

2. DATE OF EFFECT

2.1 INTRODUCTION – ISSUES RAISED

- 2.1 At the preliminary hearing for these proceedings on 20 November 2006, Mr Watts for the ACTU seemed to sum up the ACTU's contention for a common operative date which apparently turns on the corporate status of employers (at PN51):

The concern that we have is one of operative date, and that's where these directions flow from. The Fair Pay - the awards that were previously contained - sorry, the rates of pay that were previously contained in pre reform awards that deal with constitutional corporations will be varied from 1 December. That raises some real logistical issues for both employers and employees if the Commission is to have a separate operative date. In particular it will require a final determination for all employers as to whether they are constitutional corporations or not. That raises real issues we suspect, real issues for employers and employees. It's largely a matter for enforcement, but it certainly is a matter that will raise itself.

- 2.2 The ACTU in its submission again reiterates this point in its submissions, stating at para 87:

In the current environment there is benefit from simplifying wherever possible. A common operative date, as well as common quantum of increase, is desirable, particularly for employers that are in the "twilight zone" between a trading corporation and a non-trading corporation.

- 2.3 The status of some employers being constitutional corporations or not is a fundamental reality employers have been dealing with before and since 27 March 2006. This does not support the notion that a common operative date should apply because of apparent inattention on some employers to determine whether they are covered by *WorkChoices*.
- 2.4 There is nothing in the legislation which suggests that the ACTU's point about legal status is a guiding criterion for the Commission in exercising its discretion to grant a common operative date of operation. In fact, to avoid confusion and uncertainty, employers should be afforded a sufficient opportunity to have their matters dealt with on an award-per-award basis.
- 2.5 Similarly, in order to avoid further complexity, all employers with an interest in an award should be given draft orders to know the

methodology of calculating adjustments to specific provisions. This would avoid the unnecessary burden everyone's resources in going back to the Commission to seek correction orders.

- 2.6 The ACTU itself acknowledged that there are difficulties in varying awards, notwithstanding the seeking of a common operative date (at PN53) :

The intent is simply to vary them in a manner which has previously been adopted by the Commission where there has been a flat dollar increase where - recognising however that there are complications for a number of awards. But I'm aware that there are a number of awards for instance in the hospitality industry where the application has caused a re-write, given the issues of allowability has required a re-write ... (emphasis added).

- 2.7 We similarly agree with those sentiments that there are complications for a number of awards.

2.2 ACCI POSITION – PROSPECTIVE EFFECT

- 2.8 As set out in Part 1, ACCI considers that the date of the effect for each award be a function of the variation of that award. The date of effect should be a date on or after the date each award is varied¹, allowing a proper opportunity for the settlement of orders.

- 2.9 This would be the prospective application of increases in this matter. Increased wages and allowance would come into effect prospectively to the variation of each award, and not from any standardised date

- 2.10 As outlined in Part 1:

- a. The primary motivations for employers in this matter is that award wages and allowances are varied accurately, that employer representatives can properly and accurately advise their members.
- b. This will not result in a significant delay in the application of the AFPC increases to award rates and allowances. There is a matter of days between the course the ACTU proposes, and the superior course

¹ Recalling that generally employers do not support variations to awards coming into effect on the date of variation, and support a period of notice between the date of decision and date of effect. This outcome was delivered by the AFPC in 2006, with its decision issued on 26 October and its increase coming into effect on 1 December.

proposed by ACCI. The ACCI approach would better meet the duties of the Commission and better accord with the *Workplace Relations Act 1996*.

2.11 Section 4 of this outline addresses various practical considerations for the variation of awards which further favour the course proposed by ACCI.

2.3 THERE IS NO DELAY IN THIS MATTER

2.12 The ACTU claims the following at paragraph 61:

61. The original applications were filed with the Commission and served on employers in November 2005. It is these original applications that the Commission should have regard to in assessing the period of delay.

2.13 There are number of points to be made in reply to that submission.

2.14 The applications lodged in 2005 are not the same applications which were filed subsequent to the Spring 2006 AFPC decision, for the following reasons:

- a. The 2005 applications sought completely different relief (a 4% increase) to that now sought (the \$27 and \$22 under the AFPC decision).
- b. Did not, to ACCI's recollection, detail the variations sought to a number of allowances.
- c. Were advanced under materially different provisions under materially different legislation.

2.15 There is nothing material in the expectations of union applicants for a hearing of some other matters prior to the commencement of the *WorkChoices* amendments². Indeed, there is something somewhat disingenuous being claimed here. It was made very clear from May 2005 that the AFPC would assume its role under *WorkChoices* and that a 2006 AIRC wage case was not intended to proceed. Unions had no legitimate

² ACTU Submission, *2006 Wages and Allowances Review*, ¶64, p.29

expectations at the time their 2005 applications were made that they would proceed to be heard as a 2006 wage case.

