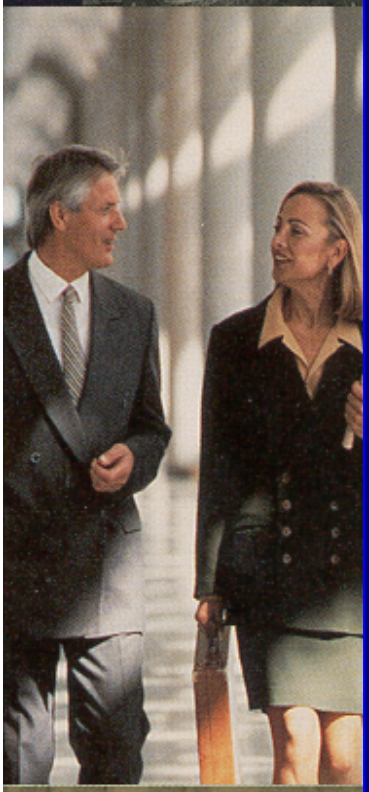

SENATE EDUCATION, EMPLOYMENT AND WORKPLACE RELATIONS COMMITTEE

Inquiry

Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009

ACCI SUBMISSION

April 2009

LEADING AUSTRALIAN BUSINESS

ACCI – LEADING AUSTRALIAN BUSINESS

ACCI has been the peak council of Australian business associations for 105 years and traces its heritage back to Australia's first chamber of commerce in 1826.

Our motto is "Leading Australian Business."

We are also the ongoing amalgamation of the nation's leading federal business organisations - Australian Chamber of Commerce, the Associated Chamber of Manufactures of Australia, the Australian Council of Employers Federations and the Confederation of Australian Industry.

Membership of ACCI is made up of the State and Territory Chambers of Commerce and Industry together with the major national industry associations.

Through our membership, ACCI represents over 350,000 businesses nation-wide, including over 280,000 enterprises employing less than 20 people, over 55,000 enterprises employing between 20-100 people and the top 100 companies.

Our employer network employs over 4 million people which makes ACCI the largest and most representative business organisation in Australia.

Our Activities

ACCI takes a leading role in representing the views of Australian business to Government.

Our objective is to ensure that the voice of Australian businesses is heard, whether they are one of the top 100 Australian companies or a small sole trader.

Our specific activities include:

- Representation and advocacy to Governments, parliaments, tribunals and policy makers both domestically and internationally.
- Business representation on a range of statutory and business boards, committees and other fora.

- Representing business in national and international fora including the Australian Fair Pay Commission, Australian Industrial Relations Commission, Australian Safety and Compensation Council, International Labour Organisation, International Organisation of Employers, International Chamber of Commerce, the Business and Industry Advisory Committee to the Organisation for Economic Co-operation and Development, the Confederation of Asia-Pacific Chambers of Commerce and Industry and the Confederation of Asia-Pacific Employers.

- Research and policy development on issues concerning Australian business.

- The publication of leading business surveys and other information products.

- Providing forums for collective discussion amongst businesses on matters of law and policy affecting commerce and industry.

Publications

A range of publications are available from ACCI, with details of our activities and policies including:

- The ACCI Policy Review; a analysis of major policy issues affecting the Australian economy and business.

- Issue papers commenting on business' views of contemporary policy issues.

- Policies of the Australian Chamber of Commerce and Industry – the annual bound compendium of ACCI's policy platforms.

- The Westpac-ACCI Survey of Industrial Trends - the longest, continuous running private sector survey in Australia. A leading barometer of economic activity and the most important survey of manufacturing industry in Australia.

- The ACCI Survey of Investor Confidence – which gives an analysis of the direction of investment by business in Australia.

- The Commonwealth-ACCI Business Expectations Survey - which aggregates individual surveys by ACCI member organisations and covers firms of all sizes in all States and Territories.

- The ACCI Small Business Survey – which is a survey of small business derived from the Business Expectations Survey data.

- Workplace relations reports and discussion papers, including the ACCI Modern Workplace: Modern Future 2002-2010 Policy Blueprint and the Functioning Federalism and the Case for a National Workplace Relations System and The Economic Case for Workplace Relations Reform Position Papers.

- Occupational health and safety guides and updates, including the National OHS Strategy and the Modern Workplace: Safer Workplace Policy Blueprint.

- Trade reports and discussion papers including the Riding the Chinese Dragon: Opportunities and Challenges for Australia and the World Position Paper.

- Education and training reports and discussion papers.

- The ACCI Annual Report providing a summary of major activities and achievements for the previous year.

- The ACCI Taxation Reform Blueprint: A Strategy for the Australian Taxation System 2004–2014.

- The ACCI Manufacturing Sector Position Paper: The Future of Australia's Manufacturing Sector: A Blueprint for Success.

Most of this information, as well as ACCI media releases, parliamentary submissions and reports, is available on our website – www.acci.asn.au.

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INTRODUCTION

1. The Fair Work (Transitional Provisions and Consequential Amendments) Bill 2009 (the Bill) is far more than a technical Bill. Its application will represent the first interaction for many employers with the *Forward with Fairness* system. It is essential that it introduces fair and workable provisions for employers who must by 1 July 2009, understand and put in place arrangements to transition into the *Fair Work Act 2009* (FW Act). The overall objective of the transition needs to minimise disruption or dislocation to business as a consequence of system change.

2. Unfortunately, the Bill is not just a standard transitional and consequential piece of legislation. It is a substantial, complex, detailed and large (spanning just under 300 pages) Bill. It simultaneously repeals the current WR Act, continues the ongoing operation of certain provisions of the WR Act, and creates a separate Act for organisations. It affects material outcomes and obligations in Australian workplaces.

3. Whilst we commend the Government for producing a more slim lined piece of regulation in the form of the FW Act, the system now requires employers and their representatives to be across the detail of over 2,288 pages of regulation which covers the *Workplace Relations Act 1996* (WR Act), associated regulations, FW Act, and this Bill. Additional regulations will also be promulgated that will add further detail.

4. Many issues of complication and concern identified by ACCI in this submission would not occur if the new industrial relations system took effect on and from 1 January 2010, as originally indicated by the Government. We maintain the view that this should be the case, both from an operational and technical perspective, and also a policy perspective.

5. The Bill imposes additional costs and regulatory burdens on employers. This should not be ignored in the detail of the Bill. ACCI, its members and employers are concerned that there has not been a cost benefit analysis of these increased costs, as well as a recognition of the increased regulatory burden to business (particularly smaller

enterprises) as a result of the Bill. Some of these direct on-costs and challenges to employers include:

a. Increased wage rates under a modern award applying to all existing agreements from 1 January 2010.

b. New employment standards applying to all existing agreements from 1 January 2010, when some of those agreements may have provided for additional compensation to cover similar entitlements under the NDT.

c. Additional time and resources to restart the bargaining process for agreements that have been substantially completed before 1 July 2009.

d. Additional costs for outsourcing arrangements, where the contractual arrangements were settled before 1 July 2009, but the staff start after that time.

6. Whilst we welcome the Senate Inquiry into the Bill, and encourage the all Senators to consider ACCI and ACCI member submissions, we also find ourselves with a short amount of time to comprehend and digest the implications of the new system. There will be complications down the track no doubt, despite our earnest effort to identify most provisions that require moderation or amendment.

7. However, the Government is encouraged to constructively engage with employer concerns and be ready to provide legislative support to address any unintended consequences if required.

Senate Amendments to FW Act

8. In addition to the level of complexity and detail in the Bill, employers have not had sufficient time to process the 225 amendments made to the FW Act during the Senate process. ACCI maintains the view that a range of issues were not addressed, or not adequately addressed, by the Senate debate on the FW Act in March. The unresolved issues should be attended to.

Other Issues

9. ACCI is also aware of the final report into the transition of the Australian Building and Construction Commission (ABCC) into Fair Work Australia (FWA).

10. Whilst there is no indication that the Government will use this Bill as a vehicle to implement any possible changes to the ABCC, we signal up front that this should not occur without a proper and separate Parliamentary process being established.

11. The Committee is reminded that this Bill is a transitional measure for a particular purpose. There should not be any amendments to current legislation in other areas.

SCH 2 – OVERARCHING SCHEDULE

12. Part 1 of Schedule 2 to the Bill is extremely wide in breadth and scope. Its main effect would be to "revive" any provisions of the WR Act, and associated regulations, despite its repeal (expected to be 1 July 2009).

13. Part 2, item 7(1) refers to "old WR Act (and any Acts that amended that Act)". There is no reference to "old WR Act", in the definition section of the Bill. ACCI recommends that this should be clarified to remove any ambiguity.

ACCI Proposal

Clarify what is an "old WR Act" for the purposes of Schedule 2.

SCH 3 – CONTINUING INSTRUMENTS

Content Rules of Transitional Instruments

14. ACCI supports item 4 of Part 2. This ensures that the same content rules apply to all transitional instruments. However, there may be some confusion regarding the exact clauses that are maintained as a result of item 4. The definition of an "instrument content rule" only describes in a narrative manner, which provisions in the WR Act are not repealed, rather than actually setting them out.

15. This may need to be revised if this causes unintended consequences in the future, with more exact provisions inserted.

Extending Pre-Reform Certified Agreements

16. ACCI supports the ability for pre-reform certified agreements and preserved collective State agreements to be extended and varied within the bridging period, under items 13 and 14 of Part 3.

Terminations of Collective Agreement-Based Instruments

17. ACCI is concerned with the effect of items 15 and 16.

18. These items would change the current rules pertaining to the termination of existing agreements (ie. agreements made before and during *WorkChoices* period, including up to 1 July 2009 under the WR Act). The items would require an existing "transitional based collective agreement" to be terminated in accordance with the FW Act.

19. Existing agreements made from 26 March 2006 are able to set out a method for their termination. Items 15 and 16 would only allow agreements to be terminated by consent of Fair Work Australia from 1 July 2009. Whilst we have no objection to this occurring for agreements made under the FW Act, there is no policy rationale for this applying to existing agreements, which are able to be unilaterally terminated after their nominal expiry date in a manner provided by the agreement (s.392 of the WR Act). The EM does not offer any explanation as to why a single method for termination is being introduced.

20. The Senate should be satisfied that there will be a safety net should an agreement be unilaterally terminated in accordance with the terms of the agreements. For example, depending on when the agreement is terminated the employee will revert to a robust safety net of conditions (such a modern award, and the NES). Furthermore, the redundancy provisions in these agreements also continue to apply for up to 2 years from when the termination took effect (see item 38, Schedule 3, Part 6).

