schedule A of 2/2007 and includes a new classification provision for “exceptional circumstances employees” (see A1 and A2 of 2/2007). This is defined as:
- An exceptional circumstances employee is an employee who, at a particular point in time:*
- (a) *is engaged by a primary producer who is in receipt of the primary producers’ Exceptional Circumstances Interest Rate Subsidy; and*
- (b) *performs work for this primary producer in an Exceptional Circumstances Declared Area, as declared by the Minister for Agriculture, Fisheries and Forestry.*

- i) The decision also inserts into a number of federal and state pay scales the following provision:

Exceptional circumstances employees - rate of pay

The basic rate of pay that applies to an exceptional circumstances employee is the rate that would have been applicable to that employee under this Australian Pay and Classification Scale on 30 September 2007 if the employee had, at that time, been in their current circumstances of employment.

- b. Wage-Setting Decision 3/2007: This decision is the main wage-setting decision which comes into operation on the first pay period on or after 1 October 2007 and adjusts:
 - i) The Federal Minimum Wage (FMW) under the Act by 27 cents per hour, bringing the new FMW to \$13.74 (see A1 of 3/2007).
 - ii) New special FMW No.1 and 2, relating to employees with a disability (see B1 and B2 of 3/2007).
 - iii) Basic periodic rates of pay (other than those rates specifically adjusted by D of 3/2007) by:
 - (1) Increasing rates of pay up to and including \$18.42 per hour by 27 cents per hour, and
 - (2) Increasing rates of pay more than \$18.42 per hour by 14 cents.
 - iv) Parts D, E and F outline how to adjust rates of various pay scales, including those relating to juniors, apprentices and trainees. D5 and Schedule A of 3/2007 set out the adjusted rates of pay contained in pay scales derived from the National Training Wage Award.
 - v) Part G provides that hourly rates are adjusted to the nearest cent (with 0.5 cents and above being rounded up).
 - vi) Part H reiterates the exemption of certain pay scales from receiving the pay increase until 12 months have elapsed.
- c. Wage-Setting Decision 4/2007: This decision is related to 2/2007 and comes into effect on 1 October 2008. It removes the exemption provisions

introduced by 2/2007 relating to pastoral industry pay scales for those employers who are in receipt of the ECIRS and have employees who work in an Exceptional Circumstances Declared Area.

- d. Wage-Setting Decision 5/2007: This decision increases the minimum weekly payment in the Supported Wage System (SWS) from \$64 to \$66.
63. Clarification of Wage-Setting Decision 1/2007: Wage-Setting Decision 1/2007 (dated 12 February 2007) does not form part of the 2007 AFPC Wages Review, but corrects a pay scale relating to employees with a disability.
64. ACCI considers that it is necessary to identify each decision, as the AIRC must have regard to each “wage-setting decision” of the AFPC and must ensure that any decision of this Commission is not “inconsistent” within the meaning of the Act.
65. ACCI submits that relevant provisions of the Act require the AIRC to consider not only the main quantum awarded, but also any applicable deferrals to certain employers or pay scales, and other material implementation factors the AFPC has chosen to attach to its decision(s).

2.3 QUANTUM

ACCI Submission to AFPC

66. ACCI once again provided substantial submissions to the AFPC for the purposes of the 2007 AFPC Wages Review. To summarise, ACCI supported only a moderate increase if any increase was to be awarded, and implementation not prior to 1 December 2007. ACCI relies on these submissions for the purposes of these matters before the Commission to the extent that they inform the Commission within the confines of its statutory considerations.
67. ACCI’s submission to the 2007 AFPC Wages Review can be viewed at: www.fairpay.gov.au.

What the AFPC awarded

68. To reiterate, the AFPC awarded a headline increase in the following quantum:
- a. 27 cents per hour to rates in pay scales up to and including \$18.42 per hour; and
 - b. 14 cents per hour to rates in pay scales above \$18.42 per hour.