2.16 The live applications in this matter and the overwhelming majority of the applications before this bench have been lodged in the wake of the 26 October 2006 AFPC decision and seek to give effect to that decision.

2.17 There is no delay, this is not a relevant consideration, and there is no legitimate basis to conclude that this matter in any way commenced prior to the issuing of the 2006 AFPC decision.

2.3.1 Original Applications

2.18 As stated in Part 3 of this submission, the status of the original applications is somewhat uncertain. The ACTU suggests that as employers have known about the 20 applications lodged in November 2005 which were to form a second 2005 Safety Net Review, that this somehow relates to the issue of whether a retrospective date should be given. Additionally, they advance their submission in full knowledge that there was not a decision of the AFPC.

2.19 The contention by the ACTU that *“the applicants have stood ready since November 2005 and have not sat on their hands”*³ does not assist their case and should hold sufficient weight to persuade the Commission that all applications in this matter should be given a common operative date of 1 December 2006.

2.20 All that can be said in this regard, is that employers have only known about 20 applications from November 2005 which are not the same as the re-submitted 20 applications.

2.4 RETROSPECTIVITY

2.4.1 Introduction

2.21 This matter is being heard on 4 and 5 December 2006 and it is unlikely a decision could issue prior to 6 December 2006. The ACTU is

³ ACTU Submission, p.34

seeking an operative date of 1 December 2006, and is therefore seeking a retrospective wage and allowance increase.

2.22 This demands consideration of matters, including:

- a. Scope for retrospective increases under the *Workplace Relations Act 1996*.
- b. How this Commission has, and should consider scope for such retrospective increases.
- c. Balancing retrospectivity against other considerations in this matter.

2.4.2 Retrospectivity Provisions in Act

2.23 ACCI submits that it is necessary to clearly define the operation of the statutory provisions in the Act which the Commission must consider in these proceedings on the issue of granting any retrospective order. We contend that the proper approach outline here is that which should be adopted by the Commission, as opposed to those submissions of the ACTU.

2.24 We submit that the ACTU has fundamentally strayed into error when applying the application of the statutory provisions of the former and current Act.

2.25 Section 572(1) and (2) of Pt 10 and clause 66, Pt 6 of Schedule 6 of the Act came into operation on 27 March 2006.

2.26 Sections 571 and 572 provide:

571 Date of awards

The date of an award or an award-related order is the day on which the award or order was signed under section 567.

572 Commencement of awards

(1) An award or an award-related order is to be expressed to come into force on a specified day.

(2) Unless the Commission is satisfied that there are exceptional circumstances, the day specified in an award or an award-related order for the purposes of subsection (1) must not be earlier than the date of the award or order.

2.27 Clause 65 and 66 provide:

65 Date of orders

The date of an order made by the Commission for the purposes of this Schedule is the day when the order was signed under subclause 61(1).

66 Date of effect of orders

(1) An order made by the Commission for the purposes of this Schedule must be expressed to come into force on a specified day.

(2) Unless the Commission is satisfied that there are exceptional circumstances, the day specified in the order must not be earlier than the date of the order.

2.28 Section 572 and clause 66 largely replicates repealed ss. 145 and 146 of the pre-amended Workplace Relations Act 1996.

2.29 Relevantly, s. 146 provided:

Section 146 Commencement of Awards

146(1) An award shall be expressed to come into force on a specified day.

146(2) Unless the Commission is satisfied that there are exceptional circumstances, the day specified in an award for the purposes of subsection (1) shall not be earlier than the date of the award.

2.30 The Full Bench has considered the nature of repealed s.146 and has made some general observations:

- a. Section 146(2) confers discretion on the Commission to make an award which comes into force earlier than the date of the award.⁴
- b. The question in every case is whether there are exceptional circumstances⁵.
- c. The Commission does not have the power to make an award which operates retrospectively if it is not so satisfied.⁶

⁴ PR922761, Re Shop, Distributive and Allied Employees Association (Giudice J, McCarthy DP, Gay C), 24 September 2002, at [7].

⁵ PR922761, Re Shop, Distributive and Allied Employees Association (Giudice J, McCarthy DP, Gay C), 24 September 2002, at [19].

⁶ Ibid, at [7].

