Fair Work Commission

Fair Work Act 2009

Annual Wage Review 2016-17

Post-Budget Submission,
Response to Questions on Notice and further matters
by the
Australian Catholic Council for Employment Relations
12 May 2017

Table of Contents

1. This submission by the Australian Catholic Council for Employment Relations (ACCER) follows the handing down of the Australian Government's Budget for 2017-18, addresses various Questions on Notice published by the Fair Work Commission (FWC), responds to recent updates to the FWC's *Statistical Report* and responds to the FWC's decision on 7 April 2017 in respect of an application for it to set a medium term target for the National Minimum Wage (NMW).

A. The May 2017 Budget

2. Unlike the Budgets of the previous three years, the May 2017 Budget did not announce substantial proposals for cuts to the social safety net, in particular family payments, that would impact on the living standards of wage-dependent workers and their families. The reason for this absence was the enactment of the *Social Services Legislation Amendment Act 2017* on 29 March 2017 and the confirmation in the May 2017 Budget that the remaining proposals from the May 2014 Budget that threatened a further reduction in family living standards would not be pursued. The relevance of the recent

changes to the current wage review are covered in ACCER's Reply of April 2017. We should also record that in the absence of any tax cuts for taxpayers, apart from high income earners previously paying the Budget Repair Levy, bracket creep will continue to reduce the after tax incomes of wage-dependent workers. This matter was discussed at paragraph 745 of the March 2017 submission where we noted that "if any tax cuts are introduced in the May 2017 Budget, the first $7.95 per week for NMW-dependent workers would be compensation for bracket creep".

3. The broad macroeconomic assessment presented by the May 2017 Budget is positive:

> "Australia's journey to broader-based growth after the mining investment boom is now well advanced.
>
> In its 26th year of consecutive growth, the nation is well placed to build on the hard-won growth secured in recent years and rising optimism about the global outlook.
>
> Real GDP growth is expected to rebound to 2¾ per cent in 2017-18 after slowing in 2016 -17 as a result of weather-related factors in early 2016-17 and Tropical Cyclone Debbie more recently. Growth is forecast to increase to 3 per cent in 2018-19.
>
> This Budget seeks to build on that impressive growth story, ensuring that all Australians have the opportunity to enjoy the benefits of a prosperous economy. It seeks to make the right choices to secure better days ahead for Australians, and those right choices are clear. " (*Budget Paper No.1, Statement 1: Budget Overview*, page 1-1)

4. This assessment of the strength of the Australian economy is supported by several of the major economic forecasts included in *Budget Paper No.1, Statement 1: Budget Overview*, at Table 2:

- Real GDP is forecast to grow by 2.75% in 2017-18 and by 3.0% in 2018-19, up from a forecast for 2016-17 of 1.75%.
- The Consumer Price Index is forecast to rise by 2.0% in 2017-18 and 2.25% in 2018-19.
- The Wage Price Index is forecast to rise by 2.5% in 2017-18 and 3.0% in 2018-19, up from a forecast for 2016-17 of 2.0%.

5. This material supports ACCER's submission that its claims are both fair and affordable.

B. Recent data

6. The *Statistical Report* of 5 May 2017 includes updates to Tables 8.6 and 8.7 following the publication of *Poverty Lines: Australia, December quarter 2016*. Table 41 (which is numbered to follow earlier tables) reproduces Table 8.7 of that report, with the

addition of similar data for December 2010 and January 2017. The figures for December 2010 are taken from the Table in the FWC's Statement of 26 July 2016 ([2016] FWCFB 5047), which corrected Table 5.7 of the Annual Wage Review 2015-16 decision of 31 May 2016. The calculations for January 2017 are based on the most recent poverty lines and the disposable incomes in Table 8.6 of the *Statistical Report*. The disposable incomes in Table 8.6 are at December 2016 and include the Schoolkids Bonus in households with children on the basis that the children are at primary school. The notes to Table 8.5 advise that the Schoolkids Bonus is calculated at $8.27 per week, per child. The January 2017 calculations for families with children are based on the disposable incomes at December 2016 less the appropriate amount in respect of the Schoolkids Bonus.

7. Table 41 shows a substantial cut in the living standards of low income families, specifically those dependent upon the NMW (the C14 award rate) and the C10 award rate, and, implicitly, those dependent on a wage between those two wage levels. In families where the child or children are attending secondary school the losses have been greater: the Schoolkids Bonus entitled parents to $430.00 per year for each primary school student and $856.00 per year for each secondary school student. Of course, families with pre-school age children have not suffered this loss. In the absence of data on the average loss per family as a result of the ending of the Schoolkids Bonus, the calculations in the *Statistical Report* of the value of the Schoolkids Bonus are appropriate.

