Submission by the Australian Catholic Council for Employment Relations
to an inquiry by the
Senate Committee on Education, Employment and Workplace Relations
into the *Fair Work Bill* 200*8*

9 January 2009

Summary of Submission

This submission by the Australian Catholic Council for Employment Relations ("ACCER") has two parts.

First, a Statement made by the Australian Catholic Bishops on *Work Choices*, parts of an assessment of *Work Choices* made by ACCER and a commentary on aspects of the *Fair Work Bill*. ACCER welcomes the major changes proposed by the *Fair Work Bill* because they substantially address concerns expressed by the Bishops when *Work Choices* was introduced and the various issues considered by ACCER in its book *Workplace Relations: A Catholic Perspective*. However, ACCER remains particularly concerned about the position of low paid workers and their families and the ability of FWA to resolve some disputes between workers and their employers.

Second, arguments in support of two amendments to the *Fair Work Bill* 200*8*: the amendment of the definitions of the "modern awards objective" and the "minimum wages objective" in the proposed sections 134 and 284, respectively. These amendments would require Fair Work Australia to take into account, amongst other matters, "the needs of the low paid and their families" when exercising its powers. The proposed underlined words are the same as those used in the International Labour Organisation's *Minimum Wages Convention*, a convention to which Australia is a signatory. The need for these amendments is highlighted by the reasoning of the Australian Fair Pay Commission in its minimum wages decision of July 2008. ACCER presents a number of reasons in support of the amendment, with emphasis on the protection of workers with family responsibilities.

Introduction

1. The Australian Catholic Council for Employment Relations ("ACCER") is an agency of the Australian Catholic Bishops Conference. ACCER provides advice to the Bishops on employment policies and is a public advocate for policies which are consistent with the principles of Catholic social teaching concerning work and the employment relationship. The Catholic Church is one of Australia's largest employers. Over 100,000 are employed in health, education, welfare and church administration.
2. These submissions are made by ACCER to the Senate Standing Committee on Education and Employment in respect of its inquiry into the *Fair Work Bill* 2008. The Bill has passed the House of Representatives and will be considered by the committee before debate in the Senate. The major purposes of the Bill are to repeal provisions enacted by the Parliament in 2005, commonly known as *Work Choices*, which amended the *Workplace Relations Act 1996* ("the WR Act") and to replace the WR Act with the *Fair Work Act*. A new tribunal, Fair Work Australia ("FWA"), will be established as the primary regulator of workplace relations in Australia. The changes follow the present Government's *Forward with Fairness* policy, which has been implemented, in part, through amendments made by the *Workplace Relations (Transition to Forward with Fairness) Act 2008*.
3. This submission seeks two amendments to the legislation: the amendment of the definitions of the "modern awards objective" and the "minimum wages objective" in the proposed sections 134 and 284, respectively. These amendments would require FWA to take into account, amongst other matters, "the needs of the low paid and their families" when exercising its powers. The proposed underlined words are the same as those used in the International Labour Organisation's *Minimum Wages Convention*, a convention to which Australia is a signatory.

4. This submission also includes a Statement made by the Australian Catholic Bishops on *Work Choices*, parts of an assessment of *Work Choices* made by ACCER in its book *Workplace Relations: A Catholic Perspective* and commentary on aspects of the *Fair Work Bill*.

5. ACCER welcomes the major changes proposed by the *Fair Work Bill* because they substantially address concerns expressed by the Bishops when *Work Choices* was introduced and various issues considered by ACCER in *Workplace Relations: A Catholic Perspective*. However, ACCER remains concerned about the position of low paid workers and their families and the ability of FWA to resolve some disputes between workers and their employers. The matters raised in this submission do not cover all of ACCER's concerns about the current and proposed legislation. For example, ACCER has opposed the differential treatment of the right to job security according to the size of the enterprise in which they are employed. The proposed legislation contains such a distinction in respect of the qualifying period for protection against unfair dismissals and regarding entitlements to redundancy payments.

The Statement on *Work Choices* by the Australian Catholic Bishops in November 2005

6. In a Statement of 25 November 2005 on the *Work Choices* legislation (which was then before Parliament), the Australian Catholic Bishops Conference said:

> "We are concerned that the proposed legislation, as it is presently drafted, does not provide a proper balance between the rights of employers and workers in several respects. Changes are necessary to alleviate some of the undesirable consequences of the legislation, especially in regard to its potential impact on the poor, on the vulnerable and on families.
>
> The integration of economic growth and social justice is a fundamental obligation of government. They must be pursued in ways that are fair and equitable to the society as a whole. In this context, our proposals for change to the *Workplace Relations Amendment (Work Choices) Bill 2005* seek to moderate the impact on the poor, the vulnerable and families and limit any consequences on social cohesion." (Paragraphs 9 and 14.)