69. Hourly Rates vs Weekly Rates: The quantum awarded by the AFPC is by reference to hourly rates. In PR002006, the Full Bench considered this issue and stated at para [66]:

ACCI submitted that there were a number of technical difficulties in the calculation of increases, including rounding issues, because the APCs under the AFPC's jurisdiction are to be expressed in hourly rates whereas the transitional awards for the most part contain weekly rates. It is difficult to express minimum rates in transitional awards in a way which precisely mirrors the rates resulting from the AFPC decision, if for no other reason than because the AFPC has not published the hourly rates resulting from its decision. In the circumstances, and because of the concerns raised by ACCI, we have rounded the increases in the AFPC decision. In this respect we have used as a base the weekly rates which the AFPC itself has indicated should be applied then rounded those figures to the nearest 10 cents.

70. Whilst ACCI does not press in these proceedings that the above statement should constitute a precedent to be followed by the AIRC in every flow-on case or application emanating from a central Full Bench W&A Review decision, we consider it appropriate that on this occasion the main headline decision (ie. AFPC Wage-setting decision 3/2007) be converted into a weekly rate (based on 38 hours) and then rounded to the nearest 10 cents. We reserve future rights in relation to this matter.
71. What ACCI Proposes: Therefore, based on this approach, the quantum to be flowed-on to transitional awards, which would not inconsistent with the wage-setting decision of the AFPC, is as follows:
- 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.

72. Allowances in pre-reform and transitional awards should be commensurately adjusted in accordance with established practice and the *Furnishing and Glass Industries Allowances* decision (Print M9675).
73. ACCI's approach is consistent with that of the ACTU, but not that proposed by ACCER. ACCI rejects the submissions of ACCER and deal with that organisation's contentions further in Part 3.

2.4 STATUTORY CONTEXT

74. Whilst the Commission in PR002006 outlined its powers to vary pre-reform and transitional awards within the new statutory framework, it's important to reiterate the applicable provisions guiding the Commission's determination in these proceedings.

2.4.1 Pre-Reform Awards

75. With respect to pre-reform federal awards, ss.510, 511 and 553 outline the objects guiding the AIRC's functions and powers, and factors it must take into account when varying pre-reform awards:

510 Objects of Part

The objects of this Part are:

(a) to ensure that minimum safety net entitlements are protected through a system of enforceable awards maintained by the Commission; and

(b) to ensure that awards are rationalised and simplified so they are less complex and are more conducive to the efficient performance of work; and

(c) to ensure that the Commission performs its functions under this Part in a way that:

(i) encourages the making of agreements between employers and employees at the workplace or enterprise level; and

(ii) protects the competitive position of young people in the labour market, promotes youth employment, youth skills and community standards, and assists in reducing youth unemployment.

...

511 Performance of functions by the Commission

(1) The Commission must perform its functions under this Part in a way that furthers the objects of this Act and, in particular, the objects of this Part.

(2) *In performing its functions under this Part, the Commission must have regard to:*

(a) *the desirability of high levels of productivity, low inflation, creation of jobs and high levels of employment; and*

(b) *decisions of the AFPC, and, in particular, the need to ensure that Commission decisions are not inconsistent with AFPC decisions; and*

(c) *the importance of providing minimum safety net entitlements that do not act as a disincentive to bargaining at the workplace level. (emphasis added)*

76. Further, s.553 indicates a range of pre-conditions which must be met in order for the AIRC to grant a variation to pre-reform awards.

553 Variation of awards if essential to maintain minimum safety net entitlements

(1) *An employer, employee or organisation bound by an award may apply to the Commission for an order varying the award on the ground that that the variation is essential to the maintenance of minimum safety net entitlements.*

(2) *If an application is made under subsection (1), the Commission must take such steps as it thinks appropriate to ensure that each employer, employee and organisation bound by the award, and any other interested persons and bodies, are made aware of the application.*

(3) *The Minister may intervene in relation to the application.*

(4) *The Commission may make an order under this subsection varying the award only if the Commission is satisfied that:*

(a) *the variation is essential to the maintenance of minimum safety net entitlements; and*

(b) *all of the following conditions are met:*

(i) *the award as varied would not be inconsistent with decisions of the AFPC;*

(ii) *the award as varied would provide only minimum safety net entitlements for employees bound by the award;*