21. Employers, employees and unions who have agreed how agreements should terminate after their nominal expiry date should continue to be able to utilise this avenue from 1 July 2009. Any new agreement made

from 1 July 2009 under the FW Act should be subject to the termination rules under that legislation.

ACCI Proposal

Existing collective-based agreements should be terminated in accordance with the existing rules, and not in accordance with Subdivision C of Division 7, Part 2-4 of the FW Act.

Agreements should be able to be unilaterally terminated in accordance with the current rules of the WR Act.

Existing Agreements – Higher Costs to Employers

22. AFPCS: Item 22, in Part 4 states that the Australian Fair Pay and Conditions Standard (Standard) continues to apply in the same way from 1 July 2009 (until commencement of NES from 1 January 2010). However, an instrument will not override the Standard from 1 January 2010 under item 22(2). The *note* indicates that:

> This may result in an employee becoming entitled to a rate of pay under a transitional APCS that is higher than was required to be paid to the employee under a transitional instrument during the bridging period. If that occurs, the employer may apply to FWA for a determination to phase-in the effect of the increase (see item 14 of Schedule 9).

23. Modern Award Wages: Item 13 of Schedule 9 provides that from 1 January 2010, all employees will be entitled to at least the wage rates under the modern award. This will result in employers' costs increasing in some cases.

24. For example, this will occur when a pre-*WorkChoices* agreement provided for pay rates less which are less than the modern award rates of pay. This is not an unusual situation because modern awards have higher rates of pay and penalty rates.

25. NES: Similarly, item 23 in Part 5 provides for interaction rules between transitional instruments and the National Employment Standards (NES). This will apply on a practical basis to employers from 1 January 2010 in the following manner:

    a. Employers on pre-*WorkChoices* agreements have (in most cases) not been required to comply with the Standard, including pay

scales, as these agreements were made under a No-Disadvantage Test (NDT) and therefore contemplated trade-offs between various conditions, so long as the employee was not disadvantaged when compared to the award.

b. Employers bound to agreements made under *WorkChoices* and the first 6 months of agreement making under the FW Act are not subject to the NES during that period, rather they are subject to the Standard. However, they will be subject to the NES after 1 January 2010.

c. The NES will apply from 1 January 2010 and will contain a number of additional new standards, such as severance, jury pay, and enhanced leave. Pre-*WorkChoices* agreements will now need to comply with these new employment standards.

   i) For example, most pre-*WorkChoices* agreements had 8 days of personal leave per annum – this will increase to 10 days from 1 January 2010. A direct cost to employers.

   ii) Other agreements provided for increased wages and conditions in lieu of severance pay provisions under awards or annual leave. Despite these specific trade off's under the NDT, employers will now be forced to provide these additional employment conditions from 1 January 2010. Once again, a direct cost to employers.

26. ACCI members will provide additional industry specific examples of increased costs in their submissions to the Committee.

27. Similarly, from 1 January 2010, modern awards will apply, including increased wage rates. This will apply to pre-*WorkChoices* agreements and will impose significant increases to employers in some cases. Wage rates are only basic wages, other on-costs such as superannuation, workers compensation premiums and payroll tax must also be taken into account, when wages are increased for employers.

28. ACCI is concerned that the Government has not considered the increased costs that will be imposed as a result of the NES and modern award wage rates applying to the above employers from 1 January

2010. There is no cost/benefit analysis in the Bill, nor an assessment of the economic and jobs impact.

29. It also requires employers making agreements during the bridging period (1 July 2009 – 31 December 2009) to contemplate higher costs and employment regulation from 1 January 2010, but at a time when the NES does not actually apply. This prospective application of employment conditions not yet operative has never occurred in our industrial relations system.

30. The Government should provide a cost impact statement of the increased costs to employers as a result of these provisions in the Bill applying, and consider whether the resulting increase to employers is in the public interest at a time of increasing economic instability, and threats to jobs.

31. Whilst we understand that the Government may want its new safety net applying to all employers and employees from 1 January 2010, regardless of any existing employment arrangements, the Senate should seriously consider any increase to employers' costs that may negatively impact job sustenance and creation.

NES Proposal

32. Primary Position: Therefore, and in order to not place additional financial burdens and require employers to rework existing HR / payroll systems, ACCI recommends that all of the NES provisions should only apply to new enterprise agreements made under the FW Act from 1 January 2010, and not apply retrospectively to agreements made before that time.

33. However, ACCI would not oppose two other alternative propositions, should the Senate not accept the above primary position.

34. Alternative 1: ACCI would not oppose most of the NES entitlements commencing that could be smoothly integrated into current arrangements without significant additional costs or re-working of arrangements.

35. Therefore, ACCI does not oppose the NES relating to the following employment standards to apply from 1 January 2010 to all existing agreements (including agreements made pre and post *WorkChoices*).

    a. Maximum weekly hours;

    b. Requests for flexible working arrangements;

    c. Parental leave;

    d. Community Service Leave (except jury service payments unless it currently applies);

    e. Notice of termination.

36. If the Senate accepts this proposal, the effect would be that:

    a. Pre-*Workchoices* agreements would continue to apply as they currently do (but subject to a number of NES provisions as outlined), until they are terminated and/or replaced by a new agreement made under the FW Act.

    b. Agreements made from 27 March 2006 would continue to be subject to the Standard (plus the following NES outlined).

37. Alternative 2: Whilst item 26 allows FWA to vary a transitional instrument to resolve any *"uncertainty or difficulty relating to the interaction between the instrument and the NES",* this does not go far enough to assist employers who must now be required to comply with new employment standards.

38. Therefore, ACCI would not oppose a process whereby an employee or union on their behalf made an application to FWA to have the NES provisions apply to agreements made before 1 January 2010. An application should only be made if it's in the public interest and taking account the financial viability of the enterprise.

Wages Proposal

39. Primary Position: Similarly, increased wage rates under modern awards should not apply to pre-*WorkChoices* agreements (as pay scales currently do not apply and previous safety net increases did not apply),

until those agreements are either terminated and/or replaced by a new enterprise agreement under the FW Act. Once an agreement is terminated the employer and employee would be subject to applicable rates of pay under a modern award or National Minimum Wage Order.

40. Under the Bill, employees may make an application to terminate a pre-*WorkChoices* agreement once it passes its nominal expiry date to FWA or at any time by agreement. (most of these agreements would have passed their nominal expiry date unless they were or will be varied/extended)

41. Alternative: A less preferable proposition is that the rates of pay under a modern award would only apply to an employer and employee on a pre-*WorkChoices* agreement if an application has been made to FWA and an order granted.

42. Under this secondary position, FWA would only grant the order if its in the public interest and after considering the financial viability of the enterprise concerned. FWA should also be able to phase in any increases, at its discretion, taking into account the financial viability of the enterprise concerned.

ACCI Proposal

The Government should undertake a cost/benefit analysis of NES and wage rates applying to all transitional instruments.

Transitional based agreements should not be required to comply with all of the NES provisions from 1 January 2010. Only new agreements made under the FW Act from 1 January 2010 should comply with all of the NES provisions.

Pre-*WorkChoices* agreements should continue to be exempt from the NES and wage rates under modern awards until their agreements are either terminated or replaced by a new agreement made under the FW Act from 1 January 2010.

Alternative options to the above include:

1. The following NES provisions should apply to all transitional agreements from 1 January 2010:

a. Maximum weekly hours;

b. Requests for flexible working arrangements;

c. Parental leave;

d. Community service leave (except jury service payments, unless they were previously entitled under the agreement);

e. Notice of termination.

2. An employee or their union making an application to FWA to have the NES and/or increased wage rates under a modern award apply, but only if FWA is satisfied that it is in the public interest and it has considered the financial viability of the enterprise.

NES – No Detriment

43. As stated above, ACCI believes there should be some moderation of when new employment standards should operate for existing transitional based agreements.

44. Item 23 provides the no detriment test for determining when the NES would apply to transitional instruments, as follows:

> **23 The no detriment rule**
>
> (1) To the extent that a term of a transitional instrument is detrimental to an employee, in any respect, when compared to an entitlement of the employee under the National Employment Standards, the term of the transitional instrument is of no effect.
>
> Note 1: A term of a transitional instrument that provides an entitlement that is at least as beneficial to an employee as a corresponding entitlement of the employee under the National Employment Standards will continue to have effect.

45. If the item is to remain (despite ACCI's contention that it shouldn't as set out above), there are number of concerns employers have with the current drafting.

46. Terminology: The word "term" does not appear to be defined. Nor is the term "detrimental". What is detrimental to an employee may not be detrimental to the employer and vice-versa, and it is equally not clear when any clause would meet such a test.

47. Item 23(1) would appear to have the effect that even if term of a transitional instrument could be severed into different parts (ie. in "any respect"), so long as one part of the term is detrimental the whole of the term is of "no effect". This does not appear to be what is intended by this provision.

48. It may have the unintended consequence of rendering inoperative parts of a clause in an agreements that are beneficial in some aspects. For example, paid parental or adoption leave in an agreement may not

provide for an extension of 12 months (as the NES was never in existence at the time of making the agreement), but it does provide for some form of payment. The effect of item 23 is to render the whole of the term inoperative.

49. ACCI considers that the test should not be a line-by-line assessment of conditions against the NES, but rather a global test against transitional instruments. This could be on the lines of the current No-Disadvantage Test under s.346D.

50. Alternatively, the Senate could recommend substituting Note 1 (p.32, line 10) for item 23(1), which would provide for an "as beneficial" test. Note 1 states:

> Note 1: A term of a transitional instrument that provides an entitlement that is at least as beneficial to an employee as a corresponding entitlement of the employee under the National Employment Standards will continue to have effect.

51. Should item 23 remain (contrary to ACCI submissions made above) a better worded provision can be found in s.172(2) of the WR Act which specifies when the Standard is more favourable. That section provides:

> The Australian Fair Pay and Conditions Standard prevails over a workplace agreement or a contract of employment that operates in relation to an employee to the extent to which, in a particular respect, the Australian Fair Pay and Conditions Standard provides a more favourable outcome for the employee.

52. However, to reiterate and make clear, ACCI's preference would be for a global NDT test against the existing transitional instrument, in place of a line-by-line assessment. This could easily be drafted based on s.346D.

53. It must be recalled that employers and employees in good faith have made agreements which were made lawfully and at a time of existing legislation. There should be cogent reasons provided to the Senate as to why new employment laws should be introduced retrospectively to change these continuing legally enforceable agreements.

ACCI Proposal

If the no-detriment rule remains, it should either be (in preference):

a. Replaced by a global No Disadvantage Test under s.346D.

b. Replaced by a Note 1 under item 23.

c. Replaced by similar wording to s.172(2) of the WR Act.