7. The Bishops identified four areas of concern:

> "*Minimum Wage*
> Workers are entitled to a wage that allows them to live a fulfilling life and to meet their family obligations. We are concerned that the legislation does not give sufficient emphasis to the objective of fairness in the setting of wages; the provision of a fair safety net by reference to the living standards generally prevailing in Australia; the needs of employees and

> their families; and the proper assessment of the impact of taxes and welfare support payments.
> In our view, changes should be made to the proposed legislation to take into account these concerns.
> *Minimum Conditions and Bargaining*
> The legislation proposes a major change in the guaranteed safety net for workers and the procedure for making employment agreements. Our concern is that many workers, especially the poor and vulnerable, may be placed in a situation where they will be required to bargain away some of their entitlements. In particular, we refer to overtime rates, penalty rates and rest breaks. The legislation should be amended to provide that these are appropriately protected.
> *Unfair Dismissals*
> The Government proposes the removal of unfair dismissal laws in regard to businesses with up to 100 employees and to make changes to the laws applying to larger firms. Such changes would reduce job security. Workers should have appropriate redress against unfair dismissals. This does not ignore that termination of employment is justified in particular cases. There is also a case for the amendment of the existing unfair dismissal laws to improve their efficiency and effectiveness. However, unfair dismissal rights should not be dependent upon the size of the employer's undertaking.
> *The Role of Unions*
> The legislation should enable cooperation between workers so that they can advance their mutual interests and enable them to participate freely in unions. The legitimate rights of unions are derived from the rights of their members. In their proper role in the workplace they are not "third parties" or outsiders to the employment relationship. We ask the Parliament to give close consideration to the potential impact of the proposed legislation on the capacity of unions to represent their members. It would be wrong for the Parliament to enact laws that impede or frustrate unions in carrying out their lawful representative activities." (Paragraphs 10-13)

8. The basis of the Bishops' Statement was Catholic social teaching on work, the employment relationship and the role of governments. Governments have a responsibility to promote employment and to ensure that the basic needs of workers and their families are met through fair minimum standards that reflect a proper balance between the rights and responsibilities of workers and their employers. The Bishops said:

> "A major concern of Catholic Social Teaching is always the effect legislation has on the poor and vulnerable and its impact on family life. As Pope John Paul II wrote in his encyclical *Laborem Exercens*:

> "…in many cases they [the poor] appear as a *result of the violation of the dignity of work*; either because opportunities for human work are limited as a result of the scourge of unemployment, or because a low value is put on work and the rights that flow from it, especially the right to a just wage and to the personal security of the worker and his or her family." *(Laborem Exercens,* 8*)*

> Our experience emphasises the importance that employment, fair remuneration and job security play in providing a decent life for workers and their families. They are particularly important for those who have limited job prospects and who are vulnerable to economic change. It is not morally acceptable to reduce the scourge of unemployment by allowing wages and conditions of employment to fall below the level that is needed by workers to sustain a decent standard of living." (Paragraphs 4 and 5)

9. On the centenary of Pope Leo XIII's 1891 encyclical *Rerum Novarum*, the Australian Catholic Bishops referred to the need for adequate wages and other entitlements:

> "It was his [Pope Leo XIII's] view that human society is built upon and around productive human work. When a person is employed to work full-time for wages, the employer, in strict justice, will pay for an honest day's work a wage sufficient to enable the worker, even if unskilled, to have the benefits of survival, good health, security and modest comfort. The wage must also allow the worker to provide for the future and acquire the personal property needed for the support of a family. To pressure or trick the worker into taking less is, therefore, unjust." (*A Century of Catholic Social Teaching)*

10. ACCER made written submissions to the 2005 Senate Inquiry into *Work Choices* and appeared before it. It opposed aspects of *Work Choices* on the basis that they were unfair to workers and their families and sought changes to the proposed legislation. These matters were developed in a book published by ACCER in June 2008: *Workplace Relations: A Catholic Perspective*. The book reviewed Catholic social teaching on work and workplace relations and discussed four rights which "flow" from work (*Laborem Exercens*, 8) and which broadly coincide with the four matters identified in the Bishops' Statement:

    - the right to a just wage;
    - the right to protection against unfair agreements;
    - the right to participate in unions; and
    - the right to job security.

