

Productivity Commission Inquiry into the Workplace Relations Framework

Submission by the Australian Catholic Council for Employment Relations

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Attachment: ACCER submission to the Senate Standing Committee on Employment and Workplace Relations, 20 September 2012

A. Introduction

1. This submission to the Productivity Commission's Workplace Relations Framework inquiry is made by the Australian Catholic Council for Employment Relations (ACCER). ACCER is an agency of the Australian Catholic Bishops Conference which provides the bishops with advice on employment relations issues and acts as a public advocate for good employment relations. One of its principal activities has been the advocacy of adequate safety net wages for low paid workers.
2. The Catholic Church employs over 180,000 employees through its many agencies across Australia. ACCER's advocacy is informed by the Church's experience as a major employer and as a major supplier of services in health, aged care, education and welfare throughout Australia. However, its advocacy on workplace relations issues is based on concern for the well being of workers, especially low paid workers and low income working families, as well as Catholic social teaching on work and the employment relationship. Catholic social teaching places great emphasis on the right of workers to wages that will support themselves and their families at a decent standard of living.

3. As a regular participant in annual national wage reviews ACCER has considered and responded to a number of issues regarding the provision of an adequate safety net for low paid workers and their families. ACCER's submissions to the Annual Wage Review 2014-15 are in preparation at the present time and are due to be filed by 27 March 2015. As those submissions will bear on some of the issues being considered by the Productivity Commission, ACCER seeks leave to file a supplementary submission to the current inquiry by 10 April 2015.

B. The living wage, *Harvester* and the right to decent wages

Harvester

4. The judgment of Justice Higgins in the *Harvester* case of 1907 (*Ex parte McKay* (1907) 2 CAR 1) is sometimes said to be the origin of the living wage principle and that the living wage principle was a uniquely Australian contribution to employment protection. Too much can be claimed for *Harvester*; but what is true is that *Harvester* made a major contribution to the *application* of the living wage principle which was being articulated and propounded around Australia and other industrialising societies at that time.
5. It is important to understand *Harvester* in its context and to see it as a manifestation of a desire by working people for a fair wage that would enable them to live in dignity. To think of it only as a formula (a wage for a workman, his wife and three children), as some do, is to misunderstand history and the real basis for Australian wage setting.
6. *Harvester* was not a minimum wage case, as such, but a case concerning exemptions from excise duties. Employers were able to gain exemptions if they paid fair and reasonable wages to their employees. Justice Higgins addressed that issue and determined an appropriate amount. In the following year the *Harvester* ruling was adopted by the Australian Court of Conciliation and Arbitration in settlement of an industrial dispute.
7. The term "living wage" was not used in the *Harvester* judgment, but the wage that was found to be the fair and reasonable minimum wage was applied in subsequent wage-setting cases and came to be known through subsequent usage as the living wage, or the basic wage. The living wage was debated, applied and increased over the following years. The early history of the spread of the living wage through wage-setting decisions is found in Justice Higgins' article *A New Province for Law and Order: Industrial Peace through Minimum Wage and Arbitration*, published in the *Harvard Law Review*,

in November 1915 (at vol. 29, pages 13-39). The setting of minimum wages in Australia has been underpinned by the living wage principle.

The historical context

8. The living wage principle has a long history in public discourse and public policy as well as in wage-setting decisions. The living wage was pursued in Australia and other nations in the late nineteenth century in response to widespread "sweating" and social deprivation. In the late nineteenth century sweating by low pay and long hours was a serious social problem and a major political issue in industrialising nations. The living wage was a response to that social condition. The living wage was both a guiding principle and a goal to be achieved through legislation. The living wage principle propounded a right to laws that would enable the worker and the worker's family to live in dignity.
9. On 26 August 1882 *The Sydney Morning Herald* (at page 5) carried a report about the "great freight handlers' strike" in the United States and the workers' grievance that they were not being paid a "living wage". On 9 December 1893 *The Sydney Morning Herald* (at page 5) reported that a "conference of representative Christians is shortly to be held in London to discuss the living wage and the actions which should be taken by the various sections of the Christian church, with a view to putting an end to, or at least diminishing the evils of the present system of industrial warfare. Among those who have consented to take part in the conference are Cardinal Vaughan, the Bishop of Ripon, Archdeacon Farrar, and several of the Presidents of the Nonconformist Unions". *The Catholic Press* of 14 November 1896 advised that the St James' Glebe Point debating society had accepted a challenge from the Paddington Society for a debate at St Francis' Hall in Oxford St. on the question "That the condition of the people would be improved by the adoption of the minimum or 'living' wage principle".
10. In 1909 Winston Churchill introduced into the House of Commons legislation to establish wages councils with the statement "It is a serious national evil that any class of His Majesty's subjects should receive less than a living wage in return for their utmost exertions" (*Hansard*, House of Commons, 28 April 1909). The legislation was based on a report about the operation of minimum wage setting arrangements which were already in operation in Australia and New Zealand at the time of *Harvester*.
11. In the United States *A Living Wage* was published in 1906. It was a substantial work by Fr. John A Ryan, a Catholic priest who later, as Monsignor Ryan, played a

significant role in the formulation of New Deal employment policies. In the Preface to the book, which was subtitled *its ethical and economic aspects*, Fr Ryan wrote:

"This work does not profess to present a complete theory of justice concerning wages. It lays down no minute rules to determine the full measure of compensation that any class of laborers ought to receive. The principles of ethics have not yet been applied to the conditions of modern industry with sufficient intelligence, or confidence, or thoroughness, to provide a safe basis for such an undertaking....

Upon one principle of partial justice unprejudiced men are, however, in substantial agreement. They hold that wages should be sufficiently high to enable the laborer to live in a manner consistent with the dignity of a human being.....

While insisting that every laborer has a right to at least a Living Wage, the author does not commit himself to the view that this quantity of remuneration is full and adequate justice in the case of any class of laborers. His concern is solely with the ethical minimum."

12. The purpose of this eclectic collection of historical events is to illustrate that the living wage principle pre-dated *Harvester* and was not, as some might think, a uniquely Australian aspiration born of *Harvester*. This is not to limit the contribution that *Harvester* made to the framing of workplace rights. The point about the living wage principle is that it is universal, it is concerned with decent standard of living and it seeks the support of families through a wage that recognises the obligations of workers with family responsibilities.
13. The living wage promotes the common good because it provides economic support for the nurturing of children, enables social participation and social inclusion of workers and their families and promotes social cohesion.
14. The living wage is not a term of another era, but one that still has wide resonance around the world in countries as diverse as the United States and Bangladesh. It will be invoked and campaigned for wherever there is no minimum wage protection or where a legal minimum wage fails to meet the ordinary needs and modest expectations of workers and their families. It is the guiding principle for advocacy and action in advanced and developing economies.

Human rights

15. The living wage principle came to be enshrined in the *Universal Declaration of Human Rights*, which recognises that 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)). The United Nations' *International Covenant on Economic, Social and Cultural Rights*, recognises a universal right "...to the enjoyment of just and

favourable conditions of work which ensure, in particular: ... Remuneration which provides all workers, as a minimum, with ... Fair wages and... A decent living for themselves and their families” (Article 7(a)). The covenant is one of the two major conventions giving effect to the rights identified in the *Universal Declaration of Human Rights* and has been ratified by Australia.

16. The recognition of these rights necessarily involves the protection and support of children. When the *Universal Declaration of Human Rights* declares the right of workers to an existence worthy of human existence, it is recognising a right of those who depend on workers to share in that fundamental right. In 1945, when close attention was being given to the nature and articulation of human rights, the International Labour Organisation conference adopted a resolution concerning the protection of children and young persons. The resolution provided that:

“[all necessary measure should be taken] to assure the material well-being of children and young persons by...the provision of a living wage for all employed persons sufficient to maintain the family at an adequate standard of living” (*Resolution concerning the Protection of children and young workers*, 4 November 1945, paragraph 5(b)).
17. The living wage identified in that resolution was a wage that would maintain the family at an adequate standard of living.
18. The living wage principle, like the terms of the *Universal Declaration of Human Rights* and the *International Covenant on Economic, Social and Cultural Rights*, does not provide a fixed formula that will apply to all economies and societies. When a fair trade advocacy group advocates for workers in developing countries to be paid a living wage for producing goods that are exported to Australia, they are advocating for a wage that will enable the workers and their families to live in dignity within their society.
19. Any policy deliberation about the minimum wage should take full account of the human rights dimension. That dimension has been increasingly recognised over the decades. One manifestation of this is the acceptance that people have a right to participate in their societies. In commenting on basic justice in a Pastoral Letter issued in 1986 the National Conference of Catholic Bishops of the United States said:

"These fundamental duties can be summarized this way: *Basic justice demands the establishment of minimum levels of participation in the life of the human community for all persons.* The ultimate injustice is for a person or group to be treated actively or abandoned passively as if they were non members of the human race. To treat people this way is effectively to say they simply do not count as human beings. This can take many forms, all of which can be described as varieties of marginalization, or exclusion from social life... These patterns of exclusion are created by free human beings. In

this sense they can be called forms of social sin. Acquiescence in them or failure to correct them when it is possible to do so is a sinful dereliction of Christian duty.

