

## Section 6

### 6. Junior employees

The Australian Fair Pay Commission (Commission) is required to provide minimum wages for junior employees that ensure they are competitive in the labour market.

#### 6.1 The legislation and junior wages

Section 178 of the *Workplace Relations Act 1996*, as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (WR Act) defines a junior employee as an employee who is under the age of 21. The key functions of the Commission in relation to junior rates are to:

- establish and adjust special Federal Minimum Wages (special FMW) for juniors; and
- review and adjust the minimum wages for juniors that are contained in Australian Pay and Classification Scales (Pay Scales).

In establishing or adjusting minimum junior rates of pay, the Commission must have regard to providing minimum wages for junior employees that ensure they are competitive in the labour market while providing a safety net for the low paid.

Subsection 182(3) of the WR Act exempts junior employees from the standard Federal Minimum Wage (standard FMW).

Junior wage rates provided for in preserved Pay Scales have been drawn from pre-reform wage instruments, predominantly federal and state awards. In awards, junior rates were usually set as a percentage of the wage that applied to an adult employee, with the actual percentage increasing yearly along with the employee's age. Most awards applied adult wages to employees at the age of 21. Preserved Pay Scales only contain the actual monetary amount of the junior rate, and not the percentage of the adult rate that was contained in awards.

#### 6.2 Who is paid junior rates?

The Australian Industrial Relations Commission (AIRC) Junior Rates Inquiry 1999 examined the characteristics of the recipients of junior rates:

An estimated 56 per cent of all people aged under 21 years are employed on junior wage rates. The retail industry is the largest employer of teenage workers. Some 289,000 young workers or 49.4 per cent of the total teenage workforce are so employed. In the retail industry a 17 year old typically earns \$6.82 an hour or 60 per cent of the adult rate and will be employed for about 12 hours per week. In retail and in industry generally, the full rate applies only at age 21 in most cases.<sup>1</sup>

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<sup>1</sup> AIRC, *Junior Rates Inquiry*, Print R5300, 4 June 1999, p. 9, para. 1.5.4.

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The Australian Government submits:

Nearly all employees under the age of 21 are already covered by the minimum wages that have been derived from federal and State awards and that are now embodied in preserved APCSSs. In effect, the previous federal and State wage safety nets now apply to young employees covered by the federal system. Significantly this includes preserved APCSSs derived from State common rule awards and other State standards of general application. The Government is not aware of any significant area of youth employment that is not already covered by the safety net constituted by the system of minimum wages in preserved APCSSs.<sup>2</sup>

### 6.3 New special Federal Minimum Wages and special Pay Scales – changes to preserved junior wage Pay Scale relativities

#### 6.3.1 Age-based wage scales and competitiveness

There is broad consensus among submissions regarding the retention of concessionary wage rates for young employees. The Australian Government argues for the need to retain the competitive position of young employees in the labour market:

If young people are to be competitive in the labour market, their minimum wages should reflect the fact that, on average, they do not have the skills, experience and maturity of adults. Unless the minimum wages of young people reflect these factors, they will not be competitive with adults for employment opportunities.<sup>3</sup>

The Australian Chamber of Commerce and Industry (ACCI) argues that “it is a settled matter of law and merit that age-based junior wages be retained in Australia”.<sup>4</sup> Further, the ACCI submission recommends retaining all age-based junior wages.<sup>5</sup>

The National Association of Retail Grocers of Australia argues for the need to retain age-based wage arrangements to support youth employment:

Retail is a major employer of juniors, providing many young people with their first experience of paid work and basic work related training...

Too high a minimum wage will price these workers out of the market, as it will become more cost-effective to hire people with a greater skill set or to further automate operations. Stores which, because of size and/or staff numbers, cannot adjust will, as a consequence, become less competitive.<sup>6</sup>

as does the Australian Hotels Association:

In considering whether to increase minimum wages, the focus should be on the competitiveness of relative participants in the market, and in particular, the need to provide incentives to employ junior, trainee and disabled employees when compared with employees with a greater level of skill, experience or ability.<sup>7</sup>

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<sup>2</sup> Australian Government, 2006, *Submission to the Australian Fair Pay Commission 2006*, 28 July 2006, p. 173-4, para. 9.72.

<sup>3</sup> Australian Government, 2006, p. 181, para. 9.104.

<sup>4</sup> ACCI, *2006 Minimum Wage Review: ACCI Submission*, July 2006, p. 378, para. 18.35.

<sup>5</sup> ACCI, 2006, ch. 18.

<sup>6</sup> National Association of Retail Grocers of Australia Pty Ltd, *Submission to the Australian Fair Pay Commission regarding the First Minimum Wage Determination*, July 2006, p. 7.

<sup>7</sup> AHA, *Submission to the Australian Fair Pay Commission Concerning Minimum Wages*, July 2006, p. 11, para. 8.

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A number of submissions, including that of the Australian Council of Trade Unions (ACTU), direct the Commission to the recent Organisation for Economic Co-operation and Development conclusions on this issue:

Recent experience suggests that a moderate minimum wage generally is not a problem, but that adequate allowance for sub-minima for youth and possibly other vulnerable groups is essential. Another insight is the potential for a well-designed minimum wage to contribute to a broader strategy to foster higher employment by guaranteeing that work pays better than remaining on social benefits.<sup>8</sup>

The Shop, Distributive and Allied Employees' Association, Queensland Branch (SDA Qld), draws attention to the competitiveness of young workers in the retail sector, saying "Junior employees are already highly competitive in retail businesses".<sup>9</sup>

On the other hand, some submissions argue for the exercise of caution in maintaining age-based wages in light of the diverse circumstances of young workers:

Young people are not a homogenous group, and YACVic would like to highlight the diversity of young people's needs, experiences, opinions and interests. Young people may be students, workers, unemployed, apprentices or trainees, young parents. Young people may live independently, financially support others or provide an important source of income to a family group. Given the diversity of young people's experiences and financial responsibilities, YACVic believes that young people should not be confined in their earning capacity on the basis of age alone.<sup>10</sup>

A small number of submissions, such as the Youth Action Policy Association submission, challenge the argument that junior rates need to be maintained in order to protect the competitiveness of junior workers in the labour market:

The issue of a safety net for young people directly relates to an adequate standard of living...YAPA completely rejects the simple economic theory that claims to reduce youth unemployment by reducing the pay and conditions of young people. YAPA does not believe that by pushing young people close to the poverty line, just to allow other young people to be 'employed' in this precarious situation, is beneficial for young people or the economy overall.<sup>11</sup>

### 6.3.2 Changes to relativities and new Pay Scales

There is a broad consensus in the submissions that the Commission should exercise caution in implementing changes to the current framework of junior wage arrangements. The ACTU submission recommends that any changes to relativities should occur with proper consideration:

'Any attempt to restructure APCs as they apply to junior [sic] is, in our view, a complex task and not something that should be undertaken lightly or with haste.'<sup>12</sup>

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<sup>8</sup> ACTU, *Australian Council of Trade Unions Submission to the Australian Fair Pay Commission*, July 2006, p. 115. ACTU cites Organisation for Economic Co-operation and Development, *OECD Employment Outlook No. 79*, May 2006, p. 88.

<sup>9</sup> SDA Qld, *Australian Fair Pay Commission Minimum Wage Submission*, July 2006, p. 20, para. 8.1.6.

<sup>10</sup> Youth Affairs Council of Victoria, *Submissions relating to the Commission's Considerations of the Minimum Wage*, 28 July 2006, p. 1.

<sup>11</sup> Youth Action Policy Association, *Minimum Wage Determination*, 28 July 2006, p. 7.

<sup>12</sup> ACTU, 2006, p. 140.

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'It is the firm view of the ACTU that the AFPC should not alter the existing arrangements and principals that apply to the establishment of 'special rates'. In so far as it is possible the existing relativities and formulas that apply to the establishment of these rates should continue to apply. Whilst it may be tempting for the AFPC to act expeditiously, we strongly advise caution. The potential for added confusion and economic harm is significant. We urge caution and further consultation regarding the establishment of new rates or formulas for the establishment of rates of pay for Trainees and Apprentices, Juniors, Piece Rate workers and workers with disabilities:<sup>13</sup>

The Australian Government proposes that:

...there may be advantages in awaiting the rationalisation of the system of minimum wages in preserved APCs before setting a special FMW...[P]reserved APCs currently contain a wide diversity of junior rate scales. Once these junior rates have been rationalised, and the adult rates to which they relate have also been rationalised, it will be easier to choose a scale of junior rates for a special FMW that is consistent with and has a proper relationship with the junior rates contained in preserved APCs.<sup>14</sup>

The Australian Government also suggests that "Disturbing the relativities between adult and junior pay rates risks distorting the labour market".<sup>15</sup>

ACCI also calls on the Commission to:

...research and take submissions on the future rationalisation of junior wages towards fewer, more consolidated percentage arrangements, and the inclusion of age based junior wages in all industry minimum wage structures.<sup>16</sup>

The Australian Industry Group similarly supports a more detailed examination of junior rate of pay issues before changing the current diverse arrangements.<sup>17</sup>

### Decision

The Commission is aware that junior wage arrangements present some complex issues and will initiate a wage review on junior wage arrangements in early 2007 to gather further information on these issues.

## 6.4 Review and adjustment of Pay Scale rates for junior employees

Prior to 27 March 2006, increases in adult rates of pay automatically flowed on to the majority of junior rates as the junior rate was expressed as a percentage of the relevant adult rate. Junior rates thus maintained their relativity with adult rates over time.

As a result of legislative changes, all junior rates have been expressed in monetary rather than percentage values since 27 March 2006.<sup>18</sup>

<sup>13</sup> ACTU, 2006, p. 127.

<sup>14</sup> Australian Government, 2006, p. 174, para. 9.73.

<sup>15</sup> Australian Government, 2006, p. 180, para. 9.96.

<sup>16</sup> ACCI, 2006, p. 393, para. 18.89.

<sup>17</sup> AiG, *2006 Review of Minimum Wages: Submission to the Australian Fair Pay Commission*, July 2006, p. 86, para. 227.

<sup>18</sup> WR Act, s. 209.

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In some pre-reform wage instruments, junior rates are expressed as flat monetary amounts without reference to either a percentage or a relevant adult rate of which the junior rate is a proportion.

There is some consensus among the main stakeholders regarding the appropriate approach to be adopted by the Commission in relation to its first decision.

The ACTU proposes that changes to junior rates should occur as a function of changes to the standard FMW and relevant Pay Scales.<sup>19</sup>

The Australian Hotels Association proposes:

The AFPC has responsibility for providing minimum wages for junior employees, employees to whom training arrangements apply and employees with disabilities that ensure those employees are competitive in the labour market.

The AHA recommends that the AFPC maintains the current practice of discounting minimum wages to protect the interests of junior employees and people with disabilities.<sup>20</sup>

Some submissions, such as the Restaurant & Catering Australia submission, argue that a negative employment impact will result in the sector if junior wages are increased:

In addition to the minimum wage, the Australian Fair Pay Commission has carriage over other rates of pay that impact heavily on the restaurants and catering industry. In particular junior, trainee and apprentice rates and the casual loading are of great importance to the industry. On capacity grounds alone, any increase to any of these rates (either proportionately with a minimum wage increase or disproportionately through any adjustment to these proportionate rates) would negatively impact on employment in these categories.