(iii) *the award as varied would not be inconsistent with the outcomes (if any) of award simplification and award rationalisation;*

(iv) *the making of the variation would not operate as a disincentive to agreement-making at the workplace level;*

(v) *such other requirements prescribed by the regulations (if any) for the purposes of this paragraph have been satisfied. (emphasis added).*

2.4.2 Transitional Awards

77. The objects and considerations the AIRC must have regard to when varying provisions in transitional awards are outlined in clauses 1 and 8 of Schedule 6:

1 Objects of Schedule

...

(2) *The objects of this Schedule are to ensure that, during the transitional period:*

...

(c) *The Commission's function and powers to vary transitional awards are exercised so that wages and other monetary entitlements are not inconsistent with wage-setting decisions of the AFPC. (emphasis added).*

8 Performance of Commission's functions under this Schedule

(1) *The Commission must perform its functions under this Schedule in a way that furthers the objects of this Schedule.*

(2) *In performing its functions under this Schedule, the Commission must ensure that minimum safety net entitlements are maintained for wages and other specified monetary entitlements, having regard to:*

(a) *the desirability of high levels of productivity, low inflation, creation of jobs and high levels of employment; and*

(b) *the principle that the wages and other monetary entitlements of transitional employees should not place them at a disadvantage compared with the entitlements of employees (within the meaning of subsection 5(1)); and*

(c) *the principle that the costs to transitional employers of wages and other monetary entitlements should not place them at a competitive disadvantage in relation to employers (within the meaning of subsection 6(1)).*

(3) *In having regard to the factors referred to in paragraph (2)(a), the Commission must have regard to:*

(a) *wage-setting decisions of the AFPC; and*

(b) *in particular, any statements by the AFPC about the effect of wage increases on productivity, inflation and levels of employment.*

(4) *In performing its functions under this Schedule, the Commission must have regard to:*

(a) *the desirability of its decisions being consistent with wage-setting decisions of the AFPC; and*

(b) *the importance of providing minimum safety net entitlements that act as an incentive to bargaining at the workplace level. (emphasis added).*

78. The power to vary wages and allowances in transitional awards and allowances in pre-reform awards, in particular the theme of consistency between decisions of the AFPC and the AIRC is expressed in a similar way for pre-reform and transitional awards.

2.5 CONSISTENCY

79. It is clear from the Act that the AIRC must exercise its power in a way that is not “inconsistent” with wage-setting decisions of the AFPC. This is an objective repeated for both transitional and pre-reform awards, and was observed by the Commission in last year’s decision.
80. Specifically, cl.8(3)(a) and 4(a) of Schedule 6 expressly mandate the Commission to have regard to “wage-setting decisions” of the AFPC and the desirability of its decisions being “*consistent with wage setting decisions of the AFPC*”.
81. This Commission stated its desire to maintain consistency in a number of decisions subsequent to issuing of PR02006. For example, in [PR975527] the Full Bench stated at para [4]:

So far as practical we think we should maintain consistency with the APCs fixed by the AFPC. In the circumstances the appropriate course is to use a notional weekly increase of \$44.36, rounded for practicality to \$44.40. This will provide a base for the calculation of the increase in wage-related allowances very similar to the increase in the relevant APCs.

82. Again in [PR975850] the Full Bench stated at para [8]:

In our view it is desirable that, as a general rule, the rates and wage-related allowances in awards should be consistent with the relevant APCs set by the AFPC.

83. Therefore, the Commission has maintained that so far as practicable, consistency should be the norm and not the exception. This isn’t to say that some nuances with particular awards may require a departure from a general headline increase, and a Full Bench should be available to deal with such circumstances.

2.5.1 What is Inconsistent?

84. The term “inconsistent” as it appears in the Act and Schedule is not further defined. The *Macquarie dictionary* defines the adjective “inconsistent” as:

1. Lacking in harmony between the different parts or elements; self-contradictory. 2. Lacking agreement, as one thing with another, or two or more things in relation to each other; at variance. 3. Not consistent in principles, conduct, etc. 4. Acting at variance with professed principles ...