11. Various aspects of Work Choices were considered in the light these four rights. In each case, ACCER found a continuing basis for the kinds of concerns identified by the Bishops in November 2005 and argued for changes to be made to the legislation.

The role of unions and dispute resolution

12. The Bishops' Statement included some general views about the role of unions and their capacity to represent their members. It did not make any specific conclusions on this issue, but said:

> "We ask the Parliament to give close consideration to the potential impact of the proposed legislation on the capacity of unions to represent their members. It would be wrong for the Parliament to enact laws that impede or frustrate unions in carrying out their lawful representative activities." (Paragraph 13)

13. No relevant changes were made to the proposed legislation. ACCER reviewed and evaluated the enacted legislation in *Workplace Relations: A Catholic Perspective*. Its summary of that review and evaluation is also relevant to the *Fair Work Bill*:

> "We have reviewed the legislation by reference to the right of workers to join and participate in unions, to protect and further their own, and each other's, interests. It is an important aspect of the principle of solidarity in Catholic social teaching. This review has taken us to the capacity that the AIRC is able to play in the resolution of industrial disputes and the establishment of minimum entitlements through the current award system. The legislation gives us cause for concern in several respects. First, the legislation does not make sufficient provision for unions to effectively represent their members and for workers to join together in the pursuit of collective enterprise agreements. Second, the AIRC, which has lost its century-long capacity to conciliate and arbitrate disputes according to law and industrial principle, has insufficient powers and breadth of jurisdiction to resolve the merits of industrial disputes. Third, the current provisions for the making and variation of awards are inadequate to secure a fair outcome for those who do not have the capacity to bargain for greater benefits. All of these require changes to the legislation."(*Workplace Relations: A Catholic Perspective*, paragraph 263)

14. The discussion leading to that conclusion referred to the importance of unions in Catholic social teaching, not only as a representative of their individual members, but to their broader social role: "The Church emphasises the importance of unions

because of the role that they can play in advancing the interests of workers in the workplace and in society as a whole. They are encouraged for that reason." (Paragraph 216). A number of points were made:

- The right to union membership is not a bare right. Article 23(4) of the *Universal Declaration of Human Rights* states: "Everyone has the right to form and to join trade unions *for the protection of his interests"* (emphasis added). The pursuit of this purpose is an essential part of the right to union membership.

- The workers right to union membership carries with it rights to participate in union activity in the workplace, to deal with the employer through the union and to have the union recognised by the employer.

- The right of workers to participate in and through their unions when dealing with their employers must be supported and guaranteed by legislation and by those governmental institutions that regulate employment.

- The rights of unions are derived from the rights of their members to receive fair and just treatment from their employers and to join with others for their mutual protection and advancement.

- It would be contrary to the rights of those workers for their employers to refuse to deal with their union when the union is acting on their behalf in relation to wages and working conditions. Unions are not "third parties" to the employment relationship.

15. The chapter on the right to participate in unions argued that the rights of workers need to be protected in two ways:

    - in the laws that directly affect individual workers and their unions; and

    - in the powers and decisions of the tribunals that hear and determine their claims, grievances and disputes.

16. This led us to consider how *Work Choices* had affected a worker's individual and collective capacity to resolve the kinds of disputes, both individual and collective, that arise in the workplace. These disputes might be about the implementation of existing rights or about claims for changes in those rights. We pointed out that a major impact of *Work Choices* had been the removal of the powers of the Australian

Industrial Relations Commission ("AIRC") to arbitrate disputes. The basic constitutional power underpinning the federal legislation was the conciliation and arbitration power in the Australian Constitution. The change from that power to the corporations power in the Constitution as the basic underpinning of the federal scheme does not require any departure from a system of conciliation and arbitration.

17. The representation of Australian workers by their unions was reinforced by their access to systems of conciliation and arbitration, at Federal and State levels, for the resolution of unresolved workplace disputes. The conciliation and arbitration of industrial disputes has been a most efficacious method of dealing with disputes in the workplace. It is important to understand that the system did not require the AIRC and its predecessors to arbitrate a dispute by the creation of new rights and duties. The arbitration of local or workplace disputes about claims for new rights was a power that had been used sparingly: the AIRC established various *industrial principles* upon which it would resolve disputes over wages and other issues and how it would exercise its award-making powers.