2.31 The ACTU has quoted a Full Bench decision to make the point that delays between making an application and the hearing of a matter, may justify retrospectivity, stating it its submission:

65. Delays between the making of applications and the determination of the matter have been held to warrant a retrospective date of effect. In Re Victorian Shops Interim Award 2000 (PR922761) the Full Bench noted there will be delays between the making of an application and the hearing of the matter. The Commission noted “[21] ... In some cases such delays may justify a date of operation earlier than the date of the hearing.”⁷

2.32 However, the quote needs to be read in the context of the full paragraph:

[21] We have concluded that the operative date should be the first pay period on or after 6 June 2002, the date on which the application was heard. While we appreciate that 6 June is four days after the anniversary of the implementation of the previous safety net adjustment in the award, the Statement of Principles does not require that a Safety Net increase be granted every 12 months, only that there be at least 12 months between increases. We do not think that four days should be given a great deal of weight, particularly when account is taken of the fact that the Safety Net Review Decision was announced one week later in 2002 than it was in 2001. We do not attach much significance to the delay in listing the application. It is to be expected that there will be delays between the filing of applications and the hearing. In some cases such delays may justify a date of operation earlier than the date of hearing. When all things are considered this is not the case here. (emphasis added).⁸

2.33 The Full Bench of this Commission has also commented that notwithstanding the “*legislated limitation on retrospective orders in s.146(2) of the Act [which] does not apply to Minimum wage orders made by the Commission pursuant to s.501*”, there is a general presumption against retrospectivity, stating:⁹

[40] As a Minimum wage order is not an award for the purpose of s.143 the limitation on retrospectivity in s.146(2) does not apply to general orders made pursuant to s.501.

[41] Despite the inapplicability of s.146 we are persuaded, by the decisions relied on by Ms Murdock, that even if the Commission is not restricted by s.146 there is a general presumption against retrospectivity. The Commission

⁷ ACTU Submission, Wages and Allowances Review 2006, p.29.

⁸ PR922761, Re Shop, Distributive and Allied Employees Association (Giudice J, McCarthy DP, Gay C), 24 September 2002.

⁹ PR907793, Re ANF and others, applications for s.501 minimum wage orders (Ross VP, Watson SDP, Lewin C), 16 August 2001, at para [38].

*has discretion to grant a retrospective operative date where there are exceptional or unusual circumstances. The Commission has awarded retrospectivity where it is in the interests of justice, equity and fairness to do so. A number of the decisions referred to supported these general propositions*¹⁰ (emphasis added).

2.34 The Full Bench has recently commented that the Statement of Principles cannot alter the effect of s.146 which is the source of the Commission's power to make retrospective awards.¹¹ The Full Bench in the 2002 Safety Net Review commented at para [184]:

*We note that whether an application is dealt with by a single member or a Full Bench there is no power to make an award which comes into force on a date earlier than the date of the award unless the Commission is satisfied that there are exceptional circumstances.*¹²

2.35 Principle 10 currently provides:

10. MAKING AND VARYING AN AWARD ABOVE OR BELOW THE SAFETY NET

Any application to make or vary an award for wages or conditions above or below the safety net or for a date of operation of a safety net adjustment earlier than the date of the award may be dealt with by:

(a) a Full Bench; or

(b) a single member, provided the President has had an opportunity to consider whether the application should be dealt with by a Full Bench and has decided not to refer the application to a Full Bench.

2.36 Therefore, s.146 will always be a relevant condition precedent for the Commission exercising its discretion to award retrospective dates of effect. ACCI would submit that this should also be the case with the new provisions.

2.37 Notwithstanding submissions made to the contrary, the Commission has previously rejected cases where delays were incurred between the filing and the hearing of applications to vary awards to give effect to safety

¹⁰ Ibid.

¹¹ PR922761, Re Shop, Distributive and Allied Employees Association (Giudice J, McCarthy DP, Gay C), 24 September 2002, at para [9]; Safety Net Review 2002 Decision, para [184].

¹² PR002002, Safety Net Review 2002 Decision, 9 May 2002.

net adjustments, and has found that they do not constitute exceptional circumstances.¹³

2.38 The ACTU's reliance on a past decision of the Commission does not assist the Commission in determining the current applications before it.

2.39 The decision of Riordan DP, in *Re AMIEU and others* (Print J0916; [1989] 1076 IRCommA) considered the application to vary two awards in regard to TCR provision. Two important points can be said about this decision:

- a. The cases upon which Riordan DP relied upon were all pre-1988 decisions were developed in the absence of a specific statutory "*exceptional circumstances*" provision.¹⁴ Therefore, retrospectivity was and could only develop on notions of fairness and equity.
- b. There is nothing analogous to the facts and circumstances of the above case which may assist this Commission in determining these applications. Nor was there anything analogous in the cases quoted by Riordan DP in that case.

2.40 Notwithstanding, Riordan DP makes the important point that: "*It is clear enough that industrial tribunals have generally taken the view that the matter of retrospective operation of awards is a matter to be decided in the circumstances of the particular case*".¹⁵

2.41 ACCI reiterates this point and contends that there have not been any other similar circumstances which the Commission can draw upon which would easily persuade it to exercise its discretion.

2.42 There have not been any other cases where such mass award variations have been imposed upon the Commission and on respondents as has happened in the present proceedings. It should be a matter to be determined in the circumstances of each particular case.

¹³ See for example PR920036, Re ALHMWU, s.113 applications for variations, (Lawson C), 12 July 2002, para [7].