Transitional Agreements and Modern Awards

54. ACCI supports item 28(1) but opposes item 28(2).

55. Item 28 details when a modern award applies to an employer or employee covered by agreement based transitional instruments as follows:

> **28 Modern awards and agreement-based transitional instruments**
>
> (1) While an agreement-based transitional instrument of any of the following kinds applies to an employee, or to an employer or other person in relation to the employee:
>
> (a) a workplace agreement;
> (b) a workplace determination;
> (c) a preserved State agreement;
> (d) an AWA;
> (e) a pre-reform AWA;
>
> a modern award does not apply to the employee, or to the employer or other person in relation to the employee.
>
> (2) If:
>
> (a) an agreement-based transitional instrument of any of the following kinds:
> (i) a pre-reform certified agreement;
> (ii) an old IR agreement;
> (iii) a section 170MX award; and
>
> (b) a modern award;
>
> both apply to an employee, or to an employer or other person in relation to the employee, the agreement-based transitional instrument prevails over the modern award, to the extent of any inconsistency.

56. ACCI opposes item 28(2) as employers would prefer a single manner of treating all transitional instruments vis-à-vis a modern award for the following reasons:

a. It would be more stable to existing industrial arrangements if modern awards did not apply to pre-*WorkChoices* agreements, in a same way that they do not apply to agreements made post 27 March 2007. Whilst we concede this may be the current rule, it is only in respect of continuing *pre-reform awards* – not modern awards.

b. Pre-reform awards are vastly different to modern awards, and to now require pre-reform agreements to be read in conjunction with a modern award, may impose additional costs and regulatory burdens where none currently applies.

c. Having a single rule for all transitional agreements in this respect would make for more stable industrial relations and would not impose additional costs on employers.

57. If item 28(2) remains despite employers' opposition, then it should at the very least:

a. Only apply to pre-*WorkChoices* agreements which specifically called up pre-reform awards in existence before 1 January 2010. The pre-reform award should continue to apply and not the modern award.

b. Not apply to wage rates under modern awards (consistent with our previous submissions above on this issue).

Guarantee of Annual Earnings

58. Item 35 would apply from 1 January 2010, and appears to cover employers and employees covered by transitional instruments. Item 3(3) also needs to be read in conjunction with item 35 which states:

> However, an award-based transitional instrument does not apply to an employee (or to an employer, or an employee organisation, in relation to the employee) at a time when the employee is a high income employee (see section 329 of the FW Act).
>
> Note: Item 35 deals with the application of section 329 of the FW Act to award-based transitional instruments.

59. Notwithstanding items 3(3) and 35, it appears that existing employees on 1 January 2010, would not be able to continue to be exempt from transitional awards and pay scales, despite being a high income employee.

60. We understand this to not be the intention of the above provisions. Based on our analysis, this anomaly arises because item 35 does not make any reference to s.330(1)(d)(i) and (ii), which requires the undertaking to be given "*before the start of 14 days after … the day the*

employee is employed or a day on which the employer and employee agree to vary the terms and conditions of the employee's employment."

61. Existing employees on common law contracts who exceed the threshold will be required to agree to a variation. This will impose additional costs to an employer, as a variation to a common law contract will require additional consideration to be valid (unless it is by deed).

62. It seems to be an anomaly that there be a transitional provision for existing employers and employees, but no corresponding provisions that deals with the above situation.

ACCI Proposal

Existing employees on common law contracts who satisfy the requirements under Division 3 of Part 2-9 of the Fair Work Act should be exempt from a modern award or transitional awards/pay scales from 1 January 2010, without being required to enter into a variation of their common law contracts.

Unfair Dismissal

63. Item 36 would apply from 1 July 2009 and would affect s.389 of the FW Act *"meaning of genuine redundancy"* in the following manner.

64. Section 389 deems a redundancy to be genuine only if certain prescribed requirements are met, including under s.389(1)(b) *"the employer has complied with any obligation in a modern award or enterprise agreement to consult about redundancy"*.

65. Item 36 requires employers to comply with any "obligation" under a transitional based instrument, such as pre-reform certified agreements, collective agreements and awards.

66. ACCI opposes s.389(1)(b) of the FW Act and maintains that opposition for the reasons articulated in our previous written submissions to the Senate inquiry into the FW Bill.

67. If such a term exists, and the employer failed to comply, it would be a breach of the agreement – it should not also extend to other areas of regulation that actually are about process (the consultation) and not substance (whether a position has been made redundant at law).

68. Whilst new agreements made under the FW Act will now contemplate how the unfair dismissal provisions operate with respect to consultation provisions, the same could not be said for transitional agreements. It would not be fair to extend this additional hurdle to employers who have made bona fide redundancies after 1 July 2009, to comply with an "obligation" to consult about redundancy.

ACCI Proposal

Section 389(1)(b) of the FW Act should be omitted.

Alternatively, item 36 should be amended so as not to make reference transitional agreements under s.389(1)(b).

SCH 4 – NATIONAL EMPLOYMENT STANDARDS

Redundancy Pay

69. ACCI supports item 5(4), Part 3 which makes clear that service does not apply to NES entitlements under redundancy pay if an employee was not entitled to redundancy pay before 1 January 2010. Such an outcome accords with the Redundancy Case standard developed by the AIRC in 2005.

70. ACCI raised this during the Senate submission process to the FW Bill and outlined the substantial cost this would impose on employers for employees that had not had an existing entitlement to severance pay.

SCH 5 – MODERN AWARDS

Section 103 of WR Act

71. Item 2, Part 2 allows Part 10A of the WR Act to continue to apply.

72. Item 2 should also support the continuation and continued application of s.103 of the WR Act and s.3 of the WR Act. These are important provisions that the AIRC must consider when making modern awards. To not do so sends a signal to the AIRC that those considerations should not be taken into account from 1 July 2009.

73. Section 103 of the WR Act requires the AIRC, when performing its functions under the Act to take into account important objectives.

Commission to take into account the public interest

(1) In the performance of its functions, the Commission must take into account the public interest, and for that purpose must have regard to:

(a) the objects of this Act; and

(b) the state of the national economy and the likely effects on the national economy of any order that the Commission is considering, or is proposing to make, with special reference to likely effects on the level of employment and on inflation.

…

74. Section 3 of the WR Act sets out the objectives, with the most relevant extracted:

Principal object

The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

(a) encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and;

(b) establishing and maintaining a simplified national system of workplace relations; and

(c) providing an economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by this Act; and

…

(g) ensuring that awards provide minimum safety net entitlements for award reliant employees which are consistent with Australian Fair Pay Commission decisions and which avoid creating disincentives to bargain at the workplace level; and

…

(k) protecting the competitive position of young people in the labour market, promoting youth employment, youth skills and community standards and assisting in reducing youth unemployment; and

75. This is qualitatively different to the objectives under the FW Act and also under Part 10A.

76. It seems to be either an oversight that s.103 is being omitted by the Bill, or a policy intention that the Government does not consider the AIRC should have regard to such objectives from 1 July 2009. That is the public interest should no longer be considered. ACCI is concerned that these objectives which consider fundamental national economic conditions, inflation and jobs, may be diminished in award modernisation.

77. The Senate should ensure that these very important guiding objectives are retained by the Bill. To omit s.103 would, with respect, provide the wrong type of signal to the AIRC when Australian economy is undergoing considerable economic instability and challenge.

ACCI Proposal

Section 103 (and s.3) of the WR Act should continue and not be repealed for the purposes of Part 10A award modernisation functions.

2 Year Review

78. Employers generally support a 2 year review of modern awards under items 6 and 7. Employers remained concerned that modern awards have resulted in increased costs to employers, as was outlined to the Senate Committee during the inquiry into the FW Bill.

Take-Home Pay Orders

79. ACCI strongly opposes Item 8 under Part 3, unless it is substantially amended to provide employers with reciprocal rights and recourse.

80. The Government has previously indicated to all parties during award modernisation that the process is not intended to "increase costs for employers" nor "disadvantage employees". This is specified clearly under the Minister's Request at paragraph 2 (c) and (d).

81. There are a number of factors which the AIRC has taken into account during the making of 'modern' awards. These factors are provided for by Part 10A of the WR Act, s.103 of the WR Act (which is to be repealed by this Bill) and the Minister's Request.

82. The only provisions that allow employers breathing space to absorb any increase costs under modern awards appears under s.576T of the WR Act as follows:

Terms that contain State-based differences

(1) A modern award must not include terms and conditions of employment that:

(a) are determined by reference to State or Territory boundaries; or

(b) do not have effect in each State and Territory.

(2) Despite subsection (1), a modern award may include terms and conditions of employment of the kind referred to in subsection (1) for a period of up to 5 years starting on the day on which the modern award commences.

(3) If, at the end of the period of 5 years starting on the day on which a modern award commences, the modern award includes terms and conditions of employment of the kind referred to in subsection (1), those terms and conditions of employment cease to have effect at the end of that period.

Continuing Employer Concerns

83. ACCI and ACCI members have positively and constructively engaged in the AIRC's award modernisation process. Whilst there have been some positive outcomes as a result of award modernisation, including the rationalisation of a multitude awards applying to a workplace, it has come at too great a cost in some areas. Only a minority of employer participants support the outcomes of this process to date.

84. ACCI members continue to express grave concern over the possibility of higher costs and increased regulation as a result of a modern award applying from 1 January 2010. This is despite the fact that the AIRC *may* provide for some form of transitioning over a 5 year period.

85. Notwithstanding the ability to phase-in increases over time, it is a possibility and continuing concern that some increases under modern awards will not be able to be absorbed by employers even within a 5 year period. Transition is important but cannot remove the impact of an inappropriately large labour cost increase. This is particularly the case when the government committed that there would be no increased labour costs on employers. ACCI expects the government to uphold that commitment. If it does not do so, the Senate should compel the government to do so via appropriate legislative amendments.

86. **ACCI has attached a number of documents which indicate some industry sector's increased costs as a result of award modernisation.**

87. **They also highlight why it is important that s.103 of the WR Act not be repealed.**

88. The modernisation process was intended to deliver a modern award with "swings and roundabouts" for both employers and employees.

89. ACCI continues to maintain its position of 3 March 2009, when ACCI maintained that issues concerning employers' increased costs must be addressed by Parliament. This was not addressed by this Committee's report into the FW Act.

SENATE REPORT MISSES KEY PROBLEM WITH PROPOSED NEW AWARDS

Statement by Peter Anderson, Chief Executive

The Australian Chamber of Commerce and Industry, Australia's largest and most representative business organisation, has called on the Senate to prevent employers bearing higher employment costs from 'modern awards', when it debates new industrial relations laws this month.