Table 41

Comparison of 60 per cent median income poverty lines with disposable income of selected households

December 2010 to January 2017

	December 2010			December 2011			December 2015			December 2016			January 2017		
	60% median income PL	Disposable income as a ratio of 60% median income PL		60% median income PL	Disposable income as a ratio of 60% median income PL		60% median income PL	Disposable income as a ratio of 60% median income PL		60% median income PL	Disposable income as a ratio of 60% median income PL		60% median income PL	Disposable income as a ratio of 60% median income PL	
	($ pw)	C14	C10	($ pw)	C14	C10	($ pw)	C14	C10	($ pw)	C14	C10	($ pw)	C14	C10
Single adult	455.57	1.15	1.31	474.00	1.13	1.30	517.94	1.15	1.30	523.01	1.16	1.31	523.01	1.16	1.31
Single parent, one child	592.24	1.27	1.40	616.20	1.26	1.39	673.32	1.27	1.39	679.91	1.29	1.40	679.91	1.27	1.39
Single parent, two children	728.91	1.17	1.28	758.40	1.16	1.26	828.70	1.17	1.27	836.81	1.18	1.28	836.81	1.16	1.26
Single-earner couple, no children	683.36	1.04	1.08	711.00	1.00	1.02	776.91	1.02	1.03	784.51	1.02	1.03	784.51	1.02	1.03
Single-earner couple, no children (no NSA)	683.36	0.83	0.94	711.00	0.77	0.87	776.91	0.79	0.88	784.51	0.80	0.89	784.51	0.80	0.89
Single-earner couple, one child	820.03	1.05	1.07	853.20	1.04	1.06	932.29	1.05	1.07	941.42	1.06	1.07	941.42	1.05	1.06
Single-earner couple, one child (no NSA)	820.03	0.92	1.01	853.20	0.91	1.00	932.29	0.92	1.00	941.42	0.93	1.01	941.42	0.92	1.00
Single-earner couple, two children	956.70	1.01	1.03	995.40	0.99	1.02	1087.67	1.01	1.02	1098.32	1.01	1.02	1098.32	1.00	1.01
Single-earner couple, two children (no NSA)	956.70	0.89	0.97	995.40	0.88	0.96	1087.67	0.89	0.97	1098.32	0.90	0.97	1098.32	0.89	0.96
Dual-earner couple, * no children	683.36	1.21	1.35	711.00	1.17	1.34	776.91	1.19	1.36	784.51	1.20	1.37	784.51	1.20	1.37
Dual-earner couple, * one child	820.03	1.21	1.31	853.20	1.20	1.30	932.29	1.21	1.30	941.42	1.22	1.31	941.42	1.21	1.30
Dual-earner couple, * two children	956.70	1.14	1.23	995.40	1.13	1.21	1087.67	1.14	1.22	1098.32	1.15	1.23	1098.32	1.14	1.22

Note: * One partner earns 100% of the specified wage rate, the other earns 50% of this rate.

ACCER's calculations of poverty lines and poverty gaps

8. ACCER's March 2017 submission included calculations of poverty lines and poverty gaps for January 2017 based on *Poverty Lines: Australia, September quarter 2016*. Those figures produced a median equivalised disposable household income of $875.57 per week and a 60% relative poverty line of $525.34 per week for a single person. The *Statistical Report* calculates the single person poverty line at December 2017 as $523.01, $2.33 per week less than ACCER's estimate. For the sole parent with two children the excess of ACCER's figure over the report's figure is $3.74 per week and for the couple with two children the excess is $4.90 per week. ACCER accepts the poverty line calculations in the *Statistical Report* and will re-calculate the various figures used in the March 2017 submission if the FWC wishes this to be done.

9. We should also note that there is a small discrepancy in the respective calculations of the disposable incomes of families; for example, after the deduction of the Schoolkids Bonus the *Statistical Report* produces a figure of $972.88 per week for the NMW-dependent family of a couple and two children (without the Newstart allowance), whereas Table 28 of ACCER's submission calculates the disposable income at $973.71 per week, 83 cents per week more than the report. Apart from the removal of the Schoolkids Bonus there were no income changes from the end of December 2016 to the start of January 2017.