18. The value of the Australian system of dispute resolution was recognized by Pope John Paul II in a speech made on his visit to Australia in 1986:

> "Australia has a long and proud history of settling industrial disputes and promoting co-operation by its almost unique system of arbitration and conciliation. Over the years this system has helped to defend the rights of workers and promote their well being, while at the same time taking into account the needs and the future of the whole community." (Address to workers at the Transfield factory, Parramatta, 26 November 1986)

19. In 1993 the Australian Bishops' Committee for Industrial Affairs made the following observation on that passage in the context of debates about changes to the regulation of employment rights:

> "Whatever changes need to be made to the mechanics of the conciliation and arbitration system, it should be ensured that these principles are preserved." (*Industrial Relations - The Guiding Principles*, page 5)

20. Critical features of a system of the conciliation and arbitration system were removed by *Work Choices*; and the *Fair Work Bill* does not propose their return.

21. ACCER opposed the fundamental change in the AIRC's role as the arbitrator of disputes which cannot be solved by negotiation and conciliation. It was in part based on its potential impact on the capacity of unions to operate effectively, but it was also based on concern about the ability of workers with little or no industrial bargaining power, whether they be unionist or not, to achieve a collective bargain.

22. In *Workplace Relations: A Catholic Perspective* ACCER pointed to the important question about the circumstances in which the AIRC should get involved in the merits of the claims that are in excess of the legal minima. Clearly, in a system that promotes collective bargaining that is underpinned by a fair set of minimum terms and conditions, as is proposed by the *Fair Work Bill*, the tribunal should not arbitrate as a matter of course. The power to arbitrate should be used in accordance with broad statutory criteria and principles for arbitration developed by FWA.

23. ACCER argued in the book that an appropriate system of collective enterprise bargaining, capable of flexible operation, should have a number of requirements and features. Two of them remain relevant to the *Fair Work Bill*. First, there should be an obligation on all parties to bargain in good faith and a failure to engage in this process might result in the arbitration of a workplace determination of the kind that is available under section 504 of the current (*Work Choices*) legislation. We said "might", because of the need to both encourage bargaining and to avoid arbitration except in appropriate circumstances. Second, there should be a procedure whereby a stalemate in negotiations for a collective agreement might be resolved by the AIRC. This proposal was based on the capacity of tribunal members to assist parties and the potential to resolve issues that would present an impediment to the making of an agreement.

24. The *Fair Work Bill* proposes the imposition of an obligation to bargain in good faith, which manifests itself in largely procedural terms and in an obligation to give "genuine consideration to the proposals of other bargaining representatives"

(subclause 228(1)). The good faith bargaining requirements do not require a bargaining representative to make concessions during bargaining for the agreement or a bargaining representative to reach agreement on the terms that are to be included in the agreement (subclause 228 (2)). This provision operates without limitation and there is no recourse if the opposition to the making of an agreement is, for example, unreasonable. It also means that a party is not obliged to make an agreement in respect of particular circumstances in the workplace that are not covered by the provisions of the relevant modern award. In these circumstances FWA is powerless to resolve the dispute except in defined circumstances.

25. Clauses 423 and 424 provide very limited circumstances in which an unresolved dispute can be arbitrated by a determination. They are "safety valve" provisions. The latter reflects the current section 504, to which we have referred. The former, clause 423, requires, among other matters, imminent significant and ongoing economic harm before the tribunal can arbitrate. It is not sufficient that, for example, the position of one of the parties is unreasonable or that some workplace-specific provision (for which the relevant award makes no provision) is highly desirable. The provision depends on disruption, not merit. There will be no prospect of arbitration for those workers, and employers, who cannot sustain the harm that the proposal requires; see subclause 423 (6). This is particularly disadvantageous to low paid and vulnerable workers. It is much more limited than the kind of provision favoured by ACCER. There is need for a power of the kind set out in clause 423, but the requirements for its exercise are too limited. This safety valve provision should be reviewed.

The amendments proposed by ACCER

26. The modern award and minimum wages objectives oblige FWA to have regard to a number of matters when making and varying modern awards under the proposed Part 2-3 and when setting and varying minimum wages under Part 2-6 of the legislation. If amended, the proposed subsection 134(1) would read (underlining added):

"(1) FWA must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid and their families; and
(b) the need to encourage collective bargaining; and
(c) the need to promote social inclusion through increased workforce participation; and
(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
(e) the principle of equal remuneration for work of equal or comparable value; and
(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the ***modern awards objective***."

If amended, the proposed section 284 would relevantly read (underlining added):

"(1) FWA must establish and maintain a safety net of fair minimum wages, taking into account:

(a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
(b) promoting social inclusion through increased workforce participation; and
(c) relative living standards and the needs of the low paid and their families; and
(d) the principle of equal remuneration for work of equal or comparable value; and
(e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

This is the ***minimum wages objective***.

