



INQUIRY INTO A RANGE OF TAXATION ISSUES WITHIN AUSTRALIA

**ACCI Submission to the
Joint Standing Committee on Public Accounts
and Audit**

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ABN 85 008 391 795

Canberra Office

24 Brisbane Avenue
BARTON ACT 2600

PO Box 6005
KINGSTON ACT 2604

Telephone: (02) 6273 2311
Facsimile: (02) 6273 3286
Email: info@acci.asn.au

Melbourne Office

Level 3
486 Albert Street
EAST MELBOURNE VIC 3002

PO Box 18008
Collins Street East
MELBOURNE VIC 8003

Telephone: (03) 9668 9950
Facsimile: (03) 9668 9958
Email: melb@acci.asn.au

Web: www.acci.asn.au

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ABOUT ACCI

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

Our motto is "Leading Australian Business."

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

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

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

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

INTRODUCTION

On Wednesday 7 December 2005, the Joint Committee on Public Accounts and Audit resolved to undertake a new inquiry into Certain Taxation Matters, and has asked for submissions into the inquiry.

Terms of Reference of the Inquiry are:

- Part A: The administration by the Australian Taxation Office (ATO) of the *Income Tax Assessment Act 1936* and *1997* (including the amendments contained in the *Tax Laws Amendment (Improvements to Self Assessment) Bill (No. 2) 2005*) with particular reference to compliance and the rulings regime, including the following:
 - the impact of the interaction between self-assessment and complex legislation and rulings;
 - the application of common standards of practice by the ATO across Australia;
 - the level and application of penalties, and the

application and rate of the General Interest Charge and Shortfall Interest Charge; and

- the operation and administration of the Pay As You Go (PAYG) system.
- Part B: The Committee shall examine the application of the fringe benefit tax regime, including any "double taxation" consequences arising from the intersection of fringe benefits tax and family tax benefits.

PART A: SELF-ASSESSMENT AND COMPLEX LEGISLATION AND RULINGS

The Australian Government has, over a number of years, sought to reduce taxation complexity. ACCI applauds the Government for what it has done, however, it is evident that there are a large number of taxation compliance issues still being raised by the business sector.

Despite the significant overhaul of Australia's taxation regime, compliance costs remain a major concern for Australian businesses. Business believes that governments and the ATO pay insufficient attention to the compliance difficulties created by extra legislation, particularly the total burden rather than measures taken individually.

The quarterly *Survey of Investor Confidence*¹ run by ACCI consistently ranks 'Business Taxes and Government Charges', and 'Cost of Compliance with Government Regulations' as critical issues to business. This reflects that taxes are a significant cause of concern for small to medium businesses in particular.

In addition, ACCI's 2004 *Pre-Election Survey* of almost 1700 businesses indicated that business regulation dominates the concerns of Australian businesses.² The ten most important issues are shown in Figure 1 on page 5. Note that tax issues were the first, second, fourth and fifth highest concerns.

The ideal of self-assessment has merit since it should facilitate the 'internalisation' of tax compliance, i.e. tax compliance becomes incorporated into the company's ethos. However, in practice, many firms have had to outsource tax accounting, because the system remains too complex. As such, small and medium enterprises (SMEs) generally do not have the confidence to self-assess, especially with the ATO expanding its audit programme. The risk of being audited under 'self-assessment'

¹ Reference.

² Reference.

Figure 1
ACCI Pre-Election Survey June 2004
Relative Ranking of the Ten Most Critical Issues Facing Businesses

Rank	Area of Concern
1	Level of Taxation
2	Overall Complexity of the Tax System
3	Workers Compensation Costs
4	Personal Tax (Pay As You Go)
5	Frequency of Changes to Tax Laws and Rules
6	Unfair Dismissal Legislation
7	Recruiting Employees with Appropriate Skills
8	Termination, Change and Redundancy Regulations
9	Complexity of Government Regulations
10	Cost of Compliance with Government Regulations (Non-Tax)

Source: ACCI Pre-Election Survey Results, 2004.

combined with a lack of confidence forces many businesses to employ specialist professional assistance. ACCI supported the review of self-assessment done by Treasury in 2004³ and the progressive implementation of a number of changes from that Report. The implementation of remaining reforms should continue. Our members have not raised any concerns with the implementation of the Recommendations from this Review.

ACCI Proposals

The ‘overall complexity of the tax system’ was found to be the highest ranked compliance issue in the 2004 pre-election survey of ACCI,⁴ with 89 percent of the respondents finding it a concern.

The data reveals that it is not so much specific issues that are concerning small business as the general level of complexity. The typical approach to these issues tends to involve marginal, ad hoc amendments that do not fundamentally change the overall small business compliance burden. While case-by-case simplification is important, an impetus for sustained and comprehensive reform is needed.

In our consultations with business, ACCI has come to the conclusion that rather than proposing a solution to everyone of these many issues, we would be better to

focus on the systemic answers to the issues that arise. In particular there should be put in place better regulatory assessment processes for tax administration and better consultation mechanisms.

A major effort to simplify the tax system should be a priority for the Government. To reduce the overall compliance burden and the frequency of changes to tax legislation, ACCI proposes introducing a Tax Administration Impact Statement (the TAIS). By introducing a TAIS, government and taxation officials will be required to explicitly state the estimated compliance costs of further changes.

In introducing the TAIS:

- The Inspector General should undertake a survey of the time and money that business spends on complying with the Tax Act.
- The Inspector General in conjunction with the ATO should introduce a range of initiatives to assist business to identify, understand and implement new and existing taxation requirements. Information programs for small business in particular should involve all components of the small business network.
- The Inspector General should include within the TAIS a requirement that quantitative estimates of compliance costs, based on detailed proposals for implementation and administration, be attached to any new tax proposal.

³ Treasury (2004) *Report on Aspects of Income Tax: Self Assessment*, August 2004. Available at http://selfassessment.treasury.gov.au/content/_download/report/final_report.pdf.

⁴ Ibid, page 4.

- There should also be regular reviews of the accuracy of compliance estimates in the TAIS for regulations with a major impact on business.
- The Inspector General in conjunction with the ATO should regularly review its taxation impact assessment arrangements to ensure that they meet best practice standards with regards to minimising the compliance burden on business. International best practice should be continuously introduced into Australia.
- The Inspector General in conjunction with the ATO should develop a consistent methodology for measuring the tax compliance burdens imposed.
- Greater education, skill development, resources and priority within agencies are needed. The Inspector-General, in conjunction with the Commissioner of Taxation, needs to address the corporate culture within the ATO to ensure that the TIS is carefully constructed when each new tax change is proposed.

The Treasury should establish a committee similar to the Corporate Consultative Committee at the ATO, which has the aim of tapping into business concerns and experience in the development of tax legislation and its administrative arrangements.