The restaurant, café and catering industry urges the AFPC to retain junior, trainee and apprentice rates at their current levels in order to ensure the retention in commitment to employment of these employee groups.<sup>21</sup>

A number of submissions argue the importance of an increase to junior rates of pay, especially in the context of youth wages and financial independence. The NSW Young Lawyers submission notes that many junior workers support themselves on junior rates of pay:

... not all young people are casuals or students. In a study of young working adults aged 20-24, VandenHeuvel and Wooden found that a large majority (77%) of young adults in the labour force are employed and non-students.

This means tens of thousands - over two thirds of young people who work - work full time to support themselves.<sup>22</sup>

This view is also supported by the National Group of Working Women's Centres.<sup>23</sup>

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<sup>19</sup> ACTU, 2006, p. 140.

<sup>20</sup> AHA, 2006, p. 6.

<sup>21</sup> Restaurant & Catering Australia, *Australian Fair Pay Commission 2006 Submission*, July 2006, p. 9.

<sup>22</sup> NSW Young Lawyers - Employment and Industrial Law Committee, *Submission to the Australian Fair Pay Commission Spring 2006 Minimum Wage Determination*, 2006, p. 12.

<sup>23</sup> NWWC, *Working Women's Centres Submission to the Australian Fair Pay Commission: Minimum Wage Decision*, 2006, p. 9.

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### Decision

The Commission will flow on the general adult decision in relation to Pay Scales to preserved junior wage Pay Scales. The general pay increase will be pro-rated on the basis of formulas applying in the relevant pre-reform wage instruments.

In circumstances where there was no formula in the pre-reform wage instrument (for example, where a junior rate was originally expressed as a dollar value rather than a percentage), the general increase will be pro-rated so that the junior rate retains its relativity to the relevant adult rate in the preserved Pay Scale. If no relevant rate is identified, the junior rate will be adjusted to retain its relativity to the lowest adult<sup>24</sup> rate in the Pay Scale.

For example, if the dollar value of a junior rate represented 70 per cent of the relevant adult preserved Pay Scale prior to the general wage increase being applied to the adult Pay Scale, then the junior rate should be adjusted so that it remains as 70 per cent of the relevant adult preserved Pay Scale after the general increase has been applied to the adult rate.

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<sup>24</sup> Where adult means a basic periodic rate of pay that does not explicitly apply to a class of employees with a disability or employees to whom a training arrangement applies or junior employees.

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### 7. Employees to whom training arrangements apply

The Australian Fair Pay Commission (Commission) is required to provide minimum wages for employees to whom training arrangements apply that ensure they are competitive in the labour market.

'Training arrangements' have historically been referred to as apprenticeships and traineeships and provide a combination of on and off the job training linked to formal employment arrangements.

#### 7.1 What are apprenticeships?

Apprenticeships have been the traditional point of entry for many trades, with a typical duration of either three or four years.

Prior to 27 March 2006, apprentice rates of pay for each stage of an apprenticeship were typically expressed as a percentage of the trade rate and set out in the relevant award. As apprenticeships developed on an industry basis, however, there were substantial variations from award to award. For example:

- the percentage rates of pay varied from award to award and, in some cases, within different classes of apprenticeships in the same award or from one state to another;<sup>1</sup>
- some awards provided for higher rates based on an apprentice's education level (e.g. pre-apprenticeship courses<sup>2</sup> and/or completion of year 11 or 12<sup>3</sup>); and
- some awards provided for higher rates based on the age of the apprentice<sup>4</sup> (adult apprenticeships).

In some pre-reform wage instruments apprentice rates are expressed as a flat monetary amount with no provisions explaining the method of adjustment to flow on a general wage increase. These may be either junior or adult apprentice rates.<sup>5</sup>

Some pre-reform wage instruments also express adult apprentice rates as a flat monetary amount based on another rate of pay not specified in the award. For example, the Vehicle Industry Award 2000 [Fed] specifies a weekly amount for an adult apprentice, first year, and prescribes that this rate is based on the National Training Wage Award - Skill Level 'B' exit rate. The award, however, does not contain this rate of pay and no precise formula or method of calculation is provided.

In addition, awards varied substantially with regard to the award-specified conditions or minimum rates of pay, resulting in gaps of coverage and issues of accreditation relating to:

- competency progression (as distinct from the traditional 'time served' approach);<sup>6</sup> or
- completion of some or all of the apprenticeship while attending school or on a part-time basis.<sup>7</sup>

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<sup>1</sup> e.g. National Building and Construction Award 2000 [Fed].

<sup>2</sup> see footnote above.

<sup>3</sup> e.g. Metal, Engineering and Associated Industries Award 1998 [Fed].

<sup>4</sup> see footnote above.

<sup>5</sup> e.g. Joiners (State) Award [NSW] and the Energy (Gas) Industry Award 1999 [Fed].

<sup>6</sup> e.g. compare National Building and Construction Award 2000 [Fed] and Metal, Engineering and Associated Industries Award 1998 [Fed].

<sup>7</sup> e.g. compare National Building and Construction Award 2000 [Fed] and Hairdressing and Beauty Services - Victoria - Award 2001 [Fed]. As a result of legislative changes, all preserved Pay Scales now have access to pro-rata rates of pay for school based apprenticeships and traineeships.

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*The Workplace Relations Act 1996*, as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (WR Act) legislatively provides for school-based apprenticeships. Since 27 March 2006, apprentice rates of pay have been expressed as monetary values in the preserved Australian Pay and Classification Scales (Pay Scales).

### 7.2 What are traineeships?

Traineeships were first introduced in Australia in 1985. Traineeships became more accessible after the introduction of the federal National Training Wage Award (NTW Award), which established the predecessor to the traineeship wage structure that continues to govern rates of pay for the majority of trainees today.<sup>8</sup> As a test case standard, the NTW Award either directly or indirectly formed the model for a number of other training awards.<sup>9</sup>

National Training Wage trainee rates have traditionally been expressed as monetary amounts but include implicit discounts. In some instances, the rates in other pre-reform wage instruments no longer reflect the rates in the key NTW Award; for example, the Victorian Independent Schools - Clerical/Administrative Employees - Award 2004 [Fed].

### 7.3 The legislation and training arrangements

Employees to whom training arrangements apply are exempt from the standard Federal Minimum Wage (standard FMW).<sup>10</sup> The Commission may determine a special Federal Minimum Wage (special FMW) for all, or for a specific class of employees to whom training arrangements apply.<sup>11</sup>

Many (if not all) employees to whom training arrangements apply will already be covered by a preserved Pay Scale derived from a pre-reform federal or state wage instrument.<sup>12</sup> The Commission is required to consider whether it should determine a new Pay Scale for employees to whom training arrangements apply (special Pay Scale).<sup>13</sup>

The Commission may review and adjust the minimum wages for apprentices and trainees that are contained in preserved Pay Scales.<sup>14</sup>

### 7.4 New special Federal Minimum Wages and special Pay Scales – changes to preserved training wage Pay Scale relativities

There is broad consensus in submissions regarding the need to retain concessionary wage rates for employees to whom training arrangements apply:

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<sup>8</sup> AIRC, *National Training Wage Interim Award 1994*, Dec 1596/1994 [Print L 5188 (12 September 1994)]. The current NTW Award is the National Training Wage Award 2000 [Fed].

<sup>9</sup> AIRC, *Third Safety Net Review Decision*, Dec 2120/1995 [M5600 (9 October 1995)]; *Award Simplification Decision* Dec 1533/97 [M Print P7500 (23 December 1997)].

<sup>10</sup> WR Act, s. 194.

<sup>11</sup> WR Act, s. 197.

<sup>12</sup> e.g. *Apprentices and Trainees Wages and Conditions (Excluding Certain Queensland Government Entities) 2003 Order (Qld)*; *Minimum Conditions of Employment Act 1993 (WA)*, s. 14.

<sup>13</sup> WR Act, s. 221(4).

<sup>14</sup> WR Act, s. 216.

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'There are special economic considerations for this sub-group which specifically require retention of concessional wage rates to reflect the fact that trainees/apprentices engage in mix of both productive work and on/off the job training and become increasingly productive over time.'<sup>15</sup>

'If apprentices and trainees are to be competitive in the labour market, their wages must recognise the time they spend in structured training rather than productive work. The wages must also reflect that on average apprentices and trainees do not have the same level of skills, experience and maturity compared to employees undertaking the same type of work who may be older than them or fully trained in the work.'<sup>16</sup>

'It is the firm view of the ACTU that the AFPC should not alter the existing arrangements and principals [sic] that apply to the establishment of 'special rates'. In so far as it is possible, the existing relativities and formulas that apply to the establishment of these rates should continue to apply.'<sup>17</sup>

Submissions vary regarding the approach the Commission should take in setting a special FMW for this group:

'The establishment of a special FMW prior to the rationalisation of apprentice and trainee rates and the wages to which they are related would tend to distort existing relativities. Once the rationalisation process has been undertaken it will be easier to determine a special FMW that is consistent and has a proper relationship with other rates.'<sup>18</sup>

'The Queensland Government submits that the AFPC should determine a special FMW and a new Australian Pay and Classification Scale (APCS) to operate for all APCSs and for all employees to whom training arrangements apply with the following minimum provisions.'<sup>19</sup>

'Under s.197 of the Act, the AFPC may determine a special FMW for all or a class of employees to whom training arrangements apply. Given that wage rates for these employees are comprehensively dealt with in APCSs, Ai Group does not see a need for such special FMW to be established.'<sup>20</sup>

'If the AFPC was inclined to create special trainee FMW(s), then further input from industry would be necessary.

...

Similarly ACCI would not suggest the creation of any special apprentice FMW(s) without further industry consultation and input.'<sup>21</sup>

There is a majority view among the above submissions that such matters should be the subject of further consideration or consultation with stakeholders.

The Commission is also required to consider whether it should determine a special Pay Scale for the purposes of s. 221(1) of the WR Act. Submissions identify a wide range of issues to be addressed by the Commission in determining any special Pay Scale. For example, in the case of apprenticeships:

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<sup>15</sup> ACCI, *2006 Minimum Wage Review: ACCI Submission*, July 2006, p. 399.

<sup>16</sup> *Australian Government, Submission to the Australian Fair Pay Commission 2006*, 28 July 2006, p. 290, para. 10.271.

<sup>17</sup> ACTU, *Australian Council of Trade Unions Submission to the Australian Fair Pay Commission*, July 2006, p. 127.

<sup>18</sup> Australian Government, 2006, p. 291, para. 10.280.

<sup>19</sup> Qld Government, *Australian Fair Pay Commission: Queensland Government Submission*, 28 July 2006, p. 56, para. 313.

<sup>20</sup> AIG, *2006 Review of Minimum Wages: Submission to the Australian Fair Pay Commission*, July 2006, p. 90, para. 240.

<sup>21</sup> ACCI, 2006, p. 432, paras 19.124 -5.

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Very few federal and State awards have been varied to include the model part-time apprenticeship provisions. In order to ensure that part-time apprentices receive appropriate minimum wages, it is therefore necessary for a special APCS to be created under section 221 of the WR Act. This special APCS would establish appropriate minimum wages for part-time apprentices, and would apply to any part-time apprentices that are not already subject to a preserved APCS that explicitly provides minimum wages for part-time apprentices.<sup>22</sup>

There is substantial variation and complexity in other identified issues, such as competency-based (as distinct from time-served) approaches to apprenticeships. On this matter, submissions differ as to whether or not to declare a special Pay Scale, and place differing emphases on training progression, wage progression and apprenticeship completion.<sup>23</sup>

There are also differing views regarding the approach the Commission should take to adult apprenticeship rates:

'The minimum rate of pay for all apprentices and trainees, who are 21 years of age or older at commencement of their apprenticeship or traineeship, shall be at least an amount equivalent to the Standard FMW.<sup>24</sup>

'The Australian Government is not aware of any comprehensive study of the impact of adult apprentice rates on the competitiveness of adult apprentices in the labour market.

