Senate Standing Committee on Employment, Workplace Relations and Education

Inquiry into:

Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

ACCI Submission

February 2008

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 310,000 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 for a.

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

- Issue papers canvassing business' views on 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 Bank-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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1. INTRODUCTION

ACCI Members and the Agreement Making System

1. ACCI and its members have extensive day to day experience working with the agreement making provisions of the *Workplace Relations Act 1996* (and the preceding *Industrial Relations Act 1988*) as they have evolved across more than 15 years. They assist employers in negotiating, drafting and lodging agreements on a daily basis.

2. This experience is not limited to the federal jurisdiction, with ACCI members working across a number of different State industrial relations systems. ACCI members work with employers in the making of collective agreements with and without union parties, and in the making of individual agreements.

3. As central and enduring users of the system, ACCI and its member network is uniquely placed to examine and respond to the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* (the Transition Bill) and to assist this committee in relation to both policy and operational considerations.

4. ACCI has previously sought to assist this committee in relation to previous iterations of reform in agreement making.

5. This submission is provided in that spirit. Some introductory policy and framework issues are addressed (Section 1). However, the majority of the submission (Sections 2-11) focuses on operational matters and how various of the amendments would operate in practice.

6. In each instance where appropriate, ACCI has sought to identify specific alternatives and proposals for amendments to the Bill as introduced. These are collated in Section 12.

Bargaining Options

7. ACCI supports a system which provides employers and employees with options. In light of the structure of Australia's wider workplace relation system, this extends to options for collective agreements with unions, collective agreements with employees, and agreements between employers and individual employees subject to appropriate safeguards.

8. It should be stated up front that ACCI welcomes the emphasis in the proposed amendments on the transition which employers and employees will need to make in the short to medium term. The amendments constructively and practically recognise that some employers will be required to shift approaches at the workplace level. ACCI welcomes that that the Bill seeks to provide realistic and pragmatic arrangements to facilitate this transition.

9. Following the introduction of the Transition Bill, ACCI indicated the following on 20 February 2008:

> **A WORKABLE ALTERNATIVE TO AWAs MUST EXIST**
>
> The Australian Chamber of Commerce and Industry, Australia's largest and most representative business organisation, has called on all parties in the Australian parliament to ensure that a workable alternative to AWA individual workplace agreements exists, before passing any laws phasing out the AWA system.
>
> The parliament needs to be realistic and practical. With or without AWAs, the Australian economy needs to retain flexibility in the way people work and are remunerated. It is the responsibility of our parliament to ensure that exists.
>
> Whatever the politics of the moment, individual agreements based on a proper 'no disadvantage' test need to remain an ongoing part of the industrial relations framework, together with a safety net and a collective system of enterprise bargaining.
>
> Phasing out the AWA system should not be a theoretical exercise. Thousands of businesses and hundreds of thousands of employees have AWAs, which usually provide higher wages than awards as an offset for workplace flexibility.
>
> The Senate would do well, when considering proposals to phase out the AWA system, to examine whether employees and employers with AWAs are happy with their wages and working conditions, and whether alternative approaches provide comparable benefits and flexibilities.
>
> Australia's leading employer and industry organisations, with the support of ACCI, will be examining the AWA proposals at meetings in Melbourne this Friday, with a view to presenting the Senate with a constructive analysis of the government's proposals, and how a workable alternative to the AWA system might be framed.

10. ACCI maintains this perspective. Employers expect the Australian industrial relations system to retain scope for both collectively and individually agreed flexibility.

11. If AWAs are to be removed from the system, ACCI believes discussion should be about what form or forms of individual bargaining should appropriately replace them.

12. ACCI is very happy to participate in a discussion on tests and protections which should underpin an individual agreement making system for the future/to replace AWAs.

13. It is reassuring that the Government has expressed an intent to retain some flexibilities for both collective and individual agreement making, as well as attempting to provide a framework for approval of agreements in as efficient manner as possible.

14. ACCI will participate constructively in the formulation of the best possible model flexibility provisions for awards and agreements. However, it remains unclear whether flexibility provisions within an award or agreement can substitute for capacity to make a wider agreement between an individual and his or her employer.

Priorities For Employers

15. Employer policy is a product of experience, and this is as true of agreement making as any other area of workplace relations. Employers have clear experience based expectations of how any agreement making system should operate, which are directly relevant to how the present Bill should be considered, and some essential amendments.

16. For agreement making, employers have the same expectations they had of the former no-disadvantage test under both ALP and Coalition era reforms, including:

    a. Any agreement making system has to be ‘can do’. It has to be navigable and actually translate to agreed settlements between employer and employee(s) at the workplace level being approved, enforceable instruments.

    b. Any agreement test must be simple, straightforward to comply with and ultimately practical and pragmatic. Industrial relations advisors must be able to operate the test with confidence and familiarity in negotiating and drafting agreements, and in advising employers.

    c. Agreement making should not involve the risk of further or new legal obligations eventuating, should an agreement not pass (ie. no ongoing role for *designated* instruments once the purposes of testing agreements is complete).

d. The benchmark instruments for any NDT must be a genuine safety net (such as awards and/or legislated minimum terms and conditions).

e. Any NDT must be a truly global test against a benchmark or comparator instrument. It should not be a line-by-line assessment against the benchmark.

f. The NDT should operate in a universally consistent manner for both individual and collective agreements, with and without union parties.

g. Variations to agreements that initially do not pass the NDT should be expeditiously processed. Ultimately, any system should encourage the actual making of agreements and the successful navigation of agreement making tests.

h. Any approval test must not delay agreement making, nor become bogged down in administrative inertia. Agreements have to be able to negotiate approval / lodgement processes with expedition.

i. Where an agreement does not pass:

   i) There should be rapid and clear communication with agreement parties.

   ii) There should be a clear and straightforward avenue to redress problems and have the agreement approved.

   iii) All parties should know where they stand at all times.

j. The tester (in this case the Workplace Authority) should provide information to the parties in a speedy manner to ensure agreements can be approved and changes can be made to expedite approval.

k. Once the test is passed and an agreement is approved, it must operate without scope for subsequent challenge or litigation for underpayment or agreement reversal. Once undertaken, any test must stand.

l. Agreements should be able to come into effect as quickly as possible.

m. Agreements should have a reasonable duration to ensure certainty for both employees and employers.

17. These are the type of fundamental standards/expectations against which employers will assess any proposed amendments to agreement making.

The Context In Which Amendments Will Commence

18. It is important to recognise the current state of play these amendments will be introduced into.

a. There is a significant backlog of agreements to be approved.

i) Looking at the period following the introduction of the Fairness Test in May 2007, ACCI understands From 7 May 2007 to 31 January, 278,275 agreements were lodged for assessment by the Workplace Authority. As at 31 January, less than 50% (129,912) of those agreements had been finalised.[1]

ii) (Although it must be acknowledged that agreement approval against lodgement levels appears to have accelerated rapidly during more recent months.[2])

b. Employer applicants are experiencing significant and damaging delays in agreement approval, often stretching to months.

c. There is a growing level of dissatisfaction with agreement approval timelines and with the operation of the agreement approval system generally.

d. Employees expect agreement making approval to accelerate following the passage of the Transition Bill.

19. This backlog is a product of essentially two developments:

a. There was a significant increase in demand for agreement approval in the period 2006-2007, preceding the creation of the fairness test. I.e. there were more agreements to be approved, placing stress upon the resources of the OEA and then Workplace Authority.

[1] Evidence from Ms Bennett, Workplace Authority Director, *Standing Committee On Education, Employment And Workplace Relations, Hansard*, 21 February 2008, p.63.
[2] http://www.workplaceauthority.gov.au/graphics.asp?showdoc=/news/researchStatistics.asp#monthly

b. The Fairness Test introduced in mid-2007 is often very difficult to administer and navigate, and has not redressed delays in agreement approval.

20. This underscores the importance of getting it right this time.

21. It underscores the importance of creating a navigable, practical NDT which favours agreement making and minimises scope for becoming bogged down in administration. All users of the system, and the Parliament overseeing it, are entitled to expect a more efficient system following the transitional amendments not subject to the present delays and backlogs.

Terms of Reference

22. In reviewing and reporting on the Transition Bill, the Committee has been requested to have particular reference to:

    a. economic and social impacts from the abolition of individual statutory agreements;

    b. impact on employment;

    c. potential for a wages breakout and increased inflationary pressures;

    d. potential for increased industrial disputation;

    e. impact on sectors heavily reliant on individual statutory agreements; and

    f. impact on productivity.

23. ACCI supports both collective and individual agreement making options for the contemporary Australian system. ACCI believes the considerations in the terms of reference support such an approach.

Economic and social impacts

24. ACCI has produced a body of research and analytical materials over some years in support of ongoing capacity for both collective and individual agreement making. This material is available on the ACCI website.

25. The ultimate point made by ACCI is that some capacity for individual agreement making within a wider system providing for collective agreement making, has (and can continue to have) a positive impact on the economic and social life of Australians.

26. To look at the social impacts, ACCI understands that a number of individual agreements have been used to reflect individual employee priorities on issues such working time and leave. ACCI is concerned that providing flexibility only within the collective context may reduce options available to some individuals, including flexibility to balance their working and family life.

Employment

27. Employment growth in Australia remains strong, and unemployment has reached levels unseen for decades. However, the complete impact of the Forward With Fairness amendments will not be implemented in the labour market of 2008, but that of 2010 and beyond. There are increasing factors in our economy (and the global economy) which should support a cautious approach to any policy setting which may impact upon scope to offer and sustain jobs.

28. Instruments that can reduce benefits below award levels are not under consideration in this inquiry. ACCI believes the key question for consideration on this occasion is whether the ITEAs (which will be subject to the new NDT) should be capable of being ongoing and capable of being entered into by all employees, and what safeguards should facilitate this outcome (See Section 2).

29. ACCI considers that permitting some scope for individual agreement making allows more employers and employees to match their demands and availabilities, and to resolve this into an employment opportunity. Precluding such an option at the point of engagement may have some impact on scope for some jobs to be offered.

30. There is also the threat that wage settlements in translating into collective instruments (for presently non-collective workplaces) may not be productivity related, and that this may impact on the opportunity to generate new jobs.

Wages and Inflation

31. Many workplaces use collective or multi employee reward models and do so quite effectively, but for others this is not appropriate or effective.

32. Performance related reward has been a key part of many individual agreements. Ending individual bargaining may curtail capacity to link wages to productivity in a proportion of workplaces (which is the recipe for non-inflationary wage increases). Collective negotiations may in some cases introduce two considerations:

    a. Firstly, some unions may pursue wages agendas based on externalities, including so called industry claims which pay no regard to the productivity and cost considerations for particular workplaces.

    b. Secondly, employers may have to pay some premium to enter a non-union or even union CA as a transition out of AWAs and ITEAs, and this will be without regard to productivity or the capacities of an enterprise.

33. If this occurs based on additional costs and without regard to productivity, this will add to wages pressures and inflation.

34. Some scope for individual negotiations and agreement also provides a safety net in some negotiations and bargaining situations (just as protected action does on the employee side) and leads to successful collective outcomes without protracted industrial action. If this option is removed, unions may become more implacable and entrenched in future disputes, leading to more strikes, longer run strikes and less productive and non-inflationary wage settlements.

Industrial disputation

35. Australia has been transformed from a strike prone country to an essentially post industrial action country. It is quite remarkable how many workplaces bargain successfully and resolve disputes without industrial action in contemporary Australia. ACCI hopes this continues into the future, and it will be a key performance measure of any package of amendments to our industrial relations system.

36. Causes of this beneficial transformation to Australia's economy and society are complex, and ACCI does not presume to attribute this transformation to any one form of agreement.

37. However, employers are concerned that removing scope for individual bargaining may carry with it scope for increased industrial action in some areas, for reasons including the following:

    a. Individual agreements can be a highly efficient mechanism for individual reward, incentives and productivity. Employers and unions may well disagree significantly on how such reward models should be collectivised (to the extent they can be) and for example how much reward can be made contingent on performance under CAs.

    b. If ITEAs are not ongoing, many workplaces will need to ultimately re-collectivise, and move onto some form of collective agreement (or settle back onto awards). This is another industrial and coverage transformation, and potentially opens up fresh contest and disputation on what form of CA should cover such workplaces.

38. In all, ACCI would recommend caution. As set out through this submission, the Parliament should consider building on the ITEA model (but in a more ongoing and accessible model), rather than excise any capacity for individual bargaining from the system entirely.

Sectors Reliant On Individual Statutory Agreements

39. Some ACCI members may wish to address the Committee on the Transition Bill, including from industries using many AWAs.

40. The key point ACCI would make in relation to such sectors is that the amendments will require employers and employees to make a major transition. A post AWA "collectivisation" process may create more disagreement and disputation, and may open up scope for union agitation at the workplace and industry level.

41. Employers are also likely to have to pay an incentive or premium for employees to enter into a collective agreement. In particular, employees may need to pay again to maintain flexibilities and efficiencies previously secured through AWAs.

Productivity

42. Along with collective agreements, scope for individual agreement making has played a role in enhancing Australian productivity. It should be acknowledged upfront that:

a. Productivity needs to improve further, and that it was never claimed that of itself scope for any particular form of bargaining was the panacea for Australia's productivity challenge.

b. Any form of individual agreement can only ever be part of a wider system of options to enhance productivity, which will include collective agreement making.

43. Neither workplaces nor individuals are homogenous or interchangeable. Some workplaces are collective in nature. Others need the option of an individual agreement to meet mutual priorities, including from the employer side, the need for enhanced productivity.

44. An individual agreement option allows for the individual customisation of working time, rewards and incentives, that can lead to greater productive output (and indeed to greater employee satisfaction and retention which is vital to productivity).

45. Linked to the preceding, ACCI also believes some capacity for individual agreement making can be an important measure for retaining people in the workforce across the life-course (including parents and older employees). Providing individuals with more working options, customised to their needs, through an individual agreement provides greater capacity for employee retention, experience retention and skills retention, all vital to productivity.

This Submission

46. ACCI welcomes the opportunity to address such considerations upfront. The remainder of this submission focuses on the proposed amendments contained in the Transition Bill.

47. It puts to one side the issue of what forms of bargaining should be accommodated under the Australian system, and engages the detail of the proposed amendments in the Transmission Bill.

48. At all points ACCI has attempted to be constructive and to examine the proposed legislation against employer experience in bargaining and in the operation of previous systems (such as the pre-*WorkChoices* NDT).

49. We have strived to assist the Senate, and the government, with practical input towards the best possible and most practical and clear set of transitional amendments.

2. ITEAs

Individual Transitional Employment Agreements

50. Schedule 1 of the Transitional Bill seeks to amend the *Workplace Relations Act 1996* by repealing current AWA provisions, and inserting a new s.326 to create an instrument called, Individual Transitional Employment Agreements (ITEAs).

51. The Minister's second reading speech states the rationale for these instruments:[3]

> To provide sensible transitional arrangements for employers who currently use AWAs, the Bill will create a special instrument called an Individual Transitional Employment Agreement.
>
> …
>
> ITEAs will give these employers time to transition to the Government's new workplace relations system.

52. Section 326 relevantly provides:

> 326 Individual transitional employment agreements
>
> (1) An employer may make an agreement (an individual transitional employment agreement or ITEA) in writing with a person whose employment will be subject to the agreement.
>
> (2) The agreement is not an ITEA unless:
>
> (a) as at 1 December 2007 the employer employed at least one person whose employment with that employer was regulated by an agreement of a kind specified in subsection (3); and
>
> (b) the person whose employment is to be subject to the ITEA:
>
> (i) did not commence that employment more than 14 days before the day on which the ITEA was made, and had not previously been employed by the employer; or
>
> (ii) is in an employment relationship with the employer and that employment relationship is regulated by an ITEA or an agreement of a kind specified in subsection (3).
>
> (3) The kinds of agreements for the purposes of paragraph (2)(a) and subparagraph (2)(b)(ii) are the following:
>
> (a) an AWA within the meaning of Schedule 7A;

[3] The Hon. Julia Gillard MP, Second Reading Speech, *House of Representatives Hansard*, 13 February 2008, p.10.