Recent Catholic social thought regards the task of overcoming these patterns of exclusion and powerlessness as a most basic demand of justice. Stated positively, justice demands that social institutions be ordered in a way that guarantees all persons the ability to participate actively in the economic, political, and cultural life of society. The level of participation may legitimately be greater for some persons than for others, but there is a basic level of access that must be made available to all. Such participation is an essential expression of the social nature of human beings and their communitarian vocation. (*Economic Justice for All*, 1986, paragraphs 77-8, footnotes omitted, italics in original.)

20. This passage speaks about what we now call social inclusion. Social inclusion is a fundamental objective of the *Fair Work Act*. Section 3 provides:

"The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians...."

21. The object of social inclusion calls attention to the requirement to promote the ability of workers and their families to live in dignity and participate in society. The provisions in the *Fair Work Act* dealing with the setting and fixing of the National Minimum Wage (NMW) should be treated as beneficial legislation and should not be construed or applied narrowly.

Giving effect to human rights

22. The practical application of these human rights and the living wage principle requires the proper consideration of a range of factors, personal and community, social and economic. The International Labour Organisation's *Minimum Wage Fixing Convention*, 1970, also ratified by Australia, brings together a range of factors that need to be considered:

"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--

- (a) 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;
- (b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment."

23. Section 3 of the *Fair Work Act* sets out a number of particular objectives of the legislation, including that it takes into account "Australia's international labour obligations". This requires serious attention to the rights in the *International Covenant*

on *Economic, Social and Cultural Rights* and the obligations set out in the *Minimum Wage Fixing Convention, 1970*. Those matters mean that the position and protection of workers with family responsibilities must be an essential part of the setting of a minimum wage. Setting wages by reference to the position of a single worker is inconsistent with human rights and the intention of Parliament to have the wage setting system take into account Australia's international obligations.

24. These kinds of matters are taken into account in the current Australian legislation. Section 284(1) of the *Fair Work Act 2009* provides the basis upon which the Fair Work Commission (FWC) must exercise its wage setting function:

“The FWC 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
- (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*” (Italics in original)

C. The temporary loss of fairness in wage setting

25. Under the *Work Choices* amendments in 2005 to the national employment laws the wage setting function was exercised by the Australian Fair Pay Commission (AFPC) under statutory provisions that made no reference to the setting of a fair wages safety net. The significance of the AFPC's charter was referred to in a paper by the former Chairman of the AFPC, Professor Ian Harper, after the abolition of the AFPC by the *Fair Work Act 2009*:

“Notwithstanding the name of the [Australian Fair Pay] Commission, the words ‘fair’ and ‘fairness’ did not appear among the criteria governing the powers of the AFPC. The closest the law came to obliging the Commission to consider distributional aspects of minimum wage-setting (i.e. the ‘needs’ or living standards of low paid workers) was the requirement to have regard to the provision of a safety net for the low paid. This was in stark contrast to the wording of the prior legislation and to the current *Fair Work Act*, which explicitly directs the AFPC’s successor (the Minimum Wages Panel of Fair Work Australia) to establish ‘fair’ minimum wages. Nor was there any express reference to the living standards or needs of the low paid, as there had been in prior legislation, and as there is now, reflecting the influence of the original *Harvester Judgement* and Justice J.B.Higgins’ notion of the ‘basic living wage’.”

(*Why Would an Economic Liberal Set Minimum Wages?*, Policy, Vol. 25 No. 4, 2009, page 4.)

26. By contrast to the *Work Choices* system, the pre-2005 provisions, introduced under the Coalition Government in 1996, required the Australian Industrial Relations Commission (AIRC) to set fair wages. Section 88B(2) of the *Workplace Relations Act 1996* required the AIRC to:

"...ensure that a safety net of fair minimum wages and conditions of employment is established and maintained, having regard to the following:

- (a) the need to provide fair minimum standards for employees in the context of the living standards generally prevailing in the Australian community;
- (b) economic factors, including levels of productivity and inflation, and the desirability of attaining a high level of employment;
- (c) when adjusting the safety net, the needs of the low paid."

27. When the *Workplace Relations Amendment (Work Choices) Bill 2005* was before the Senate in November 2005 the Australian Catholic Bishops Conference issued a Statement in relation to aspects of the proposed changes to workplace legislation. A number of the matters are relevant to the productivity Commission's inquiry into the Workplace Relations Framework. Relevantly to the minimum wages issue, it stated:

"The Commonwealth Government's proposals for reforms to Australian employment law have prompted wide debate throughout the country. It is a debate that has caused many of us to reflect on the fundamental values that should underpin our workplaces and society as a whole.

Economic growth is needed to provide prosperity and economic security for all and to provide equity and social cohesion. Economic growth is needed to enhance social justice.

Catholic Social Teaching

The Catholic Bishops of Australia have been scrutinising the religious and ethical implications of the Commonwealth Government Workplace Relations Amendment (Work Choices) Bill (2005). Given the fact that the Catholic Church is a major employer in Australia, this legislation is of particular interest to us. We are guided by our own social teaching that offers us ethical principles and terms of reference.

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.

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.

Catholic Social Teaching recognises and supports a proper balance between the rights and responsibilities of employers and workers. The terms of employment cannot be left wholly to the marketplace. The responsibility of government is to ensure that there is a proper balance between respective legal rights, especially when bargaining positions are not equal.

Our Concerns

Does the proposed national system of employment regulation include the objectives of employment growth, fair remuneration and security of employment? Does it promote truly cooperative workplace relations and ensure the protection of the poor and the vulnerable?

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.

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.

....

Conclusion

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.

28. ACCER urges the Productivity Commission to consider and apply these principles in this inquiry,
29. There are a number of important points made in this Statement, including the point made in *Laborem Exercens* by St John Paul II about the rights of workers and the scourge of unemployment. The bishops state that 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. It is not

morally acceptable because there are other ways to address the challenges raised by unemployment, matters that are within the role of government. In particular, a morally acceptable wages policy calls for a morally acceptable national budget, with the burdens and benefits being shared according to needs and capacities.

30. This is the context in which we welcomed the *Fair Work Act* reforms to national wage-setting system, reforms which were, in substance, the same as those introduced by the Coalition Government in 1996.

D. The single person test

31. We welcomed the *Fair Work* reforms of 2009, but we have been critical of the wage outcomes of that system. In 2014 ACCER reflected on past wage decisions in the following terms:

"The FWC has been faced with compelling evidence of widespread poverty among low paid workers and their families. It has apparently accepted the substance of the evidence, but has failed to take any action to target poverty." (ACCER submission, March 2014, paragraph 17)

32. The FWC's decision in June 2014 made it clear that it was not going to target poverty among low paid workers and their families. Rather, it decided that the "appropriate reference household for the purposes of setting minimum wages is the single person household"; *Annual Wage Review 2013-14*, [2014] FWCFB 3500, at paragraphs [38], [365] and [373].
33. This was the first time in more than a century of minimum wage setting in Australia that an industrial tribunal had decided that minimum wages should be set on that basis, thereby excluding considerations of the needs of workers with family responsibilities. ACCER has given notice that it will argue in the submissions due by 27 March 2015 that the decision was contrary to law. It expects that the FWC's response and reasons will provide the basis upon which any aggrieved party can seek judicial review.
34. In the third of its references to the single person test the FWC referred to the written submission of the Australian Council of Social Services (ACOSS):

"[373] We note also that ACOSS adopted the position that the appropriate reference household for the purposes of setting minimum wages is the single person household [footnote] rather than couple households with children. This is also our view."
35. The footnote in this passage is "ACOSS submission at p. 6". However, the ACOSS position was not as it was described by the FWC. The relevant passages in the ACOSS submission are:

"Decisions on the level of minimum wages should be informed by 'benchmark' estimates of the cost of attaining a 'decent basic living standard' for a single adult according to contemporary Australian standards.