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Until definitive and comprehensive evidence of the impact of increased adult apprentice rates is available, whether or not particular adult apprentices should be paid more than other apprentices can be decided much more accurately and safely through the process of workplace bargaining.<sup>25</sup>

Further, there is disagreement regarding whether any special Pay Scale determined by the Commission should specify higher rates to apprentices who have completed schooling beyond Year 10;<sup>26</sup>

'Given the fragility of the labour market for apprentices and its importance in the context of skill shortages, it would be very risky to grant significant increases to apprentices in the absence of ...evidence. Apprenticeship opportunities for young people who have completed year 11 or year 12 would be seriously undermined if they are required to be paid significantly more than other apprentices of the same age, and if their productive value does not prove to be sufficiently higher than the value of other apprentices.<sup>27</sup>

In relation to traineeships, the Commission is urged to adopt a variety of different approaches:

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<sup>22</sup> Australian Government, 2006, p. 272, para. 10.200.

<sup>23</sup> e.g. Qld Government, 2006, p. 56, para. 313 (d); Australian Government, 2006, pp. 268-9, paras. 10.185-6); ACTU, 2006, p. 129; CFMEU (Construction and General Division), *Submission to the Australian Fair Pay Commission on An Apprentice and Trainee Australian Pay and Classification Scale for the Building and Construction Industry*, July 2006, p. 3, para. 2.4; ACCI, *2006 Minimum Wage Review: ACCI Supplementary Submission*, August 2006, p. 171, para. 10.10(b).

<sup>24</sup> Qld Government, 2006, p. 56, para. 313(c).

<sup>25</sup> Australian Government, 2006, p. 262, para. 10.161 & p. 264, para. 10.165.

<sup>26</sup> e.g. Metal Engineering and Associated Industries Award 1998. See *Apprentice Training Decision* 21 February 2006, Print PR 968890.

<sup>27</sup> Australian Government, 2006, p. 260, para. 10.155.

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'The main task of the AFPC is the translation of the NTWA into a workable instrument which can apply to all trainees (as defined). The new APCS would need to be updated with an allocation of training certificates to wage levels, in a manner consistent with previous approaches. There is also a need to provide default wage allocation levels as outlined in our primary submission. The lack of a default wage allocation is one of the most serious shortcomings of the current NTWA and it is a matter that can be easily fixed by the AFPC:<sup>28</sup>

'Action is also necessary to ensure that trainee wages are available for traineeships for certificate levels above Certificate Level IV. The current trainee wage structure that was established by the NTW Award includes wage levels applicable to trainees undertaking training packages up to and including Certificate level IV...However, with the growing support for the expansion of skills formation that is currently a key focus of all stakeholders, new traineeships are being developed for certificate levels above level IV...As these new traineeships are developed, it is essential that appropriate trainee wages are available for them so that they are competitive in the labour market:<sup>29</sup>

As can be seen, the setting of a special FMW and special Pay Scales for employees to whom training arrangements apply is complex, encompassing a wide variety of issues on which no clear consensus has yet emerged.

There is general agreement, however, that such matters should be dealt with as part of the Australian Pay and Classification Scale Rationalisation process following further consultation.<sup>30</sup>

### Decision

The Commission has considered whether there should be a new Pay Scale that applies to all, or a class of, employees to whom training arrangements apply. Such a Pay Scale would encompass issues raised in submissions such as gaps in part-time apprenticeship arrangements, competency-based provisions (as opposed to time served), and adult apprenticeship Pay Scales. Given the complexity of the issues with some divergent views amongst those that would be affected by change, the Commission has decided that establishing new Pay Scales at this stage would be premature and may have unforeseen consequences.

Therefore the Commission will initiate a wage review in 2007 of Pay Scales for employees to whom training arrangements apply to inform itself more fully about these issues.

The Commission notes that this decision does not limit the Commission (s. 221) making a decision in future to determine, adjust or revoke Pay Scales subject to any legislative guarantees that apply.

## 7.5 Review and adjustment of Pay Scale rates for employees to whom training arrangements apply

Prior to 27 March 2006, increases in the trade rate of pay automatically flowed on to the relevant apprentice rate in the majority of cases, as the apprentice rate was expressed as a

<sup>28</sup> ACCI, *2006 Minimum Wage Review: ACCI Supplementary Submission*, August 2006, p. 172-3, para. 10.12.

<sup>29</sup> Australian Government, 2006, pp. 282-3, paras 10.242-3.

<sup>30</sup> e.g. AIG, 2006, p. 89, para. 238; ACCI suppl., 2006, p. 169; ACTU, 2006, p. 127.

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percentage of the tradesperson rate. The apprentice rates thus maintained their relativity with the tradesperson rate over time.

The Australian Government submission draws attention to alternative arrangements that were included in some pre-reform wage instruments:

Rates of pay applicable to adult apprentices may or may not be specified as a percentage of the fully qualified tradesperson's rate. In some instances rates for adult apprentices are derived from a specific rate in another APCS. For example, the first year adult apprentice rate in the preserved APCS derived from the Metal Industry Award is the rate applying to the 'traineeship wage level B' [sic] exit rate contained in the preserved APCS which was derived from the NTW Award.<sup>31</sup>

Safety net increases flowed on to trainee rates under the NTW Award through an agreed adjustment method which maintained the relativities to key award rates as originally set out in the NTW Award.<sup>32</sup> This adjustment method was not included in the award. The method of adjustment was explained in transcript by the Australian Council of Trade Unions (ACTU) in relation to the 2003 Safety Net Review decision and therefore does not form part of the preserved Pay Scales.

As a result of legislative changes, all apprentice and traineeship rates have been expressed in monetary rather than percentage values since 27 March 2006.<sup>33</sup>

There is some consensus among the main stakeholders regarding the appropriate approach to be adopted by the Commission in relation to its first decision:

'If the Commission determines to adjust minimum wages generally, then pending the absence of rationalisation of wages and classification structures it would be desirable that apprentice and trainee rates be adjusted so as to maintain their existing relativities with other rates.'<sup>34</sup>

'In so far as it is possible the existing relativities and formulas that apply to the establishment of these rates should continue to apply.'<sup>35</sup>

'ACCI broadly supports the AFPC adopting an approach consistent with the submission of the Australian Government. While by no means perfect, existing arrangements in awards have functioned adequately and they are understood to some degree by users of the system.'<sup>36</sup>

'Minium [sic] rates of pay for apprentices and trainees are referenced to minimum adult rates, or tradesmen's rates, in either industrial awards or the national training wage award. As an interim measure GTA would seek to maintain this reference. The commission will need to be mindful of this nexus, and the possibility of breaking it, when determining minimum training rates.

[GTA recommends] [t]hat there should be no reduction to the current minima for apprentices and trainees but rather an increase.'<sup>37</sup>

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<sup>31</sup> Australian Government, 2006, p. 253-4.

<sup>32</sup> e.g. AIRC, *National Training Wage Award 2000*, Transcript of Proceedings, (C2003/2533), 2 July 2003.

<sup>33</sup> WR Act, s. 209.

<sup>34</sup> Australian Government, 2006, p. 290, para. 10.272.

<sup>35</sup> ACTU, 2006, p. 127.

<sup>36</sup> ACCI suppl., 2006, p. 170, para. 10.5.

<sup>37</sup> GTA, *Australian Fair Pay Commission Submission from Group Training Australia Ltd on the Spring 2006 Minimum Rates Decision*, July 2006, pp. 2 & 4.

## Section 7

However, some organisations raise the potential risks of flowing on a general increase to trainee pay arrangements:

In addition to the minimum wage, the Australian Fair Pay Commission has carriage over other rates of pay that impact heavily on the restaurants and catering industry. In particular junior, trainee and apprentice rates and the casual loading are of great importance to the industry. On capacity grounds alone, any increase to any of these rates (either proportionately with a minimum wage increase or disproportionately through any adjustment to these proportionate rates) would negatively impact on employment in these categories.

The restaurant cafe and catering industry urges the AFPC to retain junior, trainee and apprentice rates at their current levels in order to ensure the retention in commitment to employment of these employee groups.<sup>38</sup>

### **Decision**

The Commission will flow on the general decision in relation to Pay Scales to employees to whom training arrangements apply.

### **Apprentices**

The general pay increase will be pro-rated on the basis of formulas applying in the relevant pre-reform wage instruments so as to maintain the relativity of the basic periodic rates of pay for apprentices with the relevant tradesperson rate. Formulas, where available, will be used to adjust basic periodic rates of pay for full and part-time apprentices, and school-based apprentices (noting that the Pay Scale derived from repealed s. 552 of the WR Act retains a formula suitable for flowing on the general minimum wage increase).

Where apprentice rates are derived from a specific rate in another Pay Scale, they will be adjusted to reflect the parent rate on which they are based, where the parent rates have been adjusted to give effect to the general decision.

### **Trainees**

Trainee basic periodic rates of pay provided for in preserved Pay Scales will be adjusted to flow on the general decision using the method described in the transcript of the application to vary the National Training Wage Award 2000 for the 2003 Safety Net Review (see Appendix A).

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<sup>38</sup> Restaurant & Catering Australia, *Australian Fair Pay Commission 2006 Submission*, July 2006, p. 9.

## Section 8

### 8. Employees with a disability

The *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices) preserved pre-existing disability wage arrangements in both federal and state systems in the form of preserved Australian Pay and Classification Scales (Pay Scales).

Prior to 27 March 2006, the regulation of rates of pay for employees with a disability contained gaps in the coverage of statutory minimum rates of pay and access to pro rata wage arrangements in both open and business services employment.

Work Choices does not legislatively fill these gaps. It does, however, oblige the Australian Fair Pay Commission (Commission) to examine these matters with a view to filling gaps in coverage of disability wage provisions.

#### 8.1 The legislation and the definition of an employee with a disability

An 'employee with a disability' has a specific meaning for the purposes of the Commission's determination and is defined by s. 178 of the WR Act as follows:

... an employee who is qualified for a disability support pension as set out in section 94 or 95 of the Social Security Act 1991, or would be so qualified but for paragraph 94(1)(e) or 95(1)(c) of that Act.

Qualification for the Disability Support Pension (DSP) under the *Social Security Act 1991* (SS Act) is met under s. 95 where a person who has turned 16 is permanently blind. The SS Act provides qualification for other impairments and states at s. 94(1):

A person is qualified for disability support pension if:

- (a) the person has a physical, intellectual or psychiatric impairment; and
- (b) the person's impairment is of 20 points or more under the Impairment Tables; and
- (c) one of the following applies:
  - (i) the person has a continuing inability to work;
  - (ii) the Health Secretary has informed the Secretary that the person is participating in the supported wage system administered by the Health Department, stating the period for which the person is to participate in the system; and
- (d) the person has turned 16; and ...

Section 94 further provides that a person will meet the requirement of a 'continuing inability to work' where they are unable to work independently of a program of support (or undertake training to enable such work) for at least 15 hours per week at a relevant minimum wage for a fully productive employee.

## Section 8

### 8.2 Employment of employees with a disability

There are two types of employment where wages are specific to employees with a disability:

- open employment; and
- business services (also known as 'supported employment services' or 'sheltered workshops').