No improvement in living standards

10. On the basis of the FWC's figures in the latest *Statistical Report*, we can say that, in January 2017, the NMW-dependent family of a couple and two children had a poverty gap of $125.44 per week and a similar family dependent on the C10 award rate had a poverty gap of $46.62 per week.

11. Table 41 shows that the relative living standards of low paid workers with family responsibilities have not improved since December 2010: in the 16 households with children, 10 declined and 6 were unchanged. It should also be noted that over the period December 2010 to December 2016 the position of the NMW-dependent single adult had improved by only one percentage point, while the C10-dependent single adult remained on the same ratio to the poverty line. The single earner couples had suffered a decline in their relative living standards following the withdrawal of the dependent spouse taxation rebate from 1 July 2011; see note to Table 8.5 of the *Statistical Report*.

12. Table 41 supports ACCER's contention that decisions under the *Fair Work Act 2009* have not addressed the falling living standards of low paid workers prior to its

commencement in 2010, which was one of the reasons for the enactment of the legislation. The decisions over the past seven years have arrested the substantial decline, but have not addressed the longer term decline in living standards.

C. Responses to Questions on Notice

13. On 3 May 2017 the FWC published Questions on Notice for the consideration of the parties and for response. The following paragraphs respond to the questions that are relevant to ACCER.

14. **Question 2.3**. The FWC has asked if any party wishes to change its proposed wage rise as a result of the publication of the Consumer Price Index for the March quarter 2017. ACCER does not wish to change its proposals for wage increases.

15. **Question 4.1** concerns views expressed in a passage from the *Annual Wage Review 2015–16* decision concerning the distribution of low paid workers among households and the role that the NMW and award wages have in addressing the relative living standards and the needs of the low paid. ACCER does not dispute the views of fact and interpretation in that passage.

16. **Question 4.2** concerns submissions made by ACCER regarding past decisions by the FWC and the statutory requirements for the setting of the NMW and award wage rates. ACCER does not wish to add to its submissions on these matters.

17. **Question 6.2** is an invitation to all interested parties to provide more detailed consideration of the reasons for the increase in award reliance, including the findings from the FWC's *Research Report 4/2017—Explaining recent trends in collective bargaining*.

18. The matters and issues raised in the report are of substantial importance and require more consideration than ACCER is able to provide in the time available. According to a census commissioned by ACCER and the Australian Catholic Bishops Conference (ACBC) in late 2016, the Catholic Church in Australia employs over 225,000 people. Over 70% of these employees are covered by collective agreements. This high percentage partly reflects the significance of employment in the education, health, aged care and welfare sectors, but it also reflects a commitment by the Catholic Church to collective enterprise bargaining.

19. The Church's view of collective bargaining is summarised in *Good Works: The Catholic Church as an Employer in Australia*, published in May 2015 by ACCER and the ACBC:

"Cognisant of workers' rights through the principle of subsidiarity to participate in decision making that affects them, the Australian Bishops have also supported the introduction of enterprise bargaining by Church organisations inasmuch as it:

- reflects a collective rather than an individualistic approach. Solidarity in the employment relationship should ensure that the potentially adversarial nature and conduct of enterprise bargaining is antithetical to the nature of Church organisations and their mission
- respects the fact that, in a collective framework, it should be possible to have regard to the particular circumstances and needs of individual employees. Collective bargains should acknowledge that the circumstances or needs of each workplace may lead to variations in the agreements that can be achieved between different employers and employees
- is based on a system where there is equity of power between the negotiating partners.

  "No party should hold unreasonable sway over another."(BCIA [Bishops' Commission for Industrial Affairs], 1993, *Industrial Relations - The Guiding Principles*, p.4)

Given the right to freedom of association, Church employers should recognise that trade unions have a legitimate interest in representing their members, whether in relation to compliance with awards and legislation, the representation of individual employees in grievance processes or in the negotiation of enterprise agreements. In reaching a collective bargain, Church employers:

- should be guided in their agreements by the future direction and requirements of their organisations, rather than the circumstances of external bodies
- need to be aware of industry and community standards, and the historical nexus between wages and conditions in their own and other sectors
- must acknowledge that it is in the best interests of Church organisations to ensure that their employees and their representatives understand the funding of their organisations. This enables fairness and objectivity about the financial parameters of the organisation during enterprise bargaining discussions." (page 26)

20. In a global assessment of changes in collective bargaining and the capacity of unions to represent members, Pope Benedict XVI has observed:

> "Through the combination of social and economic change, trade union organizations experience greater difficulty in carrying out their task of representing the interests of workers, partly because Governments, for reasons of economic utility, often limit the freedom or the negotiating capacity of labour unions. Hence traditional networks of solidarity have more and more obstacles to overcome. The repeated calls issued within the Church's social doctrine, beginning with *Rerum Novarum*, for the promotion of workers' associations that can defend their rights must therefore be honoured today even more than in the past, as a prompt and far-sighted response to the urgent need for new forms of cooperation at the international level, as well as the local level.‖ (*Caritas in Veritate*, 2009, paragraph 25, emphasis added, footnote omitted. A longer extract from this encyclical is at paragraph 272 of ACCER's March 2017 submission.)

21. Fortunately, for Australian workers, the *Fair Work Act 2009* encourages, rather than

frustrates, collective bargaining, but there may be some broad economic, social and cultural factors that explain some of the changes discussed in *Research Report 4/2017—Explaining recent trends in collective bargaining*. The FWC is right to raise questions about the changes in collective bargaining in Australia because of their potential impact on the way in which the FWC sets safety net award wage rates in the context of the statutory objective of promoting collective bargaining. The matters raised in the research report could be facilitated through a conference or formal consultations held later in the calendar year. ACCER and, we expect, a range of Catholic employers would be keen to participate any such activity.

D. Responses to the medium term target decision

22. ACCER's Reply submission of April 2017 referred to the FWC's decision on United Voice's application for the setting of a medium term target for the NMW; see Decision [2017] FWCFB 1931, 7 April 2017 (Preliminary Decision) . Two matters were raised in response: one concerning the construction of the provisions under which the FWC sets the NMW and award wage rates; and an alternative response to the underlying issue of longer term wage cuts which had been demonstrated in the union's application.

The construction of section 284(1) and section 134(1)

23. ACCER's Reply summarised its concern about the FWC's views about the terms and operation of the safety net provisions concerning the NMW and award terms and conditions in sections 284(1) and section 134(1), respectively:

> "ACCER's submissions on the medium-term target decision will contend that the FWC's construction of the terms of each of section 284(1) and 134(1) of the *Fair Work Act* are erroneous and will address the FWC's views at paragraphs 50, 57 and 58 of the decision. ACCER will contend that the FWC has failed to identify its fundamental obligation to set a safety net which, of its nature, is intended to protect the living standards of workers. In setting such a safety net the FWC is obliged to take into account the specified factors in sections 284(1) and 134(1), which have an operation that is ancillary to the fundamental obligation of setting a safety net for the benefit of workers. The FWC's construction of these sections disconnects the particular matters to be taken into account from the FWC's fundamental obligation. ACCER notes that the FWC's views draw on the analysis of the same sections in the Penalty Rates Decision. ACCER contends that the construction adopted in the Penalty Rates Decision was erroneous and should not be followed." (Paragraph 18)

The Preliminary Decision

24. The statutory construction issues are raised by a number of passages in the Preliminary Decision which deal with the terms of the legislation and the particular issue of whether

the setting of a medium term target for the level of the NMW is permissible or desirable:

> "[44] The Act requires the Panel [when conducting an annual wage review] to take into account a number of considerations in performing these functions. The relevant statutory considerations are set out in the object of the Act (in s.3), the modern awards objective (in s.134(1)) and the minimum wage objective (in s.284(1)). The Panel must conduct the Review within the legislative framework of the Act.
> [45] It is clear, and uncontroversial, that in the context of a particular Review the Panel cannot 'bind' future panels in subsequent reviews. It follows that any attempt to adopt a 'hard' or binding medium term target for the NMW would be ineffective (even if it were accepted that the Panel had power to adopt such a target). The issue then becomes whether any useful and appropriate purpose would be served by adopting a more 'flexible' medium term target of the type described by the ACTU and United Voice. For the reasons that follow, we think not.

25. The reasons for the rejection of the setting of soft target are then set out in the context of a consideration of the statutory terms. The constructions given to those terms, which we contend were erroneous, were not necessary for the conclusion to reject the claim for a soft medium term target. The rejection of the soft medium term target could have been made on the basis of the construction of the legislation for which ACCER contends.

26. ACCER does not, therefore, seek to demonstrate that the conclusion in the Preliminary Decision to reject the setting of a medium term target was wrong; rather, its concern is with aspects of the reasoning that lead to that conclusion.