(b) a pre-reform AWA;

(c) a preserved individual State agreement within the meaning of Schedule 8;

(d) an employment agreement within the meaning of section 887.

(4) The fact that a period of work performed by a casual employee has ended does not of itself bring an end to the employee's employment relationship with the employer for the purposes of subparagraph (2)(b)(ii).

(5) An ITEA may be made before the commencement of the employment.

53. It should be stated upfront that ACCI's primary position is that ITEAs should not be transitional. Given that the new NDT will be against the full award (and should be) and against the statutory standard / NES, there will be a qualitative difference between AWAs and ITEAs, and the highly publicised concerns about outcomes under some AWAs will not arise.

54. ITEAs as regulated by the NDT and other amendments in the Transition Bill will operate more akin to the first generation (1997-2005/6) of AWAs, assessed against the previous NDT by the Office of the Employment Advocate.

55. ACCI's primary position, and primary call to this Committee and the Parliament is to amend the Transition Bill to ensure:

(a) ITEAs (of a non-transitional and non-time limited nature) are available to all employers, for all employees, on an ongoing basis, regardless of an employers history of AWA use.

(b) ITEAs be available for the same term as all other form of agreements under the *Workplace Relations Act 1996*, and not be limited in their nominal term to the end of 2009.

Which Employers Can Make Agreements?

56. The Transition Bill, under s.326(2)(a), makes clear that an employer who *"as at 1 December 2007 the employer employed at least one person whose employment was regulated by an agreement of a kind specified in subsection (3))"* is able to make an ITEA.

57. Whilst the creation of ITEAs was announced in the FWF IP in August 2007, there does not appear to be any specific rationale for the 1 December cut off date. The obvious effect of this date is to disenfranchise employers the ability to make ITEAs with either new or existing employees, if they did not have an employee's employment

regulated by a AWA (type instrument as in s.326(3)) on 1 December 2007.

Many <u>Employers</u> Will Not Be Able to Make ITEAs

58. The wording of s.326(2)(a) would appear to exclude the following employers from being able to make an ITEA:

    a. Any employer who previously made an AWA (both *WorkChoices* and pre-reform AWAs) with an employee that was subsequently terminated, or was terminated and replaced with a collective agreement, before 1 December 2007.

    b. Any employer who previously transitioned into *WorkChoices* with an employee on a preserved individual State Agreement or s.888 Victorian agreement, that was subsequently terminated, or terminated and was replaced with a collective agreement, before 1 December 2007.

    c. Any employer who had previously employed someone on an AWA who resigned/or was terminated before 1 December 2007.

    d. New businesses which commence after 1 December 2007, but which may have been using AWAs in a previous business (possibly for a decade or more).

59. The threshold for making ITEAs as provided by s.326(2)(a) would appear to exclude a number of employers who have used AWAs (or like instruments) in the past, but as of 1 December 2007, did not have any employee engaged on them. The question must be asked as to what is the policy rationale for excluding past employees, as ACCI does not see any clear reasons for this limitation.

60. The Minister in her second reading speech states *"ITEAs will give these employers time to transition to the Government's new workplace relations system."*[4] Leaving out employers referred to in (a) and (b) of the above, would not seem to be consistent with the policy rationale.

61. Secondly, there may be new businesses established after 1 December 2007, and which may have used AWAs (or like instruments) prior to this date in a previous business. In fact, this may have been the only mode of employment arrangement for some small businesses for a considerable period of time before 1 December 2007.

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[4] The Hon. Julia Gillard MP, Second Reading Speech, *House of Representatives Hansard*, 13 February 2008, p.10.

62. Again, it would appear to be inconsistent, to exclude the ability for these employers to be able to make ITEAs who require appropriate transitional instruments.

Which Employees Can Make Agreements?

63. Subject to satisfying s.326(2)(a), only the following employees can make agreements:

    a. A new employee, as long as they had not previously been employed by the employer and they make an ITEA within 14 days of being employed (s.326(2)(b)(i)).

    b. An existing employee who is in an employment relationship with the employer and that employment relationship is regulated by an ITEA or an agreement of a kind specified in subsection (3) (s.326(2)(b)(ii)).

Many Other Employees Cannot Utilise ITEAs

64. ACCI is concerned that the Government has introduced a higher threshold for offering ITEAs to new employees, which is an addition to the previously announced policy.

65. It has done so by only allowing an employer to offer an ITEA to a new employee *"if they had previously not been employed by the employer and they make an ITEA within 14 days of being employed"*.

66. The Government's FWF IP states quite clearly:

> A key feature of the transition arrangements will be the availability of a special instrument called Individual Transitional Employment Agreements (ITEAs) which may be made during the two year period of award simplification.
>
> Individual Transitional Employment Agreements (ITEAs) may be made:
>
> • during the 2 year period of award simplification;
>
> • between:
>
> - an employer who has any employee engaged on an Australian Workplace Agreement as at 1 December 2007; and
>
> - a new employee or an existing employee whose terms and conditions are governed by an Australian Workplace Agreement;

• with a nominal expiry date of no later than 31 December 2009, provided;

• the ITEA does not disadvantage the employee against a collective agreement applying to the work the employee will perform at the workplace or, where there is no collective agreement, the applicable award and the Fair Pay and Conditions Standard.

67. Similarly, the Minister's second reading speech states that *"…employers may use ITEAs to employ new employees or for existing employees who were employed on AWAs"*.[5]

68. Therefore, ACCI sees no reason why this additional hurdle has been introduced in the Transition Bill, particularly given that many employees are engaged on the following arrangements and they will, once the Bill is passed, not be able to make an ITEA if they were previously employed by the same employer:

a. Daily hire.

b. Casual employment.

c. On-hire situations.

d. Fixed Term/Specified Contracts.

69. These employees are quite re-engaged regularly by the employer across hundreds of thousands of workplaces in Australia, and particularly impacts upon resources and the construction sector.

70. A key example of this is work on remote projects, including some massively important resource projects in areas of remote WA and Queensland where labour is very scarce and all options need to be available to attract employees. Employees are regularly employed on AWAs for the life of a project, and then re-employed under a fresh AWA by the same company for a fresh project after a period (such as for example some months rest with family and friends in Perth or Brisbane).

71. Why shouldn't a skilled construction employee who may have worked under AWAs for years be allowed to enter an ITEA during 2008/09 (given that the employer may remain a user of individual agreements), purely because his or her employer may previously have employed that person. In this example, there may be no collective framework to revert to for that work with that employer, and the award may be

[5] The Hon. Julia Gillard MP, Second Reading Speech, *House of Representatives Hansard*, 13 February 2008, p.10.

completely inappropriate for the hours of work and AWA based shift cycle in the remote workplace.

72. The effect of s.326(2)(b)(i)) is that these employees cannot be offered an ITEA if they have previously worked for the employer in the past. There is also no time limit as to how far an employer needs to go back in their records to ascertain whether the employee had previously been employed. It appears that this is ultimately anti-employment and illogical, as it would discourage employees from re-hiring people they know, trust and may be keen to work with again.

Former Casuals/Contract Staff

73. As stated above, the effect of s.326(2)(b)(i) is that employers who regularly engage staff (whether be short term/fixed term contract, casual, on-hire etc.) cannot make an ITEA with such a person upon re-engagement.

74. An unintentional consequence of that section is that it appears to overlook that many employers legitimately engage the same people after previous engagement periods. This is particularly the case for casual work and for on-hire situations which is an extremely significant mode of engagement by many small and larger firms and across many industries.

At the very least, ACCI would support amendments that will allow an employer who has engaged the same person within a period of 2 year to be able to offer these technically "new" employees an ITEA.

Employment Relationship

75. Section 326(b)(ii) talks about an employer making an ITEA with an existing employee. However, it is also unclear whether s.326(b)(ii) applies to casual staff who are "on the books" (when read with s.326(4)).

76. If s.326(b)(ii) applies to casual staff who are on the books, they need to be regulated *"by an ITEA or an agreement of a kind specified in subsection (3))*, for the employer to make an ITEA with them. However, if they are not in an *"employment relationship"* they could be engaged on an ITEA under s.326(b)(i).

77. Section 326(4) does not appear to rectify this situation or provide certainty for employers who have employed casual staff. It merely states that *"the fact that a period of work performed by a casual employee has ended does not of itself bring an end to an employee's employment relationship …"*.

78. This would require an assessment by each employer who has engaged the particular person and is a question of fact and law, which may require legal advice. Given the short-term nature of causal work employers require more certainty in their employment arrangements. Section 326(4) does not go far enough in this respect.

As a minimum, ACCI supports s.326(4) being expanded to also refer to daily hire, fixed term contracts/contracts for a specified task, and on-hire arrangements.

14 Day Time For New Employees

79. Section 326(2)(b)(i)) also requires an employer to make an ITEA with a new employee within 14 days of being employed.

80. Whilst ACCI's primary preference is for the Transition Bill to allow all new employees to be offered an ITEA (ie. no previous employment and 14 day time limit threshold/requirements), if it was to remain, the Committee should recognise that it is common practice for a new employee to be technically employed by the employer, but not actually commence work until sometime later (usually dependent on when the employee completes any working notice period with the previous employer).

81. This is usually around 4 weeks, but can extend considerably for professionals/high income earners.

Therefore, it would be prudent and reasonable that if there is a period by which an employer must offer a new employee an ITEA, that the 14 day window be extended to at <u>least 30 days</u> to allow time to work out/negotiate conditions of the ITEA.[6]

ITEA Nominal Expiry Date (NED)

82. Under the pre-*WorkChoices Workplace Relations Act 1996*, AWAs could only have a maximum nominal expiry date of 3 years (s.170VH(1)).

[6] This period of time is consistent with the 30 day period afforded to employers who vary ITEAs to comply with the NDT (s.346W).

Under *WorkChoices*, the nominal expiry date for both union/employee collective agreements and AWAs were extended to 5 years.

83. Proposed ss.352(1)(aa) and 352(2)(aa) would reverse this and limit the nominal expiry date of an ITEA to 31 December 2009. The rationale for this is that *"[o]n and from 1 January 2010, Labor's new National Employment Standards and modern simple awards will be in operation and there will be no need for any individual statutory employment agreements"*.[7]

84. ACCI would support amendments to ensure that ITEAs and collective agreements can have the same ongoing duration for the following reasons:

   a. NDT/Standard: Given that the combination of the NDT and the Australian Fair Pay and Conditions Standard provides a comprehensive test for these agreements, in a similar way - and arguably higher - than the pre-*WorkChoices* legislation provided, ACCI supports ITEAs with a nominal expiry date equivalent to union/employee collective agreements (ie. 5 years).

      (i) Furthermore, as the Standard is to be replaced by the Government's National Employment Standards (NES) on 1 January 2010, the case for equivalence can only be strengthened.

   b. ITEAs = Collective Agreements: It must be noted that the Transition Bill requires an ITEA to be benchmarked against a "collective instrument" in the first instance. This is in reality, a higher threshold than the one that collective agreements and AWAs (both current and pre-*WorkChoices*) are (and were previously) required to undergo. Therefore, an ITEA approved in accordance with the Transition Bill is more akin to a collective agreement and should be capable of having an equivalent term.

   c. The Standard: Given that all ITEAs must comply with the Australian Fair Pay and Conditions Standard (the Standard), an ITEA is subject to a higher threshold than pre-*WorkChoices* AWAs and collective agreements. An ITEA must always, throughout its life, not just at the point of making the agreement, comply with at least the level in the Standard (this includes pay rates under an applicable pay scale or applicable special/FMW) – including the NES when it comes into operation.

[7] The Hon. Julia Gillard MP, Second Reading Speech, *House of Representatives Hansard*, 13 February 2008, p.10.

85. This much is made clear by a note to proposed s.326:

> Note 1: In addition to the no-disadvantage test, the Australian Fair Pay and Conditions Standard prevails over a workplace agreement to the extent to which the Australian Fair Pay and Conditions Standard provides a more favourable outcome for the employee or employees—see section 172.

86. Therefore, where collective agreements apply to the workplace, ITEAs are subject to a very strong safety net than that which applies to collective agreements, and AWAs.

87. Secondly, ITEAs would also have to meet the National Employment Standards (NESs) when they come into effect from 1 January 2010, which significantly builds upon the current Standard. This supports amendments which would increase the nominal expiry date for ITEAs to equal that of CAs.

ACCI supports ITEAs which are:

- Available to all employers (no 1 December 2007 reference).

- Available for all former and new employees.

- Which have a maximum nominal expiry date equivalent to collective agreements (5 years).

Therefore, ACCI supports appropriate amendments to proposed ss.326, 352(1)(aa) and 352(2)(aa) that reflects the above.

New NDT for Agreements

88. The Minister outlined in her second reading speech the amendments to the current Fairness Test and the creation of a new NDT.[8]

> The Bill will introduce a new no-disadvantage test for all individual and collective workplace agreements that are made after the commencement of the legislation.
>
> The Bill will end the compliance nightmare created by the backlog of agreements that has piled up under the fairness test changes.
>
> To pass the new no-disadvantage test, ITEAs must not disadvantage an employee against an applicable collective agreement or, where there is no such collective agreement, an applicable award, and the Australian Fair Pay and Conditions Standard.
>
> Collective agreements must not disadvantage employees in comparison with an applicable award and the Standard.

[8] The Hon. Julia Gillard MP, Second Reading Speech, *House of Representatives Hansard*, 13 February 2008, p.10.

89. Proposed s.346D would set out the new NDT for both ITEAs and collective agreements, as follows:

> (1) An ITEA passes the no-disadvantage test if the Workplace Authority Director is satisfied that the ITEA does not result, or would not result, on balance, in a reduction in the employee's overall terms and conditions of employment under any reference instrument relating to the employee.
>
> (2) A collective agreement passes the no-disadvantage test if the Workplace Authority Director is satisfied that the agreement does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees under any reference instrument relating to one or more of the employees. (emphasis added).

Reference Instruments - ITEAs

90. ACCI considers that there will be a considerable difference between the proposed NDT and the former pre-*WorkChoices* NDT in relation to the benchmark used to assess the proposed agreements.[9]

91. The proposed NDT for ITEAs makes a significant departure from the old NDT, in that the benchmark for the purposes of the NDT is not a federal award (or designated award), but rather, a cascading number of "*reference instruments*".

92. ACCI considers that the "reference instruments" are not appropriate for ITEAs and that for both ITEAs and collective agreements the benchmark should be Standard and consistent.

93. A *"reference instrument"* is further defined in proposed s.346E as follows:

> (1) *A* ***reference instrument*** is:
>
> (a) in relation to an employee whose employment is subject to an ITEA:
>
> > (i) any relevant collective instrument; or
> >
> > (ii) any relevant collective instrument and any relevant general instrument, to the extent that the instruments operate concurrently; or

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9 Former s.170XA of Part VIE of the *Workplace Relations Act 1996* provided:

> … (2) Subject to sections 170XB, 170XC and 170XD, an agreement disadvantages employees in relation to their terms and conditions of employment only if its approval or certification would result, on balance, in a reduction in the overall terms and conditions of employment of those employees under:
>
> > (a) relevant awards or designated awards; and
> > (b) any law of the Commonwealth, or of a State or Territory, that the Employment Advocate or the Commission (as the case may be) considers relevant.

(iii) if there is no relevant collective instrument—any relevant general instrument; or

(iv) if there is no relevant collective instrument or relevant general instrument—any designated award; (emphasis added).

94. A *"relevant collective instrument"* is further defined in s.346E(2) and (3) as follows:

(2) A ***relevant collective instrument***, for an employee whose employment is subject to a workplace agreement, is an instrument of a kind specified in subsection (3):

(a) that regulates, or would but for an ITEA, pre-reform AWA or AWA (within the meaning of Schedule 7A) having come into operation regulate, any term or condition of employment of persons engaged in the same kind of work as that performed or to be performed by the employee under the workplace agreement; and

(b) that was binding, or would but for an ITEA, pre-reform AWA or AWA (within the meaning of Schedule 7A) having come into operation have been binding, on the employee's employer immediately before the day on which the workplace agreement was lodged.