Open employment exists where employees with a disability are engaged in the mainstream workforce and compete with fully productive employees in a commercial setting.

There are two sub-types of open employment:

- employees with a disability who are able to earn full adult, training or junior wages (with reasonable adjustment as appropriate<sup>1</sup>) as their disability does not impair their productive capacity; and
- employees with a disability who are unable to perform the range of duties to the competence level required within the class of work for which the employee is engaged because of the impact of their disability on their productive capacity.

The Supported Wage System (SWS) was established for employees whose disability affects their productive capacity. A model award clause provided for a system to assess the productivity of disabled employees to determine a specified pro rata wage rate. The model clause now forms part of the Pay Scales where it was included in pre-reform wage instruments.

The Australian Government submission estimates that there were almost 3,500 participants in the SWS in the 2004-05 financial year.

Business services are charitable not-for-profit organisations and have traditionally operated outside of the federal and state systems of employment regulation through a lack of specific coverage (federal) or statutory exemption (state). Business services are subject to federal government funding and accreditation through the *Disability Services Act 1986* and are required to meet specified standards.

The Australian Government submission estimates that 17,500 people with a disability are employed by 224 business services operating at 380 locations across Australia.<sup>2</sup>

Pay Scales covering business services are derived from the Australian Liquor, Hospitality and Miscellaneous Workers Union Supported Employment (Business Enterprises) Award 2001 [Fed] (LHMU Award).<sup>3</sup> These Pay Scales are specific to the business services sector. However, there are gaps in coverage within the sector.

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<sup>1</sup> The term 'reasonable adjustment' is not contained expressly in the *Disability Discrimination Act 1992* (DD Act). However, the DD Act has an implied requirement for employers to make reasonable adjustments. The implied requirement under the DD Act to make reasonable adjustment results from s. 6, on indirect discrimination. Section 6 defines discrimination as including the imposing of any 'requirement or condition' which a person with a disability cannot or does not comply with, if a substantially greater proportion of people without than with the disability can comply with it, and if it is not reasonable. A requirement or condition does not have to be a specific rule, policy, direction or action. For example, in *Waters v. Public Transport Corporation* (1992) 173 CLR 349 the High Court upheld a finding that a tram operator who ran trams and buses without conductors and with steps at the entrance had imposed conditions or requirements of being able to climb steps and being able to board without assistance from a conductor.

<sup>2</sup> Australian Government, *Submission to the Australian Fair Pay Commission 2006*, 28 July 2006, p. 346, para. 11.18.

<sup>3</sup> The Supported Employees Industry Award 1998 [WA] does not contain rates of pay and so did not translate into Pay Scales for employees covered by the award. However, some of these business services may be covered by either federal or state registered agreements.

## Section 8

### 8.3 Gaps in coverage of disability wage arrangements

#### 8.3.1 Employees with a disability who are able to earn full adult, junior or trainee wages (with reasonable adjustment as appropriate<sup>4</sup>) as the effects of their disability do not impact on their productive capacity

Employees with a disability who are fully productive in the class of work for which they are engaged do not require access to pro rata rates of pay. Many of these employees are already (and will continue to be) employed in positions covered by Pay Scales that are not pro rated.

However, where the employee with a disability is not covered by a Pay Scale, they will be without a prescribed minimum rate of pay as they are exempt from the standard Federal Minimum Wage (standard FMW).

This represents a gap in coverage since fully productive employees with a disability could be paid at rates below the standard FMW compared to other fully productive employees doing the same type of work who are covered by the standard FMW.

#### 8.3.2 Employees with a disability who are who are unable to perform the range of duties to the competence level required because of the effects of a disability on their productive capacity

##### Open employment

The SWS model clause was developed with the expectation that it be extended to all areas of open employment.<sup>5</sup> However, for various reasons, the insertion of the SWS model clause into federal and state awards has not delivered comprehensive coverage.

Employees with a disability in open employment who are covered by a preserved Pay Scale but are without access to the SWS model clause are subject to full adult, junior or trainee rates of pay. This represents a gap in coverage, since employees with a disability that affects their productive capacity are required to be paid full rates of pay, potentially impairing their competitiveness in the labour market.

A further gap in coverage exists where employees with a disability in open employment are not covered by a Pay Scale. Since they are also excluded from coverage of the standard FMW, such employees are without access to any statutory minimum wage or pro rata assessment method.

##### Slow worker permits

Some employees with a disability engaged in the open employment sector have been employed under various alternative arrangements through federal and state laws that provide reduced rates of pay due to an assessed impairment. These arrangements are commonly referred to as 'slow worker permits' or 'special wage permits'.

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<sup>4</sup> The term 'reasonable adjustment' is not contained expressly in the *Disability Discrimination Act 1992* (DD Act). However, the DD Act has an implied requirement for employers to make reasonable adjustments. The implied requirement under the DD Act to make reasonable adjustment results from s. 6, on indirect discrimination. Section 6 defines discrimination as including the imposing of any 'requirement or condition' which a person with a disability cannot or does not comply with, if a substantially greater proportion of people without than with the disability can comply with it, and if it is not reasonable. A requirement or condition does not have to be a specific rule, policy, direction or action. For example, in *Waters v. Public Transport Corporation* (1992) 173 CLR 349 the High Court upheld a finding that a tram operator who ran trams and buses without conductors and with steps at the entrance had imposed conditions or requirements of being able to climb steps and being able to board without assistance from a conductor.

<sup>5</sup> Australian Government, 2006, p. 359, para. 11.65; AIRC, *Supported Wage Decision* [Print L5723, (10 October 1994)].

## Section 8

These arrangements are pre-reform wage instruments and are preserved as Pay Scales.<sup>6</sup> However these preserved Pay Scales will cease to have effect at the end of two years from the commencement of Work Choices. The expiry of the various arrangements represents an anticipated gap in coverage for employees covered by these arrangements.

### Business services sector

The business services sector is partially covered by the Pay Scales derived from the LHMU Award which had 15 respondents as of 27 March 2006.

Employees with a disability employed in business services and who are not subject to a business services Pay Scale will be without coverage of a statutory minimum rate of pay or provision for pro rata arrangements. Employees of an estimated 200 business services fall into this category.

## 8.4 Agreements to fill coverage gaps in disability wage arrangements

The regulation of wages for employees with a disability has historically been characterised by a substantial level of agreement making among stakeholders.

### 8.4.1 Prior to 27 March 2006

This agreement making approach characterised wage regulation both in open employment and the business services sector.

#### Open employment

The SWS model clause was inserted following a consent application to the Australian Industrial Relations Commission (AIRC) by the Australian Council of Trade Unions (ACTU), Australian Chamber of Commerce and Industry (ACCI) and the Australian Government (supported by bodies representing people with a disability).

...

The parties to this application submitted that:

To provide a mechanism for a wages system for workers unable to work at full productive capacity, several options exist.

Pro-rata wages could be provided for by way of a general exemption to pay the minimum rate, with wages determined by agreement at the workplace. Alternatively the Commission could set an appropriate rate of pay for such workers upon application on a case by case basis.

However, the parties to this application, and disability groups more generally, consider that there are shortcomings with each of these options and consider that in order to provide the necessary safeguards and to ensure equity in outcomes wages should be determined on an assessment of the productive capacity of the individual in the particular job that they are performing.<sup>7</sup>

The AIRC approved the model clause to be inserted in federal awards.<sup>8</sup> It provides the basis for paying pro rata wages based on an assessment of an employee's skills and productive capabilities. Parties could include the model clause in an award on application to the AIRC. There remain gaps in coverage.

<sup>6</sup> Workplace Relations Regulations 2006, Part VII, Division 2, Regl. 7.2 & 7.3.

<sup>7</sup> Australian Government, 2006, p. 349, para. 11.30 quoting *Supported Wage System for People with a Disability: A Joint Submission by the ACTU, ACCI, Commonwealth Government*, 20 July 1994.

<sup>8</sup> AIRC, *Supported Wage System for People with a Disability*, Dec. 1831/94, [L5723, (10 October 1994)]

## Section 8

### Business services

In 2002, amendments to the *Disability Services Act 1986*<sup>9</sup> (DS Act) resulted in a requirement that business services meet new standards to qualify for federal government funding. The new standards include the requirement to pay 'award based wages' using a transparent tool for the determination of pro rata wage rates. Due to the economic impact of an increase in wage costs arising from the amendments to the DS Act, the Department of Family, Community Services and Indigenous Affairs reached agreements with some business service operations for the 'phasing in' of compliance with the new standards.<sup>10</sup> The Australian Government submission notes that 61 business service operations (employing 5,714 employees) have agreements in place to phase in compliance with the quality standards by 11 May 2008.<sup>11</sup>

These agreements are deemed to be included in any relevant preserved Pay Scale and will exclude the relevant employers from coverage of any Pay Scale until 11 May 2008 or as otherwise provided for in the agreement.<sup>12</sup>

In 2004, the LHMU applied to the AIRC to vary the LHMU Award to introduce pro rata award wages. In August 2005, the AIRC varied the LHMU Award to reflect the agreement. It was anticipated that this award would be extended to other business services in the sector, with the exception of Western Australia, through 'roping-in' applications.<sup>13</sup>

#### 8.4.2 After 27 March 2006

After 27 March 2006, parties can no longer apply to vary awards to extend disability wage arrangements. Rather the Commission decides such matters. Many submissions argue that the Commission should extend disability wage arrangements consistently with pre-existing agreements for both open employment and business services:

'ACCI continues to strongly support the use of the SWS to support the employment of persons with a disability in open employment. This successful approach, agreed on a bipartisan basis, should be maintained by the AFPC as the key minimum wage for persons with a disability working in open employment.'<sup>14</sup>

'The parties should be allowed to continue the agreed approach as reflected in the Liquor, Hospitality and Miscellaneous Union Supported Employment Services Award 2005, including the acceptance of agreed and compliant wage assessment tools (that were not inserted into the Award prior to *Work Choices*) as minimum wages for people with a disability working in Supported Employment Services.'

There is an industry, union, parent and disability group consensus in support of the agreed terms of the Liquor, Hospitality and Miscellaneous Union Supported Employment Services Award 2005, which was finalised only last year. This enjoys continued support as the way forward for the industry during this time of transition and modernisation and should be maintained.<sup>15</sup>

'Given the widespread acceptance of the SWS and its ability to set the minimum wages for employees with a disability that ensure they are competitive in the labour market, the Commission could consider determining a special APCS that provides universal access to the SWS under APCSs by filling all gaps in its coverage.'<sup>16</sup>

<sup>9</sup> *Disability Services Amendment (Improved Quality Assurance) Act 2002* (Cth).

<sup>10</sup> Since 24 January 2006, FaCs has been renamed the Department of Families, Community Services and Indigenous Affairs (FaCSIA).

<sup>11</sup> Australian Government, 2006, p. 352, para. 11.41.

<sup>12</sup> Workplace Relations Regulations 2006, Part VII, Division 2, Regl. 7.4.

<sup>13</sup> Australian Government, 2006, p. 353, para. 11.42.

<sup>14</sup> ACCI, *2006 Minimum Wage Review: ACCI Submission*, July 2006, p. 452, para. 20.49.

<sup>15</sup> ACCI, 2006, p. 473-4 para. 21.52-3.

<sup>16</sup> Australian Government, 2006, p. 360, para. 11.71.