(2) The minimum wages objective applies to the performance or exercise of:

(a) FWA's functions or powers under this Part; and
(b) FWA's functions or powers under Part 2-3, so far as they relate to setting, varying or revoking modern award minimum wages."

Work Choices and the protection of low paid workers and their families

27. One of ACCER's major activities is advocacy on behalf of low-income working families. The Federal Minimum Wage ("FMW"), which is currently $543.90 per week, together with relevant transfer payments, is manifestly inadequate to meet the needs of Australian families. Working families who rely on the FMW (and other low rates of pay) are at the neediest end of the working family spectrum. Their interests and rights as Australian citizens are often overlooked in debates about economic and industrial relations policies. ACCER believes that a precondition for social inclusion is a wage which, together with government transfers, will support families at an acceptable standard of living in the context of Australian living standards.

28. When the then Commonwealth Government announced its *Work Choices* policy in May 2005 it said that the legislation would enable the setting of a *single adult minimum wage*. ACCER's opposition to this proposal was set out in the booklet *Briefing Paper No1 on the Commonwealth Government's Proposals to Reform Workplace Relations in Australia* (September 2005). When the legislation was introduced in October 2005 it made no reference to the single person test. The Commonwealth proposed the establishment of a new wage-setting tribunal, the Australian Fair Pay Commission ("AFPC"), to operate under new "wage-setting parameters" that made no reference to the establishment of a "safety net of fair minimum wages", as was provided in the then current legislation.

29. In its submissions to the Senate inquiry into *Work Choices* on 9 November 2005, ACCER pointed out the uncertainty in the proposed section in regard to the family wage issue and the absence of any reference to fairness:

> "…the proposed section does not refer to the earlier announced single person wage. ACCER welcomes this change, but it has not put the matter beyond doubt. ACCER has several concerns about the provision. First, it contains no explicit basis upon which it could be argued that the wages fixed by the AFPC should have regard to the needs of employees and their families. There should be no ambiguity about this aspect. The needs of families should be recognised in the legislation.
>
> ….
>
> Our second concern with the proposed section…is that it contains no reference to fairness, as there is in the current legislation. It will be noted that fairness in the current legislation is fairness in the context of

> economic factors so that the AIRC is to properly balance the various factors when fixing wages. Unless fairness is one of its parameters it may be said that it has no obligation to consider fairness. We see no reason why fairness cannot be an explicit consideration and a guiding principle for the AFPC, especially given that it is named the Australian Fair Pay Commission. Fairness would also require the safety net to be fixed "in the context of living standards generally prevailing in the Australian community", as is presently the case…" (ACCER submission to the Australian Senate Employment, Workplace Relations and Education Legislation Committee's Inquiry into the *Workplace Relations Amendment (Work Choices) Bill 2005*, paragraphs 32 and 36)

30. The legislation was not changed and what ACCER feared in regard to the support of families has come to pass with the decision of the AFPC in 2008, as we explain below.

31. There is a discussion of ACCER's second concern in *Workplace Relations: A Catholic Perspective*, especially at paragraphs 164-70, where it is argued that *Work Choices* gave insufficient weight to the setting of a wage safety net. ACCER welcomes the requirement in the proposed subsection 284(1) that FWA set a fair safety net: "FWA must establish and maintain a safety net of fair minimum wages…" In this regard, the legislation is consistent with the pre-*Work Choices* provision which imposed an obligation on the AIRC "to ensure that a safety net of fair minimum wages and conditions is established and maintained…"

Why the amendments are needed: wage case decisions

32. Consistent with Catholic social teaching, ACCER's submissions to wage cases conducted by the AIRC and the AFPC have sought the fixing of minimum rates of pay that are sufficient, after allowing for income tax and relevant government transfers, to support a family of four at the minimum acceptable standard of living without the need for the second parent to undertake paid employment. The family of four has been identified because a family with two children best approximates the size of contemporary Australian families. It should be noted that ACCER is not asking for amendments to the *Fair Work Bill* that are formulaic or prescriptive of a benchmark. It is asking that the legislation contain an explicit obligation on FWA to take account of the needs of families when setting wages. In that context ACCER

would seek to make out a case for that family to be a benchmark or reference point for the setting of minimum wages.

33. ACCER has argued against the adoption of the single person test in the absence of adequate transfer payments and a commitment from the Commonwealth to fully fund the dependants of the low paid. Family assistance payments, although substantial, are presently inadequate to meet these needs, and have never been intended to do so.