¹⁴ It appears that the *Conciliation and Arbitration Act 1904* did not contain such an express provision.

¹⁵ Re AMIEU and others (Print J0916; [1989] 1076 IRCommA), Riordan DP.

2.4.3 Onus

- 2.43 Within the required statutory and precedential framework, the ACTU as the applicant seeking retrospectivity bears the onus to demonstrate that the ordinary presumptions of this Commission, and of the legal system more generally, should be disturbed and retrospectivity granted.
- 2.44 In this instance, this includes but is not limited to demonstrating that the circumstances are exceptional under the precepts of section 572 and clause 65.
- 2.45 The ACTU has failed (as it must) to provide the Commission with sufficient basis to conclude in its favour in this regard. It cannot and has not proved exceptionality such that retrospectivity to 1 December 2006 could be countenanced.
- 2.46 Accordingly, the Commission should not exercise a “*discretion conditioned by the requirement that exceptional circumstances exist*”¹⁶ to vary allowances in Part 10 of the Act, or to wages and allowances under Schedule 6 in the manner sought, as the ACTU has clearly not discharged the evidentiary onus.
- 2.47 ACCI would also submit that in all circumstances it is not in the interests of justice, equity and fairness to grant a general retrospective date of effect for all applications sought by union applicants.

2.4.4 New ≠ Exceptional

- 2.48 This matter is by definition the first time this Commission has considered the flow on of the AFPC decision to its residual award jurisdiction. It is therefore “new” or “novel” – this is not contested.
- 2.49 This does not however make the matter “exceptional” as would be required to discharge s.572(2). The Macquarie Dictionary defines exceptional as:

¹⁶ PR922761, Re SDEA, s. 45 appeal against Ives SDP decision (Giudice J, McCarthy DP, Gay C), 24 September 2002, at 12.

ˈɒk'sɛpʃənəl/ (say uhk'sepshuhnuhl), /ɛk-/ (say ek-) *adjective*

1. forming an exception or unusual instance; unusual; extraordinary.
2. extraordinarily good, as of a performance or product.
3. extraordinarily skilled, talented, or clever.

--**exceptionally**, *adverb*

--**exceptionalness**, *noun*

2.50 Thus, for the ACTU to make out its case, it would need to (in addition to other considerations) show that its applications form an exception, that they are an unusual instance or that they are extraordinary.

2.51 The ACTU has not shown this and could not show this.

2.4.5 Delay ≠ Exceptional

2.52 There is no delay in hearing this matter. The Full Bench has convened expeditiously in the wake of the AFPC decision, and in particular very expeditiously in the wake of ACTU affiliates lodging applications to vary awards. Indeed, the bench has listed this matter so rapidly that not all applications and draft orders have been finalised.

2.53 However, beyond this, even the ACTU's perception of delays in this matter do not of themselves render its applications exceptional. This jurisdiction is well able and familiar with delayed proceedings, and to dealing with them when lodged.

2.4.6 Distinguishing the Riordan Precedent

2.54 At paragraph 79, the ACTU states that

84. As noted by Deputy President Riordan in the extract at paragraph 79 above, the fact that transitional employees would be left lagging behind the vast majority of safety net dependent workers in Australia is a relevant circumstance.

2.55 In relation to this 17 year old decision, and in addition to what we have already said above, we would point out the following:

- a. This appears to have been a case in which there redundancies had occurred and retrospectivity was considered to provide the employees with some payment (the AIRC having abandoned the case by case approach to severance pay in its 1984 TCR decision). There was a clear

standard and this was a question of whether it be applied to particular facts.

- b. The exact formulation of the TCR test case provisions was standardised across awards, and had been clear since December 1984. Respondents in these proceedings would have known exactly the variation to the awards they were responding to for their industry. This is a materially different circumstance to that we are currently facing in which exact relief in regard to particular awards .

2.56 ACCI would argue that a precondition to awarding retrospectivity is an exactitude in the relief sought and all parties having clear access to the form of relief sought – that is not the case in these circumstances.

2.4.7 Did the ACTU create the circumstances it relies on?

2.57 The ACTU cannot create a situation where they force through 400 plus November 2006, applications on the back of a known 20 adjourned 2005 application and turn around and say *“the exceptional circumstances in which these applications have been dealt provides overwhelming grounds for the Commission to make the orders with retrospective application”*.¹⁷

2.58 This only highlights that the usual approach to varying awards through the establishment of a test case has not been followed, and that this course should be applied.

2.5 EMPLOYERS HAVE NOT BEEN FOREWARNED

2.59 From paragraph 69 of its outline, the ACTU seeks to make something material of its belief that *“in the current case employers knew or ought to have known that wage increases not dissimilar to those awarded by the FPC would be awarded by the AIRC, and will therefore not be unduly disadvantaged by a retrospective operative date”*.