The combined effect of the minimum wage and family payments on the extent of poverty among families should also be taken into account in setting minimum wages." (ACOSS submission page 6.)

36. The ACOSS position has been advanced for a number of years, along with concern about the extent of poverty among working families. As the passage makes clear, ACOSS has sought the protection of families against poverty. This position has been a point of difference between ACOSS and ACCER. ACCER has argued that families should not only be protected against poverty, but they should have an acceptable standard of living, which would be substantially above poverty.
37. This is not a situation where a simple choice has to be made between a single person and couple households with children. ACCER had not argued that it was. The purpose of the legislation, consistent with the living wage principle, is to provide a fair safety net for those who need to be protected.
38. The term "safety net" is not defined in the legislation. The term must be given its ordinary meaning in the context of other provisions and the purpose of the legislation. As beneficial legislation it should not be construed or applied narrowly.
39. The purpose of a safety net is to protect workers in the ordinary and expected situations in which workers find themselves. The safety net does not have to cover exceptional cases, but it must cover ordinary and expected circumstances. These situations will cover single persons, workers who are sole parents and workers with a partner and children. We do not, therefore, exclude the position of the single person from consideration, but we know that given the level of transfers available to families, families will be in greater need of the safety net.
40. In the contemporary Australian context, having two children is within the scope of the ordinary and expected situation. A safety net wage must be sufficient to support families with two children, whether the family is headed by a couple, where one of them stays at home to remain outside the paid workforce in order to care for their children, or by a sole parent in employment, and incurring child care expenses. It would not be acceptable to set a wage that is sufficient for one of these families, but not for the other. A safety net designed for single workers cannot be a safety net for workers with family responsibilities.
41. For more than a century Australian minimum wage decisions had taken into account the family responsibilities. Two cases illustrate this history. In 2004 the AIRC said:

"Whilst a significant proportion of Australian families continue to rely upon a single wage as their sole source of income, the needs of single income families will continue to be relevant in connection with a consideration of the needs of the low paid." (*Safety Net Review Case, 2004*, PR002004, italics in original)

42. The concluding sentence of this paragraph is significant. Not only did it reinforce the position that the needs of families would be taken into account when setting wages, but that the AIRC would take into account the position of single breadwinner families.
43. In the *Annual Wage Review 2013-14*, ACCER produced data from the national Census of August 2011 which showed the employment profile of low income couple parent families with two children. The data included families with a reported disposable income that would have been below the 60% relative poverty line. Within this group the percentage of single breadwinner families was greater than the number of families with two breadwinners by a margin of almost two to one; see ACCER submission, March 2014, Table 32.
44. The AFPC also took into account the family responsibilities of workers. Under the heading "Providing a safety net for the low paid" in its July 2009 decision, the AFPC said:

"The Commission maintains its view that the income safety net is provided by the combination of minimum wages and the tax/transfer system, with the Australian Government responsible for the latter. This is consistent with Article 3 of the International Labour Organisation (ILO) C131 *Minimum Wage Fixing Convention, 1970* (ratified by Australia in 1973), which lists social security benefits in the range of factors to be considered in determining minimum wage levels." (*Wage-Setting Decision and Reasons for Decision, July 2009*, page 50)
45. This was reinforced in the following paragraphs where the AFPC discussed the submissions put to it and the need for it to set wages having regard to the impact of changes in the tax/transfer system. It stated that "information on recent trends in the disposable incomes of households reliant on minimum wages, either solely or in combination with income transfers, is relevant to its deliberations" (page 52).
46. The interaction of wage and transfers has been the subject of little public discussion. However, there was substantial public discussion following the publication in *The Australian* in October 1998 of the "Five Economists" letter to Prime Minister Howard. The writers proposed a plan that included:

"Replacing Living Wage adjustments, for the time being, with tax credits for low wage earners in low income families (to be done in a way that reduces effective

marginal tax rates for low income families)." (*The 'Five Economists' Plan: The Original Idea and Further Developments*, Peter Dawkins, Discussion Paper No. 450, Centre for Economic Policy Research, November 2002, page 1.)

47. This proposal is referred to in the Productivity Commission's *Issues Paper 2* (at page 7). It is a matter worthy of some consideration, but it has not had a substantial impact on the course of wage setting decisions, budgetary decisions or public discourse. Although there have been some significant increases in transfer payments since 1998, they have been driven by factors other than a desire to get a better balance between the public purse and the wage packet.

E. The wage packet and the public purse

48. The *Minimum Wage Fixing Convention* recognises that some of the needs of workers and their families will be met by social security benefits. This provision recognises the substantial extension of the social safety net in many countries over the course of the 20th century. The living wage principle was developed in a world where workers and their families were utterly dependent on the wage packet and it has adapted to the changes. Family payments grew slowly in Australia until the 1970s, but have increased substantially since then.
49. The work of the Commonwealth Commission of Inquiry into Poverty, under the chairmanship of Professor Ronald Henderson, in the early 1970s made an important contribution to family policies in Australia and the articulation of the values that should underpin them. In part, the inquiry arose out of a widespread concern that many families were living in poverty, even when they were being supported by a full time breadwinner. One of its recommendations was to change the family payments system so as to provide greater Commonwealth support for low income families. The substance of this proposal was taken up in the late 1970s and early 1980s by successive governments.
50. In 1973 family transfers were limited. A single breadwinner couple with two children, where the breadwinner was on the lowest wage rate, had a disposable income that was 8.3% more than the single worker on the same wage rate. By January 2001 the family's disposable income margin over the single person had risen to 45.3%; and by January 2014 it had risen to 52.0%. The relevant data for these figures is in Table 11 of ACCER's submission of March 2014 to the *Annual Wage Review 2013-14* and are based on the children being 8 and 12 years of age with one in primary school and the other in secondary school. If we add in rent assistance, which was not available in 1973 but introduced before 2001, the 2014 margin rises to 64.8%. A sole parent with

two children (in the same age group as in the couple family) receives the same amount of family support and has the same disposable income if employed on the same rate as the breadwinner in the family of four.

51. This trend has had a major impact on single workers in Australia. This can be illustrated by relative movements in the net wage of the lowest paid adult and in Household Disposable Income per head (HDI) as calculated by the Melbourne Institute of Applied Economic and Social Research (Melbourne Institute); see *Poverty Lines: Australia, September Quarter 2014* and Table 11 of ACCER's March 2014 submission. HDI in December 2013 was 15 times the September 1973 figure, compared to an increase in disposable income for the single worker of 10.5 times. The extent of overcompensation of single workers in a minimum wage rate based on the need to support workers with family responsibilities has decreased remarkably. The cost of this has been carried by the taxpayers through higher taxes, but single workers have paid a price. The change has had social consequences for young workers, impacting on their capacity to save and prepare for future family life.
52. Although substantial, these transfers are insufficient to support the worker's dependants. They are not intended to remove the need for the wage packet to provide substantial family support. Furthermore, the current and prospective circumstances of the Commonwealth's current fiscal position will not permit it to fully undertake this responsibility.
53. The Commonwealth Government also takes the view that the transfers are for the partial support of families. The Treasurer, Mr Hockey, said in his Budget Speech on 13 May 2014:

"Unlike pensions, which are an income replacement payment, family payments are an income supplement to help with *some* of the costs of raising a family" (Emphasis added)
54. The single person test was announced three weeks later. Under the last two Budgets various measures have been proposed to reduce the amount of transfers to low and middle income families. It is likely that, over the next few years, family transfers will comprise a smaller proportion of the disposable incomes of many Australian families. The Schoolkids Bonus will cease at the end of 2016. In the case of a family with a child at primary school and another at secondary school, the loss will be \$23.57 per week.
55. The still unresolved proposal in the Budget to effectively remove Family Tax Benefit Part B from sole breadwinner families with school age children, but none of pre-school

age, would reduce family payments for low income couple parent families by more than \$50.00 per week.

56. This means that wages will be required to contribute a greater proportion to family budgets. Unless wages are increased to reflect this reality, poverty will increase beyond its current unacceptable level.

57. The FWC was aware of these potential consequences for the family. It stated:

"[38] We note that a number of the proposed changes to tax-transfer payments announced in the 2014–15 Budget will particularly impact on families, rather than individuals. The appropriate reference household for the purposes of setting minimum wages is the single person household, rather than the couple household with children. For this reason, it should not be assumed that the tax-transfer payments announced in the Budget will automatically be taken into account in determining the level of the increase in next year's Review."