27. The aspects of the reasoning in the Preliminary decision that we challenge were drawn from the *4 yearly review of modern awards – Penalty Rates, Decision* [2017] FWCFB 1001 (Penalty Rates Decision) of 23 February 2017. The Annual Wage Review Panel referred to the consideration of the statutory provisions in that decision and adopted that reasoning, and the "principles" identified, with the conclusion: "We intend to conduct the 2016-17 Review in accordance with the principles set out above." (paragraph 78).

28. The paragraphs leading to the conclusion in paragraph 78 set out the relevant statutory terms: section 3 (the object of the Act), section 284(1) (the minimum wages objective), section 134(1) (the modern awards objective) and section 578(a) (which requires the FWC takes into account the object of the Act when performing its functions or exercising its powers). It concluded:

> "[50] Sections 134, 284 and 578 of the Act each direct the Panel to 'take into account' certain specified considerations in conducting and completing an AWR. A matter which the Panel is directed to 'take into account' is a relevant

> consideration in the *Peko-Wallsend* sense;[footnote to citation] which is those matters which the decision maker is bound to take into account and treat as matters of significance in the decision making process. [footnote to cases] No particular primacy is attached to any of the considerations identified in the modern awards objective (s.l34(l)(a)(h)) or in the minimum wages objective (s.284(1)(a)(e)). For our part we would observe that the weight to be attributed to a particular statutory consideration may vary from year to year depending on the social and economic context in a particular Review."

29. In the following paragraph of the Preliminary Decision a distinction is drawn between three broad categories of the considerations to be taken into account in regard to each wage setting function: economic, social and collective bargaining. The social considerations are discussed at paragraphs 52 to 55.

30. We should note that these social considerations are employee-specific and do not relate to the interests of employers. In regard to the obligation to take into account the needs of the low paid the FWC repeats a passage used in past annual wage review decisions:

> "The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a 'decent standard of living' and to engage in community life, assessed in the context of contemporary norms." (paragraph 55).

31. By way of summary the Panel stated:

> "[56] As the Panel has observed in previous Review decisions, there is often a degree of tension between the economic, social and other considerations which the Panel must take into account and, as we have mentioned, *no particular primacy is attached to any of these considerations*." (footnote omitted, emphasis added)

32. The particular matters to be taken into account in sections 134(1) and 284(1), like other frequently found statutory provisions which guide and constrain the exercise of statutory discretions by tribunals and decision makers, do not contain a stated weighting or primacy. However, the weight to be given to each of the matters may be determined by the purpose for which the statutory power is given. The statutory context may mean that some matters may be more relevant and should command greater attention by the decision maker. Where a statutory power is conferred to protect a particular interest, having regard to, or taking into account, a range of considerations which may promote or constrain the purpose of the power, each of the identified considerations would not carry the same weight. A decision maker could not be indifferent to the relative importance of those matters in achieving the statutory purpose. This does not prevent or inhibit the decision maker from considering all of the facts and circumstances

relevant to each statutory consideration and drawing conclusions about each of them. In the context of the obligation on the tribunal to set a safety net wage, the relative living standards and the needs of the low paid (see section 184(1)(c)) will have particular importance.

33. The purpose for which the specified matters are to be considered is discussed by the FWC in paragraph 57:

> "[57] While the statutory considerations referred to must be taken into account it is important to bear in mind that these considerations inform the modern awards objective and the minimum wages objective, but they do not themselves constitute the relevant statutory objectives. The modern awards objective is to ' ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions.' The minimum wages objective is to 'establish and maintain a safety net of fair minimum wages.' These objectives are very broadly expressed and the notion of fairness is at the heart of both statutory objectives. *Fairness in this context is to be assessed from the perspective of the employees and employers covered by the NMW or the modem award in question*. [footnote: [2017] FWCFB 1001 at paras 117- 119.]" (Emphasis added)

34. The specified considerations are to be taken into account for the purpose of setting a safety net, either a wage safety under section 284(1) or an award safety net under section 134(1). Fairness is, to use the words of the FWC, at the heart of both statutory objectives. However, the last sentence of paragraph 57 is, we contend, inconsistent with the purpose of each of the safety nets required to be established under the two sections.

35. ACCER contends that the last sentence of paragraph 57 is erroneous and not consistent with the proper construction of the terms of sections and 284(1) and 134(1) and the object of the Act in section 3. The adjective *fair* in each of the sections relates to the *safety net* which is to be established for the benefit and protection of workers.