PART B: FRINGE BENEFITS TAX

Fringe benefits are non-cash benefits provided by an employer to an employee instead of salary. Examples can include a car, computer, insurance, accommodation and meals. Before 1986, many fringe benefits were not taxed. This provided an incentive for significant salary packaging to avoid tax. Therefore, the Government introduced a Fringe Benefits Tax (FBT) in 1986 to bring non-salary benefits paid to workers into the income tax system.

Regrettably, the reforms went further than was warranted, encompassing legitimate business expenses that should properly be considered costs of doing business rather than fringe benefits to employees. Compliance problems have also plagued the fringe benefits system and are a key area of concern for the Australian business community.

Under the 1986 changes, FBT is payable by employers on certain fringe benefits paid to employees and their associates. The purpose of FBT is to ensure the fringe benefits are taxed at the same rate as if the employee had earned the equivalent amount through a salary. However, the regime does not treat fringe benefits as part of the

employee's salary or wages. Instead it makes the employer responsible for the tax. In addition the assumption is made that all employees are on the maximum marginal tax rate of 48.5 per cent.

Generally, the tax value of fringe benefits is in line with their market value, apart from the concessional treatment of car fringe benefits and some exempt items. A lesser rate of FBT is charged for some employers, such as public benevolent institutions, hospitals or rebatable employers. In addition, some benefits are taxed concessionally (eg cars provided to employees and entertainment expenses) or are not subject to FBT (eg superannuation, work-related items like tools of trade and some loans related to purchase of shares and rental property).

The number of FBT payers has declined over the past 10 years, partly because an increasing number of employers seek employee contributions to reduce their FBT liability to nil so they are not required to lodge FBT returns. Yet despite the decreasing trend in the number of FBT payers, the amount of FBT paid has increased significantly during the past decade, mainly due to the introduction of the gross-up rules.

Consideration of Issues

FBT has long been a matter of genuine concern to Australian business. In the pre-election survey of 2004, ACCI found that 68 percent of Small Businesses were concerned about the level of FBT.⁵ In 2001, business ranked FBT as the 20th largest concern to business.⁶ In fact, business believes that the tax has been extended well beyond its original purpose of ensuring consistent taxation of all forms of remuneration.

The extension of FBT coverage has added substantially to the costs of doing business, particularly by increasing the tax compliance burden. The resulting costs and complexities are borne disproportionately by smaller businesses, exemplified by the case of FBT on childcare, discussed hereunder. This seriously hampers small businesses, and does not recognise the essential contribution small business makes to Australian future

5 Australian Chamber of Commerce and Industry (2004) *2004 Pre-Election Survey Small Business Priorities: Taxation, Economic Management & Workplace Relations*, page 2. Available at http://www.acci.asn.au/text_files/issues_papers/Pre_Elect_Survey/Small%20Business%20Priorities%20_September%202004_.pdf page 2.

6 Australian Chamber of Commerce and Industry (2001) *What Business Wants: ACCI's Pre-Election Survey Results*, page 4. Available at http://www.acci.asn.au/text_files/issues_papers/Pre-Elect_Survey/PES04.pdf.

export growth, investment and employment creation. Various elements of the FBT apply inappropriately to genuine business related expenses in contrast to the original intention of capturing employee benefits. Business is also concerned that application of FBT to allowances paid for employment in remote areas and certain costs relating to relocation are counterproductive to other economic and social objectives for Australia.

Compliance Costs

Dr Jeff Pope of the University of Western Australia has estimated that for 1990-91, the total costs of tax compliance were \$3.3 billion (around 23 per cent of total revenues), with FBT contributing the most toward this figure.⁷ His work also reinforces that compliance costs are comparatively higher for small business. In the case of FBT, Dr Pope estimated compliance costs borne by small enterprise represent almost 40 per cent of FBT revenue.

What does not show up in these calculations is the confusion and frustration that FBT is causing among small business. Small business does not have the management systems, the expertise or the computer capacity of larger business or the Australian Taxation Office. In an environment when businesses are exhorted to be internationally competitive and succeed in foreign markets, the current treatment of entertainment, employee share schemes and other so-called 'minor benefits' (such as mobile phones, airport lounges, tax travel, etc) is discouraging business.

If simple and sensible FBT rules were applied, it is likely that tax compliance of small businesses would increase considerably, with potentially sizeable gains to Government revenue. Significant advances could be achieved by the ATO requiring less documentation and applying broad and simple formulas applying risk management techniques to compliance.

ACCI supports a number of proposals for reducing FBT compliance costs, including:

Business Meals

There are currently 39 different possible treatments of the FBT on a business meal. This clearly needs to be simplified, to encourage compliance and to reduce costs.

The Time for Business (Bell) Review and the Review of

⁷ Pope, Fayle & Chen (1993) *Compliance Costs of Employment Related Taxation in Australia*, Australian Tax Research Foundation.

Business Taxation (Ralph Report) both recommended removal of FBT on business meals due to the high compliance cost.

The Bell Review argued that "Small business regards current rules and compliance costs in this area [FBT on Business Meals] as a nightmare. They require constant assessment of the circumstances under which meals are provided and detailed record-keeping."

The complex interaction between FBT and GST has only increased this compliance cost since the Bell Review.

In addition, a report Access Economics concluded that "In its tax treatment of business meals, Australian practice leads the world in complexity, inefficiency, and unfairness."⁸

An option worth exploring to reduce these costs is the Ralph Review recommendation that business entertainment expenses should be made non-deductible and exempt from FBT. We understand that Restaurant and Catering Australia (one of ACCI's members) is making a separate submission to this inquiry on this issue.

Car Parking

The rules for FBT on car parking are excessively complex, and would need to be simplified. It has been argued that

*"the cost of determining the lowest car parking fee at a commercial parking station within one kilometre of employer provided parking can be quite large, either in terms of time commitment from an employee undertaking the necessary investigation, or in paying an external consultant to provide the information."*⁹

ACCI supports some form of optional standard rates, which could apply for a year or part year, provided that the rates are set in an equitable and realistic manner.

Employee Declarations

Individual employees should not be required to make employee declarations. In the spirit of 'risk management'

⁸ The Case for, and Economic Effects of, Part-Recognition of Business Entertainment as Legitimate Business Inputs or Expenses for Taxation Purposes.

⁹ The Institute of Chartered Accountants in Australia, Law Council of Australia, National Tax & Accountants Association Limited, National Institute of Accountants, Taxpayers Australia Inc and Taxation Institute of Australia (2004) *Re: Fringe Benefit Tax and Cost of Compliance Issues*, 4 August 2004.

and avoidance of unnecessary documentation, declarations should be replaced by allowing senior managers to provide authorisation, based on sighting of required information.

Other Simplification Proposals

- optional alignment of FBT and income tax years;
- relocation benefit verification costs are sufficiently high to justify exemption from FBT but an alternative could be acceptance of an employer declaration;
- living away from home allowances should be exempt from FBT if they are provided at a rate in accordance with an industrial award or an enterprise agreement; and
- corporate uniform compliance costs could be significantly reduced, for example by removing the current TCF Development Authority registration or providing an exemption for clothing bearing the employer's logo.