"[365] We note that a number of the proposed changes to the tax-transfer system will particularly impact on families, rather than individuals. The appropriate reference household for the purposes of setting minimum wages is the single-person household rather than the couple household with children. For this reason it should not be assumed that the tax-transfer payments announced in the 2014–15 Budget will be automatically taken into account in determining the level of the increase in next year's Review."

58. At the very point where the declining support of families was foreshadowed, in the full knowledge of that change, the FWC decided that the needs and the living standards of workers with family responsibilities should be excluded from any consideration in the setting of wages.

59. An economic case can be made for a change in the balance between wages and transfers in the support of families by increasing transfers, but any decision to increase family support requires funding; and the political will to do it in tight budgetary conditions. This is a matter of some importance to the productivity Commission's inquiry: given that workers and their families need to be protected against poverty, what financial support is required of the wages safety net and the social security safety net?

F. Poverty among low income working families

60. Despite very substantial evidence being put to the FWC, poverty was not even mentioned in the *Annual Wage Review 2011-12* decision of June 2012. In the June 2013 decision poverty was canvassed, with the following important observation:

"Low-paid employment appears to contribute more to the total numbers in poverty than does unemployment". (*Annual Wage Review 2012-13*, decision, paragraph [408])

61. Despite the need for poverty to be targeted, all wage rates were increased by 2.6% in the June 2013 decision. The FWC appeared to be unmoved by the extent of poverty. In the following review ACCER submitted:
- "The FWC has been faced with compelling evidence of widespread poverty among low paid workers and their families. It has apparently accepted the substance of the evidence, but has failed to take any action to target poverty." (ACCER March 2014 submission, paragraph 17.)
62. In March 2014 ACCER presented calculations on the position of various low income safety net-dependent families relative to the poverty line and how their positions had changed over the previous decade; see ACCER March 2014 submission, paragraph 118 and Chapter 7C of the attachment. Over the decade January 2004 to January 2014:
- The NMW-dependent family of four fell further into poverty: from 3.3% below to 10.0% below, with a poverty gap of \$104.25 per week;
 - The C12-dependent family of four fell into poverty: from 1.7% above the poverty line to 6.7% below it, with a poverty gap of \$69.74 per week; and
 - The C10-dependent family of four fell into poverty: from 7.6% above to 2.3% below, with a poverty gap of \$23.68 per week.
63. In the same submission ACCER referred to a Productivity Commission Staff Working Paper, *Deep and Persistent Disadvantage in Australia*, which was published in July 2013. This paper seeks to understand and measure the personal cost of disadvantage for the individual and the consequent costs to society. ACCER drew a comparison between its content and with the content of past wage decisions, saying that the Productivity Commission's Staff Working Party
- "... raises a number of issues and points that should also be the concern of the FWC, charged as it is with promoting social inclusion through a fair wages safety net that takes into account relative living standards and the needs of the low paid. Yet the history of wage-setting for more than the last decade has seen very little interest in the kind of questions being tackled in this paper. It is hard to find in past wage decisions any substantial concern by the successive tribunals that the wages that they have set may be contributing to the unacceptable degree of disadvantage in Australia." (ACCER submission to the Annual Wage Review 2013-14, March 2014, Attachment, paragraph 560.)
64. This is a very substantial criticism, which we do not seek to qualify in the light of the June 2014 decision.

65. In the June 2014 decision poverty was again canvassed in the FWC's decision, with another important conclusion:
- "[399] Single-earner families that receive the NMW or a low award rate have had declines in their equivalent real disposable income, to the point where today a couple with two children would be in poverty as conventionally measured. Households that rely on earnings as their principal source of income comprise about one-third of all families below a 60 per cent median poverty line."
66. It was in the context of this finding that the FWC stated the "appropriate reference household for the purposes of setting minimum wages is the single person household". This was not a case of the FWC being required by the legislation to adopt a position that would leave families in poverty. It must have been a policy decision. We can only speculate on the reasons for the decision because no reasons were given for the change; nor was notice given.
67. We accept that there may be debate about the appropriateness of the poverty line being set at 60% of median. The 50% of median poverty line is also used in a number of studies in Australia and overseas. An empirically tested needs-based poverty line, of the kind originally developed by Professor Henderson and his colleagues in the 1960s, would most likely fall within this range. There is only limited evidence in Australia that could identify an empirically determined needs-based poverty line. The best evidence about the needs of low income individuals and families is in the Budget Standards research by the Social Policy Research Centre (SPRC) at the University of New South Wales; but that material does not set out to find a poverty line, as such. The SPRC is currently undertaking a revision of the budgets which were calculated in the mid-1990s. In the absence of this kind of material, we should continue to use the FWC's conventional measure of poverty, i.e. the 60% of median poverty line.
68. The Productivity Commission Staff Working Paper explains and elaborates on poverty and disadvantage in Australia. However, the report does not deal with in-work poverty and disadvantage, perhaps because the emerging poverty and disadvantage in the workforce, which is well-known within limited circles, has not been given due recognition in public discussion and debate. One of the Productivity Commission's tasks in its current review of minimum wages, we suggest, should be to examine this phenomenon.
69. The Staff Working Paper provides the reasons for the engagement by the Productivity Commission (and government as a whole) in issues regarding disadvantage. Similar reasons also apply in regard to in-work poverty. The paper explains:

“There are a number of reasons why policy makers need a better understanding about the nature, depth and persistence of disadvantage.

1. There is a high personal cost from disadvantage. People can suffer financially, socially and emotionally, have poor health and low educational achievement. Family, particularly children, and friends can also be affected. Given that key objectives of public policy are to improve the lives and opportunities of Australians (both today and in the future), it is important to find ways to reduce, prevent and ameliorate the consequences of disadvantage.
2. Disadvantage reduces opportunities for individuals and society. By addressing disadvantage, more Australians can be actively engaged in, and contribute to, the workforce and to society more generally. Higher levels of engagement typically lead to higher personal wellbeing — improved living standards and quality of life.
3. Disadvantage has wider consequences for Australian society. For example, persistently disadvantaged communities can erode social cohesion and have negative social and economic consequences for others. Overcoming disadvantage can lead to safer and more liveable communities.
4. Support for people who are disadvantaged and the funding of programs to overcome disadvantage involves large amounts of taxpayers’ money and private funding. Policy relevant questions include: what are the most effective investments for reducing and preventing disadvantage; and what are the costs and benefits?” (Page 28)

70. In the 2012 Social Justice Statement issued by the Australian Catholic Bishops, *The Gift of Family in Difficult Times: The social and economic challenges facing families today*, summarised the position of families in these terms:

“It is a concern, therefore, that in our prosperous nation many families are facing social and economic pressures that threaten their survival: they are struggling to meet the costs of raising a family, to live in dignity and to contribute to the genuine development of their members. There is an urgent need to address the social and economic structures that influence the formation, unity and healthy functioning of families.” (page 3, footnote omitted.)

71. The Social Justice Statement referred to the increasing frequency of families turning to charities for assistance for essentials like rent and prescriptions even where they have one or more members in paid work (page 10). In regard to minimum wages and income support payments, the Statement concludes: “Our concern is to ensure a decent life for all parents with family responsibilities and all children whether they live with one, both or neither of their parents” (page 10).
72. ACCER has shown that low income safety net-dependent workers have fallen behind rising national living standards to such an extent the NMW and other low paid minimum wage rates have left increasing numbers of families in poverty. The NMW is

not a living wage because many families are now living in poverty. This is not an observation about unusual cases, but an observation about how the NMW impacts on the *ordinary and expected* circumstances in which workers with family responsibilities live. A living wage is not a wage that merely keeps the worker and his or her family out of poverty in the ordinary and expected cases, but one that provides them with a basic acceptable standard of living that enables them to live in dignity. So the absence of poverty in these cases is a necessary, but not sufficient, requirement for the application of the living wage principle.