(3) The kinds of instruments for the purposes of subsection (2) are any of the following:

(a) a collective agreement;

(b) a pre-reform certified agreement (within the meaning of Schedule 7); (c) an old IR agreement (within the meaning of Schedule 7);

(d) a preserved collective State agreement (within the meaning of Schedule 8);

(e) a workplace determination;

(f) a section 170MX award (within the meaning of Schedule 7).

95. A *"relevant general instrument"* is further defined in s.346E(4) and (5).

(4) A ***relevant general instrument***, for an employee whose employment is subject to a workplace agreement, is an instrument of a kind specified in subsection (5):

(a) that regulates, or would but for a workplace agreement or another industrial instrument having come into operation regulate, any term or condition of employment of persons engaged in the same kind of work as that performed or to be performed by the employee under the workplace agreement; and

(b) that was binding, or would but for a workplace agreement or another industrial instrument having come into operation have been binding, on the employee's employer immediately before the day on which the workplace agreement was lodged.

(5) The kinds of instruments for the purposes of subsection (4) are any of the following:

(a) an award;

(b) a common rule in operation under Schedule 6;

(c) a transitional Victorian reference award (within the meaning of Part 7 of Schedule 6);

(d) a transitional award (within the meaning of Schedule 6), other than a Victorian reference award (within the meaning of that Schedule), to the extent that the award regulates excluded employers in respect of the employment of employees in Victoria;

(e) a notional agreement preserving State awards (within the meaning of Schedule 8).

CAs Are Not Safety Net Standards

96. The effect of s.346E(1)(a) and (2) is that an ITEA will be benchmarked against (possibly) a number of collective instruments (as set out in s.346(3)).

97. There are a number of problems with using CAs as the benchmark for the NDT for ITEAs.

    a. It must be recalled that instruments such as collective agreements, old IR agreements, and preserved collective State agreements are not a safety net for employees, in the sense that awards are.

    b. These instruments are detailed and mostly, comprehensive negotiated agreements which set actual terms and conditions of employment. They do not represent a minimum safety net as awards do, but rather trade off terms and conditions for higher conditions and/or flexibilities.

    c. It is far easier for all users of the system if there is a universal safety net benchmark for agreement making that will apply in a consistent manner. CAs can be far lengthier than awards and deal with a variety of terms and conditions. This will undoubtedly impact upon the ability of the Workplace Authority to process ITEAs.

    d. CAs contain wages which are far in excess of the minimum award derived pay rates which would not represent an appropriate transitional instrument for former AWA users.

e. Some CAs are not particularly well drafted, as parties "knew what they meant" (ie. because they could work it out later at the workplace level). If drafting is shoddier in CAs, this is going to make ITEAs particularly difficult to assess and approve.

98. Furthermore, it is important to note that the exact nature of each collective instrument referred to in s.346E(3) varies, depending upon when and how it was created, for example:

a. With respect to pre-*WorkChoices* certified agreements, these agreements would have had to pass the old 170XA NDT by the AIRC. Specifically for union CAs, there would probably have been extensive negotiations and bargaining, usually well above and in excess of award wage outcomes.

b. With respect to certified agreements made under the *WorkChoices* amendments, this may include pre and post Fairness Test CAs.

c. Preserved State Agreements were made under the State system which had its own approval process and benchmark for approval similar, but different, from the federal CAs.

d. Section 170MX awards were an AIRC arbitrated outcome in relation to specific industrial events and the AIRC was not bound to allowable award matters as set out in former s.89A.

e. Lastly, for new collective agreements made under proposed 346D(2) will be yet another benchmark for passing the future ITEAs which are different from pre-reform CAs and *WorkChoices* (pre and post Fairness Test) CAs.

99. This is a very complicated and inappropriate basis for any practicable and navigable NDT.

Awards Should be Benchmark for ITEAs

100. In other words, there is no consistency of safety net quality between the various collective instruments for the purposes of approving ITEAs under the NDT.

101. If the purpose of passing an ITEA is to ensure an employee is not disadvantaged as compared to a safety net of minimum terms and conditions, an award should be the sole benchmark (with any statutory Standard), as is the case for CAs.

Reference Instruments - CAs

102. The Transition Bill treats new CAs in a similar way to the pre-*WorkChoices* NDT, in so far as awards are used as the benchmark.

103. Section 346E provides:

> (1) A *reference instrument* is:
>
> … (b) in relation to employees whose employment is subject to a collective agreement:
>
> > (i) any relevant general instrument; or
> >
> > (ii) if there is no relevant general instrument—any designated award; for one or more of the employees.
>
> … (4) A *relevant general instrument*, for an employee whose employment is subject to a workplace agreement, is an instrument of a kind specified in subsection (5):
>
> > (a) that regulates, or would but for a workplace agreement or another industrial instrument having come into operation regulate, any term or condition of employment of persons engaged in the same kind of work as that performed or to be performed by the employee under the workplace agreement; and
> >
> > (b) that was binding, or would but for a workplace agreement or another industrial instrument having come into operation have been binding, on the employee's employer immediately before the day on which the workplace agreement was lodged.
>
> (5) The kinds of instruments for the purposes of subsection (4) are any of the following:
>
> > (a) an award;
> >
> > (b) a common rule in operation under Schedule 6;
> >
> > (c) a transitional Victorian reference award (within the meaning of Part 7 of Schedule 6);
> >
> > (d) a transitional award (within the meaning of Schedule 6), other than a Victorian reference award (within the meaning of that Schedule), to the extent that the award regulates excluded employers in respect of the employment of employees in Victoria;
> >
> > (e) a notional agreement preserving State awards (within the meaning of Schedule 8).

104. The Transition Bill provides that where an instrument of the kind mentioned in s.346E(5) does not apply, a pre-reform designated federal award may apply (see below for Designation).

105. Whilst these general instruments are of a similar quality, there are some major differences due to their historical industrial creation and continued operation (see wages below).

106. This again, reinforces ACCI's support for a process of agreement making that operates akin to the previous pre-*WorkChoices* NDT and which uses only federal/State awards as the safety net benchmark.

107. Former State Awards: Given that State awards are now notional agreements preserving State awards (NAPSAs), ACCI supports a benchmark for CAs that includes a relevant/binding NAPSAs where they apply (See below for Designation).

What About the Fair Pay and Conditions Standard?

108. It appears that for the purposes of performing the NDT, the relevant benchmark is not explicitly against the Australian Fair Pay and Conditions Standard (Standard), as outlined in the Minster's second reading speech.[10]

> To pass the new no-disadvantage test, ITEAs must not disadvantage an employee against an applicable collective agreement or, where there is no such collective agreement, an applicable award, and the Australian Fair Pay and Conditions Standard.(emphasis added).

109. The definition of reference instrument in s.346E for both ITEAs and CAs does not include any reference to the Standard.

110. This appears to be an anomaly and potential problem as pay rates are contained in pay scales (and other rates such as FMWs) which are part of the Standard. It may be a major omission to not include these as part of a global NDT (see below).

Wage Rates and NDT

111. If ACCI is correct in identifying that for the purposes of performing the NDT, the relevant benchmark does not include a relevant pay scale (which is part of the Australian Fair Pay and Conditions Standard – Part 7), then there are a number of issues which flow from that for agreement making.

112. Depending on what reference instrument is used for conducting the NDT, there are potential inconsistencies in agreement making as outlined in the following table:

[10] The Hon. Julia Gillard MP, Second Reading Speech, *House of Representatives Hansard*, 13 February 2008, p.10

New ITEAs

Proposed Section	Possible Benchmark	Contains Wages
s.346E(3)(a)	New collective agreement	Yes (probably)
s.346E(3)(b)	A pre-reform certified agreement	Yes (probably)
s.346E(3)(c)	An old IR agreement	Yes (probably)
s.346E(3)(e)	A preserved collective State agreement	Yes (probably)
s.346E(3)(f)	A workplace determination	Possibly
s.346E(3)(e)	A section 170MX award	Possibly

New CAs (and ITEAs where No CA instrument applies)

Proposed Section	Possible Benchmark	Contains Wages
s.346E(5)(a)	An award	No (contained in a corresponding pay scale)
s.346E(5)(b)	A common rule under Schedule 6	Yes
s.346E(5)(c)	A transitional Victorian reference award under Part 7 of Schedule 6)	Yes
s.346E(5)(d)	A Transitional award under Schedule 6	Yes
s.346E(5)(e)	A notional agreement preserving State awards (under Schedule 8)	No (contained in a corresponding pay scale)

113. It is uncertain whether the wage rates as contained in the associated pay scale would be tested for those instruments that either contain or do not contain pay rates. The explanatory memorandum does not appear to address this issue.

114. On a literal reading of the Transition Bill, it would appear that for the purposes of the NDT, the reference instrument is the only benchmark. This leads to a number of problems:

   a. ITEAs: For those instruments outlined above that do contain wage rates (ie. CAs), then the NDT would seem to apply to those wage rates (for example in a CA applying in the workplace) and not the relevant pay scale derived from a federal or State award (because these are part of the Standard). Recalling that pay rates in certified agreements are usually higher rates of pay than awards.

   b. CAs: For those reference instruments that do not contain wage rates (ie. awards), the NDT would not be applied to any relevant pay scale (or FMW). For example, if a new CA was made and the benchmark was an award, then the allowable award conditions would be the only benchmark for conducting the NDT.

115. In other words, there does not appear to be link to the corresponding pay scale from that award for the purposes of the NDT: This appears nonsensical. How could an NDT be operationalised without wages being taken into account?

116. Whilst it is clear that s.172 states that the Standard (and a pay scale is part of the Standard) prevails over a workplace agreement to the extent to which the Standard provides a more favourable outcome, pay scales do not appear to have any specific relevance for the purposes of the actual NDT. To derogate from an applicable minimum rate of pay would be a breach of the Standard only.

117. Therefore, ACCI notes that:

   a. It appears an anomaly for a global NDT to not be conducted against, in the case of ITEAs, the relevant minimum wage rates (as contained in relevant/binding pay scale or special/FMW where no pay scale applies) but against actual rates of pay in an applicable certified agreement.

b. It is also inconsistent that the global NDT for new CAs is not conducted against rates of pay in any relevant and binding pay scale on the employer (or special/FMW where no pay scale applies).

118. To reiterate and make clear, ACCI is concerned that it would not be possible for the Workplace Authority Director, (as the provisions are currently drafted), to consider a relevant/binding pay scale (or special/FMW where no pay scale applies) for the purposes of conducting the NDT.

119. It is equally unclear as to how the WA would assess an agreement against the other non-wage rated parts of the Standard (ie. personal leave, annual leave, etc.).

120. The Transitional Bill should be amended to expressly allow the NDT to be conducted against an applicable and binding pay scale or special/FMW. If there is no applicable pay scale or special FMW, then the FMW should be the wage rate benchmark for the purposes of the NDT (for those that are entitled to the FMW).

121. These amendments would also enable a consistent and universal approach to processing agreements under the new NDT with appropriate safety net benchmarks similar to those which existed for the NDT pre-*WorkChoices*.

ACCI supports the benchmark for new CAs being limited to either a relevant or designated federal award/NAPSA.

ACCI therefore supports amendments to s.346E(4) and (5) to remove references to anything other than *an award* and a *notional agreement preserving state awards*.

ACCI supports the benchmark for ITEAs being the same as collective agreements.

ACCI therefore supports amendments to ss.346D(1) and 346E(1) to ensure that ITEAs are not benchmarked against any relevant *collective instrument*, but only against relevant federal award/NAPSA or designated federal award/NAPSA.

ACCI supports amendments to include a new provision called a *"reference pay instrument"* which would include a relevant and binding pay scale or special/FMW or in the absence of a relevant/binding pay scale, the FMW (if an employee is entitled to the FMW).

However, the drafting of the those amendment(s) should not affect the operation of s.346D(6) and (7). (ie. If there is no *reference* instrument, such as an award, but there is a reference *pay scale* instrument, the agreement should be taken to pass the NDT).

NDT Over Life of Agreement

122. ACCI is unsure as to why the words *"or would not result"* in ss. 346D(1) and (2) are necessary.

123. These sections provide that an ITEA/CA *"passes the no-disadvantage test if the Workplace Authority Director is satisfied that the ITEA does not result, or would not result, on balance, in a reduction in the employee's overall terms and conditions of employment …."*.(emphasis added).

124. Whilst s.346F States that *"the Workplace Authority Director must consider it [the agreement] as in existence or operation (as the case may be) immediately after lodgement"* there appears to be an inconsistency between the two provisions. If the intention as expressed in s.346F is not clarified in s.346D(1) and (2), a Court may hold that an agreement must satisfy the NDT over the life of the agreement.

125. ACCI is concerned that the effect of using the words *"or would not result"*, appears to require the agreement to satisfy the NDT over the agreement's life and not at the point of conducting the NDT.

126. This would result in ongoing legal uncertainty for employers, employees and unions during the currency of the agreement. It would be very difficult for the employer to know what his/her compliance obligations are at any given time.

127. This is also contrary to the wording in the previous NDT, under former s.170XA which was cast in the present tense:

> (1) An agreement passes the no-disadvantage test if it does not disadvantage employees in relation to their terms and conditions of employment. (emphasis added).

128. ACCI therefore supports removing the reference to *"or would not result"* in s.346D(1) and (2) to remove any doubt of inconsistency.

ACCI supports removing the reference to *"or would not result"* in s.346D(1) and (2).

Exceptional Circumstances

129. The Bill will allow union/employee collective agreements that would otherwise fail the NDT to be approved in a limited number of circumstances.

130. Section 346D(3)(b) would allow the Workplace Authority Director, in the case of employee or union collective agreements, *"if satisfied that, because of exceptional circumstances, approval of the agreement would not be contrary to the public interest"*.

131. A statutory example of such a case is provided in s.346D(4):

> (4) An example of a case where the Workplace Authority Director may be satisfied that the requirements in paragraph (3)(b) are met is where making the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the employer's business.
>
> (5) If the Workplace Authority Director decides under subsection (3) that an agreement is taken to pass the no-disadvantage test, the Workplace Authority Director must publish his or her reasons for the decision on the Workplace Authority's website.

Confidential / Sensitive Commercial Information

132. If the WA decides that the agreement satisfies s.346D(4), "the Workplace Authority Director must publish his or her reasons for the decision on the Workplace Authority's website."

133. The explanatory memorandum does not provide any further information concerning the level of detail that is considered necessary to be part of the published reasons.

134. Whilst ACCI does not oppose s.346D(4), it is concerned that sensitive commercial or confidential information may be contained in the Workplace Authority's reasons, which will ultimately be published on the world wide web. Appropriate safeguards should be included in the legislation, which would direct the Workplace Authority Director not to include any commercially sensitive or damaging details in any published decision.

What About ITEAs?

135. Section 346D(3) and (4) provides a very limited ability for a employee or union collective agreements to be approved. ACCI agrees that there should be an exceptional circumstances approval mechanism, that would, in any event remain rarely utilised in but all of a small number of cases. ACCI also believes that this should be extended to the approval of ITEAs.

136. It is not clear why the same test should not apply to the approval of ITEAs, where an employer can satisfy the Workplace Authority Director, that exceptional circumstances exist and that it would not be contrary to the public interest.

137. Alternatively, the Bill could be amended to reflect the current s.346M which provides capacity for all agreements (collective and individual) to be approved in exceptional circumstances:

> (4) In exceptional circumstances, and if the Workplace Authority Director is satisfied that it is not contrary to the public interest to do so, the Workplace Authority Director may, in addition to the matters specified in subsections (2) and (3), also have regard to the industry, location or economic circumstances of the employer and the employment circumstances of the employee or employees when considering whether a workplace agreement provides fair compensation to an employee or in its overall effect on employees.
>
> (5) An example of a case where the Workplace Authority Director may be satisfied that it is not contrary to the public interest to have regard to the industry, location or economic circumstances of the employer is where the workplace agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the employer's business.