2.60 Specifically, the unions seek to argue that employers have been forewarned of the AFPC increase and that the application of it to award wages and allowances can be backdated on this basis.

¹⁷ ACTU Submission, p.35

2.61 Employers utterly reject this contention and the assumptions behind it. It offers the Commission nothing in support of the course the ACTU would have it adopt.

Its not quantum at issue – its detailed application

2.62 The ACTU states that “*it would be disingenuous for employers to argue that they have had insufficient notice of the quantum of increase likely to be payable*”. This is not what we argue – we can read the figures \$27.36 and \$22.04 in the AFPC decision as well as anyone else.

2.63 At issue is exactly how this applied to the detailed and often complex wages and allowances provisions of particular awards. At issue is ensuring that the application of increases to awards is accurate and can be reliably implemented by employers. What employers need is not notice of the general or headline increases, but notice of the particular increases in particular classification rates and particular allowances. That is what we have to comply with, and that is what we have to get right.

We can't calculate the increases

2.64 The ACTU is wrong to assume that “*reasonable employers could be expected to have anticipated the Commission awarding increases, including the operative date, comparable to those awarded by the AFPC*”.

2.65 This anticipation cannot be a detailed or legally reliable one in regard to particular minimum wages and allowances. Employers rely on properly made and issued orders varying their obligations accurately and in detail, to alter their payments.

2.66 A reasonable employer, indeed a best practice employer putting quite some considerable resources into compliance, acts according to the law, and to formal notification of increased obligations. They do not act until formally notified and follow that formal notification.

Don't attempt to shift onus onto employers

2.67 There is also an attempt at onus shifting here. The ACTU and its affiliates are applicants in this matter – they are seeking to prosecute an increase in relief against a respondent. The onus cannot legitimately be shifted to that respondent, even where there is any purported predictability at the general increase level.

Could always have done this

2.68 If the ACTU's reasoning held on this, why wouldn't a general order and common operative date have applied to the flowing on of preceding years' safety net decisions. We knew for example from early May or June each year what the quantum was – why then would the Commission not have varied all awards from a common operative date prospective to that date.

2.69 The answer is of course that:

- a. Awards of this Commission need to be varied case by case to ensure they are varied properly.
- b. Award wage and (particularly) allowance provisions are not simple and straightforward in all or even most cases, such that applying increases is a no brainer.
- c. Award wage and allowance provisions are so complex that year in, and year out, mistakes are made draft orders to give effect to generic increases. The mistakes that are made, identified and corrected each year by members of this commission, respondents and even applicants indicate that it can't be assumed that varying rates is a simple matter.

2.5.1 Employer Association Advisories

2.70 From paragraph 72 to 74 the ACTU outlines what it believes to be advice from some employer associations to their members which forewarned them of the pending increase in minimum wages.

2.71 Properly analysed, the NFF and AIG passages cited¹⁸ show nothing of the kind.

- a. The NFF passage is descriptive of the current process and that of the AFPC. No reasonable reader could reliably conclude from this essentially open ended material that a particular outcome would certainly flow from this matter. Indeed, it appears to ACCI that the NFF does no more than indicate there will be a case on this – which inherently means there is something to be determined.

¹⁸ ACTU Submission, *2006 Wages and Allowances Review*, p.31

b. The AIRC extract is equally clear. It says that the “*the AIRC is expected to schedule proceedings shortly to determine whether to flow on the AFPC's decision to these transitional employers*”. Proceedings to determine...no reasonable reader could interpret this as an outcome being clear – it inherently dictates that an outcome is to be determined.

2.72 The two employer association passages cited do not publicise “the likelihood of upcoming award increases”¹⁹, nor could they be said to forewarn employers of the pending increases as claimed by the ACTU. This is not a valid conclusion.

2.73 And, the ACTU makes clear at paragraph 75, that this is about as “clear” as it gets. Well – in that case this ACTU contention does not stand.

2.5.2 ACTU Contradictions

2.74 It is also interesting that the ACTU runs such a line in light of the following elsewhere in its submission:

90. The exceptional circumstances in which these applications have been dealt provides overwhelming grounds for the Commission to make the orders with retrospective application. The Commission should be satisfied that the circumstances are indeed unusual, and that the Commission should balance the detriment to employees against the unexpected burden on employers.

2.75 So now, the burden of employers is “unexpected”. This doesn’t accord with the ACTU’s argument that employers knew this rise was coming.

2.6 EMPLOYERS HAVE NOT “BENEFITED FROM DELAY”

2.76 The ACTU claims that employers have benefited from “*over six months delay in adjustments to the safety net*”²⁰. The ACTU claims that “*the value of this benefit should be considered against any inconvenience associated with a short period of back pay*”.