G. A tool for analysing wages, fairness and poverty

73. The most useful tools for analysing relative living standards and estimating needs are the relative poverty lines, first introduced by the AFPC in its July 2008 decision: see *Wage-setting Decision and Reasons for Decision*, July 2008, page 67, Table 4.5. That work has been updated and extended and the latest version is available in the FWC's *Statistical Report* of 5 March 2015 at Table 8.2.
74. The publication over the last two decades of comprehensive national data on incomes and income distribution has provided the basis for more informed public policy on wages and income support policies. The developments in data collection and international standards over the past couple of decades have made relative poverty lines increasingly useful for social analysis and the formulation of public policy.
75. Australian Bureau of Statistics (ABS) data collection and analysis on these and associated matters have been collated and published in accordance with international standards. There is a considerable body of learning on these matters. The basic resource material is found in the *Canberra Group Handbook on Household Income Statistics*, published in 2011 by the United Nations Economic Commission for Europe. As the name suggests, the ABS was instrumental in developing this publication and its antecedents.
76. The figures in paragraph 62 regarding the extent of in-work poverty and its change over the decade 2004 to 2014 are drawn from the FWC's material, underpinned by the ABS research and standards. They are based on the ABS report *Household Income and Distribution, 2011-12*, published in August 2013. The next publication in this series will be released in August 2015, based on a survey conducted in 2013-14. In order to update past figures, the AFPC and the FWC have used movements in HDI, as calculated by the Melbourne Institute in its quarterly publication, *Poverty Lines, Australia*; see paragraph 51, above. The next publication will require the re-setting of

those calculations, by reference to the ABS's latest survey, but the re-set figures will still need to be supplemented by movements in the HDI.

77. Poverty lines are drawn from ABS data on the level of, and changes to, median equivalised disposable household income (MEDHI). The FWC's poverty line calculations can be used to calculate MEDHI for various kinds of households. Rather than plot the position of groups relative to a poverty line, we can plot their position and changes over time by reference to MEDHI. For example, in January 2014 the NMW-dependent family of four was 10.0% below the 60% of median poverty line, or 54% of MEDHI.
78. MEDHI enables comparisons of living standards across different kinds of households. In January 2014 a couple on the age pension were at 55.1% of MEDHI, the single pensioner was at 57.8% of MEDHI and a sole parent on a disability pension with two children (of the same age as the children in the family of four) was on 58.5% of MEDHI. All of these families were below their 60.0% of median poverty lines. All had a higher standard of living than the NMW-dependent family, especially when taking into account the costs of work for the breadwinner in the family of four.
79. These are important comparisons in regard to equity as between those on the wages safety net (supplemented by the social security safety net) and those who are exclusively on the social security safety net.
80. The current inequity for wage earners is a product of the fact that minimum wage increases have lagged behind the pension. This is illustrated by the changes following the reforms to pensions in 2009 when the pensions system was reformed on the basis of proving a "basic acceptable standard of living". From January 2010 to January 2014, pension rates increased by 23.1% and the NMW increased by 14.4%. The main cause of this difference has been the disconnection of safety net wages from movements on average weekly earnings, while the pensions system has been linked to those movements. Over the period January 2001 to January 2014, Average Weekly Ordinary Time Earnings increased by 80.0%, while the NMW increased by only 55.4%. Over the same time periodic pension payments for the single pensioner rose by 105.5%; and for the couple on pensions the increase in periodic payments was 87.1%; see Tables 10 and 21 of ACCER's March 2014 submission to the *Annual Wage Review 2013-14*.
81. These kinds of comparisons of changes and current levels have important policy implications. However, they do not disclose all of the relevant factors in assessing relative living standards, equity between groups that receive full or partial support from

the Commonwealth and good public policy. A better measure takes into account taxes and transfers. This is the contribution that MEDHI is able to make to wages policy and public policy more generally.

82. ACCER submits that MEDHI should be a major reference point for the assessment of relative living standards and the formulation of wages and social security policies. However, it is clear that further work needs to be done on the appropriateness of the equivalence scales when using MEDHI in some particular situations; for example, the equivalence scales used for a sole parent do not include the costs of child care and, more generally, the costs of work incurred by working households are not taken into account by the equivalence scales. We expect that these are matters on which the ABS would have considerable material and expertise. We propose that the Productivity Commission arrange for consultations with the ABS, with the opportunity for participation by relevant interest groups.

H. Penalty rates

83. The Productivity Commission's *Issues Paper 2* refers to penalty rates and raises some questions about the nature and operation of award penalty rate provisions. Penalty rates are *premiums* paid to workers for working in unsocial hours. The Australian minimum wage system has provided compensation for this kind of work in the form of special payments, reflecting the actual incidence of the detriment, rather than compensation being rolled into the wage rates. This provides equity as between employers and workers within the workplace and an industry: by compensating the workers who suffer the detriment and by requiring only the employers who operate within the relevant hours to pay the premium.
84. We expect that the issues that will be raised in submissions to the Workplace Relations Framework inquiry will be similar to those raised in regard to a Bill introduced into the Senate in 2012 by Senator Xenophon; *Fair Work Amendment (Small Business-Penalty Rates Exemption) Bill 2012*. The Senate Standing Committee on Employment and Workplace Relations called for submissions on the Bill. ACCER lodged a submission, which is the Attachment hereto.
85. We referred earlier to the Australian Catholic Bishops' 2005 Statement on the then proposed *Work Choices* legislation. One of the matters of concern to the bishops was penalty rates and the risk that they could be bargained away by workers. Under the heading "Minimum Conditions and Bargaining the Statement read:

"11. 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.”

86. On 4 June 2007 Prime Minister Howard announced that the *Work Choices* legislation would be amended to protect various award conditions and ensure that they could not be bargained away without adequate compensation. His statement, *A Stronger Safety Net for Working Australians*, read, in part:

“It was never the Government’s intention that it should become the norm for penalty rates or other protected conditions to be traded off without proper compensation.

The Government understands there is some concern in the community that the removal of penalty rates and other protected conditions without fair compensation might occur, with adverse consequences for final take-home pay. Therefore the Government is today unveiling a stronger safety net for working Australians with the introduction of a Fairness Test that will guarantee that entitlements such as penalty rates and public holiday pay are not traded off without adequate compensation.”

87. This statement effectively brought about a bi-partisan position on penalty rates, albeit one that was not shared by some employers. That bi-partisan position reflects a common view that weekends are not ordinary working days and that work on those days is work in unsocial hours; and this is so even if some occupations (such as policing, nursing and hospitality work) have to work on weekends. Similar considerations also apply in relation to shift work and work on public holidays. The attacks that have been made on penalty rates target the lowest paid and most vulnerable workers in hospitality, retail and cleaning services.
88. ACCER relies on the matters set out in the attached submissions to the Senate Standing Committee. In particular, it relies on the matters under the headings dealing with:
- The Bill fails to recognise the detrimental impact of unsocial working hours
 - The Bill proposes unfairness and discrimination
 - The rationale of the Bill is not supported by evidence or economic analysis
 - The Bill proposes a morally unacceptable means of promoting employment opportunities.

I. Conclusion

89. ACCER submits that any policy proposal in regard to minimum wages has to be tested and considered by reference to its impact on the common good and the protection of workers and their families against poverty and social exclusion. The best way out of poverty is a job that pays a living wage.
90. This task cannot be undertaken unless and until an assessment is made of the needs of workers and their families and an assessment is made of the actual and minimally acceptable relative living standards of those workers and their families who depend on the lowest minimum wage rates. They are entitled to be treated fairly and to live in dignity.
91. The kind of objectives in the previous paragraph cannot be supplied by wages alone in a developed and globalised economy. There are two realities that must be addressed in the formulation of a fair and sustainable wages policy: first, wages have to be supplemented by transfer payments and, second, governments need to promote employment by carefully scrutinising the non-wage costs of businesses. The first of these tasks requires the consideration of the balance between the public purse and the wage packet in the support of families. It is clear that, at least in the foreseeable future, the public purse cannot provide for all of the needs of the dependants of low paid workers with family responsibilities and that their wages must have a component for the support of dependants. The second, like the first, requires an acceptance that the costs of job creation and the maintenance of employment is a task of government, based on a fair tax system where burdens and benefits are shared according capacities and needs. To reduce wages to unacceptable levels in the hope of creating and maintaining jobs is morally unacceptable because there are other ways in which employment can be promoted and protected.

ATTACHMENT

to

**ACCER submission to Productivity Commission inquiry into the
Workplace Relations Framework**

.....