The Senate Employment Committee's report into the Fair Work Bill is a helpful contribution to debate, but does not do justice to very significant employer concerns regarding additional labour costs to employers when industrial awards are reactivated from 1 January 2010.

Hundreds of thousands of employers in the hospitality, retail and related service industries are set to pay higher penalty rates, allowances, overtime, annual leave and wages solely in the name of regulatory clean up (as hundreds of existing awards are rolled into a smaller number). In evidence to the Senate Committee, business organisations demonstrated that some employers face labour cost increases of 20% from next year solely from new award regulation.

"Paying more to employ people simply because regulations are being consolidated is unacceptable. It will start the new industrial relations system on the wrong note. Labour cost increases on this basis are grossly unfair to employers. They will cost jobs in labour intensive and award-reliant industries."

"Neither the government nor the parliament can simply throw this issue back to the Australian Industrial Relations Commission. The new awards are a product of government policy, and ministerial direction to the Commission under legislation."

"The government said there would not be additional costs from award modernisation, and the Senate has an obligation to make sure there are not. The Bill should be amended to direct the Commission that no new industrial award should increase employer costs.

Fair Work Australia will be able to order that an employee's pay not be reduced in the transition onto a modern award. Employers need equal protection against additional award costs.

Employers facing these additional costs will hold the government and parliament accountable for the system imposed on them. ACCI has described costs flowing from the proposed new awards as "the single largest problem" that needs to be fixed in the proposed new industrial relations system.

90. Aside from the current problems employers in some sectors will face with increased costs as a result of a modern award applying, it is one sided for the Government to introduce provisions in this Bill which allows employees to make back-pay claims as a result of a modern award, but have no corresponding ability for employers to recoup their increased costs.

91. Employers urge the Senate to consider very seriously the impact of modern awards applying from 1 January 2010, and in a period of rising unemployment and worsening economic conditions. In seeking to legislate its commitment to workers and unions but not its commitment to employers, the Government is acting in an unfair and unbalanced manner.

92. As recent as 9 April, the ABS reported that unemployment in March jumped 0.5% to 5.7%. Not only do full time jobs continue to be lost from the economy, but in March net employment fell, with 52,900 more people unemployed than in February. There are now 103,000 more unemployed people today than just two months ago. The Deputy Prime Minister has even indicated that unemployment could rise past 7% by the end of 2009.

93. The Senate should recommend that amendments are made in this Bill so that no new "modern" award operates if it increases the cost of employment. Whilst the Government promised this at various stages, that promise will be broken from January 2010 if this is without legislative teeth. Increasing the cost and complexity of employment in the midst of a recession makes no sense.

Amendments Required

94. Should item 8 remain, there are a number of amendments which ACCI urges the Senate to recommend to the Government:

a. Applicant: Under item 9(1)An applicant should only be an employee, not a class of employees, unless the individual employee's are named. There must be certainty for employers as to whom the order covers.

b. Retrospective back-pay: Under item 9, an order could be made by FWA at any period after 1 January 2010 (ie. 5 years later that the employee suffered a reduction from 1 January 2010 until 2013). It is unfair for an employer to be sued years later and be required to make significant back-pay as a result of an employee waiting to make a claim. Orders must only require compensation from the time the employee makes the application, not retrospectively.

c. No cap: Under item 9(1) it appears that FWA can make an order it "*considers appropriate to remedy the situation*". This should be amended to provide that order is limited to the actual amount of any reduction in take-home pay. Item 9 enables FWA to make an orders that are not directly related to the actual reduction.

d. Duration of Orders: Under item 11, it the take-home pay orders can apply indefinitely. FWA must have capacity to order the termination of the order or provide for the order to sun-set after a certain amount of time (ie. after 5 years).

e. Other considerations: Item 10 should be expanded to require FWA not make an order on the grounds of economic incapacity or financial viability of the enterprise. FWA should also be empowered to require staggered compensation payments instead of ordering a lump sum payment (particularly if the employee makes a claim years).

95. Such amendments would enable the provisions to operate in a more balanced manner for employers, particularly smaller businesses that could not readily absorb back-pay orders.

96. ACCI reiterates a multi-faceted approach to award modernisation as described in this submission which will provide additional flexibility and responsiveness to the current economic conditions.

ACCI Proposal

The Senate should recommend that amendments are made in this Bill so that no new "modern" award operates if it increases the cost of employment.

ACCI Proposal

Item 8 should only remain if there are amendments that provide employers with some equal capacity to reduce their exposure to increased costs as a result of the modern award applying.

Employers who are required to pay more as a result of the modern award applying, should be able to apply to FWA to obtain an order which would allow either the entire award, or certain provisions (ie. penalty rates) from not taking effect for a period of time.

Where a modern award applies to a category of employee that were never subject to an award (or parts of the award), the employer must be able to obtain an order from FWA that they be exempt for a period of time from the modern award.

SCH 6 – MODERN ENTERPRISE AWARDS

97. Schedule 6 provides for a process by which enterprise specific awards can be modernised between 1 January 2010 and 31 December 2013. After which time an unmodernised enterprise will terminate.

98. Item 4 provides a person covered by the instrument (employer, employee or union) can make an application to either modernise or terminate the award.

99. Item 9(3) states that if FWA decides not to make a modern enterprise award, the award terminates upon that decision (which can be at any time before 31 December 2013).

100. Notwithstanding our general support of modernising enterprise awards, ACCI is aware that many employers (employing 1000s of employees across Australia) did not engage in the award modernisation process, as they relied upon the Government's previous announcements that enterprise awards would continue to be unaffected by award modernisation.

101. The August 2007 *Forward with Fairness Policy Implementation Plan*, at p.16 relevantly states:

> Labor understands that enterprise awards have a special status. Many enterprises have worked for years to get their enterprise award in a shape that suits their business.
>
> Consequently, Labor guarantees that enterprise awards will continue. Labor will instruct the Australian Industrial Relations Commission to only review enterprise awards where requested by the current parties to the award.

102. As a result, many employers in Australia have not engaged in the award modernisation process, which has and will result in many occupation/industry awards applying to their enterprises from 1 January 2010.

103. Given that most awards would be modernised by the end of 2010, and these employers did not input their content, there is a very real question about the extent to which FWA will consider modernising their enterprise specific awards. Whilst Schedule 6 provides for a criteria by which FWA must consider applications to modernise enterprise specific awards there are number of risks to employers:

a. Applications to modernise enterprise awards can only be made after 1 January 2010. At that stage, most awards would be modernised without employers input into those awards that may apply on an industry or occupational basis.

b. There is an implicit presumption under Schedule 6 that the employer is required to convince FWA why their award should be modernised, and not revoked in favour of a newly modernised industry/occupation award.

c. Any person can make an application to FWA, including the union or an employee against the employer's wishes. This could be an application to either modernise or revoke the award.

104. There should be some capacity for employers to bring forward their enterprise awards before 1 January 2010 – as they will be potentially prejudiced because they did not take part in award modernisation during 2008/09 under the belief that these awards would continue in the future.

ACCI Proposal

An employer bound by an enterprise specific award should be able to make an application from 1 July 2009 to modernise the award and not wait until 1 January 2010.

105. Furthermore, there doesn't appear any scope for an enterprise award to continue to operate, should FWA decline a person's application to modernise the award. This appears heavy-handed and unfair. An employer is asked to shoulder a risk that should their application to modernise be rejected, their award may cease to exist at a premature stage.

106. As a general principle, item 9(3) should be amended to ensure that these awards continue to run its course until the general sun-setting clauses apply on December 2013, notwithstanding the success or otherwise of an application to modernise.

107. If item 9(3) is to remain, an alternative should be to allow FWA the discretion to extend either terminate at some point in time, or allow the award to operate until the sun-setting provisions apply on 31 December 2013.

ACCI Proposal

If FWA decides not to modernise the award under item 9(3), the award should continue to operate until 31 December 2013. It should not be terminated from the time of FWA's decision not to modernise the award. Therefore, item 9(3) should be omitted.

Alternatively, FWA should have some capacity to determine whether the award should terminate allow be allowed to continue to operate until 31 December 2010. Amendments to item 9(3) should be made accordingly.

SCH 7 – AGREEMENTS AND DETERMINATIONS – WR ACT

108. ACCI strongly supports item 22 of Part 5, which makes clear that FWA must not make a low-paid bargaining order if there is a history of previous agreement making, including transitional based collective agreements.

109. Notwithstanding, ACCI is concerned that already unions are agitating that the low-paid bargaining stream will be used to target large sections of the award dependent industries that were not envisaged by the Government in their announcements, second reading speeches or explanatory material.

110. This is illustrated by the ACTU's recent statement (Wednesday 11 March 2009):

> Last resort arbitration
>
> …
>
> "If workplace determinations are not available, we are consigning millions of low-paid workers in industries such as **hospitality and catering**, child care and cleaning to a lifetime on the minimum wage, with no control over their destiny or ability to bargain for higher pay," (emphasis added)

111. The hospitality and catering industries were not mentioned by the Government in either the *Forward with Fairness* policies or the legislative materials. However, it is clear that the unions will unitise this tool against employers in these sectors, who will simultaneously be facing increased costs under award modernisation from 1 January 2010.

112. ACCI recommendations on the low-paid bargaining stream is contained in our previous submission to the Senate Inquiry into the FW Act.

SCH 8 – AGREEMENTS AND DETERMINATIONS – FW ACT

ITEAs

113. Item 21, Part 2 is strongly supported by ACCI. This item continues to allow ITEAs to be made during bridging period.

Bargaining Commenced but not completed before 1 July 2009

114. ACCI understands that Schedule 8 allows collective agreements made under the WR Act to be lodged within 14 days of being "made" as defined by item 2 in Schedule 2. This item refers back to s.333 of the WR Act. Under that section, and in summary:

a. For employee collective agreements, the agreement is "made" when it is approved by the employees.

b. For union collective agreements, the agreement is "made" when the employer and union agree to the terms of the agreement.

115. If the agreement is not lodged within the time period, then all bargaining must restart under the new provisions of the FW Act. Employers who have engaged with the bargaining process, in a substantial manner, but have not yet completed the process, will incur additional time and expense by re-starting the bargaining process.

116. There should be some added flexibility for an employer that has substantially completed the bargaining process to obtain an order from FWA that they are able to continue bargaining under the WR Act provisions for a defined period of time.

117. Whilst we are not opposed to some firm cut-off dates, we suggest that there should be some flexibility to smooth out any harshness of having the date cut in when employers, unions and employees' have made substantial progress in their bargaining for a new agreement under the WR Act.

118. Therefore, ACCI recommends that:

a. For **union collective agreements**, there should be some capacity for both the employer and union to consent to continuing bargaining under the current rules (ie. WR Act) for a period of time (ie. for 3 months after 1 July 2009 or up until 31 December 2010).

b. For **employee collective agreements**, there should also be some capacity for FWA to order the continuation of bargaining under the current rules, for a period for a similar period of time.