2.77 Once again, this not a matter of at large equity as the ACTU would perceive it. Part 10 and Schedule 6 of the Act tell us how this matter is to

¹⁹ ACTU Submission, *2006 Wages and Allowances Review*, p.31

²⁰ ACTU Submission, *2006 Wages and Allowances Review*, ¶80, p.33

be determined, and any party's self generated perception of relative benefit and detriment based on timing does not fit into this.

- 2.78 The ACTU has failed to show how its proposed reconciliation and claw back of supposed employer benefit accords with the Commission's considerations under the statute.
- 2.79 The course proposed by the ACTU would also be double counting. It is clear from the AFPC decision and associated comments in the wake of the decision that the AFPC directly considered a "delay" in wage increases from mid 2006 to 1 December 2006, and directly factored its increase upwards on this basis.

Weighting In Determining Exceptionality

- 2.80 The ACTU is also wrong when it claims:

82. Delaying the wage increase will simply have the effect of further delaying transitional award-reliant workers receiving pay increases, and award - reliant workers receiving adjustments to allowances. While disadvantage to employees may not, or itself, constitute an exceptional circumstance, it is a factor to be weighed in the exercise of discretion.

- 2.81 By definition, a circumstance is either exceptional or it is not. A weighting of other considerations cannot change its character under the test the ACTU proposes the Commission follows.

2.7 HARSHIP

- 2.82 The ACTU claims that "*further days will cause hardship to transitional employees*". It does not however make this position out – there is no evidence provided for this proposition bar ACTU assumptions.
- 2.83 There is no basis to simply assume hardship as claimed by the ACTU. This would not be legitimate.
- 2.84 It is also relevant to note that such the concept of "hardship" is not included in the amended *Workplace Relations Act 1996*. There are a set of prescribed considerations in Schedule 6 and Part 10 relevant to this matter for varying awards – and the ACTU has not fitted this purported contention within them.

- 2.85 At issue in this matter is but a few days between the date of application sought by the ACTU and a proper date of effect consistent with the established practices of this Commission.
- 2.86 There is also clearly a difference between transitional and pre-reform awards in this regard. A period of perhaps a week between one date of passing on a 30 cent increase in a meal allowance and another could not constitute hardship.

2.8 AVOIDING COMPLEXITY

- 2.87 The ACTU claims that a common operative date will “avoid complexity”. That is, they appear to claim that a common operative date is needed between corporations covered by the AFPC decision for wages, and wages and allowances in this Commission’s jurisdiction.
- 2.88 Even to the extent there were any validity in the ACTU approach and assumptions on this issue, any complexity avoided in operative dates would be replaced and exceeded in spades by problems caused by rushed orders, erroneous orders, retrospective application, backpay and the circulation of advice to employers only after obligations have increased.
- 2.89 Far greater complexity and problems will stem from the course proposed by the ACTU. Real problems, additional costs, and errors of compliance flow from retrospective application, from improperly settled orders, and from advice only after new obligations have commenced. A particular source of problems and costs any requirement for backpay – and that is what the ACTU is seeking in this matter.
- 2.90 ACCI utterly disputes that there is any “Twilight Zone”²¹ between trading corporations and non-trading corporations. The ACCI membership network, along with public advisory services are engaged on a daily basis in advising employers, which regularly includes advising employers on their corporation status and coverage by *WorkChoices*, transitional arrangements, or state systems.
- 2.91 ACCI members are now quite familiar with advising (and receiving advice) which differs based on the trading corporation status of the

²¹ ACTU Submission, *2006 Wages and Allowances Review*, ¶187, p.34

employer. Differential compliance advice has now been provided for some months, and employers and their advisors are quite familiar with it. As stated in the programming of this matter:

PN137

JUSTICE GIUDICE: Mr Barklamb, could I just ask you about one thing. Mr Watts referred to the potential for an issue to arise as to whether particular entities were constitutional entities, if there are different operative dates as between - well, I suppose it's really a question of whether entities are covered by a pre reform award or a transitional award. And he advanced that as one reason for trying to have the same operative date in relation to the Fair Pay Commission decision and the transitional awards. Is that an issue that you considered or want to make any submission about? It's not necessary you do so. It can obviously be dealt with as part of any argument about retrospectivity, but it is an issue which has been raised in connection with the directions the ACTU are seeking.

PN138

MR BARKLAMB: It is, your Honour, and we would like an opportunity to address it further in merit. Even distinct from a retrospectivity point is a mere merit point in regard to congruent date. I think one thing we certainly can say is that the period since March and even before has enlivened the Australian employer community to the question as to whether they are constitutional corporations or not. We are increasingly familiar with having to determine that status and examine our rights, obligations and capacity based on that, and I don't think it would be a difficult matter for our members to advise their members in cognisance of two different situations.

PN139

JUSTICE GIUDICE: You don't think it's a particularly cogent consideration?

PN140

MR BARKLAMB: We don't, your Honour. Thank you.