ACCI strongly supports the concept of refocusing FBT to use a 'remuneration test' in the definition of fringe benefits. At present, the legislation treats everything provided to an employee by an employer as a 'benefit', which creates confusion with items that are costs of doing business and not part of employee remuneration.

A remuneration test would allow appropriate levels of usage to be determined, enabling bona fide expenditure for doing business to be exempt from FBT. Such a test would overcome the present FBT problems of economic distortion and excessive compliance costs, which are contrary to best practice management and reasonable maintenance of the well being and safety of employees.

The Ralph Review

The Review of Business Taxation's report A Tax System Redesigned (the Ralph Review) of July 1999 examined the taxation of fringe benefits. It proposed that there should be major reforms to FBT including shifting the liability of FBT from the employer to the employee. Their reason for this proposal is that the FBT is presently taxed at the highest individual marginal tax rate thereby penalising those who receive fringe benefits but are on a lower tax threshold.

ACCI supports this proposal. Like all other income,

FBT should be applied to the employee, with collection from employers in the same manner as PAYG. Other reforms included the complete removal of onsite parking and entertainment from FBT due to the high cost of compliance. This change was funded by making entertainment expenditure non-deductible and reducing the preferential treatment of motor vehicles.

FBT and Childcare

One particular proposal with respect to FBT that is often raised is the treatment of childcare provided by employers. ACCI is particularly concerned with childcare as an issue. With the ageing of the population, it is important to improve workforce participation – improving access to childcare is one way of achieving this goal.

Access and affordability of childcare are major factors in determining whether parents return to the workforce. An excerpt from ACCI's submission to the Work & Family test case relating to childcare is attached.

Currently, only childcare facilities provided by employers at their business location are exempt from FBT. Any other funding of childcare by a business is subject to FBT. This limits the flexibility of childcare options for employers and employees and discriminates against employees whose employers do not provide on-site childcare. Thus, the tax system effectively discriminates against small businesses, because they would not be able provide viable childcare to their employees on their premises.

One proposal, which ACCI does not think is the appropriate response to the issue, would be for the FBT exemption to be removed from childcare completely. This would remove many of the anomalies outlined above, but it would increase the cost of employer-provided childcare.

Instead, ACCI considers that a broader exemption is worth considering. Arguments in favour of an exemption include:

- It will reduce the barriers to employer provision of childcare for small and medium businesses that cannot provide childcare on their own premises. The current system discriminates in favour of larger businesses that have enough employees to provide childcare on their own premises.
- Many business premises are not suited to providing childcare – for example noisy, hazardous locations

– or even just locations in city centres. The current system discriminates against these businesses. It also discriminates against employees who would prefer childcare close to home rather than work.

- Even if a business can provide childcare in-house, they may choose not to because of compliance and administrative costs. A broader exemption will allow these businesses to outsource.
- The current system discriminates against shiftworkers, even at large workplaces.
- The current system is inflexible for changes in demand. If an employer can buy childcare from a number of providers, then sudden changes in demand can be managed. It is less likely that an onsite provider would be able to cope with sudden demand changes.
- It will allow more competition in the childcare market as businesses can choose to provide themselves or outsource, without tax acting as a barrier to outsourcing.
- Larger businesses that operate in multiple locations may be able to provide childcare on premises in some locations but not in others. Removing FBT from all childcare will reduce the different treatment of the different locations.
- It will mean the complexities over defining business premises for FBT will be removed.
- Employers may be able to negotiate better arrangements than employees could individually (some child care centres may be in a strong bargaining position); broadening the FBT exemption will mean that more employers can buy child care, improving the arrangements for employees. Some employers will allow employees to take the money and buy childcare themselves if they don't like the service the employer buys.

ACCI does not have a specific policy on the scope of this exemption – for example, whether the childcare exemption should be provided to after-school care or nannies.

It should be noted that the above proposals would have some revenue cost to the Government. The cost and scope of the exemption would have to be weighed against other competing demands on the Budget. However, FBT

on childcare is such an important issue that affects almost all Australian businesses, the proposals are certainly worth consideration.

The cost of a broader childcare FBT exemption will be reduced because:¹⁰

- Employer purchasing of childcare will encourage tax compliance from the unregulated sector of the economy; and
- The increased participation in the workforce will reduce family assistance payments and increase income tax payments.

However, we acknowledge that it is very unlikely that the proposal will increase revenue, as suggested in the Deloitte submission.

ACCI is constantly arguing for maximum flexibility in the workplace to allow employees and employers to come to mutual agreement on family friendly arrangements. This is much better than proscriptive one size fits all proposals like compulsory paid maternity leave. Reforms to the FBT treatment of childcare may facilitate this goal.

CONCLUSION

ACCI believes that FBT has been extended beyond its original purpose of ensuring consistent taxing of all forms of remuneration. The broad coverage of FBT has substantially added to the bona fide costs of doing business, increasing the tax compliance burden. Major reforms are needed to address this problem.

ACCI Proposals

ACCI proposes that:

- like all other income, FBT should be applied to the employee, with collection from employers in the same manner as PAYG;
- the application of FBT to allowances paid for employment in remote areas and certain costs relating to relocation are counter-productive to other economic and social objectives in Australia's industrial development;
- on compliance:

¹⁰ See Deloitte (2005) *Submission to the Federal Treasurer - Exemption of Child Care from Fringe Benefits Tax*, 11 November.

- the FBT treatment of business meals should be examined and reformed to reduce compliance costs significantly;
 - some form of optional standard rates for car parking could apply for a year or part year, provided that the rates are set in an equitable and realistic manner; and
 - employee declarations should be replaced by allowing senior managers to provide authorisation, based on sighting of required information.
- the FBT law should be based on a ‘remuneration test’ in the definition of fringe benefits; and
 - the Government should provide an FBT exemption for all childcare.

ATTACHMENT: 2004 FAMILY PROVISIONS TEST CASE

ACCI/NFF Final Written Submission – 2004 Family Provisions Case (C2003/4198 and ors)

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CORE CONTENTIONS:

- The ACTU claims there are so called gaps in the provision of care and in arrangements for pre-school children.
- The ACTU seeks to establish through evidence that their claims should be granted partially on the basis that access to care is creating significant collisions between family and work commitments.
- Childcare issues are fundamentally a government and community responsibility, not an employer responsibility, nor are they properly linked to the regulation of work.
- ACCI/NFF argues that problems associated with childcare are beyond the boundaries of the employment relationship to the extent that the Commission should not take childcare issues into account in consideration of the ACTU claim.
- Childcare has been highlighted as a major policy area of the Australian government and public policy and service action is being undertaken to resolve some of the “problems” being experienced by Australian families.
- Evidence highlights that employers are trying to assist employees minimise the pressures between the problems associated with childcare and work commitments.

I. Introduction

[6.1] One of the key issues to emerge in this case has been the provision of childcare.

[6.2] The ACTU claims there are so called gaps in the provision of care¹ and in arrangements for pre-school children. The ACTU also attempts to use issues of childcare as one of the key factors to justify many of their claims.