119. In both cases, employers and unions should be required to apply within 14 days after the WR repeal date for such an order. This will provide certainty for all parties that have spent significant time and resources into bargaining under the current framework, but may be unable to meet the deadlines that the Bill creates.

ACCI Proposal

For union collective agreements, there should be some capacity for both the employer and union to consent to continuing bargaining under the current rules (ie. WR Act) for a period of time (ie. for 3 months after 1 July 2009 or up until 31 December 2010). This form could be sent to FWA/Workplace Authority within 14 days after repeal of the WR Act.

For employee collective agreements, there should also be some capacity for FWA/Workplace Authority to order the continuation of bargaining under the current rules, for a period for a similar period of time. Employers should have to make an application within 14 days after the repeal of the WR Act.

SCH 9 – MINIMUM WAGES

Minimum Wage Review

120. ACCI supports the first minimum wage review only taking place not prior to 1 January 2010, rather than from 1 July 2009. This will allow sufficient time for the minimum wage panel to be established and for employers, unions and all interested users of the system to finalise award modernisation, properly assess it, and operationalise the new IR system. The Australian Fair Pay Commission is undertaking a review which will not be determined until late June/early July 2009.

High Income Employee

121. Whilst item 6(2) is supported, item 35 of Schedule 3 requires amendments to ensure that existing employees on common law contracts that meet the prescribed threshold are properly exempt from transitional pay scales (this was outlined earlier in this submission under Schedule 3).

ACCI Proposal

Item 6(2) is supported, but requires item 35 of Schedule 3 to be amended (as previously mentioned in this submission) to ensure existing employees who meet the high income threshold test will be excluded from transitional pay scales and a variation to their common law contract is not required.

Modern Awards

122. Item 13 provides that all agreement-based transitional instruments must comply with wage rates under modern awards from 1 January

2010. ACCI has previously indicated in this submission that it is opposed to wage rates under a modern award applying to pre-*WorkChoices* agreements until they are either terminated or replaced by a new agreement.

123. Notwithstanding, ACCI supports item 14 with some amendments. There is a limited ability under item 14(2) for an employer affected by increases to request FWA to phase-in such amounts. Item 14(2) strictly restricts FWA making any determination unless it is *"necessary to ensure the ongoing viability of the employer's enterprise"*.

124. This should be reconsidered. There should be a presumption that FWA should phase-in such increases over a period of time. ACCI submits that FWA should be required to phase in increases if an employer makes an application to do so, not a reverse presumption that item 14(2) creates. An employer should not need to meet such a high threshold based on ongoing viability.

ACCI Proposal

Item 14 should be amended to require FWA to phase-in increases upon application of an affected employer.

SCH 10 – EQUAL REMUNERATION

125. ACCI does not oppose item 4, Part 2 (existing equal remuneration orders under WR Act),

126. ACCI does recommend that item 3, Part 2 should be amended to ensure that any equal remuneration order made under FW Act does not apply to existing transitional agreements which were made prior to the FW Act.

127. New orders made under the FW Act should apply prospectively and not retrospectively to arrangements that were made lawfully and continue to remain lawful.

ACCI Proposal

Therefore, item 3(2)(a) and (c) should be omitted.

SCH 11 – TRANSFER OF BUSINESS

128. ACCI is aware of a number of situations whereby businesses may be caught by the new transfer of business rules under the FW Act, as a result of a "connection" established prior to 1 July 2009. This is the effect of item 7, Part 3.

129. An example has been brought to ACCI's attention whereby the outsourcing arrangement does not involve the "transmission of business" under the WR Act. Contractual arrangements dealing with employment arrangements were completed in 2008, with new staff starting at different phases during 2009. Some staff will start after 1 July 2009, some before 1 July 2009.

130. It appears possible under item 7, that a "connection" will be established as a result of staff commencing after 1 July 2009 under s.311(1)(d) of the FW Act.

131. ACCI does not believe that it is the Government's intention to retrospectively affect "old deals" such as this, that were negotiated well prior to the Bill becoming available. This will negatively affect contractual arrangements that were settled well before knowing the consequences of the transitional provisions in the Bill.

132. Had these businesses been aware of these transitional provisions at the time the outsourcing agreement was signed, then the financial arrangements in the outsourcing agreement would have been quite different.

133. The Bill should be amended to clarify that the effective date of operation of the new transfer of business provisions will not cover "old deals" such as this.

ACCI Proposal

Item 7 should be clarified to indicate that there is not a connection within the meaning of s.311(1)(d) of the FW Act where relevant contractual arrangements have been concluded before 1 July 2009 and employees transfer after 1 July 2009.

SCH 13 – BARGAINING & INDUSTRIAL ACTION

Notice to Employees on Individual Agreements

134. ACCI opposes item 2(3).

135. This provision provides that an employee who is on an individual transitional instrument (ie. ITEA/AWA) must be provided with a notice under s.173 of the FW Act, even though they are not entitled to vote or take industrial action in relation to a proposed collective agreement. This will cause confusion to both employers and employees. There doesn't appear to be any clear policy or bargaining rationale for such a provision.

136. The EM (p.83), in relation to item 2 states:

> 492. If an employee is covered by an individual agreement-based transitional instrument, then subitem 2(2) provides that the employee is only taken to be an employee that will be covered by a proposed enterprise agreement if the nominal expiry date of the individual agreement-based transitional instrument has passed or a conditional termination of the instrument has been made under subitem18(2) of Schedule 3. Subitem 18(2) of Schedule 3 sets out the process for making conditional terminations and the effect of these terminations.
>
> 493. The legislative note to subitem 2(2) explains the main effects of this subitem are that such an employee cannot: be represented in bargaining; vote on an enterprise agreement;
>
> - be in a group of employees covered by a protected action ballot order in relation to the enterprise agreement; or have the enterprise agreement apply to them,
>
> - unless either the nominal expiry date of the individual agreement-based transitional instrument has passed or a conditional termination has been made in respect to the instrument.
>
> 494. Subitem 2(3) provides that despite subitem 2(2), an employer is still required to give an employee a notice of employee representational rights under clause 173 of the FW Bill if the employer would otherwise have been required to give such a notice. This ensures the employee is aware that bargaining is taking place for an enterprise agreement but, as is required to be explained in the notice, a person can only become the employee's bargaining representative after either the nominal expiry date of the individual agreement-based transitional instrument has passed or a conditional termination of the instrument is made.

137. Item 2(2) makes clear that any such "eligible" employees will be entitled to participate if (a) their transitional individual agreement has passed their nominal expiry date or (b) there is a conditional termination agreement on foot.

138. If only some employees are eligible to vote and participate in bargaining for a new agreement under the FW Act, an employer should not be required to provide a notice to both eligible and ineligible employees. This does not assist in creating clear rules for employers and employees in the bargaining process, and will in fact generate confusion, compliance problems and disputation.

ACCI Proposal

Item 2(3) should be omitted. Only eligible employees on individual transitional agreements should be required to be provided with a notice under s.173 of the FW Act.

Bargaining Orders

139. Item 3 provides that good faith bargaining orders may only made in two circumstances. Once a transitional agreement is within 90 days of its nominal expiry date or after an employer asks employees to vote on a new agreement made under the FW Act.

140. To be clear, ACCI does not support the equivalent provision in the FW Act, which allows orders to be made within the nominal expiry date of the agreement. ACCI urges the Senate to fundamentally reconsider this provision.

141. Employers would prefer that all bargaining related orders, including good faith bargaining orders under s.229 of the FW Act, majority support determinations and scope orders only be able to be made by FWA, when existing agreements have passed their nominal expiry date.

142. Item 3 does not address majority support determinations and scope orders, which could be obtained at any time by unions, even if an agreement was made on 30 June 2009. It appears that a union could obtain a majority support determination on 1 July 2009 (despite the inability to obtain a bargaining related order). This does not assist the

industrial harmony in workplaces that have transitional agreements that will be made just prior to 1 July.

143. The ACCI proposal below would be consistent also with item 4, Part 3, which states that industrial action must not be taken before nominal expiry date of any transitional agreements, and it also should equally apply to the inability to obtain all bargaining related orders, including majority support determination/scope orders.

144. Therefore, ACCI recommends the following amendments:

a. Item 3(f) of Part 2 should be amended to remove reference to 90 days. In other words, it should be clear that a bargaining order under s.229(1) of the FW Act cannot be made until the transitional agreement has reached its nominal expiry date and not before.

b. An additional item should make clear that majority support determinations and scope orders should not be made until the nominal expiry date of the transitional agreement has been reached.

ACCI Proposal

Bargaining related orders, majority support determinations and scope orders should only be able to be made if the transitional agreement has passed its nominal expiry date.

SENATE AMENDMENTS TO FW ACT

145. This Senate Committee did not have an opportunity to scrutinise the 225 amendments that were made to the Fair Work Bill. ACCI wishes to briefly comment on some of those provisions that present a concern to employers and those which were made apparent subsequent to the Senate process.

146. **Unfair Dismissal – Associated Entities**: ACCI does not agree with the concept of "associated entities" for redundancy and reinstatement purposes under the FW Act.

a. Genuine Redundancy: Section 391(2) requires an employer to consider whether an employee who is made redundant could be redeployed within: (a) the employer's enterprise; or (b) the enterprise of an **associated entity** of the employer. (emphasis added).

b. Reinstatement: Under s.391(1A)(b) an order can be made by FWA that the dismissed employee be reinstated to a position "with an associated entity of the employer".

147. This is manifestly unfair and unjust to employers who must now be required to consider in a redundancy situation positions across vastly different enterprises across Australia. For example, a large employer entity, such as Coles who is under the Wesfarmers' 300 plus entities must consider whether a position is available (which may be different to their current role) is a available across a Coles store, Office Works or resources company, as they are all "associated entities".

148. Companies do not have the time, resources, nor technical capacity to establish such arrangements.

149. Furthermore, FWA could order the reinstatement of an employee to another position with an entirely different employer. This overrides the privity of contract doctrine. There must be some capacity for the other employer to object to this occurring.

150. **Agreements – "Fairly Chosen"**: Numerous provisions in the FW Act now require FWA, when considering whether to approve an agreement that has been validly approved and passed against a NDT, to be further satisfied that "*group[s] of employees covered by the agreement was fairly chosen*". [emphasis added]. There is no rationale for introducing an additional hurdle in agreement making.

151. Firstly, what is meant by the phrase 'fairly chosen'? There is no guidance on the term.

152. Second, and most concerning, is that the provisions will be used by some disgruntled employees and unions who did not agree with the vote of the agreement to frustrate the process by arguing before FWA that a group of employees was not fairly chosen.