34. For these reasons, ACCER is most concerned that the AFPC in its July 2008 minimum wages decision adopted the single person test for wage-setting, a test that is incapable of providing an acceptable standard of living for workers with family responsibilities.

35. In order to fully appreciate the importance of this issue it is necessary to refer to the material before the AFPC and its reasoning in its 2008 decision. As it did in its previous decisions, the AFPC considered the differential impact that the FMW and transfer payments have on various kinds of households at December 2007 and assessed that impact against the relevant Henderson Poverty Line ("HPL") for each of those households. (The origin, purpose and updating of the HPL are found in the quarterly publications *Poverty Lines: Australia ISSN 1448-0530,* published by the Melbourne Institute).

36. The AFPC's reasons for decision showed that the single breadwinner FMW family with two school-aged children, where the second parent does not seek paid employment, had a disposable income of $758.26 per week, while the single adult receiving the FMW and with no dependants had a disposable income of $467.70 per week. The costs of three dependants would far exceed the government transfers ($290.56) received in respect of them. The transfers are not intended to cover all those costs.

37. The HPL is designed to produce figures that identify similar standards of living for various household groups. By reference to their respective poverty lines, the family of four was 8% above the HPL, while the single worker without dependants was 25% above the HPL. The AFPC made a further comparison of relative living standards by reference to the 60% median equivalised disposable income poverty line. This

showed that the same family of four was 7% *below* that poverty line, while the single worker was 21% *above it*. The AFPC said:

> These wage-earners [single workers without dependents who are not in receipt of transfer payments] have disposable income that is 25 per cent above the relevant HPL and 21 per cent above a poverty line based on 60 per cent of median equivalised disposable income. In the Commission's view, this is a reasonable margin above poverty for a person earning the lowest adult full time wage in the regulated labour market." (2008 Decision, page 68)

38. The AFPC effectively abandoned any notion that the FMW should be a wage which, together with transfers, will provide an acceptable minimum standard of living to low paid workers and their families. A FMW that merely produces a reasonable outcome for single workers cannot provide a reasonable outcome for workers with family responsibilities. The AFPC rejected a claim by ACCER for a further $9.30 per week increase in the FMW. This modest amount would have only taken the FMW to the equivalent NSW rate. Following the various State wage case decisions in 2008 the unweighted average of each State's lowest minimum wage is $7.19 per week more than the FMW.
39. The AFPC's finding that the FMW is reasonable for single wage-earners and produces a standard of living that is appropriate for the setting of the lowest rate in the regulated labour market demonstrates an intention to make it the reference point for FMW adjustments. Based on the AFPC's reasoning, there appears to be no prospect of any improvement in the relative living standards of low income families coming from its forthcoming 2009 wage review.
40. What ACCER believes was an error of principle by the AFPC was compounded by its failure to take into account one of the most basic of needs of working families: housing. The HPL was established in 1973 and, although indexed, it substantially underestimates housing costs. The AFPC's estimate that the single breadwinner family of four was 8% above the HPL was made on the unrealistic estimate in the updated HPL that housing costs for this family were $158.78 per week in December 2007. ACCER drew this underestimation to the AFPC's attention, but, although mentioned in the decision, it was not considered or acted on. A family of four, including two school-aged children, will fall below the poverty line if it is required to

pay rent in excess of $215 per week. In the current housing market many low income working families will be substantially below the poverty line. The evident reason for the AFPC's failure to consider the impact of housing costs on low income families was its decision to determine wages by reference to the living standard of the worker without dependants.

41. ACCER believes that the situation today is similar to the early 1970s when the Commonwealth (Henderson) Commission of Inquiry into Poverty was established by the McMahon Government and expanded by the Whitlam Government. The Poverty Commission found that in August 1973 a single breadwinner family of four dependent on the minimum wage was 7% below the poverty line. The benchmark household in the HPLs is the family of four in which one parent stays at home to care for the children. By the AFPC's own yardstick to measure living standards, and after taking into account housing costs, the improvement of these families over the past 35 years has been marginal at best. Any improvement has been insufficient, especially having regard to the AFPC's own assessment of a reasonable standard of living.
42. We expect that these figures will have some resonance with Senators, especially having regard to the debate during 2008 about the single pensioner payment and the proposed increase of $30.00 per week in that payment. The quarterly HPL updates also include calculations of the living standards of pensioners and others relative to their respective poverty lines; see, for example, *Poverty Lines: Australia ISSN 1448-0530 December Quarter 2007*, at page 4. For the same quarter considered by the AFPC (December 2007) the disposable income of a pensioner couple was $498.80 per week, with a HPL of $429.69. The couple was 16.1% above their HPL. For a single pensioner, the disposable income was $321.55 per week, with a HPL of $303.35. This was an income 6.0% above the relevant HPL. An increase of $30.00 per week would have raised this to 15.9%. As we noted earlier, at the same time the single breadwinner FMW family with two school-aged children, where the second parent does not seek paid employment, was 8% above the poverty line. These comparisons provide strong evidence of the need for an increase in the disposable incomes of low income working families and of the inequity of setting wages on the

basis of what produces a reasonable standard of living for workers without family responsibilities.