[6.3] ACCI/NFF does not doubt that there are concerns throughout the community in regard to the access and cost of childcare to enable parents to return to work.

[6.4] Access to childcare and the affordability of childcare are the major factors in the parent making the choice of returning to work and, if they do wish to return to work, whether they can return on the basis that provides alignment with the needs of both the employer and the employee.

[6.5] However, ACCI/NFF does not believe it appropriate to utilise problems regarding access and cost of childcare as a justification of the ACTU claims.

[6.6] Childcare is a highly politicised area of public policy in Australia. Spending on childcare, and the availability of childcare is a major area of debate between our political parties and was directly in play during the recent federal election.

[6.7] The success or failure of childcare policy, and in particular the availability of this childcare that parents want, where and when they want it, is determined by government.

[6.8] Employers cannot solve any childcare “crisis” nor should they be the fall guy to alleviate any pressure arising from the operation of national childcare expenditure and delivery policy (the approach the ACTU would have in this matter). This is a social policy issue to be resolved through the efforts of government (and alternative governments where their childcare policies are preferred) rather through the employment relationship.

[6.9] There is no proper nexus between childcare policy and employment as the ACTU would have the Commission accept in support of its claims.

¹ ACTU Outline of Contentions, 30 April 2004, p.13

[6.10] The evidence suggests in this mater suggests that concerns with childcare access and cost are affecting some parents. In a sense, “failures” of childcare to exactly accord with parental and family priorities appear the key to many of the problems that led the ACTU witnesses to seek changes in their work and working times (most of which were accommodated).

[6.11] Where accommodation was difficult, this appears in substantial part to have been a function of inflexibility in childcare, not an inflexibility in (a) the attitudes and approaches of employers, or (b) the scope of employers to accommodate changes sought (although the ACCI/NFF propositions would further improve scope to actually allow more employees to overcome the shortcomings they experience in their childcare arrangements).

[6.12] But it does not necessarily justify the extension of a minimum award entitlement for all parents particularly when there is evidence that employers are trying to assist employees return to work under the restrictions placed by the problems associated with childcare access. Therefore, employers are already bearing some cost in facilitating return to work and working hours to assist parents with childcare access problems.

[6.13] The major claims by the ACTU including extended parental leave, return to work part time and variation of hours are all claims that seek to create absolute rights. ACCI/NFF believes it is not appropriate option in dealing with what is fundamentally a social policy matter for governments (the challenge of childcare).

[6.14] In summary:

- a. There is significant evidence that employers are already providing assistance to employees in minimising the pressure between childcare issues and employees work commitments.
- b. Considerations such as the provision of childcare, pre-school care etc are matters for governments and the community, not for employers.
- c. Initiatives were taken in a range of childcare areas in the 2004/2005 budgetary process and were included as part of the Federal Election campaign by both major parties.
 - i) The political process has been run in regard to improving childcare.
 - ii) Many of the problems identified by the evidence in this case are to be addressed through changes in childcare.

- iii) These changes need to be allowed to run their course, be implemented and have their effect. It must be presumed in this case that these policy changes will make a material difference to the concerns identified by various of the witnesses (without the intervention sought by the ACTU).
- d. There is no valid nexus between childcare problems and the employment relationship and the ACTU has not made out such a linkage. In particular it cannot be used to validate a claim to create absolute rights for the employee without balancing the needs of employers.

II. Childcare is for Government policy

INTRODUCTION

[6.15] Childcare access and cost for families is a challenge that is recognised by the Commonwealth Government as a social policy area that needs serious work. (And by the opposition in advancing alternative policies and engaging in debate on this issue).

[6.16] This is in short a key area of national public policy and expenditure. It is also a key area of political and policy debate.

[6.17] This further underscores the extent to which these are matters of public policy and expenditure and the lack of any valid nexus to the employment relationship.

[6.18] The role of the Australian Government in parental choice over whether to work and utilise childcare, or stay at home and not work is quite significant.

[6.19] The impact of Government initiatives plays a strong part in the decision making process of parents. For example, the evidence of Ms Jacqueline Luttick highlighted the role government family payments played in her decision to stay at home as opposed to returning to work.

[6.20] In the case of Ms Luttick, she was in a better financial position staying home and raising the children as opposed to returning to work and placing the children in childcare².

GOVERNMENT ANNOUNCEMENTS

[6.21] The increasing pressures on families regarding return to work decisions and childcare issues have been on the radars of Government and opposition parties. Given 2004 has been a Federal election year there have been a number of announcements outlining Government initiatives or alternative government initiatives.

² Transcript 2 September 2004, PN 1720, PN 1725 – PN 1729

[6.22] Earlier this year, May 2004, the Coalition Government announced in the 2004/2005 Australian Government Budget an additional \$19.2 million extra assistance to Australian families and 44,000 more child care places. The media release announcing the package stated *“The package will help families with the cost of raising children, improve rewards from work, and help balance work and family responsibilities.”* Further, it was stated that *“the Budget addressed the needs of families by providing a further 30,000 Outside School Hours Care Places on top of the 10,000 places announced in December 2003. This will given families more choices in balancing family and work commitments. The Australian Government will also provide an extra 4,000 family day care places which includes the 2,500 places announced in December 2003.”*³

[6.23] The fact that childcare was a major Federal election issue is indicative of the seriousness of the matter. A series of commitments were made by both political parties to resolve some of the problems.

[6.24] Initiatives of the Coalition include:

- a. Families would be provided a 30% child care rebate on their out of pocket costs;
- b. Increase the access by grandparents to Child Care Benefit
- c. Increase the maximum rate of Family Tax Benefit Part B to ensure families have choice as to their decision to return to work or not. The Family Tax Benefit Part B provides extra assistance to families with only one main income earner. The increase built on the 2004/2005 budget announcement that the Government doubled the income threshold of the secondary income earner at which benefits start to reduce and income of the secondary earner would not be counted against eligibility for the benefit already received in that financial year.

[6.25] In addition the Coalition noted that:

- a. Childcare places had increased from 306,500 in 1996 to 563,000 in 2004.

³ Media Release of Senator the Hon Kay Patterson, Minister for Family and Community Services, “Record Family Assistance, more child care and boost for carers in 2004-05 Budget, 11 May 2004

- b. The focus of a rebate was to support families choosing the childcare service to suit their circumstances and acknowledges the variation according to where they live and the type of service they use.⁴

[6.26] The Opposition also advanced a range of alternative propositions which also would have involved major public expenditures and variations to policies, payments and childcare regulation.

[6.27] The initiatives of the incoming Coalition Government should be allowed to mature and to have the policy effect they have been introduced to secure.

[6.28] It would be precipitous to usurp the proper role of government policy (and indeed the measures introduced by Parliament) by pursuing the course proposed by the ACTU.