153. **Greenfields**: The FW Act now provides for an additional hurdle for emloyers and unions to make greenfield collective agreements. Under s.187(5) of the FW Act, FWA must be satisfied that the greenfield agreement *is in the public interest to be approved*.

154. This is an unnecessary hurdle and one that presumes that such agreements are not in the public interest. The pre-*WorkChoices* legislation did not have such a test, nor did the *WorkChoices* and Government's 2008 transitional legislation. Whilst the preferential course would be to omit s.187(5), an alternative is to re-phrase the provision, so it would read:

(b) it is *not contrary* to the public interest …

155. This would be consistent with s.189 of the FW Act that uses the same wording, for agreements that pass on exceptional circumstances grounds.

156. **Flexibility Arrangements**: The term "disability" is not defined under s.65, which was amended during the Senate process. Under the *Disability Discrimination Act*, a "disability" may be every diagnosable illness or injury. In order to provide clarity for employers and employees, ACCI recommends the term should be defined. This could be easily achieved by cross-referencing it to s.12 of the FW Act (ie. "*employee with a disability*"). This would signal that s.65 pertains to someone suffering from a disability according to social security legislation.

157. Employers should also be able to request information on the disability in order to be fully informed of the circumstances of the request. There should also be guidance material on what is a disability from FWA after consulting with major stakeholders.

ATTACHMENT A

ACCI Question on Notice – Modern Award Cost Impacts on Employers

Monday, 23 February 2009

ACCI appeared at the Senate Committee hearing in Melbourne on Tuesday, 17 February 2009. At page 20 of the transcript ACCI undertook to provide a response to a question on notice:

> **Senator BARNETT**—And you have evidence to support that claim?
>
> **Mr Barklamb**—I might take that one, Senator, if I may. We will supply you, as a question on notice, with extracts from our members' submissions to the Full Bench of the Industrial Relations Commission which quantify costs in a number of those industries.
>
> **Senator BARNETT**—That would be most useful, and I do appreciate your concerns. And, finally, in relation to that, those discussions are ongoing, are they not, with the government? And is there any update you can provide the committee with regard to the extent of the concerns you have regarding the modernisation of awards?

The following information covers a number of increased costs ACCI members have calculated across key industry areas of the economy. These were calculated predominantly from the AIRC's 14 draft priority awards (September 2008).

For some industries, states and territories, the impact of imposing these draft replacement awards would be significant cost increases, and changes in the capacity to effectively structure hours of work. Some ACCI members have calculated that this will reduce their capacity to staff to effective levels, or reduce services or opening hours.

The potential impact of the draft modern awards is illustrated by the following analyses from ACCI member materials.

ACCI understands that this additional information to the Committee represents only a small sample of information on increased costs to employers as a result of award modernisation. Given that the AIRC finalised only a small minority of awards, with Stage 3 involving the modernisation of thousands of awards, employers fear they will be further exposed to increased costs as a result of this process.

Pharmacy Industry

1. **Attachment ACCI-PGA [Comparative Analysis of Wages Paid in the Pharmacy Industry, 23 October 2008, Peter Saccasan – appendices have not been attached due to size].[1]**

2. Independently audited research prepared for the Pharmacy Guild of Australia shows a significant increase in labour costs as a direct function of award modernisation.

3. The independent audit of a variety of pharmacy models throughout the country indicates that:

> 6. Table 1 sets out the final wages costs of the stores reviewed. It also includes results for stores in Victoria, ACT and Tasmania which were not included in the 10 October submission. This gives a picture of the impact on all states and territories. We note that in every instance except one (with only a $658 fall), the expectation is an additional cost to pharmacy owners – in 4 states this will be $100,000 or more, being more than a 20% increase - Western Australia, NSW, Tasmania and Queensland in particular appear to be significantly effected.

4. Table 1 of ACCI-PGA indicates the following cost increases to employers in the pharmacy industry:

[1] The entire document can be accessed here:
http://www.airc.gov.au/awardmod/databases/retail/Submissions/PGA_submission2_ed.pdf

Table 1 – Summary of impact of new Retail Industry Award on wages paid in Community Pharmacy (average increase 11.28%)

State/Location	Current Wages including current allowances	Wages under Draft Award including new allowances	$Annual Increase in Wages	$Annual Increase incl super, payroll tax & w/comp	% total Increase
WA – small suburban strip	307,695	338,587	30,892	33,841	11.00%
WA – medium suburban strip	616,931	734,299	117,369	131,357	21.29%
WA – large 24hr	740,880	882,792	141,912	164,008	22.14%
NSW – small strip	225,328	240,065	14738	16,293	7.23%
NSW – suburb medium strip	521,088	613,634	92,546	106,443	20.43%
NSW – large	970,212	1,118,342	148,130	173,449	17.88%
Qld – remote rural medical centre	515,643	594,440	78,797	86,179	16.71%
Qld – rural strip	485,517	537,752	52,235	57,129	11.77%
Qld – suburban shop centre	520,678	617,419	96,741	105,804	20.32%
Qld – suburban strip	474,860	546,437	71,577	78,283	16.49%
ACT suburban shop centre	419,227	480,531	61,304	68,733	17.07%
NT – remote city	321,045	325,570	4,525	5,031	1.57%
NT – remote rural medium	349,613	359,286	9,674	10,757	3.08%
SA – small rural	288,861	301,344	12,483	13,825	4.79%
SA – suburban strip	427,082	447,054	19,972	22,118	5.18%
SA – rural shop centre	506,516	505,921	(594)	(658)	-0.14%
Tas – large after hours	688,695	785,152	96,457	106,842	15.51%
Vic – large suburban	1,065,773	1,083,796	18,024	20,708	1.94%

5. The report indicates the reasons for the increased costs as follows:

a. New penalty rates which apply to the current base rate of pay of employees which in some cases are well above the current award rates of pay;
b. Increase in casual loadings in most states (excluding NSW and Vic);
c. Increase in garment laundry allowances in all states;
d. Introduction of new allowances – first aid, language, bicycle. We have been conservative in our estimation of these (see later comments);
e. Increase in penalty rates above existing penalty rates in some states.

6. Examining three indicative and representative pharmacy operations of different sizes, in locations throughout Australia, the Guild found:

> The increased costs per annum (inclusive of superannuation and 5.5% payroll tax) are: $190,008.58 for the large pharmacy, $136,297.95 for the medium pharmacy and $30,125.38 for the small pharmacy. These increases represent an increase of around 20% of current wages.

Retail Industry

7. **Attachment ACCI-ARA [ARA Submission to AIRC, 10 October 2008].**

8. Again examining indicative retail operations, the Australian Retailers Association (ARA) calculate that "*the results of our exercise clearly indicate that employers would face payroll cost increases ranging from at least an additional 8% through to a staggering figure of almost 50%*" (p.6)

9. They also indicate that most scenarios result in an increase in labour costs to employers (p.7):

> Out of a total of 120 different scenarios, employees are disadvantaged in only one case. Hence, there are 119 instances where employer costs have increased.

10. At the hearing before the AIRC Full Bench on Wednesday, 5 November 2008, the ARA states (at PN3399):

> This reveals to us that payroll costs would increase from between approximately 11 per cent or around $20,443 per annum in the case of Victoria through to almost 22 per cent or $30,094 per annum in the case of New South Wales, with the other jurisdictions sitting somewhere in between. Just by way of further illustration we have arrived at figures for Queensland reflecting an increase of approximately 19 per cent, WA would be around 14.3 per cent, South Australia 19.6 per cent, Tasmania 17.6 per cent, the ACT 18.5, and the Northern Territory around 11 per cent. The approximate average annual increase between all jurisdictions based on these roster examples is around 14 per cent or nearly $22,000 per annum.

11. Similarly, the National Retail Association (NRA) has calculated a number of different cost impacts across different States, which all result in cost increases to business.

12. **Attachment ACCI-NRA1 [Excel Spreadsheet Cost Impact Analysis NSW Example 1]**

Name of Award/NAPSA	Weekly Wage Cost
Shop Employees Award (NSW)	$1,834.49
General Retail Industry Award 2010	$2,053.70
Difference	$219.22
11.95% increase	

13. **Attachment ACCI-NRA2 [Excel Spreadsheet Cost Impact Analysis NSW Example 2]**

Name of Award/NAPSA	Weekly Wage Cost
Shop Employees Award (NSW)	$1,423.68
General Retail Industry Award 2010	$1,633.20
Difference	$209.52

14.72% increase

14. **Attachment ACCI-NRA3 [Excel Spreadsheet Cost Impact Analysis NSW Example 3]**

Name of Award/NAPSA	Weekly Wage Cost
Shop Employees Award (NSW)	$26,778.97
General Retail Industry Award 2010	$28,915.94
Difference	$2,136.97
7.98% increase	

15. **Attachment ACCI-NRA4 [Excel Spreadsheet Cost Impact Analysis Qld 1]**

Name of Award/NAPSA	Weekly Wage Cost
Retail Industry Award (Qld)	$17,506.52
General Retail Industry Award 2010	$19,961.33
Difference	$2,454.81

14.02% increase

16. **Attachment ACCI-NRA5 [Excel Spreadsheet Cost Impact Analysis Qld 2]**

Name of Award/NAPSA	Weekly Wage Cost
Retail Industry Award (Qld)	$34,274.22
General Retail Industry Award 2010	$39,117.85
Difference	$4,843.63

14.13% increase

17. **Attachment ACCI-NRA6 [Excel Spreadsheet Cost Impact Analysis SA]**

Name of Award/NAPSA	Weekly Wage Cost
Video Hire SA Award	$4,136.14
General Retail Industry Award 2010	$4,753.82
Difference	$617.68

14.93% increase

Hospitality Industry

18. **Attachment ACCI-RCA1 [Financial and Economic Impacts of the Introduction of the proposed *Hospitality Industry (General) Award 2010*].**

19. In a Statement to the AIRC, Restaurant & Catering Australia (RCA) calculates that the proposed *Hospitality Industry General Award* would significantly increase costs and impact upon the economic sustainability of the restaurant, café and catering industry.

20. The most significant impacts will be felt by the following proposed changes:

    a. The increase of the casual loading from 20% to 25% in South Australia and from 23% to 25% in South East Queensland;

    b. Addition of an extra 25% in Sunday penalty in New South Wales, South East Queensland and Western Australia;

    c. The addition of an evening penalty (of some 10%) for all hours worked after 7pm in New South Wales, Queensland and Western Australia and Tasmania;

    d. The significant increases in the pay rates for apprentices at each of the level of apprenticeship rates, and;

    e. The significant increase in the junior rates in most jurisdictions.