ACCI supports the exceptional circumstances test under s.346D(3) applying to ITEAs, either by inserting a reference to an ITEA in s.346D(3), OR by inserting the equivalent of current s.346M with appropriate amendments to refer to the new NDT.

ACCI supports an amendment to the Bill which would prohibit the Workplace Authority, when it publishes reasons for making a decision under proposed s.346D(3)(b), from including sensitive commercial or confidential information that an employer submits to the Workplace Authority.

Work Obligations

138. Section 346J(1)(a) states that the WA, when deciding the NDT, *"must have regard to the work obligations of the employee or employees under the workplace agreement"* .

139. The explanatory memorandum provides an example of *"rostering arrangements or shift patterns of the employee or employees"*.[11] Given that the intent of s.346J(1)(a) is about work *arrangements*, it would be more appropriate to substitute these words accordingly and to include the example in the explanatory memorandum to provide clarification.

140. To use the vernacular of "work obligations" seems to extend the reach of the considerations of which the WA must be satisfied, creating scope for potential confusion and disputation.

ACCI supports substituting the word "obligations" for "arrangements" in s.346J(1)(a) and using the examples in the explanatory memorandum.

[11] Explanatory Memorandum, p.15.

3. OPERATION FROM APPROVAL

ACCI Proposal: Accredited/Registered Orgs - Fast Track

141. Proposed s.347(1) of Transitional Bill would regulate when agreements come into operation, and does so as follows:

    a. ITEAs for new employees, Greenfield CAs - come into effect upon lodgement.

    b. ITEAs for existing employees, employee/union CAs - come into effect upon approval and on the seventh (7th) day after the notice issued by the WA.

142. This is a major change from the *WorkChoices* scheme, which provided for agreements to operate from lodgement. The Fairness Test retained this mechanism for agreements to continue to come into effect upon lodgement (with agreements that failed the Fairness Test, ceasing to operate).

143. The *WorkChoices* schema effectively provided for rapid agreement making and then approval. Feedback from ACCI's member network indicates that approval time under the current Fairness Test can range from 1-6 months (even longer in some cases).

144. ACCI supports <u>all</u> agreements commencing from the time of lodgement. However, ACCI understands that the Government's intention is for the majority of agreements to operate from 7 days of being approved and has, therefore suggested an alternative agreement approval model.

145. ACCI's model is to ensure that long standing well credentialed users of the system, (who can provide a level of trust) assist in the WA approving agreements and speeding up the process of approving agreements for employers, unions, and employees.

Registered Orgs Should Used to Fast-track Agreements

146. Registered organisations, both union and employer, have a special status under the *Workplace Relations Act 1996*. They have done so since 1904 and continue to do so under the current iteration of the Act.

147. ACCI considers that registered organisations should be able to, within strict guidelines, have some facilitative and supportive role in agreement approval. They are experienced users of the system and are

better placed than any other body to know the ins and outs of agreement making/approval.

Other Employer/Industry Organisations

148. ACCI also believes that there are employer organisations that are not registered under the *Workplace Relations Act 1996*, but have had longstanding involvement in industrial relations, agreement making and approval, which also deserve some level of recognition and trust.

149. The Committee should also consider the possibility of recognising these organisations, for the purposes of fast tracking agreement approval.

150. For example, one model could be a system whereby an accredited industrial organisation that either lodges an agreement on behalf of an employer member or is a union party to a union CA, can:

a. Have their agreement operate upon lodgement

b. Have the agreement receive special, priority attention by having it fast tracked for approval within the Workplace Authority.

151. These agreements would have been negotiated with the expertise of industrial bodies, who have worked under the previous agreement making system and who will continue to work under the current regime.

152. ACCI believes that such an example, should be statutory recognised within the Transition Bill. It could be achieved by amending the WA's objects under s.150B by including an additional function as follows:

> **(fa) to fast track variations or approvals of workplace agreements under the no-disadvantage test, where they are lodged under any partnership programme.**

153. Consequential amendments to other provisions would also have to be made if these agreements come into operation upon lodgement, rather than approval.

How This Would Work

Accreditation

154. Accreditation Oversight: Regardless of how a particular model of this fast track approval mechanism could work, ACCI would anticipate some type of accreditation scheme for organisations. Such an oversight

function could be conducted by the Workplace Authority or Department of Education, Employment, and Workplace Relations (DEEWR).

155. The responsible authority could have its own dedicated compliance team work with these accredited bodies and such information sharing will assist both the authority and the organisations.

156. Trial Period: The scheme could be trialled for a number of months to ensure that it operates effectively and efficiency and serves its purpose: quicker, efficient agreement making which complies with the new NDT.

Approval/Auditing

157. For accredited registered organisations, agreement making could be streamlined as follows:

a. Where an accredited registered organisation lodges an agreement with the WA on behalf of an employer who is a party to an agreement (either an ITEA or CA), the agreement would take effect upon lodgement.

b. A union CA would take effect upon lodgement if an accredited registered union was a party to the agreement (this would require some type of declaration form to be attached to the agreement when the employer lodges the agreement).

c. The WA would be obliged to fast track these agreements to ensure they comply with the NDT.[12]

Safeguards

158. All agreements are tested by the WA, however this approach assures the agreement has undergone some industrial relations rigour before hand and would be a common expectation that these agreements do not require the same amount of attention to detail.

159. It must be also be remembered that Parliament provides registered organisations special status and privileges under the *Workplace Relations Act 1996*, and therefore, the above fast track approval mechanism would be reflective of the special role of these organisations under the legislation.

[12] The upper limit for these agreements to be fast tracked would be around 60 days.

160. By accrediting both registered/unregistered organisations, the Government can ensure and build on a level of trust and diligence in highly experienced industrial organisations. Where agreements are not up to service standards, accreditation could be withdrawn and the usual agreement approval process would apply (ie. they would operate from lodgement or approval in the normal course under the Transition Bill amendments).

161. Therefore, under this fast track model, all other agreements that are not lodged by an accredited/registered organisation would operate from approval:

    a. Employee CA's not lodged (on behalf of the employer) by an accredited/registered employer organisation.

    b. ITEA's for existing employees not lodged (on behalf of the employer) by an accredited/registered employer organisation.

Benefits of Such a System

162. Given that industrial organisations are key stakeholders in agreement making, this approach will go some way towards alleviating the current and future workload on the Workplace Authority, by:

    a. Easing the current back-log of agreements that the WA is still required to assess against the Fairness Test.

    b. Allowing staff resources to be better served on those agreements which are lodged by non-accredited parties and which will probably involve more time in approval, checking etc.

Looking Forward

163. If agreements are not to operate from approval, then there will continue to be approval pressures placed on the WA, recalling that the proposed NDT is a more resource intense test than the current Fairness Test.

164. It requires all agreements to undergo a NDT against an entire CA or award.

165. There is an expectation that if agreements do not commence upon lodgement and/or there are lags in agreement approval, then there should be statutory obligations placed upon the WA to approve

agreements within a certain (reasonable) time frame and pursue all possible avenues to expedite processing.[13]

166. It would be seen as unacceptable by users of the agreement making system that agreements would take 6 months or more to be approved (or indeed disapproved).

167. ACCI reiterates that it is keen to engage with the Government on fast track models and on the detail of such a system, in order for agreement making to be as efficient and user-friendly as possible, for all types of agreements.

ACCI supports a fast-track approval mechanism for all agreements which undergo the NDT.

ACCI would support a model whereby industrial organisations are accredited and any agreement facilitated under an accreditation scheme operate from lodgement, with the Workplace Authority statutory required to fast-track such agreements.

[13] The upper limit should be 90 days.

4. AWARD DESIGNATION

Introduction

168. Proposed new ss.346G and 346H of Transitional Bill outlines "award designation" which appears to be similar to the approach under the Fairness Test amendments.

169. The WA would only be permitted to designate a federal award. This is inconsistent with the pre-*WorkChoices* NDT, where under the old NDT, the AIRC/OEA could designate either a federal or a State award.

170. Because the process of designation has the ability to create ongoing rights and obligations on an employer, and is it used for the purposes of passing an agreement against the NDT, it is vital that the administrative authority properly consider an employer's input into the designated award.

171. New s.346B defines what a designated award is:

> ***designated award***, designated award, for an employee or employees whose employment is or may be subject to a workplace agreement, means an award determined by the Workplace Authority Director under section 346H, and includes an award taken to be so designated in relation to the employee or employees under section 346G (unless a different award has been designated in relation to the employee or employees under section 346H).

172. Under proposed ss.346E and 346F, it is our understanding that the Workplace Authority (WA) will have the power to designate an award in the following cases:

    a. For ITEAs: Where there is no relevant collective instrument or general instrument (s.346E(1)(iv)).

    b. For CAs: Where there is no relevant general instrument. The WA will also be able to designate for one or more employees.

173. It is also possible for multiple award designation for CAs (s.346E(7)).

Criteria:

174. An award could generally be designated by the Workplace Authority for either an ITEA or a CA if the following criteria are met:

a. The employee works in an industry or occupation in which the terms and conditions of the kind of work to be performed are 'usually' regulated by an award.

b. There is no other reference instrument or award binding the employer.

c. The award is 'appropriate' and it would regulate the terms or conditions of employment of employees engaged in the same kind of work as that to be performed by the employee(s).

d. The award is not an enterprise award.

"Usually Regulated By An Award"

175. The combined reading of ss.346G and 346H allow the WA to designate an award only if an employee is employed in an industry or occupation in which the terms and conditions of the kind of work performed or to be performed by the employee are usually regulated by an award, or would but for the terms of an agreement/instrument, usually be regulated by an award.

176. ACCI accepts that where a specific employee would have had award coverage prior to *WorkChoices* save for entering an agreement of some other transitional arrangement, that employee should enjoy that award as a comparator for the fairness test.

177. However, this is an area in which there appears to be scope for some tightening of legislative expression.

a. Ideally this should be an individual assessment of the position and enterprise concerned and its "natural" exposure to award coverage, not some wider industry or occupational judgement. The principle should be that an employee, doing that job would have had award coverage prior to *WorkChoices*, and in those situations, the award which would have applied to that job should be designated.

b. If some wider construction is to be applied, the concept of "usually regulated" appears to need to be further defined. Again, the principle should be to not extend or deem award coverage where it did not exist previously, both to particular positions, but also to workplaces as a whole.

Pre Lodgement Designation

178. Section 346G would allow an employer to apply to the WA for designation before an agreement is lodged.

179. Section 346G(5) provides that a pre-lodgement designation will be the award if the *"employer later lodges a workplace agreement, or a variation of a workplace agreement, in relation to the employee or the employees."*

180. Revisit Designation Decision: Section 346G(6) would allow the WA (unilaterally) to designate another award if they become aware of further information that was not available at the time.

181. ACCI considers that whilst this may provide some flexibility in reconsidering an award designation decision, the WA should only have that ability if the employer requests the WA to revisit a designation decision and not occur unilaterally by the WA. Equally, an employer should be told if any designation is being reconsidered. Employers would also be very concerned if unions could somehow change designation to employer's detriment.

182. Notice of Award Designation: There does not appear to be any statutory notification that the WA is required to give an employer if they request an award to be designated. The legislation should provide that the WA must notify the employer of their decision to designate and when this came into effect. This is important, because s.346G(5) provides that the award designated will be used if the employer later lodges a workplace agreement.

183. Right to Challenge Decision: The employer should be able to challenge the right of a decision of the WA and provide information as to what award should correctly be designated.

Post Lodgement Designation

184. Section 346H outlines what happens when an agreement is lodged (or varied) and there is no reference instrument for the purposes of the NDT.

185. No Notification to Employer: Again, there does not seem to be any requirement on the WA to notify the employer that they are considering designating a particular award, or that they have designated an award.

186. Employers should know what award is being used for the purposes of the NDT. Indeed, the WA may have not correctly identified a relevant instrument, and erroneously designate an award. Again, employer need a chance to input which award should be designated. Employers will often have pertinent information and should be encouraged to provide this.

187. Right to Challenge: Employers should be able to challenge a decision of the WA and the WA should be expressly required to consider any relevant information that the employer provides.

188. This should not be left up to the administrative arrangements of the WA, but legislatively expressed to provide certainty for all parties involved in agreement making.

Effect of Designation:

189. ACCI understands that the effect of designation leads to a number of consequences.

    a. If an employer was not bound by an award, the very act of engaging in bargaining with an employee or group of employees (or lodging a Greenfield's agreement) and lodging an agreement will trigger a designation of an award(s) (subject to the above criteria met).

        i) This means an employer assumes an obligation to observe an award it was never bound by/subject to by virtue of a decision of the WA, where an attempted agreement is rejected.

        ii) There does not seem to be any appeal or review mechanism for an aggrieved employer who believes that the Workplace Authority has wrongly designated an award.

Analysis

190. While the NDT under the pre-*WorkChoices* legislation (former ss.170XE and 170XF) required agreements to have awards designated for the purposes of making AWAs or collective agreements, designation was only for that purpose and did not lead to an award binding the employer in perpetuity as a new obligation where there had previously been no award coverage.

191. ACCI believes that to bind employers to award conditions where they currently are not, would be premature considering that the AIRC has a mandate to modernise awards and that awards may be modernised in a way which will extend award coverage to these employees (ie. possibly by common rule). There actually appears scope to complicate modernisation if designation applies in perpetuity, as there may be issues about the status of the award which binds a particular employer and group of employees, if the employer is to be subsequently bound to a modern award.

192. The proposed approach to designation may have serious implications for employers who wish to bargain with employees when there is the potential for an employer to become bound by award whose terms did not previously apply.

193. There is also scope for the WA to designate an inappropriate award and for the employer to then have no option but the application of this award for designation, or where bargaining fails, ongoing award compliance.

194. Award coverage (outside of the narrow function of designating awards for agreement purposes) should not be made by an administrative authority such as the WA. Designating awards for the purpose of approving a non-award instrument (agreements) is a fundamentally different task to creating legal rights and obligations on an ongoing basis under an award. This should be left, and only left, to the independent decision making functions of the authority charged with the jurisdiction of making awards in the first place and establishing their scope of operation.

195. To the extent that there are unresolved issues about award coverage, the express scheme of the *Workplace Relations Act 1996* will be to have those matters addressed through the statutorily regulated award modernisation process.

196. ACCI strongly objects to the creation of ongoing award coverage through the administrative process of designating an award for comparative purposes when approving agreements.

197. State Awards: ACCI believes that the previous NDT under the pre-*WorkChoices* legislation was user friendly and provided certainty in agreement making. It also allowed the designation of State awards in appropriate circumstances.

198. ACCI would support amendments made that would allow former State awards (now NAPSAs) being designated, where the employer indicates that this is the most appropriate award.

ACCI supports amendments:

- To s.346G and 346H to expressly require the WA when determining which award it will designate, to consider any information submitted by the employer.

- To s.346G and 346H to require the WA to notify the employer if it has designated an award and when it designated the award.

- To s.346G(6) to require the WA to only be able to change an award designation determination if the employer requests and is notified.

- To ss.346ZB(2)(a) to remove the ability for a designated award to continue to bind an employer where an agreement does not pass the NDT and ceases to operate.

- To allow NAPSAs to be designated, but only where the employer requests this as the most appropriate instrument to be designated.

5. WHERE AGREEMENTS DO NOT PASS

Introduction

199. Proposed subdivision C and D of amended Part 5A would deal with two streams of agreement making:

    a. For Agreements that Operate from Approval: Sections 346K, 346L, 346M, 346N, 346P, 346Q, 346R deal with ITEAs for existing employees, union/employer collective agreements (and variations of a workplace agreement under Division 8).

    b. For Agreements That Operate from Lodgement: Sections 346S, 346T, 346U, 346V, 346W, 346X, 346Y, 346Z, 346ZA, 346ZB, 346ZC, 346ZD, 346ZE, 346ZF deal with ITEAs for new employees, union/employer greenfields agreements.

Approval Subdivision C Agreements

200. For agreements that come into operation upon approval, including ITEAs for existing employees, and union/employer CAs, these agreements will operate from the seventh (7th) day after the date of issue specified in a WA notification (s.346M) if it passes the NDT.