## Section 8

'In keeping with the process that produced the original agreement, the key industry parties have held discussions about how the agreement can be best implemented under the Commission's jurisdiction, and have reached a common position on the action that needs to be taken. The Australian Government also supports the position agreed by the industry parties as follows...'<sup>17</sup>

The Australian Government submission goes on to list the elements of the common position as including:

- adoption of the additional 11 wage assessment tools for business services that have been agreed;
- coverage of all employers currently using approved tools in the Pay Scale; and
- exemption of employers subject to phase-in agreement with FaCSIA till 2008.<sup>18</sup>

The ACTU reiterates the agreed approach to disability wage arrangements prior to the implementation of Work Choices:

'The Supported Wage System was developed on a multipartite basis by government, employer, trade union, and disability peak bodies and specialised employment agencies for people with disability. The SWS was introduced to create job opportunities for people with disability...

On July 20, 1994 a Full Bench of the AIRC heard an application jointly made by the ACTU, ACCI and Commonwealth Government for the insertion of a model clause covering the employment of workers with disability into a range of Federal Awards. Since that time the SWS model clause has been inserted into virtually all federal awards.<sup>19</sup>

'The ACTU endorses that part of the submission of ACROD which relates to supported employment. Our support for a special APCS for this sector is distinguished on the basis that the proposal is to create a special APCS which would apply across a legislated area; the legislated area as defined by the Disability Services Act.<sup>20</sup>

In addition, the ACTU notes the preferences of employees with a disability:

The wages and conditions of employees eligible for and employed under the SWS are located in most industry or occupational awards (up to 27 March 2006). This reflects the strong preference of employees with a disability to be employed under the relevant industry or occupational award, as opposed to a disability Award.<sup>21</sup>

ACROD Ltd, the National Industry Association for Disability Services (ACROD) comprehensively describes how prior agreements can be incorporated into the new legislative scheme.

Generally, there is widespread support for the SWS model clause:

'The Supported Wage System Model Clause should be incorporated in every Australian Pay and Classification Scale not already containing it to allow those people with disability in the target group (as defined in the Model Clause) to access productivity-based wages in industries or with employers not previously covered by the Supported Wage System Model Clause.<sup>22</sup>

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<sup>17</sup> Australian Government, 2006, p. 363, para. 11.83.

<sup>18</sup> Australian Government, 2006, pp. 363-4, paras 11.84-90.

<sup>19</sup> ACTU, *Australian Council of Trade Unions Submission to the Australian Fair Pay Commission*, July 2006, p. 142.

<sup>20</sup> ACTU, 2006, p. 146.

<sup>21</sup> ACTU, 2006, p. 144.

<sup>22</sup> People with Disability and NSW Disability Discrimination Legal Centre, *Minimum Wage Determinations: Spring 2006*, p. 2.

## Section 8

'The Supported Wage System is the appropriate way to deal with wages and productivity issues related to disability.'<sup>23</sup>

However, there is some limited opposition to extending SWS coverage:

Given the narrow application of the Supported Wages System and the increased complexity of industrial relations and income support legislation and policy, AFDO does not support the extension of the Supported Wages System to all Awards.<sup>24</sup>

Some submissions also raise the matter of the establishment of statutory wage protections for employees defined by the legislation as employees with a disability, who are able to earn full adult wages. For example, the Human Rights and Equal Opportunity Commission (HREOC) states:

However, working within the regime of the Act, HREOC believes that the appropriate course for the AFPC is to set a Special FMW equal to the FMW. This approach is necessary to protect workers with disabilities from discrimination who may otherwise not be covered by the FMW.<sup>25</sup>

The minimum weekly payment for employees under the SWS system has historically been determined by reference to the income-test free threshold for the DSP;<sup>26</sup>

This amount has been set, and varied each year, based on the Disability Support Pension income test free amount which employees may earn without the loss of pension and benefits. The ACTU and ACCI have for some years agreed to increase this minimum SWS payment in line with increases in this inflation indexed amount announced by the Minister for Community Services. This has been a cooperative initiative, which ACCI continues to support.<sup>27</sup>

However, ACROD has raised concerns that maintaining the minimum payment may represent a barrier to employment:

An additional issue is that the SWS minimum wage (at present \$62) is applied regardless of hours worked. It is the minimum for an employee working a 38 hour week or for an employee working an 8 hour week. People who can only work 8 hours a week tend to be those with the highest support needs and the lowest productivity. In these cases \$62 can pose a significant barrier to employment. In ACROD's view, the minimum should apply pro rata.<sup>28</sup>

The agreement of additional assessment tools in relation to business services employment is raised as an issue. The 2004 agreement between the LHMU, ACTU and employer representatives provided that:<sup>29</sup>

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<sup>23</sup> HREOC, *Submission to the Australian Fair Pay Commission for Consideration in Determining the First National Wage Decision*, July 2006, p. 9, para. 34.

<sup>24</sup> AFDO, *Supplementary Briefing for the Australian Fair Pay Commission*, July 2006, p. 2.

<sup>25</sup> HREOC, 2006, p. 9, para. 36.

<sup>26</sup> currently \$64.00 per week.

<sup>27</sup> ACCI, 2006, p. 452, para. 20.47.

<sup>28</sup> ACROD, *Submission to the Australian Fair Pay Commission in respect of Disability Employment Services Sector*, 2006, p. 17, para. 49.

<sup>29</sup> including ACROD, VECCI and ABL.

## Section 8

For a period of time after the variation was made, business services would be able to nominate further tools for inclusion in the Award, provided the tools met the requirements of the quality assurance standards. As outlined in the AIRC decision, the LHMU agreed that it would not unreasonably withhold consent in relation to a tool proposed to be added to the Award list. As an aid for the parties in assessing further tools, FaCSIA agreed to arrange for a consultant to evaluate each proposed tool against the requirements of the Guide to Good Wage Practice Determination. Further wage tools were evaluated and identified by the parties as warranting inclusion in the Award.<sup>30</sup>

Eleven additional tools have since been agreed.<sup>31</sup>

The Commission will accept submissions at any time regarding the addition of new wage assessment tools to preserved Pay Scales, new special Pay Scales and new special FMW instruments.

### 8.5 Extending coverage of disability wage arrangements

The Commission notes the consensus advocating the consistent filling of gaps in coverage to ensure that:

- employees with a disability who are able to earn full adult, junior or trainee wages (with reasonable adjustment as appropriate<sup>32</sup>) as the effects of their disability do not impair their productive capacity have access to a statutory minimum wage; and
- employees with a disability who are unable to perform the range of duties to the competence level required within the class of work for which they are engaged because of the effects of their disability on their productive capacity have the protection of statutory minimum wages that include pro rata arrangements.

This is consistent with the direction and approach taken by the key stakeholders prior to 27 March 2006 and reflects an intention to provide employees with a disability, who are unable to perform the range of duties to the competence level required because of the effects of a disability on their productive capacity, minimum rates of pay based on productivity that lead to greater opportunities to enter and remain in the labour market.

A flow chart of gaps in coverage of pre-reform wage instruments and instruments for filling gaps in coverage is provided at Appendix B.

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<sup>30</sup> Australian Government, 2006, p. 353, para. 11.42.

<sup>31</sup> Australian Government, 2006, p. 363, para. 11.86.

<sup>32</sup> The term 'reasonable adjustment' is not contained expressly in the *Disability Discrimination Act 1992* (DD Act). However, the DD Act has an implied requirement for employers to make reasonable adjustments. The implied requirement under the DD Act to make reasonable adjustment results from s. 6, on indirect discrimination. Section 6 defines discrimination as including the imposing of any 'requirement or condition' which a person with a disability cannot or does not comply with, if a substantially greater proportion of people without than with the disability can comply with it, and if it is not reasonable. A requirement or condition does not have to be a specific rule, policy, direction or action. For example, in *Waters v. Public Transport Corporation* (1992) 173 CLR 349 the High Court upheld a finding that a tram operator who ran trams and buses without conductors and with steps at the entrance had imposed conditions or requirements of being able to climb steps and being able to board without assistance from a conductor.

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### Employees with a disability who are able to earn full adult, junior or trainee wages (with reasonable adjustment as appropriate<sup>33</sup>) as the effects of their disability do not impact on their productive capacity

#### **Decision**

The Commission will establish a new special FMW - equal to the standard FMW - for employees with a disability as defined by the legislation who are able to earn full adult, junior or trainee wages as the effects of their disability do not impair their productive capacity.

This will be a default statutory minimum for employees with a disability as defined by the legislation. This special FMW will not apply to workers with a disability who are juniors, covered by training arrangements or who are otherwise covered by a Pay Scale or other special FMW.

### Open employment covered by Pay Scales that do not include SWS arrangements

#### **Decision**

The Commission will establish a new special Pay Scale that extends coverage of the SWS pro rata wages to preserved Pay Scales that do not currently provide for pro rata wage arrangements.

Coverage will be limited to those employees working in open employment who would otherwise be covered by Pay Scales that do not provide for the SWS arrangements. Specifically, the special Pay Scale will cover employees with a disability who are unable to perform the range of duties to the competence level required within the class of work for which they are engaged because of the effects of their disability on their productive capacity and who:

- work in open employment;
- are covered by a preserved Pay Scale; and
- are not otherwise covered by a SWS Pay Scale.

### Open employment not covered by Pay Scales

#### **Decision**

The Commission will establish a new special FMW that extends coverage of the SWS pro rata wages to previously award free employees with a disability.

Coverage will be limited to employees with a disability who are unable to perform the range of duties to the competence level required within the class of work for which they are engaged because of the effects of their disability on their productive capacity and who:

- work in open employment; and
- are not covered by a preserved Pay Scale.

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<sup>33</sup> See 32

## Section 8

### Supported wage system minimum weekly payment

#### **Decision**

The supported wage minimum weekly payment for the new special FMW and the new special Pay Scale will be \$64.00 per week. Where a preserved Pay Scale specifies a supported wage minimum weekly payment, this will be increased to \$64.00 per week.

This retains the historical nexus with the income-test-free threshold for the DSP, which is currently the equivalent of \$64.00 per week.

To conform with legislative requirements to express this as an hourly rate of pay a 'method' has been included in the instruments to provide for the minimum weekly wage. This method will be included in the adjustment of preserved Pay Scales.

### Business services not covered by Pay Scales

#### **Decision**

The Commission will establish a new special Pay Scale under s. 220 of the WR Act that provides pro rata wages to employees with a disability employed in the business services sector and who are not otherwise covered by preserved Pay Scales.

The new special Pay Scale will include the 11 additional wage tools that have been agreed by industry parties (22 total).

Pay Scales derived from the LHMU Award will also be varied to include the 11 additional wage tools that have been agreed by industry parties, including identified restrictions on the use of some assessment tools.

Business services that are not currently using a recognised wage tool will be excluded from this special Pay Scale until 11 May 2008.

## Section 8

### Further review of minimum rates for employees with a disability

The Commission's decision in relation to the determination of new special Pay Scales and special FMWs for employees with a disability fills the gaps in coverage discussed in submissions.

The Commission notes that many submissions suggest scope for structural change and particularly in the areas of the multiplicity of wage assessment tools that are currently used to determine productivity.

However, the labour market for employees with a disability is sensitive to structural change and the Commission considers that further consultation is required to identify areas for improvement and to establish appropriate solutions.

This is emphasised in the submission by the Australian Federation of Disability Organisations in relation to the SWS:

Radical reform is not required, rather a considered approach that will ensure that the SWS can remain relevant, responsive and flexible in a changing and dynamic environment.<sup>34</sup>

Consequently, the Commission will consult further with key stakeholders regarding the future operation of arrangements for employees with a disability.