21. RCA has identified a range of specific examples of the cost impacts of implementing the draft *Hospitality Industry (General) Award 2010* in the form released by the AIRC in September:

    a. A NSW Restaurant with a $2 Million per annum turnover that has an even spread of turnover over the 5 days of its operation. It opens both Saturday and Sunday with 20% of turnover on each day of the weekend – The proportion of staff that are casual is slightly higher than the average at 60% - This restaurant has a an average increase of 12.2% in its wage bill each year.

    b. A caterer in Queensland with a half a million dollar per annum turnover with 70% casual staff would have a 8.4% increase - This business does 70% of its business on the weekend (as most caterers would) and employs two apprentices.

    c. A restaurant in NSW that does half of its $2.5 Million turnover on a weekend would be exposed to a 15.7% increase in wage cost - In this business 80% of staff are casual and they employ a large number of apprentices in their team of 50 staff. The increase translates to a $150,000 increase in wage costs.

    d. A restaurant business in NSW with a turnover of $2.5 Million with 50% casual staff and 30% of staff working on Saturday or Sunday would have an increase of 13.3%.

    e. A restaurant business in NSW with a turnover of $800,000 with 60% of staff working on the weekend would have an increase of 11.6%.

    f. A restaurant business in NSW with a turnover of $2 Million with 60% casual staff and 20% of staff working on the weekend would have an increase of 11%.

    g. A restaurant business in NSW with a turnover of $500,000 with no casual staff and 80% of staff working on the weekend would have an increase of 32.2%.

    h. A restaurant business in NSW with a turnover of $4.5 Million with 80% of staff working Saturday and 60% of staff working on Sunday would have an increase of 27.7%.

    i. A restaurant business in NSW with a turnover of $2 Million with 70% casual staff and 60% of staff working on the weekend would have an increase of 26.6%.

j. A restaurant business in NSW with a turnover of $300,000 with 80% casual staff and 80% of staff working on Sunday would have an increase of 20.5%.

k. A restaurant business in South Australia with a turnover of $750,000 with 83% casual staff would have an increase of 17.3%.

l. A restaurant business in South Australia with a turnover of $340,00 with 100% casual staff and 40% of staff working on Saturday would have an increase of 22%.

m. A Monday to Friday restaurant business in South Australia with a turnover of $500,000 with 50% casual staff would have an increase of 24%.

22. RCA commissioned KPMG/Econtech to prepare a report titled, *"The Economic Impact of Wage Cost Increases in the Restaurant and Catering Industry"*. **[Attachment ACCI-RCA2]**

23. The report reiterates the RCA's overall findings of cost impacts:

Table 4.1: Overall Average Wage Cost Impacts on the Restaurant and Catering Industry of Award Modernisation.

NSW	VIC	QLD	SA	WA	TAS	ACT	Australia
3.55%	0.41%	5.35%	15.70%	1.50%	-3.70%	-0.47%	3.38%

Source: Restaurant & Catering Australia

24. However, the impact to jobs, as a result of increased labour costs, has also been quantified by RCA and is indicated in a report prepared by KPMG/Econtech. It indicates a 0.07 per cent reduction in employment of approximately 8000 jobs across Australia (p.20).

> Higher labour costs, as a result of the changes in the wage costs results in a lower level of national employment. The reduction in employment of 0.07 per cent is equivalent to a loss of about 8000 jobs across Australia, including about 2500 jobs from Accommodation, Cafes and Restaurants and 5500 jobs from other sectors. The reduction in employment leads to a lower level of GDP. GDP is 0.04 per cent lower than in the baseline case. These national results are medium term impacts, where each sectoral capital stock level is assumed to be fixed while the sectoral employment levels are sensitive to the wage rates they face.

25. Worryingly, the KPMG report also indicates job losses in other areas as a result of "spill-over impacts" (p.22):

> The results from MMR suggest that the increase in labour costs (except for Tasmania and ACT) hits a number of industries particularly hard. Clearly, the largest impact is felt in the Accommodation, Cafes and Restaurant sector, where the direct impacts of the wage cost increase are concentrated, employment in the industry is 0.45 per cent lower than would otherwise be the case. However, the above chart also shows that there are spill-over impacts across other industries from the wage cost increase in the Accommodation, Cafes, and Restaurants sector. In fact, employment in other industries is 0.06 per cent lower than otherwise, this is a loss of about 5500 jobs.

26. **Attachment ACCI-RCA3 [Witness Statements to AIRC, 17 October 2008].**

27. Two witness statements by restaurateurs were provided to the AIRC to illustrate the cost impact on these businesses as a direct result of the modern award. They were also provided at a time in the economy which was not as perilous as presently experienced.

Pier Restaurant

28. The Managing Director of The Pier Restaurant indicated the following consequences as a result of the modern award applying to their business:

> 49. An increase in the Sunday full-time/part-time penalty rate from 50 percent to 75 percent will increase my labour costs significantly.
>
> 50. If a new evening penalty were to be introduced from Monday to Friday my wage costs would increase markedly because most of my trade is in the evenings. However, the amount of the evening penalty set out Annexure "C" would cost more to administer than what is actually payable.
>
> 51. Labour costs are the highest expense item for Pier Restaurant, at over 33 per cent against all gross revenue. The other major expense item is rent pursuant to lease agreements. Of course, this is fixed for long periods of time.
>
> …
>
> 54. The Sunday penalty is already a heavy burden, and if it were to increase by 25 percent as well, it would have detrimental effect on the financial viability of all businesses in the industry.
>
> 55. Wage costs are high enough as it is at the moment with the turmoil on global financial markets feeding into my operating costs every day of the week. Fresh farm produce does not come cheap. Nor does high quality seafood, fresh from the source. I find it hard to understand why restaurateurs should have to shoulder Hotel award type evening penalties when our businesses are nothing a like to each other. As a restaurateur it is a tough ask to maintain high level service in a fine dining environment with wage costs increasing even more under a new Award. I have to be able to pay all my suppliers and staff on time no matter how much financial pressure my business in under.

…

60. If there was an increase in labour costs like the proposed 75 per cent for Sundays for permanent employees, reducing the number of hours of employees is not an option. I can't just raise my menu prices either, there is a certain price that customers will not be willing to pay. I would have to review our surcharge policy, but it has been in place for some time, so a sudden change could provoke complaints from even my most regular customers.

61. The surcharge at Pier Restaurant is only payable on Sundays and public holidays. A 10 dollars per person surcharge on Sundays and 12.50 dollars per person on public holidays, respectively, per guest doesn't go anywhere near covering the relevant penalty rates, but if I removed it, Sundays could become financially unsustainable. The Modern Award could make the things even more expensive, and, honestly, I would have to take a serious look at whether it would be worthwhile. The big issue would be looking at reducing staff and this does not appeal to a person like myself that prides itself on running an upmarket business which is offering something unique to overseas tourism.

Pilu at Freshwater

29. The Managing Director of Pilu at Freshwater, a family owned business, also indicated the cost impact of the modern award as follows:

IMPACT OF THE PROPOSED HOSPITALITY AWARD

108. The introduction of a higher penalty on Sundays could have a negative impact on my lunch time trade. I may have to introduce a surcharge for Sundays, which my customers have considered unpalatable in the past, so I removed it. I know that my customers would not wear an even higher surcharge, which would be a strong possibility should there be a 175% Sunday penalty.
109. The introduction of an evening penalty, Monday to Friday, would increase costs. However, the amount of the evening penalty set out in Annexure "C" would be a burden to administer.
110. Labour costs are the second highest expense item for Pilu at Freshwater Restaurant, at 30 per cent against all gross revenue, followed by purchases (beverage and food) at 35 per cent. The other major expense item is rent pursuant to our lease.
111. The Restaurant NAPSA does not have evening loadings, which means I can serve my customers in the peak periods without being penalised. The evening loadings in the Modern Award draft would make doing business even tougher. It basically means I am being penalised for catering to peak period trade.
112. Pilu at Freshwater's profitability depends on being able to open for dinner Monday to Saturday and not having to pay extra evening loadings.
113. The high level of service demanded by customers of Pilu at Freshwater and the personal philosophy of the chef and owner Giovanni Pilu, means that service is at the heart of our business. Giovanni strongly believes in the maintaining the integrity of Italian cuisine and this is why he established the Council of Italian Restaurants in Australia (CIRA). Giovanni is passionate

about Italian culinary culture, and would find it hard to reconcile cutting back on service because of labour costs rising during our peak trading times under the Modern Award.

114. It is a very tough industry, and to win two chef hats is a highly coveted prize and an honour. I don't think a restaurant critic would understand if I lost a 'Hat' because I had little choice but to reduce my service and kitchen staff because of the higher costs in the evenings and Sundays.

115. On top of that, I already put in about 60 hours a week into the business to keep it running smoothly. If I cut back on service staff to cut back on costs, my family life would come under tremendous stress. It is hard enough to juggle picking up the kids from school and keeping them happy while running a fine dining establishment like Pilu.

116. We are not in a position to cut back anyone's hours, front or back of house, because our service would suffer. It's not as simple as it sounds to let go a casual waiter or reduce our kitchen staff, because in a restaurant environment, you may have saved on your wage costs, but someone else is forced to shoulder the extra workload. This is what would happen under the draft Modern Award.

Fast Food

30. **Attachments ACCI-NRA7 and 8 [NRA Spreadsheets of Cost Impacts under *Fast Food Industry Award 2010*].**

31. Finally, by way of further example of increased employers' costs under award modernisation, the NRA also calculated the impact of the AIRC's draft *Fast Food Industry Award 2010* and summarised the resulting increase for a casual employee (in two different examples) as compared to the existing award as follows.

32. Once again, they indicate a significant increase to weekly wage costs:

Attachments ACCI-NRA7:

Name of Award/NAPSA	Weekly Wage Cost
Fast Food (SEQ)	$1,844.05
Fast Food Industry Award 2010	$2,081.55
Difference	$237.49

Attachments ACCI-NRA8:

Name of Award/NAPSA	Weekly Wage Cost
Fast Food (SEQ)	$2,257.64
Fast Food Industry Award 2010	$3,204.21
Difference	$946.57

ATTACHMENT B

[SOURCE: AUSTRALIAN RETAILERS ASSOCIATION]

AWARD MODERNISATION

MODERN RETAIL INDUSTRY AWARD 2010 - NOW RELEASED

The Modern Retail Industry Award 2010 has now been released. Download your copy of the award.

NEW RETAIL AWARD WILL DRIVE COSTS UP

After eight months of submissions, hearings, exposure drafts and further submissions the Australian Industrial Relations Commission (AIRC) today released the first of the new modern awards - the new modern Retail Award being a central feature of the announcement.