Reasons for the proposed amendments

43. It will be apparent from the foregoing that an outcome of setting minimum wages on the basis of what will produce a reasonable standard of living for a single person is inherently loaded against low paid workers with dependants and low income working families. As we have said, government transfers are not, and are not intended to be, sufficient to meet the needs of non-working family members. Yet the AFPC's 2008 decision leaves low paid workers and their families dependent on increased government transfers in order to achieve an acceptable standard of living. The adoption of the single person test has major implications for the Commonwealth budget. We note that the adoption of the single person test came without any debate about its desirability or implications or, we would expect, any commitment from the Commonwealth.

44. ACCER would not be opposed to the adoption of a single person test providing certain preconditions are met; preconditions that would satisfy relevant principles. These principles should not yield to the argument, advanced by some, that "single person" minimum rates of pay are economically desirable. In a submission to a Senate committee inquiry regarding the *Workplace Relations Amendment (Protecting the Low Paid) Bill 2003*, ACCER said:

> "If the AIRC were to formally adopt the single person criteria for the establishment of the Federal Minimum Wage it should only do so if it is satisfied that there are adequate mechanisms in place, by way of the taxation and welfare systems, that would guarantee the proper financial needs of the wage earner's dependants. Moreover, unless and until governments make commitments to the continuation and further implementation of policies for the support of dependants, the AIRC should not abandon the principle that a minimum wage should take into account the needs of dependants.
>
> Given the position of the Catholic Church on the need for wages to be sufficient to support the wage earner and his or her dependants, any support by the ACCER for the single person test for the purposes of wage fixation would only be conditional upon governments recognising that wage rates must be fixed on that basis and that they have an obligation to

> provide for the needs of dependent family members through the taxation and welfare systems." (Paragraphs 36-7)

45. There are six substantial reasons for ACCER's proposal to insert into the legislation a specific obligation on FWA to take into account the needs of families when setting minimum wages. They are drawn from relevant social policies, established industrial principle and legislation.

46. First, a central policy objective of the legislation is to establish a safety net for workers. The term *safety net* is not defined in the Bill, or in the current legislation. Commonly understood, a wages safety net provides incomes that are sufficient to meet the basic needs of workers, having regard to general living standards in the community. It is beyond argument that the basic needs of workers must include the needs of their dependants and that a wages safety net has to take into account the income tax paid by workers and government transfers paid to them and to their families.

47. Second, the consideration of the needs of the families has had a central role in how statutory powers to fix wages have been exercised, notwithstanding the AFPC's recent decision. A century ago the *Harvester* case (*Ex parte H V McKay* (1907) 2 CAR 1) established a bedrock principle in Australian wage-setting: minimum wages should be fair and reasonable and capable of supporting families. It was a principle with a limitation: it only applied to male rates of pay. That limitation has been long swept away. The *Harvester* principle was designed to support families. The concern for the families of workers in wage-setting decisions has continued in the AIRC. Until its major wage-setting role was transferred to the AFPC in 2006 by the *Work Choices* amendments, the Commission conducted annual reviews in which a wide range of issues concerning safety net wages for workers and their families were canvassed. In the *Safety Net Review Case-Wages, May 2004* the Commission said:

> "Whilst a significant proportion of Australian families continue to rely on a single wage as their sole source of income, the needs of single income families will continue to be relevant in connection with the needs of the low paid" (Print 002004, paragraph [275])

48. Third, the Commonwealth Government's promotion of socially inclusive policies and outcomes (which, at least in general terms, would have wide community support)

would be frustrated by the continued application of the position adopted by the AFPC. A precondition for social inclusion is a wage which will support families at an acceptable standard of living, after taking into account income tax and government transfer payments.