85. In the context of the current proceedings and in light of dictionary meanings, the following should be regarded as indicating a degree or level of inconsistency:
- a. Where parties ask this Commission to consider a higher or lower quantum than that awarded by the AFPC.
 - b. Where parties ask this Commission to consider imposing further obligations, conditions or administrative burdens on employers, which is not required on constitutional corporations.

2.5.2 The “Need” for Consistency

86. With respect to pre-reform awards and the Commission’s power to vary, the objects at s.511(2)(b) of the Act clearly indicate that there is a “need” to ensure Commission decisions are not inconsistent with AFPC decisions.
87. The *Macquarie dictionary* defines the noun “need” as:
- 1. A case or instance in which some necessity or want exists; a requirement...2. Urgent want, as of something requisite...3. Necessity arising from the circumstances of the case ...4. A situation or time of difficulty; exigency...5. A condition marked by the lack of something requisite ...*
88. The use of the noun “need” in s.511(2)(b) indicates some necessity or want on the AIRC to give due consideration to awarding consistent outcomes.
89. Similarly, with regard to transitional awards, the objects contained in cl.1(2)(c) of Schedule 6, are to “*ensure that during the transitional period ... the Commission’s functions and powers to vary transitional awards are exercised so that wages and other monetary entitlements are not inconsistent with wage-setting decisions of the AFPC ...*” (*emphasis added*).
90. The use of the word “*ensure*” also carries with it a sense of duty and obligation.

2.6 PRESUMPTION IS TO GIVE EFFECT

91. When considered overall, the legislation creates a presumption that the AIRC will, when varying transitional and pre-reform awards, do and so in a manner which is consistent with decisions of the AFPC.

92. This effectively means that the quantum plus any exemptions or deferrals which form part of any AFPC wage-setting decision should generally be followed. Even if a party with significant representative standing in these proceedings contends that the AFPC decision is somehow tainted with error of law or fact, the Act still mandates that this Commission consider that its decisions to be as consistent as possible to any decision of the AFPC.

2.6.1 Totality of Factors

93. When looked at in totality, there is a strong presumption that any decision of the AIRC should be consistent in both quantum and effect.
94. The four decisions of the 2007 AFPC Wages Review as outlined earlier in these submissions are what the AIRC must have regard to when exercising its power to vary both transitional and pre-reform awards (cl.8(3)(a) and (4) of Schedule 6, and s.511(2)(b)).
95. In PR002006, the Full Bench commented, at para [16]:

The second difficulty is that the NFF asks us to disregard the AFPC decision without providing any analysis to indicate why we should reject it as wrong. We would not refuse to follow the decision in relation to minimum wages without substantial reasons for doing so.(emphasis added).

96. Therefore, any party seeking to vary awards in a manner not consistent with a wage-setting decision of the AFPC (ie. asks for a higher or seeks to not apply an exemption) must rebut this presumption with substantial and cogent force.
97. No substantial reasons have been articulated by any party which would rebut this presumption.

2.7 OTHER CONSIDERATIONS

98. In addition to attempting to maintain consistency between AFPC and AIRC decisions, this Commission must also consider the following factors:
- a. Economic considerations and competitiveness between constitutional corporations and transitional employers (s.510(2)(a), cl.8(2)(a)-(c), and (3)(b) of Schedule 6).

- b. The importance of providing minimum safety net entitlements that act as an incentive to bargaining (s.510(2)(c) and cl.8(4)(b)).
99. ACCI's submission to the 2007 AFPC Wages Review addresses these considerations in the context of s.23 of the Act, and to the extent that they are relevant to the Commission's considerations in these proceedings (which should ultimately be minimal), ACCI relies on them.
100. The totality of the evidence before this Commission supports an outcome for the awards presently before it, which gives effect to both an increase to award rates of pay equivalent to that awarded by the AFPC, while granting a deferral of 12 months for a limited number of federal pastoral awards in the same manner as that awarded by the AFPC and afforded to constitutional corporations.