The new awards are in response to a direct ministerial request by Federal Minister the Hon Julia Gillard to modernise the Australian workplace and to do so in a manner which would "not disadvantage either employers or employees in a financial sense."

The ARA, after a review of the new Retail Award, can only conclude direct labour costs will go up; regulatory burden will increase as all employees are reclassified; casual employees paid a 10% premium for working on a Saturday and allowances will not only be maintained but increased.

Although the new award doesn't come into effect until 1 January 2010, when combined with the proposed new IR Bill (which gives unions greater right of entry and bargaining rights) will further dampen the confidence level of retailers.

The new Retail Award does not reflect the nature of the modern workplace. It refuses to acknowledge consumer expectations of trading hours, rostering requirements of employers to meet seasonal demands and the tightening economic environment all Australians and industries are facing.

The general consensus among employer groups has consistently shown the severe financial impacts and the ability of SME retailers to absorb these price impacts is questionable. There is no doubt consumers will foot the bill through price increases on goods and groceries.

HOW MUCH WILL THIS COST RETAILERS?

The ARA's costings analysis based on a roster for a small retailer with two full time and two casual employees indicates a $22,000 wage bill increase on average across Australia with state costings estimated to be the following:

New South Wales:	$28,473p/a	(16.5% increase)
Victoria:	$18,821p/a	(11.5% increase)
Queensland:	$25,402 p/a	(15.5% increase)
Western Australia:	$19,496 p/a	(11.5% increase)
South Australia:	$26,123 p/a	(15.6% increase)
Tasmania:	$23,693 p/a	(14% increase)
Australian Capital Territory:	$24,863 p/a	(15% increase)
Northern Territory:	$15,581 p/a	(9.5% increase)

THE NEW RETAIL AWARD AT A GLANCE:

1. Casual

A casual employee will be entitled to a casual loading of 25% in addition to the basic hourly rate of pay.

A casual employee will not be entitled to the additional penalty payment for evening work and Saturday work but must be paid an additional 10% for work performed on a Saturday between 7am and 6pm. A casual employee will however, be entitled to penalties as prescribed within the award for any work performed on a Sunday and on public holidays. Casual employees are also entitled to penalties subject to the shiftwork provisions within the award.

The minimum daily engagement for a casual employee is three hours.

2. Minimum Weekly Wages & Classifications

Eight new levels of classification based on skill levels or responsibilities required in the job *(See Award for Detailed Definition).* Classifications will also link in clerical officers working within the retail establishment.

- Retail Employee Level 1 $600.00 (previous Shop Assistant) Includes: Clerical Assistant Level 1
- Retail Employee Level 2 $615.00
- Retail Employee Level 3 $625.00
- Retail Employee Level 4 $637.60 Clerical Officer Level 2
- Retail Employee Level 5 $665.00
- Retail Employee Level 6 $675.00 Clerical Officer Level 3
- Retail Employee Level 7 $710.00 Clerical Officer Level 4
- Retail Employee Level 8 $740.00 (previous Store Manager) Clerical Officer Level 5

3. Ordinary Hours of Work

Ordinary hours of work mirror those contained in the Victorian Retail Award (SDAEA Victorian Shops Interim Award 2000). At first reading, the ordinary hours may appear broader than those contained in most current Retail Awards; however retailers should be aware that penalty rates will apply for working ordinary hours past 6pm Monday to Friday and Saturdays/Sundays.

Rostering under the Modern Retail Award allows for the same flexibility as provided in most current Retail Awards throughout Australia. The Modern Retail Award allows for ordinary hours to be averaged over a period of four consecutive weeks. Retailers will also be able to introduce rostering cycles inclusive of rostered days off.

Newsagents will be able to have their ordinary hours commence at 5am and Video Stores will have a 12 midnight spread of hours.

4. Penalty Rates

The current penalties provided for in the Victorian award will apply Australia wide. States and Territories around Australia may find there are variations to the current arrangements for hours worked that attract penalties.

The Modern Award provides penalties for hours worked on Saturdays (additional 25%), Sundays (additional 100%), Public Holidays (additional 150%) and in the evening on Monday- Friday (additional 25%). Hours in excess of the ordinary number of hours will also attract overtime penalties (time and a half for the first three hours and double time thereafter).

The Pharmacy Guild of Australia

ATTACHMENT C

Ref

19 March 2009

Professor Ian Harper
Chair
Australian Fair Pay Commission
Locked Bag 35003
Collins Street West
Melbourne VIC 8007

Dear Professor Harper

Thank you for the opportunity afforded to the Pharmacy Guild of Australia to meet with you and Mr Patrick McClure in Canberra on 17 March 2009 as part of the Australian Fair Pay Commission's consultations for the 2009 minimum wage review. Ann Dalton & Marion Whalan found the meeting most productive.

We appreciate the chance to provide details to the Commission on the unique nature of community pharmacy and to highlight the difficulties currently facing our industry due to the combination of the global financial crisis and the unfortunate timing of the Government's award modernisation process and subsequent new Pharmacy Industry Award 2010.

The Guild cannot underestimate the impact these two factors will have on community pharmacy businesses in relation to increased wages cost, ongoing job retention and job creation within an industry that provides a crucial health care delivery service to all Australians.

Community pharmacies do not have the option of simply passing on higher costs to consumers. This is because a substantial amount, on average 70-80%, of community pharmacy income is derived from the Pharmaceutical Benefits System (PBS) which has fixed prices set by the Federal Government on the sale of subsidised medicines. The pharmacy proprietor is unable to alter the revenue generated from the sale of these pharmaceutical items which can only be sold by a registered pharmacist through an approved location.

With almost 5,000 community pharmacies in Australia, many of these small businesses will be forced to change the way they operate, especially on weekends and after hours, withdraw some services, and shed jobs in a time of worsening unemployment. The impact will be particularly felt by female employees in community pharmacy, whose access to flexible working hours will be curtailed by the Award.

To give you some examples:

1. In Western Australia, we reviewed the impact of the foreshadowed wage rates now contained in the new Pharmacy Industry Award 2010. We looked at a cross section of pharmacy operations including a 24 hour pharmacy, a medium size pharmacy and the most common Western Australia small size pharmacy.

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Pharmacy Size	**No. PTE employees**	**Projected increase to per annum** wage **bill**	**Pattern of Operation**
24 hour pharmacy	14.25	$121,544 pa	Open 24 hours/day every day of the year
Medium size pharmacy	11.5	$83,890 pa	7 day trading, including 8 public holidays
Small pharmacy	6.25	$23,267 pa	Open 8.30am to 7.00pm Mon to Fri, no public holidays

In just these three sample pharmacies, the combined wages bill will increase by $228,700 pa, which represents a 13.8% increase. The proprietors advised that this cost impact would force them to reduce their employee numbers, thus resulting in a loss of 3.9 full time equivalent jobs across these three pharmacies.

If these three pharmacies were considered to be a cross sectional representation of community pharmacy in Western Australia, and all proprietors seeking to maintain customer service levels then an extrapolated figure of 680 jobs would be lost across Western Australia in the community pharmacy industry.

2. In NSW a similar exercise was undertaken and the following results were calculated:

Pharmacy Size	**No. FTE employees**	**Projected increase to per annum** waae **bill**	**Pattern of Operation**
Large pharmacy	25	$109,000 pa	Trading 7 days a week til 9.00pm each night
Medium pharmacy	19	$63,000 pa	Trading 7 days a week til midnight
Small pharmacy	10	$35,000 pa	Open 8.30am to 7.00pm Mon to Fri plus less hours on weekends

It is important to note that NSW has the largest proportion of community pharmacies, around 40%, of the total number of pharmacies nationally. Basing a state wide impact on the experience of this sample group, the potential result would be in the order of 1,390 jobs lost across NSW pharmacies.

All proprietors of the above pharmacy samples provided, believed that any wages cost increase would translate into reduced opening hours and therefore reduced staffing levels ultimately resulting in reduced access by the community to an essential health care service and advice, particularly outside regular trading and GP surgery opening hours.

3. The Guild undertook a national survey of members seeking costings on their weekly wage calculations based on the new Pharmacy Industry Award 2010 and if there were to be an increase from their current wages bill, what impact this may have on their stafftng levels.

Whilst survey responses are still being received from our members, preliminary responses from the current sample indicate that 79% anticipate an increase in weekly wages as a result of the Pharmacy Industry Award 2010 and 21 % do not anticipate an increase in their weekly wages.

In addition, respondents also indicated that 61 % expect to change their staffing levels as a result of the new Pharmacy Industry Award 2010 and 39% did not expect any stafftng level changes.

As expressed to you during the meeting, the Guild has viewed previous decisions by the Australian Fair Pay Commission as being fair and reasonable.

However, we consider the context and economic uncertainty surrounding the timing of the Commission's final minimum wage review, as quite extraordinary. It is the uncertainty of the impact of the global financial

crisis coupled with the extremely ambiguous progression of industrial relations reform at this present time that creates much concern for the Guild. It is also strongly of the view that this is not the time to be flowing on a minimum wage decision to minimum award rates contained in the pay scales for community pharmacy employee classifications.

Once again, our sincere thanks for availing yourself to meet with the Guild this week. Should you require any further information or clarification of the matters raised, please do not hesitate to contact Ann Dalton, Director Government Relations and Policy or Marion Whalan, Divisional Manager, Workplace Relations and Small Business.

I look forward to seeing you at the Guild's APP National Conference in April.

Yours sincerely

Wendy Phillips
Executive Director

ACCI MEMBERS

ACT and Region Chamber of Commerce & Industry
Business SA
Chamber of Commerce & Industry Western Australia (Inc)
Chamber of Commerce Northern Territory
Chamber of Commerce and Industry Queensland
Employers First™
New South Wales Business Chamber
Tasmanian Chamber of Commerce and Industry Ltd
Victorian Employers' Chamber of Commerce & Industry

ACCORD
Agribusiness Employers' Federation
Air Conditioning and Mechanical Contractors' Association
Association of Consulting Engineers Australia (The)
Australian Beverages Council Ltd
Australian Hotels Association
Australian International Airlines Operations Group
Australian Made Campaign Limited
Australian Mines and Metals Association
Australian Newsagents' Federation
Australian Paint Manufacturers' Federation Inc
Australian Retailers' Association
Live Performance Australia
Master Builders Australia Inc.
Master Plumbers' and Mechanical Services Association Australia (The)
National Baking Industry Association
National Electrical and Communications Association
National Fire Industry Association
National Retail Association Ltd
Oil Industry Industrial Association
Pharmacy Guild of Australia
Plastics and Chemicals Industries Association Inc
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