Submission by the Australian Catholic Council for Employment Relations

to

THE SENATE STANDING COMMITTEE ON EDUCATION,
EMPLOYMENT AND WORKPLACE RELATIONS

inquiry concerning the

Fair Work Amendment (Small Business-Penalty Rates Exemption) Bill 2012

Introduction

1. The *Fair Work Amendment (Small Business-Penalty Rates Exemption) Bill 2012* (the Bill), introduced by Senator Xenophon, proposes a fundamental change to the national award safety net system. If enacted it would remove penalty rates from the awards covering small businesses (as defined) in the restaurant, catering and retail industries and would reduce the rights and incomes of many low paid and vulnerable workers. The rationale for the Bill is that these pay cuts will lead to increased employment in the firms covered by the proposed legislation.
2. This submission by the Australian Catholic Council for Employment Relations (ACCER) opposes the Bill under five broad headings:
 - a) The Bill fails to recognise the detrimental impact of unsocial working hours.
 - b) The Bill proposes unfairness and discrimination.
 - c) The rationale of the Bill is not supported by evidence or economic analysis.
 - d) The Bill proposes a morally unacceptable means of promoting employment opportunities.
 - e) The objective of the Bill has been rejected: the *Work Choices* experience.
3. ACCER is an agency of the Australian Catholic Bishops Conference which advises the Bishops on employment issues within the Catholic Church and in society in general and which acts as a public advocate for employment policies that

are consistent with Catholic Social Teaching. The Catholic Church is one of the largest employers in Australia. ACCER's response to the issues raised by the Bill and other employment legislation and policies is informed by the Statement made by the Australian Catholic Bishops Conference on 25 November 2005 in relation to the Commonwealth Government's then pending *Workplace Relations Amendment (Work Choices) Bill 2005*. We will return to the Statement.

4. ACCER is particularly interested in the matter raised by the Bill because it is relevant to ACCER's public advocacy on behalf of low paid workers and their families. ACCER has long participated in minimum wage cases in Fair Work Australia and its predecessors to advocate for increased wages for low paid workers. It has argued that the National Minimum Wage and other low wage rates have become poverty wages for low income working families.
5. Many safety net wage rates have failed to provide a true and fair safety net. The nature and purpose of a safety net is to provide an acceptable standard of living. A safety net wage (supplemented by family transfers where applicable) should be sufficient to meet the needs of low paid workers, including those with family responsibilities. It should provide an acceptable standard of living and enable them to live in dignity. The wage safety net does not have to cover exceptional cases, but it must cover ordinary and foreseeable cases and circumstances. Having regard to the sizes of Australian families ACCER has argued that the needs should be calculated by reference to the position of families with two children. The wage has to be sufficient to cover a family of two adults and two children, where the second parent stays at home to care for the children, and to cover a sole parent with two children, where the parent will necessarily incur child care expenses. It would not be acceptable to set a wage that is sufficient for one of these families, but not for the other. Both are within the ordinary and expected scope of a safety net. Of course, a single worker without family responsibilities is also within the scope of the wages safety net, but because family transfers are not sufficient to cover all of the additional needs of dependants (and are not intended to do so), primary emphasis must be given to workers with family responsibilities.
6. Therefore, it should not be necessary for a parent to work on weekends or at nights in order for the family to achieve an acceptable standard of living. Yet many families depend on the penalty rates for this kind of work in order to make ends meet. By proposing the abolition of penalty rates the Bill threatens the incomes of some of the most vulnerable workers in this country and would drive many of them further into poverty.

The objective and rationale of the Bill

7. The objective and rationale for the Bill is set out in brief terms in the Explanatory Memorandum:

“The purpose of this bill is to seek a compromise between small business operators and their employees in relation to penalty rates.

The original intention of penalty rates was to compensate employees for hours worked outside the standard Monday to Friday working week. This concept is now largely outdated: thanks to improvements in technology, the development of a global economy and the deregulation of trading hours, many businesses trade over all seven days. As such, many part time or casual employees consider weekends to be part of their regular hours.

Generally, the Fair Work Act and modern awards do not recognise this shift towards a seven day week. The intention of this bill is to allow small businesses in the hospitality and retail sector, defined as those businesses with fewer than 20 full time and full time equivalent employees, to remain true to the original intention of penalty rates while avoiding the high cost burden during specific days of the week.

To achieve this, the bill states that for small business in those industries, penalty rates do not apply unless an employee has worked for more than ten hours in a day, or more than 38 hours over a seven day period.”

8. The Explanatory Memorandum addresses the human rights implications, as required by the *Human Rights (Parliamentary Scrutiny) Act 2011*:

“The right to work and rights in work are contained in articles 6(1), 7 and 8(1) (a) of the International Covenant on Economic, Social and Cultural Rights. These articles refer to the right of an individual to freely chosen or accepted work, and include the right not to be deprived of work unfairly. More specifically, these articles also include the right to earn a fair wage and equal remuneration for work of equal value.

While the Bill relates to penalty wages for employees, it does not impinge upon the right of employees to earn either fair wages or equal remuneration. It only affects the circumstances in which certain employers will be required to pay penalties above the base wage. It also does not affect remuneration for public holidays. This Bill also maintains the original intention of penalty rates, which is to financially recognise work performed above and beyond the usual hours of employment. The outcome of the Bill is also intended to support and encourage greater employment within small businesses.

The Bill does not affect any further human rights in relation to employment.

Conclusion

The Bill is compatible with human rights as it does not negatively impact on the rights to work or the rights in work.”

9. In his Second Reading Speech Senator Xenophon said:

“Penalty rates are a contentious subject. There is no doubt that workers deserve a fair day's pay for a fair day's work, and penalty rates have played a part in that concept since the 1950s.

But things have changed in the last sixty years. In many industries, we now have a seven day working week. While weekend penalty rates were originally intended to acknowledge employees' work outside the standard five-day working week, there are now many employees who consider their ordinary hours to include weekends, evenings and early mornings.

This bill is an attempt to balance the need for penalty rates and the strain they are placing on small businesses....

Mr Strong [the Executive Director of Council of Small Business Australia] said in the media: "We need a workplace relations system that reflects the realities of the modern world. The current approach to penalty rates has cost the jobs of people who can only work on weekends and was not developed with a view of the needs of the whole community. University students, school students, women who can only work on weekends and others have lost income."

The aim of this bill is to acknowledge that many small business employees are missing out on shifts or even jobs because small businesses simply can't afford to open on days with high penalty rates....

The provisions in this bill state that an employer in the restaurant and catering or retail industries who employs fewer than twenty full-time equivalent employees will not have to pay penalty rates during a week except where employees have worked more than ten hours in a twenty-four hour period or thirty-eight hours in one week.

The aim of this is to compensate employees who work outside the traditional thirty- eight hour week, or over what could reasonably be considered a working day. The definition of a small business as fewer than twenty full-time equivalent employees comes from the definition used by the Australian Taxation Office, as the general consensus in the industry is that the Fair Work Act definition of fifteen FTEs is too low.

These conditions will apply to all relevant current and future modern awards."

10. We contest and comment on a number of matters raised in the Explanatory Memorandum and Second Reading Speech.
11. The Bill refers to the "restaurant and catering industry" and the "retail industry". The terms are not defined and there are no other statutory terms in the principal legislation, the *Fair Work Act 2009*, that would serve that purpose. The intention is to operate on modern awards. The proposed section 155(1) states:

"A modern award must not include a term that would require or permit an employer that is an excluded small business employer to pay penalty rates to an employee for work performed for the employer unless the work performed consists of more than:

 - (a) 38 hours of work in total during a week; or
 - (b) 10 hours of work during a 24 hour period."
12. There are various awards that may operate in these undefined industries. The *Hospitality Industry (General) Award*, the *Restaurant Industry Award*, the *General Retail Industry Award* and the *Fast Food Industry Award* would be covered, but there is uncertainty about other occupation-based awards which cover, in part, employees engaged in hospitality and retail; for example, the *Cleaning Services Award*, the *Security Industry Award* and the *Clerks - Private Sector Award*.

The Bishops' Statement of 25November2005

13. [The Statement has been omitted from this attachment. The relevant part of the text is found in paragraph 27, of the submission and in the reference to penalty rates at

section H of the submission.]

14. One of the four concerns of the Bishops in the *Work Choices* proposals was the potential for unfair bargaining outcomes under the proposed bargaining system and the possibility that penalty rates could be bargained away.
15. We now turn to our reasons for opposition to the Bill.