201. ACCI reiterates that it continues to support all agreements coming into operation upon lodgement.

202. Section 346L also provides that variations to workplace agreements under amended Division 8 will also be subject to the NDT and Subdivision C.

Variations Subdivision C Agreements

203. Proposed ss.346N, 346P, 346Q, and 346R provides for a variation mechanism (ie. variations not subject to entire provisions in Division 8) for agreements (that are not yet in operation) which do not pass the NDT.

204. Under s.346N and s.346P, an employer whose agreement is lodged and does not pass the fairness test can:

    a. In the case of an ITEA (for existing employees), lodge a variation of the agreement with the Workplace Authority.

b. In the case of collective agreements (union/employer), can also lodge also a variation.

205. However, there is now no ability to give a written undertaking, instead (and in the case of a CA), the majority of employees will have to vote on the variation (s.346(2)(b)).

Response

206. ACCI understands that the inability for an employer to give a written undertaking for CAs, will extend the time for processing these agreements because another vote will be required.

207. ACCI submits that realistic pragmatic capacity to amend (either by way of variation or undertakings) an originally lodged agreement should be paramount. Employers should retain the ability to lodge an undertaking to be considered against the NDT.

208. Votes are costly and highly disruptive to workplaces. Some employers invest considerable time/cost in running employee surveys, information seminars, DVDs, etc., in the lead up to a vote on an agreement. To require the employer to undergo additional costs is unnecessarily burdensome, particularly where an employer would offer additional money in the form of an undertaking. Employers are very concerned that removing the option of undertakings from the system will lead to fewer agreements, and to employers abandoning bargaining on a cost/benefit basis.

209. **ACCI discusses an alternative "monetary" undertaking amendment below.**

210. A declaration and variation under proposed s.346P should be able to be sent by an employer by hardcopy or electronic means (email or fax). The Act should explicitly recognise this.

Approval Subdivision D Agreements

211. ACCI welcomes the ability for ITEAs for new employees, and greenfield CAs to operate from the day the agreement is lodged.

Variations Subdivision D Agreements

212. Proposed ss.346W, 346X, 346Y, and 346Z provides for a variation mechanism (ie. variations not subject to entire provisions in Division 8) for agreements (that are in operation) which do not pass the NDT.

213. Under s.346W, an employer whose agreement is lodged and does not pass the fairness test can, and within 30 days:

a. In the case of an ITEA (for new employees), lodge a variation to the agreement with the Workplace Authority.

b. In the case of greenfields agreements (union/employer), can also lodge a variation by written undertaking.

214. If a variation is not received within the 30 day period, the agreement ceases to operate, and employees may be entitled to compensation under proposed s.346ZG.

Employers Should Be Able to Give "Monetary" Undertakings

215. ACCI welcomes the 30 day time frame for lodging a variation for an agreement to comply with the NDT. However, ACCI believes that the inability for an employer to give an undertaking (bar Greenfield agreements) will significantly extend the time and costs for processing agreements.

216. This is because any variation to the agreement must undergo, in the case of a CA, another vote which will incur massive financial resources (and not to mention, loss of productivity). The balance of convenience and interest is not met by requiring employers to have a fresh vote.

217. Undertakings are a well understood and recognised mechanism to meet such statutory tests and should not be abandoned.

Undertaking Limited to Dollars.

218. The Minister's second reading speech states that *"if agreements are to be genuine agreements, any variation should have the agreement of both parties"*.[14] ACCI understands that the policy intention is that agreements should not be unilaterally varied without sufficient approval by employees, particularly where other terms and conditions of significance to employees, may be varied (ie. hours etc.).

219. ACCI submits that a realistic and pragmatic ability to amend (either by way of variation or undertakings) an originally lodged agreement should be paramount. An employer should still retain the ability to lodge an undertaking to be considered against the NDT (ie. the status quo on undertakings).

[14] The Hon. Julia Gillard MP, Second Reading Speech, *House of Representatives Hansard*, 13 February 2008, p.12.

220. However, ACCI proposes, as a secondary position that an employer should be able to give a unilateral undertaking only where it provides additional monetary compensation.

221. This will ensure that any unilateral undertaking of an employer is limited to increasing monetary terms and conditions, and will truly be to the benefit of the employee. It is difficult to envisage a situation where an undertaking in such circumstances would not be welcome by employee(s) covered by the agreement. In such circumstances there would not be any necessity for another vote.

222. It must be recalled that an agreement not passing the NDT sends a very damaging signal to the employee(s) covered by the agreement. This does not assist in productive and harmonious industrial relations. Any pragmatic ability to ensure that agreements pass the NDT, but with an employee gaining more financially, will assist in both agreement approval and industrial relations. This should be straightforward and encouraging.

223. Again, it is worth noting that having to go back to the employees and re-voting diminishes their trust and confidence, not to mention pushes the patience and goodwill afforded from the initial vote.

224. Electronic Declarations: A declaration and variation under proposed s.346X should be able to be sent by an employer by hardcopy or electronic means (email or fax). The Act should explicitly recognise this.

ACCI reaffirms that scope for undertakings should not be removed from the system.

ACCI supports amendments made to allow employers to give "monetary" undertakings in order for agreements to pass the NDT.

Instruments that Apply

225. Proposed ss.346ZB and s.346ZC deal with the situation of where ITEAs (for new employees) or greenfields agreements do not pass the NDT and which awards[15] are revived or come into effect as a consequence.

226. ACCI understands the intention of ss.346ZB is to ensure that where an agreement does not pass the NDT, the instrument which previously applied will be revived.

[15] And other instruments, etc.

227. Under s.346ZB(2)(b), if there is no instrument that would apply, then the designated award would bind the employer and employees.

228. As previously discussed, ACCI is concerned that a designated award will now bind an employer and employee, where previously they did not. An employer is being asked to assume a substantial legal risk in making these agreements. This will ultimately discourage agreement making and many employees will rationally abandon bargaining if designation is likely.

Compensation

229. Proposed s.346ZG in proposed subdivision E would deal with an employee's entitlement to compensation where an agreement (in operation upon lodgement) does not pass the NDT.

230. ACCI understands that the effect of s.346ZG is to ensure an employee is not worse off where an agreement does not pass the NDT or is varied and subsequently passes, in terms of what he or she would have earned had the agreement not operated.

14 Days Inadequate Time

231. Proposed s.346ZG also makes it an offence if any employer does not pay any shortfall (generally) within 14 days of the agreement ceasing to operate.

232. ACCI believes the 14 day time frame for an employer to provide compensation and back-pay is too short.

233. The effect of proposed 346ZG is to provide an employee with the benefit of entire award entitlements from an award, even where previously no award applied and the only association with the award has been through the designation process. This is different to the current Fairness Test, where only the protected allowable award conditions are subject to possible compensation.

234. This retrospective application of an award for the benefit of the employee requires complex calculation of back-pay and gives employees entitlements they would not have been entitled to had an agreement not been lodged. Therefore more time is required for an employer to make up any back-pay. It is also important to realise that workplaces have fortnightly and even monthly pay cycles, and this should be better aligned with how pay operates in workplaces.

235. Considering that parties are afforded 30 days to make a variation to an agreement, it is reasonable that an employer also has a similar amount of time to make any shortfall payments.

Set-Off Welcome

236. ACCI believes that the ability for employers to off-set the total amount of compensation payable under s.346ZG(2) should an agreement fail the test is sensible.

No Ongoing Award Obligation

237. As previously discussed, ACCI does not agree with the ongoing application of designated awards where agreements do not pass.

ACCI supports extending the time frame by which employers must provide compensation to employees whose agreement fails the NDT, to 30 days.

6. NEW OFFENCES

Notice offence

238. Proposed s. 346ZH, requires an employer who receives a notice from the Workplace Authority about whether the Director is required to apply the fairness test to a collective agreement or whether a collective agreement passes the fairness test, to take reasonable steps to ensure a copy of the notice is given to all employees currently subject to the agreement, as soon as practicable.

239. An employer who breaches this section, attracts a maximum pecuniary penalty of $3,300 (for an individual) and $16,500 (for a body corporate) respectively.

Analysis

240. While this appears to be a strict liability offence and there are no defences available, we note that the words "as soon as practicable" will give some flexibility to employers as opposed to imposing a strict time period.

241. An amendment or regulation should clarify that e-mail or posting on an intranet site will specifically constitute reasonable steps for this provision. This would accord with contemporary HR and IT practices.

242. The fines are manifestly excessive for a failure to circulate information. This should be re-examined and less penalty units should be applied.

243. While employers would make every endeavour to ensure that they notify employees in accordance with the new provisions, and we believe it is important to do so, ACCI believes the enforcement agency should have the ability to issue infringement notices (and thereby much lesser penalties). ACCI notes that this is already possible for contraventions of the time and wage keeping obligations under the *Workplace Relations Regulations 2006*.

New Unlawful Dismissal Laws

244. Proposed s.346ZJ in conjunction with s.346ZK, would prohibit an employer from dismissing (or threatening to dismiss) an employee if the sole or dominant reason for doing so is that a workplace agreement does not (or may not) pass the NDT. These largely replicate amendments introduced with the Fairness Test.

245. This is a reverse onus of proof offence and it is presumed that the employer's sole or dominant purpose for dismissing the employee was that the workplace agreement does not, or may not, pass the fairness test.

246. Therefore, an employer must establish (on the balance of probabilities) that the sole or dominant purpose for dismissing the employee was not a contravention of subsection 346ZF(1).

247. An employer who breaches new provisions can be liable to pecuniary penalties of $33,000 (for a body corporate) and $6,600 (for an individual) respectively.

248. Proposed s.346ZK would enable a Court on application by a workplace inspector, employee or union (subject to a written authority and eligibility criteria), or a person prescribed by the regulations to issue:

> (1)(a) an order requiring the employer to pay a specified amount to the employee as compensation for damage suffered by the employee as a result of the contravention;
>
> (b) any other order that the Court considers appropriate.
>
> (2) The orders that may be made under paragraph (1)(b) include:
>
> (a) injunctions; and
>
> (b) any other orders that the Court considers necessary to stop the conduct or remedy its effects.

249. ACCI is concerned that these provisions may have the effect of limiting the ability of an employer to dismiss an employee for reasons totally unrelated to an agreement not passing the fairness test. For example, although there are the qualifying words, "sole or dominant", an employer who dismisses an employee for serious misconduct or genuine operational reasons, where this occurs either during or after an agreement is subject to scrutiny by the *Workplace Authority*, may be the subject of lengthy investigation by the Workplace Ombudsman.

250. As a union is an eligible person able to initiate Court proceedings on behalf of affected employees, while the Workplace Ombudsman may not take any further action against an employer, it would appear possible for the union to take action nonetheless.

251. In addition to the possible pecuniary penalty of up to $33,000 per contravention, the powers of the Court upon application by eligible persons, are extensive and include reinstatement.

252. ACCI believes that an order under proposed s.346ZK(1)(a) should be subject to a monetary cap as restitution for back-pay would already be available to an employee if the agreement does not pass the fairness test.

253. The regulations should not allow another person to be eligible to bring prosecutions on behalf of an employee. ACCI submits that the most appropriate enforcer should be the independent inspectorate.

254. ACCI can see no basis for the inclusion of s.346ZK(3)(d) and supports its deletion.

ACCI supports amendments made to delete s.346ZK(3)(d).

7. TERMINATIONS OF CAS

Termination by AIRC – CAs Passed Nominal Expiry Date

255. The Minister's second reading speech states that *"a collective agreement will only be able to be terminated where the parties agree, or by the Australian Industrial Relations Commission in circumstances where termination would not be contrary to the public interest."*[16]

256. Proposed Subdivision DA would provide:

> **397A Termination by the Commission**
>
> (1) The Commission may, by order, terminate a collective agreement that has passed its nominal expiry date on application under subsection (2) if it is satisfied that it would not be contrary to the public interest to terminate the agreement.
>
> (2) Any of the following persons may apply for an order under subsection (1):
>
> (a) the employer;
>
> (b) a majority of the employees whose employment is subject to the agreement;
>
> (c) an organisation of employees that is bound by the agreement.
>
> (3) In deciding whether it would be contrary to the public interest to terminate the agreement, the Commission must have regard to all circumstances of the case, including:
>
> (a) the views of each party bound by the agreement (including the employees) about whether it should be terminated; and
>
> (b) the circumstances of each such party, including the likely effect on each such party of the termination of the agreement.(emphasis added)

257. This contrasts with the former s.170MH(1) which provided:

> (1) After the nominal expiry date of a certified agreement:
>
> (a) the employer; or
>
> (b) a majority of the employees whose employment is subject to the agreement; or
>
> (c) an organisation of employees that is bound by the agreement and that has at least one member whose employment is subject to the agreement;(emphasis added)

[16] The Hon. Julia Gillard MP, Second Reading Speech, *House of Representatives Hansard*, 13 February 2008, p.11.

may apply to the Commission to have the agreement terminated.

(2) On receiving the application, the Commission must take such steps as it considers appropriate to obtain the views of persons bound by the agreement about whether it should be terminated.

(3) If, after complying with subsection (2), the Commission considers that it is not contrary to the public interest to terminate the agreement, the Commission must, by order, terminate the agreement.

(4) The termination takes effect when the Commission's order takes effect.

258. ACCI is concerned that proposed s.397A omits certain provisions and unnecessarily adds requirements that were not previously within the purview of the AIRC under pre-*WorkChoices* approaches to CA termination.

259. Union Members: Firstly, s.397(2)(c) removes the requirement that a union which is bound by the agreement, has to have at least one member whose employment is subject to the agreement to be terminated.

260. This will open the net wider to allow unions, who may be party to a CA, to terminate the agreement, even where they no longer have a member subject to the agreement. It is not clear that a union would need to enjoy any employee support to initiate such a process.

261. Wider Test: The wording of former pre-*WorkChoices* s.170MH was a three step process:

a. A named party (and in the case of a union, where at least 1 member is bound by the agreement) applies to have agreement terminated.

b. Commission *"take such steps as it considers appropriate to obtain the views of persons bound by the agreement"*.

c. If Commission considers not contrary to the public interest to terminate the agreement, the Commission must do so.

262. However, proposed s.397A would re-cast this wider than the former test:

a. A named party (and in the case of a union, they do not even need a member who is bound by the agreement) applies to have agreement terminated.

b. Commission may terminate agreement if satisfied it is not contrary to the public interest.

   (i) ACCI notes that this could ultimately lead to prolonged litigation as the AIRC will have discretion as to whether it will terminate the agreement.

   (ii) It is unclear what basis to exercise this discretion would be.

c. In considering public interest, Commission must have regard to *"all circumstances of the case"*, including:

   (a) the views of each party bound by the agreement (including the employees) about whether it should be terminated; and

   (b) the circumstances of each such party, including the likely effect on each such party of the termination of the agreement.

263. The re-casting of s.170MH widens the net for a whole range of other circumstances to be considered by the AIRC. Arguably, it is a looser threshold than the previous test and would potentially result in more agreements, and not less, being able to be terminated.

264. It must be remembered that s.399 of the Act is to be repealed by the Transition Bill. This will allow, in the case of terminated CAs, the otherwise applicable award (and not just protected allowable award conditions), in combination with the Australian Fair Pay and Conditions Standard, to be re-vitalised.

265. ACCI considers that the wording of former s.170MH should be used and not that in s.397A, as:

a. A higher safety net will apply to employees whose agreements are terminated (ie. the full award). This means that these employees will come off CAs with more protections.

b. Awards are to be modernised and the safety net re-cast.

c. The previous s.170MH was understood by all practitioners and users of the system, and that there is a body of precedent established under the former section.

ACCI supports amendments to s.397A which reflect the exact wording of former s.170MH of the pre-WorkChoices Act.

8. TRANSITIONAL MATTERS – EXISTING AWAS

266. Schedule 1, Part 2 of the Transition Bill seeks to create a transitional Schedule 7A for existing AWAs.

Cannot Vary Existing AWAs

267. ACCI understands that Pre-Transition (ie. *WorkChoices*) AWAs cannot be varied under Schedule 7A (except under the Fairness Test in limited circumstances).