49. Fourth, the support of families through the wage packet is a recognised *human right*. The recognition of the support of families in the setting of minimum wages is evident in the *Universal Declaration of Human Rights*:

> "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection." (Article 23(3))

50. Fifth, the support of families is a requirement of the relevant international convention. It is found in the International Labour Organisation's *Minimum Wage Fixing Convention, 1970*, which has been ratified by Australia. Article 3 of the Convention recognises the interests of workers and their families and the relevance of general economic circumstances:

> "The elements to be taken into consideration in determining the level of minimum wages shall, so far as possible and appropriate in relation to national practice and conditions, include--
>
> the needs of workers *and their families*, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups;
>
> economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment." (Emphasis added)

51. Sixth, the adoption of a single person test for the adequacy of minimum wages is discriminatory and contrary to anti-discrimination laws because of its impact on workers with family responsibilities. This applies in the case of single-parent families and families where one parent works and the other does not seek paid employment in order to care for their children. To have wages fixed by reference to the more limited needs of the single workers without dependants places those who have family responsibilities at a disadvantage and discriminates against them.

52. Anti-discrimination obligations are found in a variety of regulatory schemes and have been instrumental in the development of a range of "family friendly" laws and

policies. The proposed subsection 153 (1) is an example this provision. It applies in respect of modern awards under Part 2-3, but no such provision is found in regard to the setting and varying of wages under Part 2-6. It reads:

> "A modern award must not include terms that discriminate against an employee because of, or for reasons including, the employee's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin."

53. These kinds of provisions might be breached in a variety of ways, such as by rostering and leave provisions. A provision in an award or an industrial agreement that does not enable the flexibility needed for workers to exercise their family responsibilities would be impermissible. More so, if the award or agreement was explicitly predicated on the workers being single and without dependants and not having family responsibilities. A wages policy that is predicated on the needs of the single person without dependants cannot be consistent with the protection of workers with family responsibilities.
54. A discussion of the rights of workers with family responsibilities and wages policies raise important issues about family relationships and the social support given to and needed by families. Major economic and social changes have impacted on the family, particularly in recent decades and there is now less reliance on a single wage. Much more frequently both parents work, often with one working part time. Furthermore, the increasing value of various government transfer payments to families has meant that low income families receive a significant part of their incomes from the public purse.
55. These social and economic changes do not affect the fundamental importance of providing parents with a choice about how they care for their children. The issue was usefully summarised in the major report of the Commonwealth's (Henderson) Commission of Inquiry into Poverty, published in April 1975. A major concern of the Inquiry was the extent of poverty among families supported by a full time low paid breadwinner. The Commission wrote the following in its review of the extent of poverty among families:

> "A further way in which many low income families are often placed under great stress is in relation to the freedom parents have to decide how they will divide their time between working, looking after children, and other activities. Because of financial pressures some parents are confronted with the choice of spending more time earning money and less time at home or struggling on an income below the poverty line….
> Some fathers compensate for their low wages by working more hours or working two jobs. In many instances this may create considerable pressure on parents and their children….
> Inadequate wages and pensions place considerable pressure on mothers to work…The mere fact of a mother working is not necessarily detrimental to the family. The relationship between a mother working and child development has been hotly debated in recent years, but the research on the subject has been inconclusive. The pertinent issue is the freedom of mothers to choose whether or not to work, so that each family can reach a solution which is satisfactory for its members. The pressure to work created by an inadequate income means that some mothers are less free to choose." (*First Main Report, April 1975*, volume 1, page 204, footnote omitted.)

56. This passage was written in the context of a higher proportion of stay-at-home mothers than is presently the case. Whether the changes since that time in workforce participation by mothers are the result of free choice or economic pressure is a matter of debate. However, the substantive point made in the passage remains true: parents should have the ability to choose that one of them will stay at home and care for the children and not engage in employment.

57. We emphasise that this is not a gender-specific issue. ACCER made this clear in its submissions to the AFPC's Minimum Wages Review 2008 on couple families in which one parent stays at home:

> "There are three important points to make about ACCER's view of the family wage. First, parents should have the effective right to choose that one of them will stay out of the employed workforce in order to care for their children. A corollary of this principle is that parents may decide that the interests of the family, and those of the children in particular, would be best served by both of them being employed. Second, the principle applies whether the breadwinner, or principal breadwinner, is male or female. Parents should be able to choose which one of them will be the breadwinner and which one of them will stay out of the employed workforce in order to care for their children. Third, where parents are out of the employed workforce for a substantial period of time in order to raise children there should be various kinds of training programs and other

> educational support to assist them to return to the workforce when they choose to do so." (Paragraph 17)

58. An effective choice by parents as to how they will exercise their responsibilities requires a "family wage", ie a wage which, after allowing for income tax and relevant government transfers, is sufficient to support the family at the minimum acceptable standard of living without the need for the second parent to undertake paid employment.