The Bill fails to recognise the detrimental impact of unsocial working hours

16. A long-standing and well-entrenched provision of awards is the payment of penalty rates for workers who perform their ordinary hours of work in what are commonly described as "unsocial hours". Work in unsocial hours includes evening and night work and work on weekends and public holidays.
17. Awards provide for a range of remuneration in addition to the wage rates for work classifications; and the compensation for working unsocial hours is one of them. This is illustrated in section 139(1) of the *Fair Work Act 2009*, which provides:

"A modern award may include terms about any of the following matters:

- (a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:
 - (i) skill-based classifications and career structures; and
 - (ii) incentive-based payments, piece rates and bonuses;
- (b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;
- (c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;
- (d) overtime rates;
- (e) penalty rates, including for any of the following:
 - (i) employees working unsocial, irregular or unpredictable hours;
 - (ii) employees working on weekends or public holidays;
 - (iii) shift workers;
- (f) annualised wage arrangements that:
 - (i) have regard to the patterns of work in an occupation, industry or enterprise; and
 - (ii) provide an alternative to the separate payment of wages and other monetary entitlements; and
 - (iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;
- (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;
- (h) leave, leave loadings and arrangements for taking leave;
- (i) superannuation;

(j) procedures for consultation, representation and dispute settlement."

18. The fact that an industry may be described as a "seven day a week industry" does not disentitle workers to penalty rates for the working of unsocial hours. Penalty rates are payable to workers whether they are employed as shift workers or only perform part of their work (either regularly or occasionally) in unsocial hours. Penalty payments are paid for work in unsocial hours in seven day a week industries, such as health, aged care, policing, emergency services and private security. The claim that retail, for example, has become more of a seven day a week industry does not support a claim that penalty rates should be reduced or removed. Similarly, in the restaurant and catering industries, which have always operated over seven days a week, an increase in the number of businesses opening on weekends would be no reason to reduce or remove penalty rates. The Bill, therefore, proposes treating the restaurant, catering and retail industries differently to other industries that operate during the same time periods.
19. The changes to industry working patterns over recent decades have resulted in changes in some awards to the "spread of ordinary hours" clauses, which are the clauses that regulate the employer's ability to roster an employee for his or her ordinary time. In the retail industry, for example, changes to the spread of hours clauses have reflected substantial changes in shop trading hours. In the *General Retail Industry Award 2010* the spread of hours (at clause 27) is 7.00 am to 9.00 pm Monday to Friday, 7.00 am to 6.00 pm on Saturdays and 9.00 am to 6.00 pm on Sundays. Penalty rates apply to each of those periods, and public holiday work (see clause 29). This award illustrates that industrial regulation can respond to changes in the business environment without prejudice to the right to compensation for ordinary work within unsocial hours.
20. It should be noted that the extension of retail hours across Australia in the last few decades has come in the face of substantial opposition from the proprietors of small businesses who have recognised the detrimental impact that weekend and evening work can have on their own lives.
21. The claim made in the Explanatory Memorandum that the "Bill also maintains the original intention of penalty rates, which is to financially recognise work performed above and beyond the usual hours of employment" is erroneous.
22. Penalty rates compensate for working in unsocial hours. Work on evenings, nights, weekends and public holidays is unsocial because of its impact on a wide range of individual and family arrangements. Rest, recreation and family time are valued and work in unsocial hours precludes workers from these opportunities. The loss of these opportunities is no less important for people who work in activities that are by their nature seven day a week operations.
23. The Bill raises an issue that involves the consideration and application of important

values. The intrusion of more and more commercial activities and employment into Sundays, with their religious significance, has been a particular concern to many; but the impact of seven day a week work and evening trading raise more widespread concern in the community. Many have been concerned about the personal, family and social disabilities caused by increases in work unsocial hours. Those disabilities are due, in part, to the importance of sharing periods of rest from work and recreation with family and friends and to the loss of those opportunities when being rostered to work during unsocial hours.

24. In May 2007 the Australian Catholic Social Justice Council (an agency of the Australian Catholic Bishops Conference) published a Pastoral Letter for the Feast of St Joseph the Worker on the subjects of work pressures and the loss of family time. The letter, entitled *Keeping Time: Australian families and the culture of overwork*, included the following observations:

“Over the past two decades there has been a massive encroachment of work into family time. An increasing number are juggling the demands of work with their family commitments. Families struggling to meet rising costs of living and higher levels of household debt have not been as well served by a labour market that has produced more jobs that are low paying, insecure and involve irregular hours.

Two new studies by the Relationships Australia Forum and Human Rights and Equal Opportunity Commission (HREOC) show that after 15 years of economic prosperity, many Australians are disappointed with the results and feel overworked, stressed-out and unhappy.

We are among the most overworked nations in the world, with a very high rating among 18 developed nations on key indicators of work intensification. With 22% of the workforce doing at least 50 hours each week, Australia runs second only to Japan in terms of average working hours. Almost a third of the labour force regularly works on weekends, making Australia second only to Italy. It is revealing that around two million Australians work on Sundays. Around 27% of Australian workers are in casual employment, making us second to Spain in terms of work often characterised by irregular hours and, as a result, an enforced dysfunctional family life.

For some workers, flexible working arrangements may be a benefit. For many, however, the rhetoric of family-friendly workplaces has not been realised. This is particularly true for workers in the retail, hospitality and service industries, who have the most unpredictable hours, are often low paid and have little power when it comes to negotiating hours and conditions.

This is a real problem for families with young children and those with caring responsibilities for elderly family members. People caught in the dilemma of having to work longer and harder in jobs that really upset the normal family routine are entitled to ask, ‘Where are the promised benefits of workplace flexibility?’

The studies confirm what many have experienced during two decades of labour market deregulation. The demand to work longer and more irregular hours has upset the balance. There is less time for family functions, difficulty in maintaining networks of friends, little time for religious worship, community

events and recreation. More alarming is the direct damage to the family unit in the form of high levels of depression and stress, drug and alcohol problems, strained relations leading to separation and divorce, and reduced child welfare.” (Emphasis added, footnotes omitted)

25. In May 2012 the Australian Catholic Social Justice Council referred to similar aspects in another Pastoral Letter for the Feast of St Joseph the Worker, entitled *The Dignity of Work: More than a Casual Concern*. That letter addressed the economic plight of low paid workers and their families and the need to strike a better balance between work and family responsibilities. Low paid casual and irregular work were major concerns.

“The financial pressures and irregular time demands of casual work often interrupt family life and place obstacles in the way of the important aspirations of workers and their families over the course of their lives. Marriage and family life can be harmed when parents juggling round-the-clock shiftwork face the choice of spending enough time with their families or making ends meet....

In a developed nation such as Australia, one would imagine that our wealth and the organisation of our labour market would ensure low paid, vulnerable workers and their families could live in basic dignity. Sadly, this is often not the case.

Pope Benedict XVI, in his 2009 Encyclical *Caritas in Veritate*, reaffirmed the Church’s call for ‘decent’ work:

“It means work that expresses the essential dignity of every man and woman in the context of their particular society: work that is freely chosen, effectively associating workers, both men and women, with the development of their community; work that enables the worker to be respected and free from any form of discrimination; work that makes it possible for families to meet their needs and provide schooling for their children, without the children themselves being forced into labour; work that permits the workers to organise themselves freely, and to make their voices heard; work that leaves enough room for rediscovering one’s roots at a personal, familial and spiritual level; work that guarantees those who have retired a decent standard of living.”

The casualisation of work over the past thirty years has not been confined to a few sectors of Australia’s labour market. It ranges across retail, accommodation and hospitality, health and social services, education, transport, construction and manufacturing industries.

It is unacceptable that people who work to clothe us, feed us, clean for us, teach us and tend to the sick and those in need should endure poor conditions and have such a low value placed upon their work. It is time to consider the need for more decent pay and conditions for those in insecure work. A new approach is needed that places the dignity of the worker at the centre of labour market policy.” (Emphasis added, footnote omitted.)

26. Treating a worker with respect includes striving for a system of employment rights and obligations that promote the kind of objectives identified by Pope

Benedict in the quoted passage from *Caritas in Veritate*; objectives which are drawn from the International Labour Organisation's *Decent Work* agenda. The work that is being performed and the circumstances in which it is being performed must be adequately valued. We refer to the passage in the Bishops' Statement which was taken from Pope John Paul II's 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, emphasis in original)

27. This year's Social Justice Statement by the Australian Catholic Bishops will be published on 21 September 2012 under the title *The Gift of Family in Difficult Times: The social and economic challenges facing families today*. The statement will “consider the social and economic structures of our society that impact in a significant way on the majority of families – reducing time together, making it harder to make ends meet financially, and sometimes undermining the bonds of marriage and family life” (Archbishop Denis Hart, President, Australian Catholic Bishops Conference, circular letter, 2 July 2012).
28. The foregoing passages on the impact of work on family and social relations emphasise the disabilities associated with the performance of work during evenings, nights, weekends and public holidays and the need for penalty rates. Of course, the payment of penalty rates cannot remedy the problems identified, but penalty rates can provide fair and just compensation for some of them. We accept, of course, that a wide range of work in these unsocial hours is, and will continue to be, necessary to meet the community's economic and social needs. The setting of payments for those evident disabilities should continue to be the function of the industrial arbitrator.