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<sup>34</sup> AFDO, 2006, p. 14.

## Section 9

### 9. Casual loadings

#### 9.1 The legislation and casual loadings

The Australian Fair Pay Commission (Commission) has responsibility for setting and/or adjusting casual loadings. Casual loadings may be contained within the Australian Pay and Classification Scales (Pay Scales). A preserved Pay Scale includes casual loading provisions and related casual classification provisions if the loadings are determined by classifications that were contained in pre-reform wage instruments (predominantly federal and state awards). While the majority of pay elements in preserved Pay Scales are notionally expressed as dollar amounts, casual loadings are preserved as percentages.

Casual rates are typically expressed as a percentage loading that is applied to a basic hourly rate of pay. However, a number of awards specify flat rates of pay for casual employees without separately identifying a casual loading. These can be either 'casual-only' awards or awards that also include basic hourly rates of pay for non casuals.

The Australian Fair Pay and Conditions Standard also provides for a 'default' casual loading of 20 per cent which applies to employees covered by the standard Federal Minimum Wage (standard FMW), a special Federal Minimum Wage (special FMW) or a workplace agreement.

When adjusting casual loadings, the legislative guarantee requires the Commission to ensure that casual loadings within Pay Scales are not reduced below the loading specified in the preserved Pay Scale.

An initial analysis undertaken by the Award Review Taskforce (Taskforce) identified substantial diversity in casual loadings and the basis upon which they were established:

The Taskforce found that casual loadings were commonly between 20 and 25 per cent. However, some preserved Scales in the hospitality industry have loadings of up to 50 per cent. Anecdotal evidence suggests that some of these higher loadings were introduced in order to deter casual employment whilst other high loadings replace penalty rates in whole or in part.

The variation in casual loadings was compounded by variations in award provisions relating to access to paid leave. There was no readily identifiable correlation between high casual loadings and fewer paid leave entitlements.<sup>1</sup>

Wide diversity in current arrangements reflecting pre-reform wage instruments increases the complexity of adjusting casual loadings.

#### 9.2 Casual loadings in Pay Scales and the default casual loading

There is a consensus of opinion in a number of submissions supporting the view that the Commission should not adjust casual loadings currently included in Pay Scales, or the 'default' casual loading of 20 per cent, at this time. The following extracts are illustrative of this consensus.

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<sup>1</sup> Taskforce, *Award Review Taskforce Final Report on Rationalisation of Wage and Classification Structures*, July 2006, p. 15, paras 52-3.

## Section 9

The Australian Chamber of Commerce and Industry submission does not support adjusting the default casual loading:

Casual loadings are something which varies very irregularly in Australian industrial relations, perhaps only once or twice in any industry in the space of the past 100 years.

ACCI can see no basis upon which the AFPC should consider exercising its power under s.187 of the amended *Workplace Relations Act 1996*. The default casual loading should remain at the community standard level of 20% identified in the amending legislation (s.186) less than 12 months ago.<sup>2</sup>

The Australian Government submission proposes that the Commission hold off on adjusting casual loadings at this stage:

The Australian Government has asked the ART to examine the rationalisation of casual loadings. With this in mind, the Commission should await the results of ART's research before making any adjustments to casual loadings in APCSSs. Further, given the diversity in casual loadings in APCSSs and award entitlements, the Commission may wish to undertake its own research into casual loadings to inform its decisions in this regard.<sup>3</sup>

The Australian Council of Trade Unions submits that:

In the application of any increase to casual employees arising from any wage increase awarded by the AFPC, casual employees should not be disadvantaged by the changes that are deemed to have been made post reform. That is, the rates of pay for casuals should be adjusted in such a way that they are not disadvantaged on the basis of what they would have received had the reforms not occurred but there had been a wage movement that would have affected their rates of pay.

This proposition does not affect the capacity of the AFPC to undertake any review of casual loadings as specified in the Act to determine at some time in the future appropriate casual loadings to apply to some or all APCSSs.<sup>4</sup>

The Australian Industry Group also supports leaving the default rate for casuals unchanged for the following reasons:

- ...
- It is consistent with the level of the loading in a large number of APCSSs;
  - It is already substantially higher than the loading in many APCSSs (eg. the APCSSs arising from the NSW State *Metal, Engineering and Associated Industries Award* and *Electricians & c [sic] (State) Award...*);
  - In some relatively recent Industrial Commission decisions a 20 per cent loading was found to be appropriate (eg. the August 2003 decision of the AIRC in respect of the *Glass Industry - Glass Production - Award 1998* (PR935981));
  - It is consistent with the loading in the WA *Minimum Conditions of Employment Act* and the SA *Minimum Standard for Remuneration*;
  - If the loading is increased it will have a negative impact upon employment; and
  - The level of the loading should not operate as a disincentive to the employment of casuals.<sup>5</sup>

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<sup>2</sup> ACCI, *2006 Minimum Wage Review: ACCI Submission*, July 2006, p. 357, paras 16.100-101.

<sup>3</sup> Australian Government, *Submission to the Australian Fair Pay Commission 2006*, 28 July 2006, p. 28, para. 1.90.

<sup>4</sup> ACTU, *Australian Council of Trade Unions Submission to the Australian Fair Pay Commission*, July 2006, p. 147.

<sup>5</sup> AiG, *2006 Review of Minimum Wages: Submission to the Australian Fair Pay Commission*, July 2006, pp. 98-99, para. 268.

## Section 9

The Human Rights and Equal Opportunity Commission submits that the Commission should:

...ensure that the value of loadings paid to casual workers, particularly those in female dominated industries and occupations, are not reduced, either in the initial wage determination or over time.<sup>6</sup>

A contrary view is expressed in the Restaurant & Catering Australia submission where the Commission is encouraged to reduce the casual loading rate:

Restaurant & Catering Australia believes that at a minimum the increase in the loading from 19% to 20% based on introduction of the 17.5 per cent annual leave loading should be reversed by the AFPC. Based on the ABS Report, Cafes and Restaurants Australia, a one percent [sic] reduction in the casual loading would save the industry \$15 Million dollars per annum. The industry urges the AFPC to consider reducing the casual loading.

The AFPC should also acknowledge that the casual loading, unlike other aspects of the commissions [sic] mandate, is a formula based on conditions established in the Australian Fair Pay and Conditions Standard and is not a discretionary or arbitrary ratio that should be adjusted on the basis or [sic] economic or any other consideration.<sup>7</sup>

The Taskforce in its report also identified some complex issues associated with the adjustment of casual loadings included in Pay Scales:

It appeared that the only way a casual loading could be rationalised to a single loading (without breaching the wage guarantee in s. 192 of the WR Act) would be to rationalise all of the disparate loadings to the highest loading in each industry. Consultations with stakeholders disclosed that this would result in a considerable increase in wage costs for many employers of casual employees.

The Taskforce canvassed the option of applying multiple casual loadings within an industry, with the loading rate determined by the extent of paid leave entitlements. However, the Taskforce found that this would likely be in breach of the wage guarantee.<sup>8</sup>

If the Commission does not adjust the default casual loading or the casual loadings expressed as a percentage in the preserved Pay Scales, casual employees will receive:

- the general pay increase through adjustments in their base rate of pay; and
- a higher dollar value for any given casual loading by virtue of the fact that the loading is applied to a higher base rate.

Some preserved Pay Scales specify flat rates of pay for casual employees without separately identifying a casual loading. It may not be possible to identify how these flat amount casual loadings have been calculated and therefore identify how they should be adjusted. However, it appears that, at least in some cases, these flat rates have previously been increased by the same flat amount that was applied to other wage rates in previous general increases.

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<sup>6</sup> HREOC, *Submission to the Australian Fair Pay Commission for Consideration in Determining the First National Wage Decision*, July 2006, p.30, para 171 (ix).

<sup>7</sup> Restaurant & Catering Australia, *Australian Fair Pay Commission 2006 Submission*, July 2006, p. 10.

<sup>8</sup> Taskforce, 2006, p. 15, paras 54-5.

## Section 9

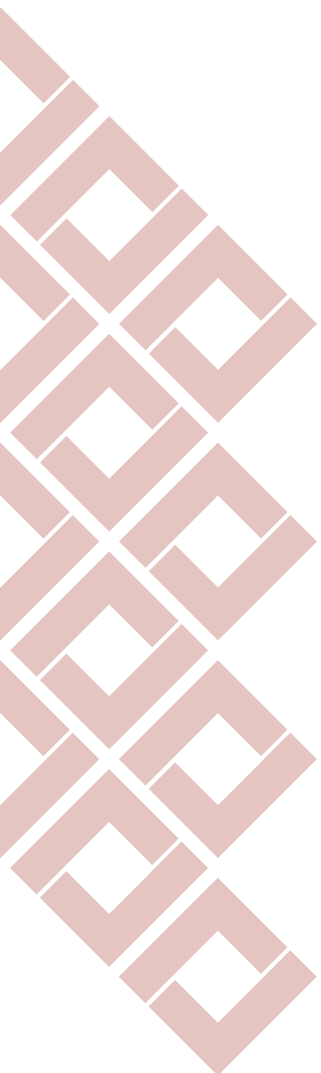
Given the level of diversity and complexity of the current casual loadings provided for in the Pay Scales, the Commission has decided that further consideration of any casual loading adjustments should be undertaken in the context of the Australian Pay and Classification Scale rationalisation process.

### Decision

The Commission will not make any adjustment to the casual loadings expressed as a percentage contained in preserved Pay Scales or the default casual loading at this time.

Where preserved Pay Scales provide a flat dollar amount for casual employees, these rates will be increased by the same amounts and in the same way as the general increase.

Further consideration of any casual loading adjustments will be undertaken in the context of the Australian Pay and Classification Scale rationalisation process.



## Section 10

### 10. Piece work rates

The majority of submissions to the Australian Fair Pay Commission (Commission) do not address the issue of piece rates and piece workers.

#### 10.1 What is a 'piece rate'?

Piece rates are a form of:

...payment for work by reference to quantifiable outputs, such as the number of unites [sic] produced or the number of fruit bins filled, and without reference to the time...it takes or any standard engagement.<sup>1</sup>

Prior to 27 March 2006, federal and state awards referred to a variety of payment schemes classified as 'piece rate systems'. As the Award Review Taskforce (Taskforce) and the Australian Council of Trade Unions (ACTU) observe:

'Piece work rates, their history and their structure vary from award to award. Piece work rates in some (pre-reform) awards determine the entire wage under the award, others determine only part of the rate and must be read in conjunction with a specified hourly or weekly rate.'<sup>2</sup>

'In some cases pre-reform awards contain a loading for piece workers, so that the piece rate is calculated to ensure that employees of average capacity earn at least the relevant loading on top of the relevant minimum wage rate. The piece rate loading is typically between 10 and 20 per cent. A number of pre-reform awards contain provisions that guarantee that a piece worker would at least earn a minimum wage rate. Others do not include specific piece rates but note that an employer may make a contract with an employee/s for payment by results by piecework and commonly include a piece rate loading.'<sup>3</sup>

#### 10.2 What is a pay scale piece rate?

*The Workplace Relations Act 1996* as amended by the *Workplace Relations Amendment (Work Choices) Act 2005* (WR Act) defines a 'piece rate of pay' as:

...a rate of pay that is expressed as a rate for a quantifiable output or task (as opposed to being expressed as a rate for a period worked).<sup>4</sup>

Section 178 separately defines a 'basic piece rate of pay' as a basic piece rate:

other than a piece rate of pay that is payable, as an incentive-based payment or bonus, in addition to a basic periodic rate of pay.