268. ACCI believes that an employer and employee should be able to vary existing AWAs as there may be a change of circumstances and capacity to vary an AWA would ensure ongoing certainty in those arrangements.

    a. For example, an employer who promotes an employee to a higher position may want to simply reflect this in the existing AWA by providing more money and further enhanced conditions.

269. The test for such variations could simply be the NDT (as it similarly applies to variations of ITEAs/CAs). To ensure that this is not used to extend the nominal expiry date of *WorkChoices* AWAs (consistent with the Government policy), such variations could not extend beyond the nominal AWA expiry date and any variation would need to be approved by the employee.

270. Pre-WorkChoices: Given that pre-*WorkChoices* AWAs were subject to the previous NDT and against a full award, it would not be inconsistent for these agreements to be capable of being varied where both sides agree.

271. Once again, such variations would not extend the nominal expiry date of these pre-*WorkChoices* AWAs.

ACCI supports employers and employees being able to vary existing and pre-*WorkChoices* AWAs subject to the NDT.

9. OTHER AMENDMENTS

New 346C(3)?

272. The Bill would introduce a new s.346C(3) in Division 5A as follows:

> For the purposes of applying this Division to a workplace agreement, a reference to an employee whose employment is subject to the workplace agreement is taken to include a reference to a person whose employment may at a future time be subject to the workplace agreement.

273. ACCI is uncertain why s.346C(3) is required. ACCI has concerns that it would unnecessarily widen the scope for employers to be subject to penalties for non-compliance with agreement making provisions. The explanatory memorandum does not provide any further information on the basis of this sub-section.

274. It would potentially allow agreements to be subject to review on compliance grounds, if certain provisions of the Act are read to include a future employee, and that future employee is not taken into account at the time the agreement is passed. However, it is impossible for an employer to know the circumstances of any *"person whose employment may at a future time be subjected to the workplace agreement"*. It could involve dozens of NDTS for theoretical future employees.

275. Unless it can be adequately explained why this provision is required, ACCI would err on the side of caution in recommending its removal.

Repeal of s.355

276. Section 355 of the *Workplace Relations Act 1996* provides that agreements can only refer to a limited number of other industrial documents (ie. federal awards and workplace agreements). It limits the extent to which parties to agreements can re-introduce instruments which have otherwise ceased to apply.

277. This does not limit the ability of a party to replicate in full any provision of any other document/instrument (other provisions, however, will limit its legal effect, such as prohibited content etc.).

278. To be clear, nothing stops any employer, employees, or unions including previous content in agreements in full, rather than by incorporation (noting prohibited content restrictions). Section 355 does not demand parties reinvent the wheel each time at all.

279. The repeal of s.355 was not announced in any policy document, but appears to have been considered by the Government as something raised by some representatives on the National Workplace Relations Consultative Council and the COIL subcommittee.[17]

280. The Second reading speech states:

> The Government has decided to adopt the following recommendations arising from the parties at these meetings … removal of the restriction on referencing other industrial instruments in agreements, which will simplify the drafting of agreements.[18]

281. ACCI has now had time to consider the effect of repealing s.355 with the input of ACCI members.

282. Upon re-examination of the potential consequences of such repeal, ACCI considers that s.355 remains warranted and places appropriate limitations on what can be incorporated into agreements by reference.

283. In summary, s.355 ensures that:

a. Only provisions in federal awards and registered agreements that are immediately relevant and binding on an employer, are capable of being incorporated by reference.

b. Awards that can be incorporated were are not pre-simplified awards and do not contain non-allowable content.

c. Other arrangements, unregistered agreements, deeds, memorandum of understanding etc, can not be incorporated by reference.

284. By repealing s.355, these limitations will be removed. The rationale for s.355 was explained in the explanatory memorandum to the *WorkChoices* amendments as follows (at p.172):

> 1009. It is intended that proposed section 101C would encourage parties to make comprehensive agreements. Specifically, it is intended that parties would only be able to 'call up' industrial instruments by incorporating them into the agreement by reference as opposed to, for example, providing that the agreement is to be 'read in conjunction' with another industrial instrument. It is intended that parties would only be able to incorporate terms by reference from a federal award or workplace agreement that applied to the employer and employees immediately before the agreement is made. It is not intended that parties be able to 'call up' awards or agreements that were in operation at a much earlier date, eg a 2006 agreement attempting to 'call up' an award made in 1988. It is intended that all other forms of 'calling up'

[17] The Hon. Julia Gillard MP, Second Reading Speech, *House of Representatives Hansard*, 13 February 2008, p.11.
[18] Ibid..

industrial instruments would be void. However, proposed section 101C is not intended to limit the ability of parties to 'call up' workplace policies such as an annual leave policy.

285. The proposed deletion of s.355 will also lead to a blow-out in agreement approvals, if the WA must scrutinise any documents that are called up by the agreement. It would not be unusual for agreements to call up multiple pre-simplified awards, old State awards, and numerous collective agreements in an enterprise (ie. EBA numbers 1, 2, 3, 4, and 5). The practical effect of this proposed amendment is much more work for the WA.

286. Inconsistent with Other Provisions: Schedule 1, Part 3 of the Transition Bill, at item 35 would amend current s.337(6) by requiring an employer, in relation to a proposed agreement that *"incorporates terms from another workplace agreement or award"* to provide ready access to those workplace agreements/awards in written form. Notwithstanding that s.355 allows any terms and condition to be incorporated by reference, if those terms are from a workplace agreement or award, it has to be available to the employee(s) in writing.

287. This negates somewhat the rationale for simplifying agreement making, if the very terms that are to be "called-up" must be available in full and in written form to eligible employees.

288. Upon due consideration and consultation with ACCI members, ACCI supports retaining s.355.

289. Furthermore, given that the Government intends modern awards to be part of the industrial relations system from 1 January 2010, ACCI also supports an amendment which would also include a "modern award" in s.355(2)(b).

ACCI supports amendments to remove s.346C(3) unless it is necessary for the operation of the Act.

ACCI support amendments made which would retain s.355, and also include a "modern award" in s.355(2)(b).

Documents Taken to Come into Effect

290. Proposed s.324A (as well as ss.368A and 381A) would be a deeming provision to give effect to a "document" that is *"represented (expressly or by implication) to be a workplace agreement, or a type of agreement mentioned in sections 326, 327, 328, 329, 330, or 331"* for the purposes of certain other sections of the Act (outlined for example, in the case of s.324A, in s.324A(c) and (d)).

291. The explanatory memorandum states the rationale for s.324A:

> 155. Item 27 would ensure that civil remedy provisions apply where an employer has lodged a document purporting to be a workplace agreement that is not capable of coming into operation because it does not satisfy section 347A. [see below]
>
> 156. So, for example, an employer would contravene the civil remedy provisions of Part 8 if the employer lodges such a document without having provided employees with ready access to the agreement or an information statement, or without having obtained employee approval (Division 4), or engages in prohibited conduct (Division 10) in relation to the 'purported agreement'.
>
> 157. This addresses situations like those in the case of *Inspector Wade Connolly v AC and MS Services* [2007] FMCA 139. That case concerned a lodged employee collective agreement that was intended to cover certain cleaning staff. The document had not been approved by the cleaning staff (who were yet to be employed), but by the company's office staff, whose employment was not subject to the agreement.
>
> 158. Raphael FM held that there was no collective agreement within the meaning of section 327 of the Act, as such an agreement could only be made with employees whose employment will be subject to the agreement. As the current penalties assume the existence of a 'workplace agreement', and there was no workplace agreement in this case, Raphael FM decided that the penalties sought could not be imposed.

292. ACCI is concerned that the effect of ss.324A, 368A and 381A, whilst attempting to address the problems in *Inspector Wade v AC and MS Services* [2007] FMCA 139, does so in a manner which is wider than necessary. It would also potentially allow the Court wide discretion (see below) under proposed s.412A.

293. Section 324 currently provides:

> So far as the context permits:
>
> **(a) a reference in this Part to a workplace agreement includes a reference to a proposed workplace agreement; and** (emphasis added)

(b) a reference in this Part to an employer, in relation to a workplace agreement, includes a reference to a person who will be an employer in relation to a proposed agreement when it comes into operation; and

(c) reference in this Part to an employee, in relation to a workplace agreement, includes a reference to a person who will be an employee in relation to a proposed agreement when it comes into operation.

294. It is worth recalling at least one of the reasons why Raphael FM did not find in favour of the inspectorate in *Inspector Wade v AC and MS Services* [2007] FMCA 139 (at para 20):

> If the legislature had intended that an agreement which could never be a WA [workplace agreement] because of the lack of an element of the jurisdictional facts necessary should nonetheless be considered, for the purposes of the Act, to be such an agreement then the word it should have used would have been 'purported'.
>
> …
>
> The failure to use this description of the "agreement" encourages me to the view that it was not intended to cover such a situation and that it would be stretching the meaning of "proposed" to include what is essentially the definition of "purported".

295. If the object is for civil penalties to be available for non-compliance with certain agreement making/variation provisions (despite an agreement not having effect), then it would appear that a simple amendment to s.324(a) by including the word "purported" would suffice, instead s.324A.[19]

296. As ss.324A is currently worded, it would be possible for employers unfamiliar with the requirements of the Act, to unwittingly impliedly represent that the document is a workplace agreement (such as ordinary common law contracts, or use unregistered agreements) and be subject to s.412A.

297. ACCI is concerned that non-expert employers could fall foul of this provision in seeking in good faith to take steps towards an agreement. Again, we want to avoid a situation in which employers become gun shy of bargaining under threat of such provisions.

Courts Power to Enliven Purported Agreements

298. Related to the above proposed new s.412A would allow a Court to order that a purported workplace agreement has effect for the purposes

[19] Any specific amendments would need further analysis to ensure that it did not actually create any unintentional consequences to the detriment of employers.

of the Act. This appears to be an extraordinarily wide power to be given to the Court and appears to be without limitation.

299. Following from the analysis above, s.412A appears to be significantly wider than necessary. If agreements are given life for civil remedy provisions only, s.412A should not be necessary.

300. Without further clarification given in the explanatory memorandum, it appears to do more than simply assist in reversing the situation in *Inspector Wade v AC and MS Services* [2007] FMCA 139. It should not.

301. Wide Effect: Section 412A effectively allows the Court to breathe life into an agreement that would not otherwise be in operation for failing certain compliance provisions.

302. However, it could then allow the Court to declare the existence of an agreement, for any purpose under the Act. This will ultimately create uncertainty in agreement making, if the Court can retrospectively activate agreements (or agreement like documents) that the parties did not believe were in operation or intended to be in operation.

303. Judicial Power?: Furthermore, given that the Court, under s.412A(2) and (3) is to consider whether an order would "disadvantage" an employee, taking into account any reference instrument, it is not absolutely certain that this power given to the Court is truly and strictly specking, judicial in nature. Its effect is akin to the power given to the WA under the NDT, and it would not aid in providing industrial parties certainty in its operation.

ACCI does not support ss.324A, 368A and 381A.

Amendments to address the issues in *Inspector Wade v AC and MS Services* [2007] FMCA 139 should be limited to only clarify that a civil remedy provision could apply to a "purported" workplace agreement.

ACCI supports the removal of s.412A from the Transition Bill unless further clarification or explanation proves that it's necessary and not prejudicial to employer party to agreements.

Fair Pay Commission

Introduction

304. Schedule 3 of the Transition Bill makes numerous amendments to the powers and functions of the Australian Fair Pay Commission (AFPC).

305. ACCI understands that that the effect of the amendments will curtail the powers and functions of the AFPC to conduct general minimum wage reviews and adjust/vary existing pay scales.

306. The AFPC would not be able to make any new pay scales.

Still No Pay Scales

307. ACCI is still concerned that there have been no settled orders for minimum pay rates since mid March 2005. Without final and binding pay scales that provide certainty and clarity regarding pay obligations, employers will have to wait until at least mid 2010, until they see enforceable wage rates in black-and-white (in modern awards).

308. ACCI understands that the AFPC will not be able to create new pay scales – however, it is imperative that the AFPC retains the right to vary and if need be, publish notional pay scales and we hope that the proposed amendments do not take away this right.

309. Whilst this is a legacy of the current *WorkChoices* legislation, during this interim period, ACCI expects that the Government will provide further resources/direction to:

    a. The AFPC to publish existing pay scales with authority, where an employer (who is traditionally/historically a party to the award from which it is derived) specifically requests this, and particularly where there is uncertainty, ambiguity and confusion in the application of minimum wages.

    b. To the Workplace Authority so it can alter, vary or extend the number of pay scale summaries (which are non-binding, but enforceable by the Workplace Ombudsman) if an employer specifically requests.

ACCI supports the AFPC publishing existing pay scales, upon application by an employer, particularly where there is uncertainty, ambiguity and confusion in its application.

ACCI supports the Workplace Authority publishing additional pay scale summaries and varying existing pay scale summaries on the request of traditional/historical parties to the award derived pay scale.

Pre-Reform Certified Agreements

310. Schedule 5 of the Transition Bill makes numerous amendments to Schedule 7 of the *Workplace Relations Act 1996*.

311. ACCI understands that this will allow a pre-*WorkChoices* CAs to be extended to a maximum of 3 years, or varied if strict conditions are fulfilled, which ACCI considers reasonable and appropriate.

NDT and former State Awards

312. However, ACCI believes there is an assumption in the proposed Schedule 5 that all pre-*WorkChoices* CAs passed the former NDT by assessing it against a federal award. This is because proposed 2A(2)(c)(i) states that a variation must be assessed against a *transitional award*.

313. This is incorrect. Many pre-*WorkChoices* CAs were passed against former State awards, where it was a relevant award, or where the AIRC designated it as a relevant award for variations to pre-reform CAs.

314. Therefore, a former State award (now a NAPSA) and its associated pay scale should also be available to be designated, but only where the AIRC considers such instruments are more appropriate than the transitional award.

ACCI supports amendments to Schedule 5, Item 1, that would include a NAPSA and its associated pay scale in proposed s.2A(c)(i), for variation of a pre-*WorkChoices* CA where the Commission considers it more appropriate than the transitional award.

Workplace Relations Fact Sheet

315. ACCI supports Schedule 4 of the Transitional Bill which will repeal the former Government's Workplace Relations Fact Sheet.

316. Whilst ACCI will be commenting on the Government's proposed National Employment Standards and its proposed *Fair Work Information Statement*[20] in due course, it is worth clarifying at this stage that ACCI does not support any obligation on employers to distribute such information to employees.

ACCI supports amendments that will repeal the WorkChoices Fact Sheet.

ACCI does not support any "fact sheet", including the proposed "Fair Work Information Sheet", being required to be distributed by employers.

[20] Pages 57-58 (paragraphs 292 – 304) of the Government's Discussion Paper on the National Employment Standards (NES) outlines the proposed NES requiring employers to distribute a Fair Work Information Statement to employees.

11. AWARDS AND AWARD MODERNISATION

Introduction

317. Schedule 2 of the Transition Bill makes numerous amendments to the *Workplace Relations Act 1996* and introduces a new Part 10A which will provide the framework for modernising awards.

318. The focus of new Part 10A is based on an *"award modernisation request"* for which is a written request from the Minster to the President of the AIRC (s.576C(1)).

Award Modernisation Request

319. Page 76 of the explanatory memorandum to the Transition Bill attaches a draft version of the Minister's proposed award modernisation request.

320. ACCI has a number of brief comments and suggestions for the finalisation of this request. These have also been provided to the Office of the Deputy Prime Minister / Minister for Employment and Workplace Relations.

General Comment

321. ACCI, like all parties, will only know how award modernisation will play out as the process matures, and in particular as we start to address specific awards during the first tranche of modernisation. On this basis any comments at this stage are preliminary ones based on the available text, and further input will only be able to be provided as modernisation proceeds.

322. The Minister is invited to consider the extent to which the Government should review the terms of the request, perhaps taking advice from the AIRC President and key parties. This might usefully be considered some months into the process, perhaps during late 2008 as the priority or initial tranche of awards is being finalised.