[6.29] This would be at odds with the well established approach of this Commission of not attempting to correct, counteract or alter the operation of other areas of government policy. It has not for example been a goal of wage setting in this Commission to attempt counteract government taxation and income policies to secure outcomes other than those which the parliament has determined appropriate.

[6.30] Similarly, the Commission should recognise the sovereignty of other areas of the state in regard to outcomes in the area of childcare. This Commission cannot, nor should it attempt to alter, the outcomes resulting from the levels of childcare / childcare outcomes the government has deemed appropriate, which the electorate has validated at the recent election.

ACTU CONTENTIONS

[6.31] In its summary, the ACTU states that:

- 3.23 The Commission has recognised that the way in which work is organised has changed significantly in the past 20 years. The rise of long hours, irregular hours and intense working arrangements has been accompanied by increased part time employment which is primarily casual, and without leave entitlements. These changes in working arrangements have not been met by changes in the provision of care. Most formal care is structured around employees who work a standard week, whose dependents have good (or at least stable) health and, who have other family resources available when usual care arrangements fail.

⁴ Howard Government Election 2004 Policy, Extra Assistance for Families

- a. That any changes in work have not been met with changes in care (to the extent this is accurate) is an issue for governments and communities not employment regulation. This is what is in play in political and policy debate on childcare.
- b. To the extent that employment flexibility can play a role, the ACCI/NFF prescriptions offer ample prospect to address this based on agreement (the approach which has been successful to date).

[6.32] The ACTU claim that various changes in the organisation of work make it harder to reconcile work and family life. Again, the interaction of changing work with non-employment, government provided mechanisms for childcare and infant care remains an issue for government. Any failure of government/ community provided services which the ACTU contends does not legitimately become the responsibility of employers, nor advance a compulsion based approach to work and family accommodation.

III. No nexus between childcare & employment

[6.33] There is also no valid nexus between any childcare problems and the employment relationship, and the ACTU has not made out such a linkage.

[6.34] In particular childcare “problems” cannot be used to validate a claim to create absolute rights for the employee without balancing the needs of employers.

[6.35] In fact there is a significant inconsistency within the ACTU’s arguments.

[6.36] On one hand the ACTU seeks to justify, through evidence, that there is a misalignment between family and work commitments. Much of that evidence relates to the flow on problems associated with lack of access to childcare, which was particularly highlighted in the ACTU witness evidence. For example, the ACTU stated in the opening remarks the following:

PN1138

The fifth sort of major trend that we wanted to draw your attention to which wasn't to do with - mothers of very young children being employed but was the gap in the provision of childcare which creates additional stresses and strains on families. About half of Australia's children use some form of childcare, formal or informal, and about half of those use formal care. But the use of formal care varies very much by the age of the child. When children are under one, very few children are included in the formal childcare figures but their propensity to use formal childcare increases with the age of the child. But there are significant gaps in the availability of childcare, and I will take you to ACTU - - -

PN1144

And then increasing significantly through the pre-school years, and it drops away again as school starts. The evidence in the witness statements is that a lack of availability of childcare is a problem for many working families. Catherine McAnda, Carol Ellison, Annette Rowlands, Beth Frere, Jacqueline Luttick and Helen Walker all give evidence about how the lack of availability of childcare forced them to - well, it had an impact on their capacity to manage their work and family responsibilities.

PN1145

Ellison and McAnda and Rowlands and Frere were all unable to get care, even though they had placed their names down in their early pregnancies. In fact, I withdraw that; I don't think they all give that evidence. Certainly Frere and Kathleen Drayton give evidence that they had placed their names down early in their pregnancies and still by the time their child's first birthday was approaching they had not been able to find a place in a childcare centre. And the others that I mentioned, Ellison and McAnda and Annette Rowlands give

evidence that they were unable to find a place even though their child's first birthday was approaching.

PN1146

Often parents can only get a part time place. Catherine McAnda's evidence is that after waiting 14 months for a place in a childcare centre, she got one day per week. And 14 months later she is still waiting for the second day in that childcare centre. And the operating hours of childcare centres are not conducive to managing work and family responsibilities. Well, they are not conducive to rapid change in schedules and work being scheduled outside the opening hours. Bri-Anne Keen and Graeme Pearce both give evidence about how tight their morning timetable is.

PN1147

For them a temper tantrum or a toilet stop on the way out the door is a sufficient delay to mean that they are late for work, and they face more scrutiny from their employer, and what the evidence illustrates is that it would be of enormous benefit to those families if they could negotiate a 15 minute later start time, or a half hour later start time. If they could negotiate that, if that was consistent with the needs of the business, if they were still able to perform their work but turn up 15 minutes or half an hour later it would provide enormous relief to their families.

PN1148

It doesn't stop when children get to school. Joanne Dennington's evidence is that she takes her lunch break at 3 o'clock, picks the kids up from school, takes them home, waits for her 18-year-old son to get home, and then goes back to work so that she can finish the day's work, and without that flexibility she would be forced to resign her job. So, the gaps in care, what they indicate is that the 12-month cutoff point for parental leave is a fairly blunt cutoff point. It is an arbitrary cutoff point, and it doesn't reflect the fact that for many parents there is no alternative at the end of parental leave and they find themselves at the end of that maternity leave or paternity leave in a position where they are unable to return to work or unable to return on a fulltime basis.

PN1149

Now, your Honour, there is evidence in the materials before you that these stresses are - and that actually managing the work and family interface causes significant problems for workers and their families, and Dr Strazdins will give evidence later in the week that managing the work life interface is actually a stress, a causer of stress in families, and the working arrangements that she associates with lower levels of stress, lower levels of parental ill-health, depression and absenteeism include predictable working schedules and working hours that are compatible with family routines.

[6.37] On the flip side the ACTU seeks to isolate outside factors including childcare to try and justify that their claims are associated with problems that exist within the employment relationship that should then enable intervention by the Commission.

PN1097

Maternal labour market attachment is a quite complex creature and it is affected by effective marginal tax rates and by the - - -

PN1098

JUSTICE GIUDICE: Social security payments.

PN1099

MS BOWTELL: Social security payments, parenting payment.

PN1100

JUSTICE GIUDICE: Yes.

PN1101

MS BOWTELL: It is affected by the availability of child care, it is affected by a large number of factors but one of the factors is the conditions in the workplace and that is the part that this case is about; it is not about the rest of the factors that affect the maternal labour market attachment.⁵

[6.38] Conditions at the workplace cannot be seen in isolation to outside factors. A silo approach to the apparent problems sought to be established by the ACTU in the above statement simply does not work.

[6.39] The ACTU has obviously worked itself into a corner and cannot get out of its own contradictions. The limitations placed on the Commission in terms of substantiating a claim for new minimum test case standards are such that it goes to the nature of the employment relationship to the extent that the relationship has to be broken down to the degree that requires Commission intervention.

[6.40] The ACTU seeks to establish that conflict has arisen in the employment relationship by utilising many outside factors beyond the boundaries of the

⁵ ACTU Opening Remarks, Transcript, 1 September 2004, PN 1097 – PN 1101

employment relationship to boost their case that should have no or at least minimal weight in the determination of the claims.