The Australian Chamber of Commerce and Industry (ACCI) argues that the amendments implemented by the *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices) narrows the range of piece rates derived from awards, noting that:

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<sup>1</sup> ACCI, *2006 Minimum Wage Review: ACCI Submission*, July 2006, p. 359, para. 17.1.

<sup>2</sup> ACTU, *Australian Council of Trade Unions Submission to the Australian Fair Pay Commission*, July 2006, p. 140.

<sup>3</sup> Taskforce *Award Review Taskforce Final Report on Rationalisation of Wage and Classification Structures*, July 2006, p. 51, para. 178.

<sup>4</sup> WR Act, s. 178.

## Section 10

An APCS piece rate would seem to include only those provisions which were not underpinned by a basic periodic rate of pay. It can not be entirely clear in advance which pre-reform awards would either be included or excluded from the special piece rate provisions which the AFPC can adjust under s. 178.<sup>5</sup>

The Australian Mushroom Growers Association makes this distinction clear:

Unless a piece rate allows an employer to pay an employee based entirely on what they pick, it will be an incentive based payment or bonus and it is not within the Commission's power to set these payments because they remain part of the award system.<sup>6</sup>

The Taskforce makes a similar observation:

Prior to the commencement of Work Choices Act, a number of awards had clauses where employees could be paid according to their output and these were deemed 'piece workers.' However the WR Act now defines a piece rate as a rate of pay that is expressed as a rate for a quantifiable output or task. Where a rate is payable in addition to a basic periodic rate of pay this is considered an incentive-based payment or bonus and is an allowable award matter.<sup>7</sup>

Many submissions refer to 'piece rates' as including both 'basic piece rates', as defined in the WR Act, and basic periodic rates, which include an incentive-based payment. Furthermore, award references to 'piece work', 'incentive-based systems', 'task systems', 'commissions' and 'payment by results' may be confusing, as many are actually underpinned by basic periodic rates of pay.

Where a pre-reform wage instrument referred to both a basic periodic rate of pay and a piece rate (including commission payments), the basic periodic rate of pay is preserved as an Australian Pay and Classification Scale (Pay Scale) and the additional component remains in the award as an incentive payment.

ACCI contends that only a minority of pre-reform awards provided for remuneration exclusively based on piece rates "without reliance or reference to a minimum wage".<sup>8</sup>

Terminology in pre-reform federal and state awards is inconsistent, diverse and does not reflect the new legislative differences.

Awards provided for a range of arrangements termed as piece rates that, to varying degrees, conform to the WR Act definition of 'piece rates'. In other cases, employees who were award-free prior to 27 March 2006 were remunerated by informal or common law piece rate only arrangements. In these cases, there were no pre-reform wage instruments from which to derive a preserved Pay Scale. Where these employees are within the federal jurisdiction, they are now subject to the standard Federal Minimum Wage (standard FMW).

In the interests of clarity, we use the term 'piece rates' in this Section to refer to 'basic piece rates' as defined in the WR Act; 'incentive-based payments' refer to arrangements in pre-reform wage instruments that specified supplementary payments in addition to basic periodic rates of pay.

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<sup>5</sup> ACCI, 2006, p. 359, para.17.4.

<sup>6</sup> Australian Mushroom Growers Association, *Submission*, 28 July 2006, p. 1.

<sup>7</sup> Taskforce, 2006, p. 50, para. 177.

<sup>8</sup> ACCI, 2006, pp. 363-4, para. 17.19.

## Section 10

### 10.3 Retention of piece rates

Most submissions support the concept of a piece rate system. Employer groups draw attention to the role piece rates play in generating employment for a range of low-skilled people. They are regarded as particularly important in economically depressed areas where workers on piece rates might otherwise be unemployed:

'...there is a place for a system of piece work rates in terms of providing employment to all levels of persons and retaining the flexibility of remunerating on the basis of a rate that reflects a balance between labour costs and market costs.'<sup>9</sup>

'The mushroom industry, like many other industries within the broad category of horticulture and agriculture, makes use of piece rates as the basis for the fair and equitable remuneration of its employees. In functions such as picking, there is a direct link between the work performed and the volume harvested. Piece rates are important to the industry because they allow employers and their employees to focus on maximising yield while guaranteeing flexibility. In particular, in an industry in which the value added by employees performing these functions is related to the yield, piece rates reward the more productive and efficient workers and encourages poorer performers to increase output. Piece rates also help guarantee a certain cost per unit produced which is essential for planning and forecasting purposes and the success of businesses that operate in the mushroom industry.'<sup>10</sup>

The Australian Government submission also notes that the award piece rate system "has served the flexibility of certain industries and workplaces well".<sup>11</sup>

The conclusion of the Taskforce is that rationalisation of piece rates is not a priority, particularly "due to the relatively small number of Scales containing piece rates and the high level of diversity in them".<sup>12</sup>

### 10.4 Determination of new basic piece rate Pay Scales

Some submissions argue that an appropriate level of piece rates should be based on an industry 'average capacity':

'It is the Company's belief that the average capacity should be based on the industry's average picking rate and not based on the minimum wage set.

This means that the minimum pay should be based on the ability of the employee to pick what is regarded as the Company's or even the Industry's average kilo rate per hour.'<sup>13</sup>

'Because the Federal Minimum Wage and Australian Pay and Classification Scales are absolute obligations that must be met by employers, it is essential that the Commission make provision for a 'genuine' piece rate which will apply nationally to employers in the industry.'<sup>14</sup>

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<sup>9</sup> SA Wine Industry Association Incorporated, *Australian Fair Pay Commission Submission*, 28 July 2006, p. 11.

<sup>10</sup> Australian Mushroom Growers Association, 2006, pp. 4-5, para. 4.1.

<sup>11</sup> Australian Government, 2006, p. 27, para. 1.85.

<sup>12</sup> Taskforce, 2006, p. 51, para. 182.

<sup>13</sup> Adelaide Mushrooms, *Submission*, July 2006, p. 3.

<sup>14</sup> Australian Mushroom Growers Association, 2006, p. 10, para. 6.2.

## Section 10

However, not all submissions agree that a measurement of average capacity is relevant or appropriate:

The concept of average capacity, whilst applicable to say a piece rate worker in the horticulture industry where almost any worker prepared to apply themselves can quite quickly be trained or motivated to achieve at least average performance, is simply not relevant to professional real estate selling.<sup>15</sup>

It is clear from submissions that, as yet, there is no consensus as to whether the Commission should consider determining any new Pay Scales containing piece rates.

### Decision

Despite what appears to be a relatively small proportion of preserved Pay Scales that establish basic piece rate Pay Scales, their operation appears diverse, reflecting industry-specific circumstances, and the historical methods of adjustment appear obscure. There is some evidence of previously award-free employees whose informal or common law remuneration arrangements reflected basic piece rate pay practices.

The introduction of the standard FMW, the legislative definition of basic piece rates and the interaction of allowable award matters and Pay Scales with pre-reform wage instrument 'piece rate' provisions raise complex issues. As part of its future inquiries, the Commission will further consider the option of new basic piece rate Pay Scales.

## 10.5 Adjustment of preserved basic piece rate Pay Scales

A number of submissions express qualified support for increases in piece rates. The ACTU and Australian Government support adjustment in accordance with previous award practices, with the ACTU recommending a 'cautious approach':

'...it is our view that piece rates should be adjusted as they would have been adjusted had the reforms not commenced. Any re-adjustment necessary should then be undertaken in accordance with the provisions of the Act.'<sup>16</sup>

'The award piece rate system has served the flexibility of certain industries and workplaces well. The Australian Government's strong view is that the Commission should adjust piece rates provisions in APCs in accordance with past practice that was taken in relation to awards.'<sup>17</sup>

Some employer groups submit that industry representatives are best placed to adjust piece rates. ACCI encourages individual industries and sectors to make their own recommendations, which the Commission could then use as a benchmark in setting piece rates:

Because piece rates are very industry specific, ACCI advocates, at this point of time, that individual industries/sectors should make submissions on their operation, including formulae for varying piece rates consistent with award practice.

This would allow those employers who have a special interest in this area to be able to make relevant submissions about their industry.<sup>18</sup>

<sup>15</sup> Small Business Union/ADL Software, *Submission for minimum wage levels in the Real Estate Industry for "Commission Only" Sales Personnel*, 2006, p. 8, para. 4.4.

<sup>16</sup> ACTU, 2006, p. 141.

<sup>17</sup> Australian Government, 2006, p. 27, para 1.85.

<sup>18</sup> ACCI, 2006, p. 366, paras 17.28-29.

## Section 10

A number of submissions draw attention to the fact that adjustment of piece rates is likely to be problematic. This is largely due to the fact that “[p]iece work rates, their history and their structure vary from award to award.”<sup>19</sup>

The Commission understands that there is wide variation in practices adopted in applying former safety net increases to piece rate provisions. However, the Commission has not been provided with any detail in relation to such practices (with some exceptions).

In other instances, the award provisions set out a relationship between the piece rate and the basic periodic rate but the actual piece rates are determined by a method set out in the Pay Scale. The ‘method’ however, involves agreement between the employer and the employee outside the award provisions, for example:

The remuneration payable to a pieceworker shall be fixed by agreement between the employee and the employer at rates which would enable such an employee of average capacity to earn, for an ordinary week’s work, not less than 25% above the appropriate weekly base rate for the class of work performed.<sup>20</sup>

The Commission has not received detailed submissions from any parties indicating how ‘past practices’ are to be maintained in respect of piece rates. Nonetheless, the Commission is aware that, due to the variety and complexity of practices in this area, it is possible that the implementation of the decision may result in anomalous results in particular instances.

### Decision

The Commission will flow on the general wage-setting decision to basic piece rate Pay Scales in the following manner. The general pay increase will be flowed on to basic piece rate Pay Scales through applying a 5.65 per cent increase to basic piece rates in preserved Pay Scales which are not otherwise increased as a result of the general decision.

However, due to the diversity within basic piece rate Pay Scales, an affected person or business may make a submission to the Commission on the grounds that such an adjustment would result in an anomalous outcome inconsistent with the Commission’s intention to flow on the general increase to piece rate workers.

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<sup>19</sup> ACTU, 2006, p. 140.

<sup>20</sup> Timber and Allied Industries Award 1999 [Fed], cl. 15.6.2.

## Section 11

### 11. Discrimination

The Australian Fair Pay Commission (Commission) received a number of submissions dealing with discrimination matters, focusing mainly on the following groups of employees:

- female employees;
- employees with disabilities;
- people from culturally and linguistically diverse (CALD) backgrounds; and
- indigenous Australians.

(See Appendix C.)

Submissions generally argue that vulnerable groups are over-represented among low-paid employees.

'In Australia 60% of low-paid (Award dependent) workers are women, with women now constituting 45% of the workforce (ABS EEEH 2004) and the majority of workers on Awards being women. Award dependant women earn 83% of male Award dependent workers, while women on Australian Workplace Agreements earn 60% of men on Australian Workplace Agreements (ABS 6306.0 May 2004). Under existing legislative structures women have still not gained pay equity and Australia has amongst the highest rates of occupational segregation in the OECD, with female workers concentrated in a narrow band (namely service industry) of occupations:<sup>1</sup>

'People with disability represent 16.6% of Australia's working age population.

...