Form of the Request

323. ACCI is not clear precisely what the status of the request is, and how it arises under the legislation. On analysis, it appears to direct the AIRC in a number of areas, and to change the scope of what may be included in awards. On this basis, ACCI queries whether this should be some

form of legislative instrument, or somehow made under the Act, perhaps as a regulation or a gazetted order.

324. We are fortified in this view in considering what may happen in modernisation in 2008 and 2009. It may be necessary to revisit this request, perhaps on the recommendation of the AIRC and parties, and it would be sound if there were a proper mechanism to do this, such as a formally revised regulation.

Objects

325. It is welcome that there is a significant consideration of regulatory imposts on business, compliance and economic sustainability.

326. To some extent the operation of the objects (Paras 1 and 2) will remain to be seen as the process emerges.

327. One key issue arises at this stage is extensions of coverage (Para 2(a)). One of the key issues in the process will be any attempt to extend coverage below the managerial and higher earning level into areas of employment which have been (in whole or substantially) award free in a particular region or industry. ACCI understands the government to have indicated that awards will not apply to existing areas of award free employment, not just for high income earners and the professions, but more generally.

328. In our view, para 2(a) should properly read as follows:

The creation of modern awards is not intended to:

a. extend award coverage ~~beyond~~ **to** those ~~classes of~~ employees **or occupations**~~, such as managerial employees,~~ who, ~~because of the nature or seniority of their role,~~ have traditionally been award free. ~~This does not preclude the extension of modern award coverage to new industries or new occupations where the work performed by employees in those industries or occupations is of a similar nature to work that has historically been regulated by awards (including State awards) in Australia;~~

Performance of the Functions of The Commission

329. Section 576B and the request address this (p.77 of the Explanatory Memorandum). ACCI has two queries on these provisions at this stage.

a. Para 3(e) and the reference to promoting *"the principle of equal remuneration for work of equal value"*. What is intended by this? What will be the status of the existing equal pay provisions after the Transition Bill (Div, Part 12 of the *Workplace Relations Act*

1996), and if they are retained how would this additional consideration assist the award modernisation process?

b. Para 3(g). Isn't the safety, health and welfare of employees addressed through other legislation (including OHS legislation and obligations). Further, isn't the only potentially relevant issue hours of work, which is subject to the proposed NES on reasonable overtime. It is difficult to see what this wording in para 3(g) will add to the modernisation process, and it may serve to introduce extraneous or confusing considerations of little use to the AIRC in modernising awards.

Award Modernisation Process

330. Para 12 should clarify that any such transitional arrangements may well apply after 1 January 2010.

Consultation

331. Nothing in the request (para 14) should preclude one or more parties preparing their own draft and having this considered in the modernisation process (and indeed where unions and employers can agree a draft for consideration this is likely to auger well for modernisation).

Interaction With The NES

332. Para 28 provides that *"A modern award cannot exclude a term of the proposed NES or operate inconsistently with a term of the proposed NES."* The principle here is obviously sound – if the NES are broadly universal they need to remain so.

333. However, award parties should have the full range of options available to them in determining the application of the NES at the workplace level. This has to include scope not just to add to the NES, but scope to customise, adjust, qualify and provide detail. There may be modes of employment where it is appropriate to significantly adjust the application of an NES, and the AIRC and parties should have this option available to them. It should be recalled that any award would only be made by a full bench, and only if consistent with the terms of the legislation and the request (which will protect employees).

Long Service Leave (LSL)

334. Para 32 of the request is as follows:

> 32. In relation to long service leave, the Australian Government will, in co-operation with state governments, develop a national long service leave entitlement under the NES. In doing so, the Australian Government will also consult with major employer and employee representative bodies. Until then, long service leave entitlements derived from various sources will be protected. So as to not pre-empt the development of a nationally consistent approach, the Commission must not include a provision of any kind in a modern award that deals with long service leave.

335. Unfortunately, the proposed approach to LSL would provide precisely the pre-emption of the review which the Government seeks to avoid.

336. There are a number of LSL awards and award provisions which differ from state legislation. If modern awards are made without LSL provisions, costs will increase for employers and LSL benefits will change prior to the proposed LSL review being completed.

337. The approach outlined is not a preservation of the status quo for those subject to award LSL. A superior approach would be to require a preservation of existing award LSL pending the outcome of the review and any specific changes / the creation of a new LSL standard. This would allow the review to consider the transitional and cost considerations for employers potentially coming off award LSL / making some changes in this area.

Shift Work and the Fifth Week of Annual Leave

338. ACCI did not support the attempt to universalise this benefit in *WorkChoices*, indicating to government a preference that any 5th weeks annual leave be restricted to those specific industries where it was in pre-*WorkChoices* awards.

339. It is welcome that the Government has accepted that not all shift work occasions a fifth week's annual leave (paras 34-36). However, ACCI has some concerns about the formulation of the proposed entitlement.

340. With respect, a *"definition of shift work"* is not the correct mechanism to properly apply an additional week's annual leave. Additional leave should be attracted by the working of particular patterns of work during the period annual leave accrued (e.g. a certain number of weekend and/or night shifts in a 12 month period). This is not a definitional issue, but one of meeting a particular fact threshold (number of hours).

341. The proposed approach carries the danger of extending the additional week of annual leave beyond those traditionally entitled to it. It also fails to correctly and comprehensively quarantine day or ordinary shift working, which should expressly be excluded from any entitlement to additional leave.

Commission Employment

342. It is welcome that awards will address unique modes of employment for pieceworkers and outworkers (e.g. para 38).

343. A directly comparable area of concern is employment solely or substantially remunerated on a commission basis (e.g. real estate sales, car sales etc). The NES and awards struggle to naturally accord with these unique modes of employment, just as they do with outwork and piecework.

344. There should be an additional direction in the modernisation request for modern awards to address commission based employment, just as there is for piecework.

Scope of Minimum Wages

345. Paragraph 41, the final para of the draft request, includes the following:

> In dealing with minimum wages in modern awards, the Commission is to have regard to the desire for modern awards to <u>provide a comprehensive range of fair minimum wages</u> for all employees including.

346. ACCI understands this would be the first time there would be a direction to ensure that minimum wages are "comprehensive". What will this mean, and what is it intended to mean?

347. If it is intended that all modern awards contain minimum wages for persons with a disability, trainees, junior etc (and ACCI has sought to include such rates in awards in the face of union opposition) then the request should be in these specific terms. If the range of minimum wages means the diversity of minimum wage clients by type of employee should be addressed– then that could be made clearer.

348. Our concern is that word "comprehensive" could be misinterpreted. Does this mean a multiplication in the number of wage classifications in pursuit of the diversity of employment in an expanded award (which is the opposite of a safety net and the opposite of broad-banding and minimum wage reform to date? Does this cut across the intention to not extend awards into managerial and non-award

employment? Clearly, such wording should be reconsidered and avoided.

Part 10A – Award Matters

$100,000 Threshold for Award Free Employees

349. ACCI is concerned that the request, or indeed, new Part 10A does not refer at all to the $100,000 threshold in a way that would properly reflect the Government's policy intentions.

350. The second reading speech relevantly provides the following in relation to high earning employees[21]:

> It's the Government's intention that employees earning above $100,000 per annum will be free to agree to their own pay and conditions without reference to awards. This will provide greater flexibility for common law agreements which have previously been required to comply with all award provisions, no matter how highly paid the employee.

351. Furthermore, the Government's FWF IP states (at p.9) provides further detail on how awards would not apply to these high income earning employees:

> **2. Individual Flexibility For Employees Earning Over $100,000**
>
> **In Labor's new industrial system employees earning above $100,000 will be free to agree their own pay and conditions without reference to awards. This will provide greater flexibility for common law agreements which have previously been required to comply with all award provisions, no matter how highly paid the employee.**
>
> Labor's industrial relations safety net has two parts. First, there will be ten National Employment Standards, a set of legislated minimum conditions which guarantee basic conditions. …
>
> Second, Labor's safety net will also include modern, simple awards. Under Labor, awards will contain a safety net of a further 10 minimum conditions and entitlements and may provide industry relevant on Labor's 10 National Employment Standards.
>
> Labor has listened to the views of employers and employees about who needs the protection of Labor's new award system.
>
> Labor has concluded that minimum award terms have less relevance to those employees whose salary exceeds $100,000.
>
> Labor in Government will legislate to confine the application of Labor's new award system to employees who earn less than $100,000 per year when the new award system commences on 1 January 2010.(emphasis added)

[21] The Hon. Julia Gillard MP, Second Reading Speech, *House of Representatives Hansard*, 13 February 2008, p.12

> The calculation of the $100,000 threshold will be the employee's guaranteed ordinary earnings. The threshold will be indexed to annual growth in ordinary time earnings for full time adult employees.
>
> This will include the pay received for ordinary hours of work, guaranteed overtime and any other monetary allowances that are a guaranteed part of an employee's normal remuneration arrangements.
>
> Fair Work Australia can provide advice to employers and employees about whether the award threshold applies to their employment arrangements.
>
> Labor will ensure the application of the $100,000 threshold exemption will not extend to artificial arrangements that involve manifestly unreasonable rostered overtime hours just to take employees over the threshold.
>
> Employees who earn over $100,000 per year will be covered by Labor's 10 legislated National Employment Standards.
>
> Where an employee earning over $100,000 is currently employed under award conditions those entitlements will continue following the commencement of Labor's new award system.
>
> An employee in this position will then be able to choose whether to negotiate with their employer about their future terms and conditions of employment under Labor's new system or to remain on their existing terms and conditions of employment.
>
> Following the commencement of Labor's new award system a new employee may therefore negotiate their terms and conditions of employment with their employer without reference to the award and by reference only to Labor's minimum employment standards.
>
> Whilst Australian Workplace Agreements have been used to undermine the award safety net for all employees, Labor preserves the award safety net for those who really need it.
>
> These employees will be free to have common law agreements in any form that suits them, building on the base of Labor's ten legislated minimum conditions.
>
> An employer and employee may of course agree to include some or all provisions from a relevant award into a common law agreement or may agree to make a collective agreement.

352. Therefore, the proposed award modernisation request, which states at clause 2(b) *"[t]he creation of modern awards is not intended to: … result in high-income employees being covered by modern awards"* should explicitly include a reference to the $100,000 threshold so that it is unambiguous as to what powers the AIRC will have in making modern awards.

353. Such a reference will aid the stakeholders during the award modernisation process, and possibly avoid.

Award Matters + NES industry Detail Only

354. Section 576J(2) would allow the modern awards *"to also include terms about any other matter specified in the award modernisation request to which the modern award relates"*.

355. The explanatory memorandum to the Bill states (at pp.68-69):

> 60. New subsection 576J(2) would provide for an award modernisation request to specify other matters about which terms may be included in awards. The scope of these matters would be affected by any direction in an award modernisation request about how, or whether, a particular matter may be dealt with in a modern award.
>
> 61. The proposed award modernisation request will specify that modern awards may include terms about the proposed National Employment Standards. Broadly, the National Employment Standards are:
>
> • hours of work
>
> • parental leave
>
> • flexible work for parents
>
> • annual leave
>
> • personal, carers and compassionate leave
>
> • community service leave
>
> • public holidays
>
> • information in the workplace
>
> • notice of termination and redundancy
>
> • long service leave
>
> 62. The proposed request will also include the rules as to how (and whether) modern awards may deal with matters that form part of the National Employment Standards. For example, the proposed award modernisation request includes a direction that that modern awards must not include terms about long service leave.

356. ACCI is concerned that s.576J(2) is too open ended and may see other matters included in modern awards, that are in addition to the list of award matters in s.576J(1) and the National Employment Standards (NES) (which are yet to be legislated).

357. ACCI would support clarifying wording or a note, which tightens the additional matters that a modern award may deal with to more properly reflect the Governments policy intention (ie. a note could state that this section applies to proposed National Employment Standards only).

358. To be clear, ACCI supports any extension of, or adjust to the matters awards may address being undertaken by this parliament not through a ministerial request. Extending award is a very substantial additional regulation of employment and should come through the legislative process only.

Procedures for Consultation, Representation and Dispute Settlement.

359. Section 576J(1)(j) would allow a modern award to deal with *"procedures for consultation, representation and dispute settlement"*.

360. ACCI is concerned that this is too open-ended and it is unclear what matters could be subject to this term of a modern award.

361. Section 514(2) currently and clearly limits a dispute settlement procedures role and function:

> The dispute settling procedure process including in an award may only be used to resolve disputes:
>
> (a) about matters arising under the award; and
>
> (b) between persons bound by the award.

362. ACCI is particularly concerned if a modern award term enabled a party to invoke a dispute settlement procedure about matters outside of the NES or award terms (as outlined in s.576J(1)), or extend the reach of what can be disputed. This could become a backdoor means of regulation.

363. For example, a dispute resolution term in a modern award, should not lead to a party being able to dispute a termination of employment using a "notice of termination clause" (which is part of the proposed NES).

364. ACCI does not support the procedures for consultation, representation and dispute settlement being able to deal with extraneous matters.

365. Unfair Dismissal: Consistent with the Government's intention to create a new unfair dismissal regime within a set framework involving a Fair Dismissal Code, it would provide more certainty if *Subdivision B –*

Terms that must not be included in modern awards, included a new section which specifically states that a modern award cannot include a terms about unfair dismissals (or type remedies) and related procedures.

a. We are concerned that it may be argued by some parties that a termination redress mechanism falls within the confines and boundary of s.576J(1)(j) *"procedures for consultation, representation and dispute settlement"*.

366. Other Proceedings: Similarly, Subdivision B should also specify that s.576J(1)(J) does not apply where the matter (subject to dispute settlement) is the subject of proceedings or has already been settled as a result of proceedings, whether before a court or another body, under a law of the Commonwealth or of a State or Territory relating to the prevention of discrimination or to equal opportunity.

367. (This is currently reflected in the dispute resolution provisions under s.700 of the Act).

368. Therefore, ACCI would support amendments to re-include these additions protections and caveats in subdivision B. This will ensure greater clarity and certainty, and avoid any disputation during award modernisation, and beyond that, when modern awards commence.

Interstate Differentials

369. The amendments would have the effect of requiring modern awards to eliminate interstate differentials, albeit subject to an (entirely warranted) 5 year adjustment period (see proposed s.576T).

370. ACCI is however concerned about the strictness with which s.576T is expressed, and in particular the requirement that:

371. If awards must have effect in each State and Territory, what would be the fate of long standing location contingent provisions such as, for example, location allowances? Consider the following provision which is common in awards covering Western Australia:

> **21.1.4** If an employee's headquarters are located in a town or place mentioned below, the employee is entitled to district allowance at the following rates instead of the rates mentioned in paragraph 21.1.3 of this award:

Location of the Employee's Headquarters	Amount of District Allowance
Kalgoorlie Boulder	$223 per year
Ravensthorpe Norseman Salmon Gums Marvel Loch Esperance	$880 per year
Carnarvon	$1,392 per year
Meekatharra Mount Magnet Wiluna Laverton Leonora Cue	$1,476 per year
Port Hedland	$3,211 per year
Karratha	$3,452 per year
Liveringa (Camballin) Marble Bar Wittenoom	$3,667 per year
Fitzroy Crossing Halls Creek Turner River Camp Nullagine	$3,946 per year
Warburton Mission	$3,972 per year

(Source: *Aboriginal Communities And Organisations (Western Australia) Award 1996*)

372. ACCI would be concerned if such provisions could not be included in awards in the future on the basis that they are geographically determined. There would be similar concerns with allowances for remote work throughout Australia, and even for some other location based work.

373. It may be that such allowances accord with proposed s576J, and could be included in an award, but would fall foul of s.576T(1)(b). There is no Halls Creek in each state and territory, so can an allowance for working in that town remain in a modern award?

374. This concern could be redressed by re-examining s.576T and reducing the strictness of interstate provisions to allow for some, appropriate location contingent provisions to be included in modern awards.