2.92 ACCI maintains this position. Australia's employer representatives are quite familiar and comfortable with advising employers based on their constitutional corporation status and have been for some time. This is not a material consideration in this matter, and cannot be relied upon as attempted by the ACTU.

2.8.1 Uniformity / Consistency– The Public Interest?

2.93 At paragraph 39, the ACTU claims that it is in the public interest that there are common rates of pay for persons undertaking the same work. There are a number of things which should be said in relation to this:

- a. This is a throw away argument – there is no development of the purported public interest cited by the ACTU.
- b. If this argument were valid, why were there ever enterprise awards providing higher rates of pay than those in industry awards?
- c. If this argument were valid, there would never have been any differences between state and federal award rates?

2.94 This is not a relevant consideration in favour of the ACTU proposal to deal with applications to vary wages and allowances. In the current context, it is the ACTU proposal which would result in uncertainty and confusion and the ACCI approach which offers the most orderly and certain approach.

2.9 STATE DECISIONS ON “INDUSTRIAL EQUITY”

2.95 From paragraph 85, the ACTU states the following²²:

A common operative date is essential to ensuring industrial equity

85. In a decision of the South Australian IRC an Appeal Bench considered that for retrospectivity to be awarded there need to be one of three circumstances: a delay caused by the action of employer; a delay caused by the workflow of the tribunal; or, that:

“the matter before the tribunal be of general application (stemming for example from a National Wage Case decision of a Commonwealth Tribunal), that, as a matter of industrial equity, it is desired to give effect to the general adjustment as nearly as may be as of a common date.”

86. The Bench continued:

This is particularly so where it is clearly understood by the commercial community at large that a particular type of decision emanating from the Commonwealth tribunal is inevitably given

²² ACTU Submission, 2006 Wages and Allowances Review, pp.34-35

effect to throughout the general spectrum of State awards” (per Bleby J., President, Olsson, J., Deputy President, and Commissioner Marron 20 September 1972, 1972 AIRL 523).

2.96 The second tranche of this decision quoted (ACTU paragraph 86) must fail in regard to this matter:

- a. The SA decision is predicated on decades of flow on from national decisions to those of state tribunals. It is a product of established practice and transactions between long established tribunals (i.e. this tribunal and its state counterparts under the decades conciliation and arbitration framework). The decision appears to be a product of decades of practice between jurisdictions.
- b. This is the first time this Commission has considered the flow on of an AFPC decision, and is the first time the pertinent parts of Part 10 and Schedule 6 of the Act have been interpreted/applied. It is simply impossible for there to be any inevitability or predictability in this matter that the SAIRC decision cited is predicated upon. Such a conclusion would be nonsensical where there is the first time interpretation of circumstances and provisions.
- c. Up until 26 October 2006, there was a very real possibility that the ACTU would argue not to give effect to the decision of the AFPC, and would seek to use this jurisdiction to seek a higher increase than that awarded by the AFPC. It could in no way be clearly understood in the commercial community that the AFPC decision would “inevitably” be given effect to in these proceedings.

2.97 In addition:

- a. This precedent is almost 35 years old. The assumptions and approaches it stands for are the product of a different award system, different economy, and a very different role for awards. Any notion of industrial equity would have meant something very different in this context than it might now (were it a meaningful concept and able to be applied under the Act, which it is not).
- b. The assumptions regarding passing on of increases were a product of an era with very strong wages centralisation and uniformity. Award rates were not a safety net, but were paid rates instruments. In this

context such an outcome may be explicable. It stands as no authority in a very different system, with a very different role for awards.

- c. Various states have general order powers to achieve standard dates of application – it is not clear to ACCI that this was not being asked of the SA Commission at this time. There is no general order power in the amended *Workplace Relations Act 1996*.
- d. This decision predates what ACCI understands to be a major re-examination of precisely this issue at the state level. ACCI understands wages freezes and pauses in the early 1980s focussed state government attention on the scope for their state tribunals to apply or depart from decisions (or indeed non-decisions) of this tribunal²³. In some states at least, state legislation was amended to tie state tribunals more closely to decisions of this tribunal.

The States Manage This Exactly As We Propose

2.98 Importantly, the logic of the passage cited by the ACTU does not hold. If these considerations were valid and paramount as claimed, then it is logical that state tribunals would have on each and every occasion it was available to them have awarded their flow on increases following national wage and safety net decisions:

- a. From a single operative date, by general order.
- b. From the same operative date as the date of the national decision.

2.99 This did not happen. In many if not most years:

- a. State wage case increases were implemented award by award, by a prospective date of variation - i.e. the same approach this Commission applies.
- b. Dates of effect not only differed between state awards in the wake of a state wage decision, but also between state and federal awards in the one industry. For example, the date of effect for a federal TCR or manufacturing award may have been weeks earlier than it would have been for the mirror/parent federal award.