[6.41] As the ACTU quite rightly point out their claims are about the working conditions not outside factors. As a consequence outside factors such as problems associated with childcare should not be given the weight sought by the ACTU.

IV. Employers are already assisting employees to minimise childcare linked pressures

INTRODUCTION

[6.42] Evidence in this matter has highlighted that employers are already assisting employees with minimising the pressures of balancing work and family commitment in relation to problems associated with childcare.

[6.43] In some instances employers may not be able to agree to all requests of employees due to the operational requirements of the business and balancing the needs of other employees but nevertheless, there is certainly no evidence to suggest that there is widespread refusal of employers to assist employees when it comes to childcare issues whether it is in relation to days or hours that an employee can work or the need to vary hours to ensure that they are able to fit in with opening and closing times.

THE EVIDENCE

[6.44] Problems relating to access to childcare were distinctly evident during the cross examination of ACTU witnesses. Further, it is clear from the evidence that assistance is being provided by the employer in relieving the pressures of childcare access with work attendance. That assistance in some circumstances may not necessarily result in being totally consistent with that sought by the employee but nevertheless identifies that employers are trying to balance competing demands at the work place including flexibility required by employees because of childcare issues.

[6.45] Some of the evidence outlined below in detail to exemplify the impact of childcare on parents seeking to balance work and family matters.

[6.46] Beth Frere explained that it had taken approximately 19 months to access 1 days' childcare following the birth of her second child. She had placed her name on a list when she was 2 months pregnant. Access to childcare for Ms Frere had been made particularly difficult after the closure of the childcare facilities at her State Government funded workplace.

[6.47] Ms Frere was able to negotiate working hours around childcare access following her return to work after the birth of both her children and had made

the decision to return to work part time as opposed to full time on a long term basis because she wanted to spend more time as a mother. While to some degree the hours are not exactly what she wanted she was able to negotiate part time and come to a compromise in terms of hours to meet her needs and also the needs of the business in requiring her services at certain times to meet is customer demands.

PN1757

and you worked - until the birth of your first child you had worked full-time, is that correct?---Yes.

PN1758

And so when you returned to work after the birth of your first child you actually negotiated a return to work on a part-time basis to accommodate that change. Is that correct?---I wanted to return part-time to see how I would go.

PN1763

Right. So just to clarify then, you say that you returned to work on a part-time, just for a short term basis. It is not clear from your witness statement, did you ever actually return full-time?---No. No.

PN1764

You didn't? So you maintained your part-time status?---It worked for me.

PN1766

And obviously as a consequence of the initial part-time return you were able to negotiate a long term part-time arrangement?---Yes. My contract is now ongoing.

PN1768

Great. Okay. And in terms of the decision to either go - stay part-time or go - return back to full-time, was that decision influenced at all by childcare arrangements?---No, I guess I always wanted to be a mother as well as a worker.

PN1772

And you say at - sorry, I will rephrase that. If you would look at paragraph 6, and you talk about the Chisholm Institute - - -?---Yes.

PN1777

And that has obviously closed down. Were there any particular reasons for the closure at all?---It was funding, and it was a creche - there was one at

Frankston, Berwick and Dandenong campuses, and they were closed because the government reduced funding, and the College or the Institute deemed that they couldn't finance it because their business was education, not creche. And that is fair enough.⁶

[6.48] Bri-anne Keen was able to find full time care for her daughter prior to returning to work after 52 weeks maternity leave. Mrs Keen took considerable time to short list childcare centres and was able to confirm that care well in advance of her return to work. Ms Keen was able to negotiate different start and finishing times with her employers to enable her to meet the opening and closing times of the childcare facility⁷ Ms Keen highlighted the difficulty for parents if they wish to vary the childcare arrangements from full time to part time and back again.

PN2882

So obviously it was I guess a balance for you in terms of the consequences of employment and the issues of financial impacts as opposed to that additional time you were seeking in terms of managing family issues?---Yes, and also if after going back to work full time for eight months and then be offered part time, I would then have to forgo my childcare. And it is not that easy to get a full time placement back again. So that to me that was also a consideration that if I said, okay, I will do three days a week, and then I got made redundant anyway, and then found another full time job, I wouldn't have had five days full time care for my daughter. So by still keeping my full time work, I was still keeping my full time place with daycare. So I guess it is just a very difficult thing to juggle, to go from full time to part time, and then get another place back to full time again with childcare because places get snapped up just like that. It is very difficult.⁸

[6.49] Catherine McAnda explained that she had sought two days childcare for her child for her return to work and was only able to secure one day with the second likely to become available after the child had turned 3 years old. As a consequence of the difficulties in accessing childcare Ms McAnda requested specific days of work and hours of work to suit the childcare arrangements, and these were met by her employer.

⁶ Transcript 2 September 2004, PN1757 to PN 1789 & Witness Statement, ACTU Exhibit 7 , pp 79 - 82

⁷ Transcript 3 September 2004, PN 2874, PN 2878, PN 2891 – PN 2894

⁸ Transcript 3 September 2004, PN 2882

PN3149

So you - I just want to talk to you about child care arrangements, and in particular the - you obviously had some issues with child care. The - just one moment, the notes I have got - focused. You say that you had difficulties in accessing suitable child care. How many creches did you think you sought to get your daughter into child care?---Every one in our municipality I approached, and would have - at least four put a deposit down on and was still on waiting lists at others.

PN3150

Right. So therefore you were waiting an awful long time, I understand from your witness statement, on the second day. So, could you explain to me exactly how one day and two days works and sort of why it is more difficult to get more days than those days?---There is a very big shortage of places in our area and when I originally applied they said if I only wanted one day it is much easier to slip into a position, but then two days it is harder to find two days in that age group room, and as it is, she is still on the waiting list for a second day.

PN3151

So how long has that been now? It sounds like about two years, nearly?---Yes.

PN3154

Right. That explains it. So obviously if child care had been more accessible, would that have obviously made issues relating to return to work and arranging your hours easier for you?---Yes. Would have been more flexibility.

Certainly. Thank you for that. If I could take you to your - about return to work following your return from maternity leave and you - looking at paragraph 19 of your statement, you talked about returning to work on a part-time basis on a roster of two days. Was that right?---Yes.

PN3156

So - and I understand from that then you worked on a Wednesday and a Saturday the first week, and then a Monday and a Friday in the - sorry, that was the first week was a Wednesday and a Saturday, and the second week would have been a Monday and a Friday, and that obviously suited your child care arrangements?---At the time, yes.

PN3157

At the time. And then I understand from paragraph 24 you then - there was an issue about starting times - sorry, finishing times, I should say, and Myer agreed to changing your finishing time to 4.45?---Eventually.

PN3158

Right. So obviously it was difficult for you to get to child care, because child care closed. Is that right?---Yes.

PN3159

So they have a very strict closing time, do they?---Yes.