While people with disability represent a significant proportion of Australia's working age population, they participate in the workforce at lower rates, they are less likely to be employed when they do attempt to participate, and they will earn less if they do get a job:<sup>2</sup>

'...it is statistically shown that people with disability earn lower wages, on average, than earned by workers without disability. People with disability also make up a disproportionately large group of people who receive a low wage or the minimum wage:<sup>3</sup>

'Almost 20% of Australia's workers are on award wages and rely on increases in minimum award rates of pay to maintain their standard of living. Low-paid workers include a disproportionate number of immigrant workers and women. Both groups are already concentrated amongst the low paid:<sup>4</sup>

'Predominantly private sector industries such as hospitality (accommodation, cafes and restaurants), cleaning (property and business services) and manufacturing have high levels of award reliant workers in the federal industrial relations system. All of these industries employ a significant proportion of workers from non-English speaking backgrounds:<sup>5</sup>

'The groups most likely to be low-paid are the more vulnerable groups of women, indigenous people from Non-English speaking background [sic], workers with a disability, and younger and older workers:<sup>6</sup>

<sup>1</sup> NWWC, *Working Women's Centres Submission to the Australian Fair Pay Commission: Minimum Wage Decision*, 2006, pp. 2-3.

<sup>2</sup> HREOC, *Submission to the Australian Fair Pay Commission for Consideration in Determining the First National Wage Decision*, July 2006, p.13, paras 61 & 67 citing ABS, *Disability, Ageing and Carers Australia*, Cat. No. 4430.0, 2003.

<sup>3</sup> PWD/DDLC, *Minimum Wage Determinations: Spring 2006*, 2006, p. 6.

<sup>4</sup> What Women Want Consortium, *Submission*, 2006, p. 9.

<sup>5</sup> SA Government, *Submission to the Australian Fair Pay Commission on behalf of the South Australian Government*, 28 July 2006, p. 16, paras 60 & 61.

<sup>6</sup> Tas. Government, *Tasmanian State Government Submission to the Australian Fair Pay Commission: Federal Minimum Wage Determination*, July 2006, p. 31.

## Section 11

In the case of indigenous Australians, some submissions argue that there is a greater likelihood of long-term unemployment:

The social demographic characteristics most likely to be associated with long-term unemployment are:

- low levels of education
- low-skilled employment experience
- having some disability and
- coming from indigenous background.<sup>7</sup>

Submissions draw attention to the fact that any decision of the Commission in relation to minimum wages will affect vulnerable groups disproportionately and, therefore, the Commission should consider the equity implications before making any such adjustment:

'Ensure that the FMW is set at a level relative to average weekly earnings for all employees and relative to men's earnings, so that it is likely to reduce rather than increase gender pay inequity..

Set minimum wage rates on a regular, preferably annual, basis to ensure that the value of the FMW does not deteriorate over time.<sup>8</sup>

'...[The] setting of a wage or wage rate at a level so unreasonably low that, although it might apply uniformly to the working population, it would, in practice, operate in a disparate, negative fashion, to the disadvantage of those who were in poor bargaining positions by virtue of their race, gender age or disability.<sup>9</sup>

The legislation specifically requires the Commission to apply the principle that men and women should receive equal remuneration for work of equal value in exercising any of its powers.<sup>10</sup> Submissions identify a range of factors that contribute to gender pay inequity.

Submissions differ regarding the approach the Commission is required to adopt:

'It is also clear that Parliament intended that the responsibility of the AFPC in relation to this section be significant. For example, while the Australian Industrial Relations Commission, in performing its functions, is required to take account of the principle of pay equity<sup>11</sup>, the AFPC is actually required to apply the principle<sup>12</sup>:<sup>13</sup>

'While the AFPC can consider the pay equity principle when setting wages rates, there is no obligation to do so.<sup>14</sup>

'[Provided] the notion of equal pay is reflected in gender neutral minimum wage rates, it cannot otherwise be properly addressed through the setting of minimum wages.

....

Gender pay equity is an important consideration for any society and for policy makers. However, there is no necessary reason for this to be a consideration in fixing a safety net of genuinely minimum wages under a bargaining based system.

...

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<sup>7</sup> Tas. Government, 2006, p. 13.

<sup>8</sup> HREOC, 2006, pp. 5-6.

<sup>9</sup> FECCA, *Submission to the Australian Fair Pay Commission 2006*, 2006, p. 17.

<sup>10</sup> WR Act, s. 222(a).

<sup>11</sup> WR Act, s. 104.

<sup>12</sup> WR Act, s. 222(a).

<sup>13</sup> HREOC, 2006, p. 25, para. 141.

<sup>14</sup> Vic and NT Governments, *Joint Submission by the Victorian and Northern Territory Governments in response to: Australian Fair Pay Commission*, 28 July 2006, p. 61, para. 5.1.

## Section 11

ACCI can see nothing in Section 23 of the Act, or in any other provisions which specifically directs the AFPC to have regard to this issue, and can see the express calling up of other non-gender related considerations.<sup>15</sup>

‘Not surprisingly pay equity issues are not expressly dealt with in the statutory charter of the AFPC. This does not mean that the AFPC should not place pay equity considerations at the forefront of deliberations.’<sup>16</sup>

No submissions raise specific claims of circumstances where the preserved Australian Pay and Classification Scales do not provide equal remuneration.

In making its wage-setting decision, the Commission has applied the principle that women and men should receive equal remuneration for work of equal value.

The Commission places considerable emphasis on who the low-paid are and the importance of its decision for all low-paid Australians. The Commission recognises that vulnerable groups are over-represented among the low-paid.

The Commission has also had regard to the requirements of the *Racial Discrimination Act 1975*; the *Sex Discrimination Act 1984*; the *Disability Discrimination Act 1992*; the *Age Discrimination Act 2004*; and the Family Responsibilities Convention, particularly those aspects which relate to preventing discrimination against workers who have family responsibilities or helping workers to reconcile their employment and family responsibilities.

The Commission has ensured that this decision does not contain provisions that discriminate because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

<sup>15</sup> ACCI, *2006 Minimum Wage Review: ACCI Submission*, July 2006, pp. 265-7, paras 12.3, 12.7 & 12.11.

<sup>16</sup> ACTU, *Australian Council of Trade Unions Submission to the Australian Fair Pay Commission*, July 2006, p. 149.

## Section 12

## 12. Future directions

### 12.1 Wage-setting reviews

In undertaking its wage review for the October 2006 wage-setting decision, the Australian Fair Pay Commission (Commission) became aware of the need for closer investigation of particular issues owing to their complexity.

The Commission will also deliver its second general wage-setting decision in mid-2007.

The Commission will therefore commence a wage review focusing on minimum wages for junior employees and employees to whom training arrangements apply in early 2007.

### 12.2 Award Review Taskforce

The Award Review Taskforce (Taskforce) was established by the Australian Government to examine and report on approaches to the rationalisation of Australian Pay and Classification Scales (Pay Scales) drawn from pre-reform wage instruments.

The Commission was presented with a copy of the *Award Review Taskforce Final Report on Rationalisation of Wage and Classification Structures, July 2006* (Report) by the Chairman, Mr Matthew O'Callaghan, on 1 September 2006. Appendix D provides a summary of Recommendations.

The Report finds that there are currently 105,235 identified classifications drawn from 3,286 awards. The three major issues identified are:

- definitional, where award classifications are unclear or uncertain;
- wage diversity in basic rates of pay and casual loadings; and
- transitional, regarding access to and identification of wages drawn from pre-reform wage instruments now forming the preserved Pay Scales.

The Report highlights problems in identifying comparable classifications and notes that some awards have no classification descriptions beyond a job title. The report highlights the potential for further consultation and states:

... Without an extensive industry-based analysis which includes the opportunity for stakeholders to clarify their respective understandings of classification definitions, the categorisation of classification for the purposes of establishing a rationalised classification model would involve unsupported assumptions and significant potential for error.

The Taskforce expects that through a broad consultative process relative to classification definitions, the uncertainty associated with these definitions could be substantially reduced or quite possibly eliminated in some industry sectors.<sup>1</sup>

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<sup>1</sup> Taskforce, *Award Review Taskforce Final Report on Rationalisation of Wage and Classification Structures*, July 2006, pp. 36-7, paras 134 & 135.

## Section 12

The Report finds that the challenge of identifying comparable classifications is compounded by wage diversity across classifications. The Report provides an example of the wage diversity between Queensland and Victoria in the baking industry, highlighting a 15 per cent variation in wages. Recommendation 6 of the Report suggests that compliance with s. 206 may not be achievable within the required three year time limit. The Commission notes that this remains a significant issue for rationalisation.

Chapter 9 of the Report provides recommendations for both the Government and the Commission to consider in approaching the rationalisation of wage and classification structures. The recommendations canvass a wide range of issues and emphasise the need for further research and consultation as follows:

The degree of definitional uncertainty and the level of wage disparity between apparently like definitions identified by the Taskforce limited the ability to immediately introduce a simplified and rationalised classification structure without additional research and stakeholder consultation. Consequently, the Taskforce reaffirms its recommendation that the Fair Pay Commission use preserved Scales as the basis for its first wage decision in Spring 2006 and undertake further research into classification and the reliance on classification amongst businesses.<sup>2</sup>

In coming to its decision, the Commission has had regard to the Taskforce's recommendations regarding the rationalisation of wage and classification structures.

In particular, the Commission has given effect to Recommendation 10 in relation to employees with a disability through the creation of new special Pay Scales and new special Federal Minimum Wages (special FMWs) that fill gaps in coverage.

### Recommendation 10

The Taskforce recommends that the Fair Pay Commission in its first wage review considers whether the SWS should apply across all industries and to all employers.

In relation to minimum wages for workers with a disability employed by business services, the Taskforce understands that key industry stakeholders are developing an agreed approach to establishing a safety net for the sector, and this would need to be considered by the Fair Pay Commission before determining a final approach to any rationalisation for the sector.<sup>3</sup>

The Commission has had regard to the Report's recommendation regarding adjustment of preserved Pay Scales for the AIRC's 2005 Safety Net Review decision.

### Recommendation 4

That the Fair Pay Commission adopt as a general principle, the adjustment of preserved Scales so as to ensure that its ongoing wage adjustments take account of any safety net adjustments from 2000 which have not already been applied to classifications, unless it has information specific to a particular classification or group of classifications that indicates that this approach would be inappropriate.<sup>4</sup>

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<sup>2</sup> Taskforce, 2006, p. 71, para. 249.

<sup>3</sup> Taskforce, 2006, p. 79, para. 275.

<sup>4</sup> Taskforce, 2006, p. 75, para. 259.

## Section 12

The Commission will adjust preserved Pay Scales in cases where they have been adjusted in accordance with the AIRC's 2004 Safety Net Review decision. Pay Scales will also be adjusted where the pre-reform wage instrument took effect after the AIRC's 2004 Safety Net Review decision and in cases where the pre-reform wage instrument could not reasonably have been expected to be adjusted for the 2004 decision due to the process required, such as the requirement to allow 12 months to elapse between variations to give effect to safety net wage adjustments.

The Commission intends to undertake further research and consultations in respect to the recommendations of the Taskforce and will commence this in 2007.

### 12.3 Research

The Commission undertakes and commissions research as part of its wage reviews. The Commission will also monitor the impact of its wage-setting decisions. The Commission directs its research programme and this research is commissioned by the Australian Fair Pay Commission Secretariat. Research reports are published in full on the website when the Commission's decisions are announced.

A number of submissions suggest topics for further research and/or analysis. These proposals are summarised in Appendix F.

The Secretariat will consult further with stakeholders and seek advice on priority areas of research to assist the Commission in future wage-setting decisions.