²³ The then Conciliation and Arbitration Commission.

c. Whilst some jurisdictions in some years have used general orders and common operative dates:

i) This has not been the case for all jurisdictions.

ii) This has not consistently been the approach, even within jurisdictions.

2.100 This is demonstrated by examining the flow on of the 2005 AIRC Safety Net Decision at the state level:

a. NSW Awards²⁴: The Commission ordered a \$17 increase to weekly rates of pay and allowances to be adjusted by 3%. However, this was not be general order, but upon individual applications to the NSW IRC.

b. South Australian Awards²⁵: The 2005 increase was operative by general order, but the operative date was “*the increases granted under principle 10.1 will be operative in each Award from the first full pay period commencing on or after the anniversary of the operative date given in each Award when varied in accordance with principle 10 of the State Wage Case June 2004*”. This means that the date of effect differed based on the legacy of previous application based increases. This is not a general order, common operative date approach.

c. Tasmanian Awards²⁶: The Tasmanian IRC did increase wages and allowances in many of its awards by general order, however:

i) This was prospective by more than a month. The increases took effect from the first pay period commencing on or after 1 August 2005. This was a week from the date of the ITC state wage decision, and 7 weeks from the national safety net decision.

ii) This appeared to have been by consent following some years of discussion and agreement on transitioning increases in some award rates and allowances.

²⁴ State Wage Case 2005 [2005] NSWIRComm 213

²⁵ State Wage Case July 2005 [2005] SAIRComm 29 (29 July 2005)

²⁶ T12144, T12156, T12157 and T12163 - 22 July 2005, Full Bench - President PL Leary, Deputy President PC Shelley, Commissioner TJ Abey.

- d. Queensland Awards²⁷: The QIRC did apply the 2005 increase by way of a general ruling, but the date of effect was 1 September 2005, well after the date of commencement for most federal awards, and almost three months after the national increase became available in federal awards. There was also a period of at least a fortnight between the date of the QIRC full bench decision and the commencement of the general order.
- e. Western Australian Awards: There was an increase by general order from 7 July 2005, based on WA's unique legislation empowering and requiring this approach. However:
- i) This was 14 days *after* the date of WA Full Bench's state wage decision, not prior to it. There was no retrospectivity.
 - ii) The standard date of effect for WA awards was exactly one month after the date of the 2005 Safety Net Review decision of this Commission. Again, there was no retrospectivity.

2.101 State wage case approaches do not stand as any authority for the course the ACTU would have this Commission take in this matter. State systems have proven themselves quite capable of addressing circumstances which the ACTU would have this Commission conclude cannot be borne.

2.10 CLEAN HANDS – IRRELEVANT

2.102 The ACTU states²⁸ that:

The applicants have clean hands

88. The Commission has, in a number of cases, had regard to the conduct of the applicants particularly where delay in the determination of matters is in issue (see for example Re Victorian Shops Interim Award 2000 PR922761).
89. In this instance the applicants have stood ready since November 2005, and have not sat on their hands.

²⁷ Application for Safety Net Increase and Application for Declaration of General Ruling to increase Queensland Minimum Wage. 23 June (B855 and B863 of 2005) President Hall, Vice President Linnane, Commissioner Brown.

²⁸ ACTU Submission, *2006 Wages and Allowances Review*, pp.34-35

90. The exceptional circumstances in which these applications have been dealt provides overwhelming grounds for the Commission to make the orders with retrospective application. The Commission should be satisfied that the circumstances are indeed unusual, and that the Commission should balance the detriment to employees against the unexpected burden on employers.

Relevance

- 2.103 We have addressed ACTU claims of exceptionality above. Beyond this, the ACTU is correct in noting that the conduct of parties can be relevant to determining *some* claims for retrospectivity. It is not however a mandatory or pre-eminent consideration, nor does the lack of a conduct based argument make retrospectivity a walk up start. Clean hands do not automatically advance a claim for retrospectivity.
- 2.104 The Commission should proceed on the basis that this is not a retrospectivity claim in which the conduct of parties (i.e. intransigence on particular industrial matters) is a relevant consideration. Other grounds should be considered, and the ACTU's retrospectivity claim should be rejected on those grounds.
- 2.105 To the extent it is worth mentioning, all parties have clean hands in this matter. All have participated in discussions, programming and hearing with a genuine commitment to efficient variation of awards and have not sought to manipulate these processes.

Standing Ready

- 2.106 The ACTU has not stood ready since November 2005 to run this matter as it claims. This is impossible, this Bench clearly found in December 2005 that it would await the initial 2006 AFPC decision, and this of necessity halted any consideration of the 2005 applications until that decision.
- 2.107 In addition, the vast majority of applications before the Commission were lodged after the 2006 AFPC decision. The ACTU cannot have stood ready on a decision which was yet to be issued.