PN3160

They do. Right. What are the consequences if you are not there?---Late fees.

PN3161

Late fees?---Because they have to pay the staff to stay back, and there has to be two staff members there, that is why they charge \$20 for each 15 minutes you are late.

PN3166

Okay. And obviously as you said, you have had - during maternity leave - sorry, before maternity leave and again after maternity leave, Myer have accommodated any requests you have had in terms of change of hours over the period of time you have worked for them?---Eventually.

PN3167

You say "eventually". What process did you go through?---Dealing with business leaders and personnel saying what I would ideally like and then coming to an arrangement, sometimes almost immediately, and other times it could be weeks before changes came about.⁹

[6.50] The particular difficulties in accessing childcare for children under 2 were highlighted by the evidence of Ms Kathleen Drayton.

PN5820

You state later on in your witness statement that you finally used childcare in 2000. So is it correct to say that it took from late 1997 until 2000 to get two days or had it become available earlier and you just decided to defer it?---No, it wasn't available. There's far less places available for babies under two because they need much more intensive care. There's a much lower ratio of babies to carers, so it's much harder to get a place for a baby. Once they're two more places become available but it's still very difficult.

PN5821

⁹ Transcript 6 September 2004, PN 3149 – PN 3167

You weren't able to get a spot until your daughter was over two years old; is that correct?---Yes.

PN5822

Thank you. You say you put your name down at several places; how many did you try?---Probably about 10.¹⁰

[6.51] Childcare issues are not confined to pre-school aged children. It was the evidence of Ms Joanne Dennington in her witness statement that it has been impossible for her to access after school care for her two children so she has had to arrange flexible hours to facilitate an arrangement.

7. There is no after school care available to me for my 10 and 9 year old children. My 18 year old son has taken on the responsibility of caring for them after school and during the holidays.
8. In order to be able to collect my children from school I take my lunch break at 3.00pm (*clarified in a supplementary statement that the lunch break is normally taken at 12.30pm each day*). I use this time to collect the two youngest children and take them home and wait for my 18 year old son to arrive home from school. Once he arrives home I return to work.
9. I can do this because the directors of the organisation where I work are prepared to provide me with the flexibility. I require to collect my children from school and wait with them until my older son arrives home. If I did not have this flexibility I could not remain in the position. I believe I would become part of the welfare system if it was not for the flexibility shown by my current employer.¹¹

[6.52] Childcare is a real issue impacting on employees that impact on their decision to work and how and when they work. This has a subsequent impact on employers. The evidence is clear that employers are assisting employees to minimise the pressure of childcare problems on their work. However, employers cannot always meet those individual demands or meet them immediately because they have to be weighed up with the operational needs of the business and also other, potentially competing, demands of other employees who may also be facing childcare pressures. This is undoubtedly a complex issue for all concerned.

¹⁰ Transcript, 10 September 2004, PN 5820 – PN 5822

¹¹ Joanne Dennington Witness statement, pp 40 – 41, ACTU Exhibit 7 & Supplementary Statement, ACTU Exhibit 10

V. Conclusion

[6.53] Throughout cross examination of ACTU witnesses it was very clear that childcare issues were playing a major role in the problems the ACTU witnesses sought to highlight in terms of them seeking to balance family and work responsibilities.

[6.54] The importance of care for the child, including access to childcare, is a key component of the claims sought by the ACTU.

[6.55] The conflict that can arise at the work place in many instances is inherent because of the flow on impacts of childcare access. Such an impact from childcare is not a component of the employment relationship per se but rather is an outside force attached to the employee that can significantly define and limit the employment relationship.

[6.56] The question is what is the level of responsibility on the employer to accommodate those restrictions attached to the employee? ACCI/NFF say that employers are already playing a role in assisting employees while balancing the operational needs of the business and needs of other employees to the extent that such claims sought by the ACTU cannot be justified.

[6.57] The resolution of childcare problems will not be satisfied by the granting of the ACTU claims. Instead the ACTU claims seek to ignore that childcare problems are a community and government responsibility and instead place the burden upon employers.

[6.58] Granting the ACTU claims creates a larger problem to solve a problem that Governments have accepted as a responsibility and are seeking to reduce the problems associated with childcare.

[6.59] ACCI/NFF submit that it is not the role of the Commission to intervene in the employment relationship by establishing new minimum safety net standards on the predominant basis that families need help in resolving caring issues when they return to work. These factors are beyond the boundaries of the employment relationship.

[6.60] There are certain benefits to employers to assist employees in resolving childcare issues when they impact on the employment relationship but not to the extent that it places a significant cost and administrative burden on employers, negatively impacts on productivity and efficiency of the workplace and negatively impacts on the employee relations at the workplace due to preferential

treatment being provided to a segment of the workforce particularly when rights are conferred to the detriment of others.

ACCI MEMBERS CHAMBERS OF COMMERCE AND INDUSTRY

ACT and Region Chamber of Commerce & Industry

12A Thesiger Court
DEAKIN ACT 2600
Telephone: 02 6283 5200
Facsimile: 02 6282 5045
Email: chamber@actchamber.com.au
Website: www.actchamber.com.au

Australian Business Limited

140 Arthur Street
NORTH SYDNEY NSW 2060
Telephone: 02 9927 7500
Facsimile: 02 9923 1166
Email: member.service@australianbusiness.com.au
Website: www.australianbusiness.com.au

Business SA

Enterprise House
136 Greenhill Road
UNLEY SA 5061
Telephone: 08 8300 0000
Facsimile: 08 8300 0001
Email: enquiries@business-sa.com
Website: www.business-sa.com

Chamber of Commerce & Industry Western Australia (Inc)

PO Box 6209
EAST PERTH WA 6892
Telephone: 08 9365 7555
Facsimile: 08 9365 7550
Email: info@cciwa.com
Website: www.cciwa.com

Chamber of Commerce Northern Territory

Confederation House
1/2 Shepherd Street
DARWIN NT 0800
Telephone: 08 8936 3100
Facsimile: 08 8981 1405
Email: darwin@chambernt.com.au
Website: www.chambernt.com.au

Commerce Queensland

Industry House
375 Wickham Terrace
BRISBANE QLD 4000
Telephone: 07 3842 2244
Facsimile: 07 3832 3195
Email: info@commerceqld.com.au
Website: www.commerceqld.com.au

Employers First™

PO Box A233
SYDNEY SOUTH NSW 1235
Telephone: 02 9264 2000
Facsimile: 02 9261 1968
Email: empfirst@employersfirst.org.au
Website: www.employersfirst.org.au

State Chamber of Commerce (NSW)

GPO Box 4280
SYDNEY NSW 2000
Telephone: 02 9350 8100
Facsimile: 02 9350 8199
Email: enquiries@thechamber.com.au
Website: www.thechamber.com.au

Tasmanian Chamber of Commerce and Industry Ltd

GPO Box 793
HOBART TAS 7001
Telephone: 03 6236 3600
Facsimile: 03 6231 1278
Email: admin@tcci.com.au
Website: www.tcci.com.au