The Bill proposes unfairness and discrimination

29. The proposed loss of penalty rates would have a major and often devastating impact on many low paid workers and their families. This will compound the situation where the National Minimum Wage and other award rates provide only poverty wages. Workers who rely on penalty rates to help make ends meet would be left without any compensation. The burden of the proposed measure is imposed on low paid workers and their families. This is unfair and discriminatory.
30. Awards made under the *Fair Work Act* are required, among other things, to comply with the “modern awards objective” in section 134 (1), which includes:

"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:....

(e) the principle of equal remuneration for work of equal or comparable value;...."
31. Sections 134 and 139 (quoted earlier) mean that a "fair ... safety net" is not limited

to the wage rate set for work classifications, but to the whole range of matters that may be included in an award: wages, other kinds of remuneration and the various conditions of employment have to be *fair*.

32. The exclusion of a class of employees from a generally applicable entitlement, by reference to the size of the employer's operation and in circumstances where they experience the same kinds of working conditions and disabilities, cannot be fair. The proposal in the Bill fails the fairness test. If the Bill is enacted the award safety net system would be severely compromised.
33. The Bill not only fails the fairness test, it also fails the discrimination test. We do not agree with the conclusion in the Explanatory Memorandum that the "Bill is compatible with human rights as it does not negatively impact on the rights to work or the rights in work". That conclusion follows from a reference to several terms of the *International Covenant on Economic, Social and Cultural Rights*, which has been ratified by Australia.
34. The *International Covenant on Economic, Social and Cultural Rights* is a treaty adopted by the United Nations which requires each of its State parties "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures" (Article 2.1). The rights recognised in the covenant include employment, economic and social rights. Article 7 covers a range of employment rights:

"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

 - (a) Remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
 - (b) Safe and healthy working conditions;
 - (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
 - (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays"
35. This obligation on the Commonwealth is not limited to discrimination such as gender, race and religious discrimination, as the words "without distinction of any kind" make clear. Legislation in compliance with this obligation would operate to ensure equal wages *and* remuneration for work of equal value. It is patently clear

that the Bill proposes different, unequal, forms of remuneration for people who do the same work in the same circumstances.

36. There are several passages in the reasoning in the Explanatory Memorandum that require comment. The document states:

"While the Bill relates to penalty wages for employees, it does not impinge upon the right of employees to earn either fair wages or equal remuneration. It only affects the circumstances in which certain employers will be required to pay penalties above the base wage. It also does not affect remuneration for public holidays. The outcome of the Bill is also intended to support and encourage greater employment within small businesses."

37. The first two sentences in this extract appear to draw a distinction between "wages and remuneration" and "penalties", with the suggestion that penalties are not remuneration. We submit this is erroneous: penalty rates are a kind of remuneration. The sentences also appear to rely on a distinction between a right of a worker and the obligation of an employer. This is an impermissible distinction: the proposal impinges on the right of a worker to be paid for the performance of work.
38. The third sentence claims that the proposal does not affect "public holidays". This is in apparent reference to the terms of Article 7 (d) of the covenant, but it misses the point that the Bill covers public holiday penalties and does not preserve them for a particular class of workers.
39. The fourth sentence suggests that discriminatory treatment may be justified by some other objective; in this case the encouragement of employment in small businesses. This is impermissible. To allow this kind of consideration would undermine the protections intended by the convention.
40. The conclusion in the Explanatory Memorandum that the "Bill is compatible with human rights as it does not negatively impact on the rights to work or the rights in work" is, in our submission, erroneous. The Bill does discriminate. It is clear that the Bill places workers in small businesses, as defined, in the restaurant, catering and retail industries in a less favourable position than those employed elsewhere in the same industry and does so by reference to a factor, i.e. the number of employees in the employer's undertaking, that is irrelevant to the proper valuation of work and the circumstances in which it is performed. It also treats workers in these three industries less favourably than workers in other industries who work in similar circumstances. Furthermore, if the intention is to cover occupational awards that partly cover the three industries (see paragraph 12, above), the Bill would provide for lower, and discriminatory, rates of remuneration for cleaners, clerks and security workers who are employed in the exempted part of those industries.

The rationale of the Bill is not supported by evidence or economic analysis

41. The rationale for the proposed legislation is that lower wages bills for the exempt businesses will promote employment opportunities. Neither the Second Reading

Speech nor the Explanatory Memorandum provide any evidentiary basis or economic analysis for this claim. There is a reference in the Second Reading Speech to several aspects of a Benchmarking Report by Restaurant and Catering Australia, but that material does not assist in assessing the potential impact of the Bill. There is no reference to the retail industry.

42. The abolition of penalty rates would result in very large windfall gains for employers, adding very substantially to the profitability of their businesses. The impact that this would have on wages, the prices for meals, goods and services, staffing levels, competition between employers (including between exempt and non-exempt employers) and employment levels is most uncertain and highly contentious. There is no basis given for forming any view as to how employment levels may respond. Nor is there any analysis of the adverse personal, family, social and economic costs of such a major cut in the incomes of so many Australian workers.

The Bill proposes a morally unacceptable means of promoting employment opportunities

43. To the extent, if any, that there would be an employment effect as a result of the abolition of penalty rates, it would come as a result of the losses suffered by low paid workers in these three industries.
44. We submit it is morally unacceptable to impose this kind of selective burden on low paid workers and their families. It is a similar issue to that addressed by the Bishops in their Statement on *Work Choices* when they said: "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"
45. It is immoral to hold back wage increases or drive wages down below a decent level on account of economic circumstances when there are other ways to promote job protection and the creation of employment opportunities, ways that are consistent with an equitable sharing of the burden of creating and sustaining jobs. The burden of creating jobs, including low paid jobs, should not be imposed on those who are in or near poverty and who are least capable of bearing the economic costs.
46. Unemployment is a scourge, but it must be addressed in an appropriate way:
"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" (Bishops' Statement).
47. Rather than seeking to impose selective burdens on low paid workers, governments, and (in the present case) the Parliament, should be considering the ways in which the costs of employment can be reduced, at a cost to the broader community, without reducing fair minimum standards for low paid and vulnerable workers.

48. The progressive abolition of payroll tax is an obvious measure. Payroll tax (which is imposed by the States) is a tax on employment. Increases in the State thresholds would reduce the costs of employing labour for more small businesses. Income tax on the National Minimum Wage, which is currently 8.2%, has the effect of increasing labour costs and also operates as a tax on employment. Changes in these taxes would promote employment opportunities and spread the costs across the community rather than imposing them on low paid and vulnerable workers and their families. A review of employer on-costs might also be undertaken with a view to reducing the costs of employment without prejudice to fair safety net wages and conditions of employment.

The objective of the Bill has been rejected: the *Work Choices* experience

49. The Bill proposes a more fundamental change to penalty rates than that enacted under the *Work Choices* legislation of 2005 (see *Workplace Relations Amendment (Work Choices) Act 2005*). Under *Work Choices* penalty rates could be bargained away without any or any adequate compensation, whereas the Bill would directly remove established award rights to penalty rates for many workers. The error of *Work Choices* in regard to penalty rates (and some other provisions) was corrected by legislation introduced in 2007.
50. On 4 May 2007 the then Prime Minister, John Howard, announced that the *Work Choices* legislation would be amended to protect various award conditions and ensure that they could not be bargained away without adequate compensation. His statement, *A Stronger Safety Net for Working Australians*, read, in part:
- “It was never the Government’s intention that it should become the norm for penalty rates or other protected conditions to be traded off without proper compensation.
- The Government understands there is some concern in the community that the removal of penalty rates and other protected conditions without fair compensation might occur, with adverse consequences for final take-home pay. Therefore the Government is today unveiling a stronger safety net for working Australians with the introduction of a Fairness Test that will guarantee that entitlements such as penalty rates and public holiday pay are not traded off without adequate compensation.”
51. The 2007 amendments made it clear that penalty rates are an inherent part of the remuneration entitlements of Australian workers, that they should be part of award safety net and that, if a variation of award entitlements is available by a collective or an individual agreement, any change in penalty rates should be offset by proper compensation. We submit that there has been a broad consensus on these matters in the debate and legislative changes since 2007. The Bill challenges that consensus without providing any substantive grounds for doing so.

20 September 2012

Australian Catholic Council for Employment Relations