Enterprise Awards

375. Whilst it is clear the Government does not intend enterprise awards to be modernised, there appears to be some unanswered questions

376. The first is in regard to single issue enterprise awards – such as a superannuation, LSL or hours award.

Single Issues Enterprise Awards

377. Will single issue enterprise awards be classified as an enterprise award for the purposes of section s.576V(3). It may be the case that traditionally an employer was bound by an industry award, for all bar one or two conditions which were subject to enterprise awards. Are they to be considered covered by an enterprise award and therefore excluded from any modern award coverage under s.576V(3), and if so where would the bulk of the employees minimum terms and conditions be drawn from?

Varying Enterprise Awards

378. There should be some scope to vary an enterprise award, including to revise classifications and other provisions to reflect a change of circumstances (for example expansions into new work, and new areas of employment). The Act should provide some mechanism for the variation of such awards, including through retaining scope to vary them outside the modernisation framework.

379. This is important to maintain the integrity of enterprise awards and the clear division between their operation and the operation of modern awards on an industry basis.

ACCI supports amendments to clarify that modern awards do not apply to employees earning over $100,000.

ACCI supports amendments to 576J(2) which would make explicit that the award modernisation request that the only matters which may be included and that are in addition to those in s.576J(1), are those that build upon the NES.

ACCI supports amendments to clarify that modern awards cannot allow a dispute resolution clause to be used for extending award regulation (ie. those matters outside of the modern award terms or NESs) in any unfair dismissal situations, or to challenge an equal opportunity claim that is on-foot in another jurisdiction.

ACCI supports re-examining s.576T and reducing the strictness of interstate provisions to allow for some, appropriate location contingent provisions to be included in modern awards (ie. allowances).

Allowable Award Terms

380. Proposed s.576J would set out the terms which can be included in a modern award. To be clear, ACCI believes that existing s.513 is qualitatively superior and better accords with the notion of awards being a genuine safety net. ACCI's primary position on award content is that it need not be extended.

381. As a more applied comment, existing s.513 is more tightly defined and indicative to parties than the proposed s.576J – which appears to leave open too many questions on award content and may lead to disputation or litigation on the proper content of modernised awards.

Matters Pertaining

382. The Transition Bill appears to omit a longstanding and fundamental concept in Australian industrial relations that requires awards to only deal with matters the extent to which they pertain to the employment relationship. This is currently reflected in s.513(2) of the *Workplace Relations Act 1996*:

> A matter referred to in [513(1)] is an allowable award matter only to the extent that the matter pertains to the relationship between employers bound by the award and employees of those employers.

383. ACCI is concerned that the omission of such a provision from proposed Part 10A may lead to uncertainty and disputation in the award modernisation process.

384. Employers request the re-insertion of this key provision into the provisions covering award making.

s.576J(1)(a) – Commission Employment

385. Section 576J(1)(a)(ii) refers to awards including terms about incentive based payments and piecerates. Consistent with this, it could usefully also indicate to the AIRC and parties that modern awards should address "commission employment arrangements". Section 576K addresses outworkers, and again extending this principle to employment based on commission in whole or part would be appropriate.

s.576J(1)(b) – Flexible Working Arrangements

386. The Government is set to introduce an NES on flexible working arrangements and some award capacity to build on that NES based on work and family considerations.

387. What then would be the purpose of also adding s.576J(1)(b) and the reference to awards addressing *"facilitation of flexible working arrangements, particularly for employees with family responsibilities"*. ACCI is not clear what work further award amendments would do at this point.

388. More generally, such matters should be bargained between employers and employees in the workplace, not be regulated by awards (as was one of the key lessons arising from of the 2004-05 work and family test case).

s.576J(1)(c) – Notice Periods

389. This proposed award content is set out as follows:

> (c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to 20 working hours;

390. *"Arrangements for when work is performed"* is a different concept to existing s.513(1)(a) which talks about awards regulating ordinary hours of work. ACCI would be concerned lest modern awards stray into prohibitions on working or any overregulation of working times. The existing formulation appears superior, clearer and more consistent with the safety net concept.

391. The reference to notice periods here is also potentially confusing. Notice of what? Is the immediate question. Notice of termination of employment is to be included as one of the NES, and awards can address this if necessary as a general issue.

392. If this is intended to mean notice of changes to rosters can be a matter in awards, then:

a. This sounds pretty prescriptive, not particularly modern, and at odds with facilitating workplace level agreement making.

b. Notwithstanding this, the wording could be clearer

s.576J(1)(f) – Annualised Salaries

393. Proposed s. s.576J(1)(f) refers to annualised salaries being able to:

> provide an alternative to the separate payment of wages, or salaries, and other monetary entitlements;

394. This could usefully also incorporate reference to "*penalty rates, additional award payments or allowances*", as these are the main factors which an annualised salary removes the need to pay separately, perhaps as follows:

> provide an alternative to the separate payment of wages, salaries, penalty rates, additional award payments, allowances, and other monetary entitlements;

s.576J(1)(g) – Allowances

395. Existing s. s.513(1)(h) defines allowances comprehensively. To be an award allowance a payment would need to fall into (i), (ii) or (iii) of that section.

396. Proposed s.576J(1)(g) would not take this approach and would allow the definition of allowances to be open ended, as follows:

> (g) allowances, including for any of the following:
>
> (i) expenses incurred in the course of employment;
>
> (ii) responsibilities or skills that are not taken into account in rates of pay;
>
> (iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

397. This means that any "allowance" potentially becomes an allowable award matter, not just the three listed sub-types of allowances. This is not sound in policy terms and is too open ended. It will encourage disputation on what payments could and should go in awards, and will be antithetical to expeditious award modernisation.

s.576J(1)(h) – Leave

398. Again, the proposed approach to leave appears too open ended. The proposed provision reads:

> (h) leave, leave loadings and arrangements for taking leave;

399. Why would awards need to contain any forms of leave not included under the NES, plus those contained in existing section 513(1)(d) and (e)? Isn't the NES essentially a comprehensive leave safety net. ACCI considers it is, with the addition of ceremonial leave and leave to seek re-employment.

400. There has been extensive litigation on what forms of leave can be included in awards across the past decade. In addition, in the absence of awards being based on employment and any weakening of the matters pertaining requirement, the definition of leave could open considerably and cause significant litigation and award claims.

401. Furthermore, what additional *"leave loadings"* could there be apart from annual leave loadings (as set out currently in s.513(c))? Again, this appears too open ended and likely to cause claims and litigation.

Existing s.513(1)(l)

402. Awards are not solely instruments for the protection of employees or setting minimum standards for employees. Some provisions provide reciprocal protections for employers and the viability of ongoing employment of an enterprises whole workforce.

403. ACCI supports modern awards continuing to include stand-down provisions as an essential protection for both employers and employees in the case of emergencies and disruptions in employment for which employers are not responsible.

404. Stand down provisions protect all users of the system from highly damaging disputes and from urgent emergency litigation. They are an established an accepted part of the Australian industrial relations system and should continue to be capable of being regulated in awards.

s.576M(2)(f) – Duration of Modern Awards

405. ACCI understands that award duration pre-*WorkChoices* was a complex technical constitutional matter arising from the basis on which awards were arbitrated.

406. It was ultimately nominal, and awards became ongoing instruments of regulation well beyond their nominal expiry dates.

407. ACCI is not clear on why a modern award would need a duration. It appears they would become even more ongoing style instruments of delegated regulation, with an industry based identity rather than products of and temporary solutions to disputes. This might be made clearer in any revised Explanatory Memorandum or debates in finalising the legislation.

Requirements for Modern Awards and Orders (s.576W)

408. ACCI has reviewed proposed s.576W(2) on what qualities or requirements modern award must meet in their terms and expression. On review, the proposed provision omits key and essential concepts. Proposed s.576W(2) should be amended to incorporate the award quality type provisions contained in existing s.568, which are:

> **568 Awards and award-related orders must meet certain requirements**
>
> (1) The Commission must, when making an award or an award-related order, if it considers it appropriate, ensure that the award or order:
>
> > (a) does not include matters of detail or process that are more appropriately dealt with by agreement at the workplace or enterprise level; and
> >
> > (b) does not prescribe work practices or procedures that restrict or hinder the efficient performance of work; and
> >
> > (c) does not include terms that have the effect of restricting or hindering productivity, having regard to fairness to employees.
>
> (2) The Commission must, when making an award or an award-related order, ensure that the award or order:
>
> > (a) where appropriate, includes facilitative provisions that allow agreement at the workplace or enterprise level, between employers and employees (including individual employees), on how the award terms are to apply; and
> >
> > (b) includes terms providing for the employment of regular part-time employees; and
> >
> > Note: Clauses 15.3.1 to 15.3.5 of the Hospitality Industry – Accommodation, Hotels, Resorts and Gaming Award 1998 provide a model (see the Award Simplification Decision at P7500).
> >
> > (c) is expressed in plain English and is easy to understand in structure and content; and

(d) does not include terms that are obsolete or that need updating; and

(e) does not include terms that discriminate against an employee because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

409. Since the mid 1990s, awards have been required to satisfy qualitative requirements in regard to clarity and encouraging productivity. This should not be lost in the proposed change to the award making provisions.

Finality of Modern Awards

410. Proposed s.576ZA replicates existing s.574. However, on further consideration the concept of attempting to exempt award making from an appeal concerns ACCI.

411. Decision makers err, and differences of opinion emerge. Any system needs to be open to appeal by those whose rights and interests are affected by proposed determinations.

412. ACCI also questions whether this section can do what it attempts to do. Can avenues to appeal be closed in this way? Is the ultimate effect of the amendment to force an appellant to the High Court, and then back to the Federal Court? Is the public interest met by creating uncertainty and additional litigation costs in this area?

12. SUMMARY OF RECOMMENDATIONS

Individual Transitional Employment Agreements (p. 16)

At the very least, ACCI would support amendments that will allow an employer who has engaged the same person within a period of 2 year to be able to offer these technically "new" employees an ITEA.

As a minimum, ACCI supports s.326(4) being expanded to also refer to daily hire, fixed term contracts/contracts for a specified task, and on-hire arrangements.

Therefore, it would be prudent and reasonable that if there is a period by which an employer must offer a new employee an ITEA, that the 14 day window be extended to at least 30 days to allow time to work out/negotiate conditions of the ITEA.[22]

ACCI supports ITEAs which are:

- Available to all employers (no 1 December 2007 reference).

- Available for all former and new employees.

- Which have a maximum nominal expiry date equivalent to collective agreements (5 years).

Therefore, ACCI supports appropriate amendments to proposed ss.326, 352(1)(aa) and 352(2)(aa) that reflects the above.

New No-Disadvantage Test (p.28)

ACCI supports the benchmark for new CAs being limited to either a relevant or designated federal award/NAPSA.

ACCI therefore supports amendments to s.346E(4) and (5) to remove references to anything other than an award and a notional agreement preserving state awards.

[22] This period of time is consistent with the 30 day period afforded to employers who vary ITEAs to comply with the NDT (s.346W).

ACCI supports the benchmark for ITEAs being the same as collective agreements.

ACCI therefore supports amendments to ss.346D(1) and 346E(1) to ensure that ITEAs are not benchmarked against any relevant collective instrument, but only against relevant federal award/NAPSA or designated federal award/NAPSA.

ACCI supports amendments to include a new provision called a "reference pay instrument" which would include a relevant and binding pay scale or special/FMW or in the absence of a relevant/binding pay scale, the FMW (if an employee is entitled to the FMW).

However, the drafting of the those amendment(s) should not affect the operation of s.346D(6) and (7). (ie. If there is no reference instrument, such as an award, but there is a reference pay scale instrument, the agreement should be taken to pass the NDT).

ACCI supports removing the reference to "or would not result" in s.346D(1) and (2).

Exceptional Circumstances Test (p.31)

ACCI supports the exceptional circumstances test under s.346D(3) applying to ITEAs, either by inserting a reference to an ITEA in s.346D(3), OR by inserting the equivalent of current s.346M with appropriate amendments to refer to the new NDT.

ACCI supports an amendment to the Bill which would prohibit the Workplace Authority, when it publishes reasons for making a decision under proposed s.346D(3)(b), from including sensitive commercial or confidential information that an employer submits to the Workplace Authority.

Work Obligations (p.32)

ACCI supports substituting the word "obligations" for "arrangements" in s.346J(1)(a) and using the examples in the explanatory memorandum.

ACCI Model - Fast Track Approval Process (p.37)

ACCI supports a fast-track approval mechanism for all agreements which undergo the NDT.

ACCI would support a model whereby industrial organisations are accredited and any agreement facilitated under an accreditation scheme operate from lodgement, with the Workplace Authority statutory required to fast-track such agreements.

Award Designation (p.44)

ACCI supports amendments:

- To s.346G and 346H to expressly require the WA when determining which award it will designate, to consider any information submitted by the employer.

- To s.346G and 346H to require the WA to notify the employer if it has designated an award and when it designated the award.

- To s.346G(6) to require the WA to only be able to change an award designation determination if the employer requests and is notified.

- To ss.346ZB(2)(a) to remove the ability for a designated award to continue to bind an employer where an agreement does not pass the NDT and ceases to operate.

- To allow NAPSAs to be designated, but only where the employer requests this as the most appropriate instrument to be designated.

Undertakings (p.48)

ACCI reaffirms that scope for undertakings should not be removed from the system.

ACCI supports amendments made to allow employers to give "monetary" undertakings in order for agreements to pass the NDT.

Time to Make Compensation Back-Pay (p.50)

ACCI supports extending the time frame by which employers must provide compensation to employees whose agreement fails the NDT, to 30 days.

Unlawful Provisions (p.55)

ACCI supports amendments made to delete s.346ZK(3)(d).

Terminating Certified Agreements (p.57)

ACCI supports amendments to s.397A which reflect the exact wording of former s.170MH of the pre-WorkChoices Act.

Variation of AWAs (p.59)

ACCI supports employers and employees being able to vary existing and pre-WorkChoices AWAs subject to the NDT.

References to Future Employees (p.63)

ACCI supports amendments to remove s.346C(3) unless it is necessary for the operation of the Act.

Calling Up Documents in Agreements (p.63)

ACCI support amendments made which would retain s.355, and also include a "modern award" in s.355(2)(b).

Purported Workplace Agreements (p.66)

ACCI does not support ss.324A, 368A and 381A.

Amendments to address the issues in *Inspector Wade v AC and MS Services* [2007] FMCA 139 should be limited to only clarify that a civil remedy provision could apply to a "purported" workplace agreement.

ACCI supports the removal of s.412A from the Transition Bill unless further clarification or explanation proves that it's necessary and not prejudicial to employers.

Pay Scales (p.67)

ACCI supports the AFPC publishing existing pay scales, upon application by an employer, particularly where there is uncertainty, ambiguity and confusion in its application.

ACCI supports the Workplace Authority publishing additional pay scale summaries and varying existing pay scale summaries on the request of traditional/historical parties to the award derived pay scale.

Pre-Reform Certified Agreements (p.68)

ACCI supports amendments to Schedule 5, Item 1, that would include a NAPSA and its associated pay scale in proposed s.2A(c)(i), for variation of a pre-WorkChoices CA where the Commission considers it more appropriate than the transitional award.

Workplace Relations Fact Sheet (p.69)

ACCI supports amendments that will repeal the WorkChoices Fact Sheet.

ACCI does not support any alternative "fact sheet", such as the proposed "Fair Work Information Sheet", being required to be distributed by employers.

Award Modernisation (p.82)

ACCI supports amendments made to clarify that modern awards do not apply to employees earning over $100,000.

ACCI supports amendments to 576J(2) which would make explicit that the award modernisation request that the only matters which may be included and that are in addition to those in s.576J(1), are those that build upon the NES.

ACCI supports amendments to clarify that modern awards cannot allow a dispute resolution clause to be used for extending award regulation (ie. those matters outside of the modern award terms or NESs), including unfair dismissal situations, or to challenge an equal opportunity claim that is on-foot in another jurisdiction.

ACCI supports re-examining s.576T and reducing the strictness of interstate provisions to allow for some, appropriate location contingent provisions to be included in modern awards (ie. allowances).

ACCI supports a tranche of other amendments to proposed Part 10A that more appropriately reflect what is currently contained in the Workplace Relations Act 1996.

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