Victorian Employers' Chamber of Commerce & Industry

GPO Box 4352QQ
MELBOURNE VIC 3001
Telephone: 03 8662 5333
Facsimile: 03 8662 5367
Email: vecci@vecci.org.au
Website: www.vecci.org.au

ACCI MEMBERS NATIONAL INDUSTRY ASSOCIATIONS

ACCORD

Dalgety Square
Suite C7, 99 Jones Street
ULTIMO NSW 2007
Telephone: 02 9281 2322
Facsimile: 02 9281 0366
Email: bcapanna@acspa.asn.au
Website: www.acspa.asn.au

Agribusiness Employers' Federation

GPO Box 2883
ADELAIDE SA 5001
Telephone: 08 8212 0585
Facsimile: 08 8212 0311
Email: aef@aef.net.au
Website: www.aef.net.au

Air Conditioning and Mechanical Contractors' Association

30 Cromwell Street
BURWOOD VIC 3125
Telephone: 03 9888 8266
Facsimile: 03 9888 8459
Email: deynon@amca.com.au
Website: www.amca.com.au/vic

Association of Consulting Engineers Australia (The)

75 Miller Street
NORTH SYDNEY NSW 2060
Telephone: 02 9922 4711
Facsimile: 02 9957 2484
Email: acea@acea.com.au
Website: www.acea.com.au

Australian Beverages Council Ltd

Suite 4, Level 1
6-8 Crewe Place
ROSEBERRY NSW 2018
Telephone: 02 9662 2844
Facsimile: 02 9662 2899
Email: info@australianbeverages.org
Website: www.australianbeverages.org

Australian Entertainment Industry Association

Level 1
15-17 Queen Street
MELBOURNE VIC 3000
Telephone: 03 9614 1111
Facsimile: 03 9614 1166
Email: aeia@aeia.org.au
Website: www.aeia.org.au

Australian Hotels Association

Level 1, Commerce House
24 Brisbane Avenue
BARTON ACT 2600
Telephone: 02 6273 4007
Facsimile: 02 6273 4011
Email: aha@aha.org.au
Website: www.aha.org.au

Australian International Airlines Operations Group

c/- QANTAS Airways
QANTAS Centre
QCA4, 203 Coward Street
MASCOT NSW 2020
Telephone: 02 9691 3636

Australian Made Campaign Limited

486 Albert Street
EAST MELBOURNE VIC 3002
Telephone: 03 8662 5390
Facsimile: 03 8662 5201
Email: ausmade@australianmade.com.au
Website: www.australianmade.com.au

Australian Mines and Metals Association

Level 10
607 Bourke Street
MELBOURNE VIC 3000
Telephone: 03 9614 4777
Facsimile: 03 9614 3970
Email: vicamma@amma.org.au
Website: www.amma.org.au

Australian Paint Manufacturers' Federation Inc

Suite 1201, Level 12
275 Alfred Street
NORTH SYDNEY NSW 2060
Telephone: 02 9922 3955
Facsimile: 02 9929 9743
Email: office@apmf.asn.au
Website: www.apmf.asn.au

Australian Retailers' Association

Level 2
104 Franklin Street
MELBOURNE VIC 3000
Telephone: 03 9321 5000
Facsimile: 03 9321 5001
Email: vivienne.atkinson@vic.ara.com.au
Website: www.ara.com.au

Housing Industry Association

79 Constitution Avenue
CANBERRA ACT 2612
Telephone: 02 6249 6366
Facsimile: 02 6257 5658
Email: enquiry@hia.asn.au
Website: www.buildingonline.com.au

Insurance Council of Australia

Level 3
56 Pitt Street
SYDNEY NSW 2000
Telephone: 02 9253 5100
Facsimile: 02 9253 5111
Email: ica@ica.com.au
Website: www.ica.com.au

Investment and Financial Services Association Ltd

Level 24
44 Market Street
SYDNEY NSW 2000
Telephone: 02 9299 3022
Facsimile: 02 9299 3198
Email: ifsa@ifsa.com.au
Website: www.ifsa.com.au

Master Builders Australia Inc.

16 Bentham Street
YARRALUMLA ACT 2600
Telephone: 02 6202 8888
Facsimile: 02 6202 8877
Email: enquiries@masterbuilders.com.au
Website: www.masterbuilders.com.au

Master Plumbers' and Mechanical Services Association Australia (The)

525 King Street
WEST MELBOURNE VIC 3003
Telephone: 03 9329 9622
Facsimile: 03 9329 5060
Email: info@mpmsaa.org.au
Website: www.plumber.com.au

National Electrical and Communications Association

Level 3
100 Dorcas Street
SOUTH MELBOURNE VIC 3205
Telephone: 03 9645 5566
Facsimile: 03 9645 5577
Email: necanat@neca.asn.au
Website: www.neca.asn.au

National Retail Association Ltd

PO Box 91
FORTITUDE VALLEY QLD 4006
Telephone: 07 3251 3000
Facsimile: 07 3251 3030
Email: info@nationalretailassociation.com.au
Website: www.nationalretailassociation.com.au

NSW Farmers Industrial Association

Level 10
255 Elizabeth Street
SYDNEY NSW 2000
Telephone: 02 8251 1700
Facsimile: 02 8251 1750
Email: industrial@nswfarmers.org.au
Website: www.iressentials.com

Oil Industry Industrial Association

c/- Shell Australia
GPO Box 872K
MELBOURNE VIC 3001
Telephone: 03 9666 5444
Facsimile: 03 9666 5008

Pharmacy Guild of Australia

PO Box 7036
CANBERRA BC ACT 2610
Telephone: 02 6270 1888
Facsimile: 02 6270 1800
Email: guild.nat@guild.org.au
Website: www.guild.org.au

Plastics and Chemicals Industries Association Inc

Level 2
263 Mary Street
RICHMOND VIC 3121
Telephone: 03 9429 0670
Facsimile: 03 9429 0690
Email: info@pacia.org.au
Website: www.pacia.org.au

Printing Industries Association of Australia

25 South Parade
AUBURN NSW 2144
Telephone: 02 8789 7300
Facsimile: 02 8789 7387
Email: info@printnet.com.au
Website: www.printnet.com.au

Restaurant & Catering Australia

Suite 32
401 Pacific Highway
ARTARMON NSW 2604
Telephone: 02 9966 0055
Facsimile: 02 9966 9915
Email: restncat@restaurantcater.asn.au
Website: www.restaurantcater.asn.au

Standards Australia Limited

286 Sussex Street
SYDNEY NSW 2000
Telephone: 1300 65 46 46
Facsimile: 1300 65 49 49
Email: mail@standards.org.au
Website: www.standards.org.au

Victorian Automobile Chamber of Commerce

7th Floor
464 St Kilda Road
MELBOURNE VIC 3000
Telephone: 03 9829 1111
Facsimile: 03 9820 3401
Email: vacc@vacc.asn.au
Website: www.vacc.motor.net.au