36. The term safety net is not defined in the legislation, but its common meaning and purpose in relation to wages recognise the need to protect vulnerable workers. This is not a question of fairness between parties, such as would arise in the case of a claim of unfair dismissal or in the resolution of many industrial disputes between a particular employer and its employees. It is more in the nature of health and safety requirements that protect workers even though these requirements are against the economic interests of employers. There are various obligations imposed on business, including the obligation to pay tax, which do not depend upon the application of fairness test as between a particular employer and a particular employee, or some other party.

37. This means that the safety net has to be fair for the workers, with due account taken of the various of matters specified in those sections, which include economic interests of employers generally and the social considerations of that apply to workers. Those factors are taken into account for the essential purpose of protecting the living standards and working conditions of workers, not to protect employers. The economic matters identified in those sections are to protect the economic interests of employers against the unreasonable setting of minimum wages and award conditions.

38. Sections 284(1) and 134(1) are beneficial provisions. For these reasons the wages and other terms and conditions under those sections are not simply set by the balancing of the interests of employers by the test of fairness as described in paragraph 57 of the Preliminary Decision.

39. The footnote to the last sentence of paragraph 57 of the Preliminary Decision is to paragraphs 117-119 of the Penalty Rates Decision, which read:

> "[117] First, fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question. So much is clear from the s.134 considerations, a number of which focus on the perspective of the employees (e.g. s.134(1)(a) and (da)) and others on the interests of the employers (e.g. s.134(1)(d) and (f)). Such a construction is also consistent with authority. In Shop Distributive and Allied Employees Association v $2 and Under (No. 2) [footnote] Giudice J considered the meaning of the expression 'a safety net of fair minimum wages and conditions of employment' in s.88B(2) of the Workplace Relations Act 1996 (Cth) (the WR Act). That section read as follows:
>
> > '88B Performance of Commission's functions under this Part …
> > (2) In performing its functions under this Part, the Commission must 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 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.'
>
> [118] As to the assessment of fairness in this context his Honour said:
>
> > 'In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. This must be done in the context of any broader economic or other considerations which might affect the public interest.'[footnote]

> [119] While made in a different (albeit similar) statutory context the above observation is apposite to our consideration of what constitutes a 'fair … safety net' in giving effect to the modern awards objective. We would also endorse the following observation by the Full Bench in the Equal Remuneration Decision 2015:
>
> > 'We consider, in the context of modern awards establishing minimum rates for various classifications differentiated by occupation, trade, calling, skill and/or experience, that a necessary element of the statutory requirement for 'fair minimum wages' is that the level of those wages bears a proper relationship to the value of the work performed by the workers in question.'[footnote]"

40. The first part of paragraph 117 of the Penalty Rates Decision focuses on some of the statutory considerations in section 134 (1) without consideration of the way in which they relate to the primary obligation to set a fair safety net of award terms and conditions. The statutory task under section 134(1) is not simply to balance the competing interests of employers and employers according to the criterion of fairness. The economic considerations in paragraphs 134(1)(d) and (f) are relevant to the setting of a fair safety net for workers and their proper consideration may provide a constraint or limitation on the content of the safety net.

41. The view in paragraph 117 of the Penalty Rates Decision and paragraph 57 of the Preliminary decision that the legislation applies fairness as between employers and employees by reference to the specified considerations is said (in paragraph 117) to be "consistent with authority". Two decisions are referred to *Shop Distributive and Allied Employees Association v $2 and Under (No. 2)* (the $2 case) and the *Equal Remuneration Decision, 2015*.

42. The principal authority relied upon for the view that the fairness in this context involves a determination of fairness as between employers and employees is the decision of the President of the Australian Industrial Relations Commission (AIRC), Giudice J, in *Shop Distributive and Allied Employees Association v $2 and Under (No. 2)* PR941526 ($2 Case). This was a dissenting decision, as the FWC noted (see below), with the majority comprising Senior Deputy President Watson and Commissioner Raffaelli.

43. The $2 Case decision, which was delivered on 3 December 2003, arose out of a letter of demand and a log of claims served by the Shop, Distributive and Allied Employees Association (SDA) on some 35,877 employers in the retail industry in Victoria and concerned the appropriate rate for the remuneration of Sunday work. The SDA argued for double time, which was contested by employer organisations, who argued the rate should be time and a half. The majority decision sets out the arguments on behalf of

the parties to the dispute. It appears from the majority decision that the construction of the legislation as adopted by Giudice J was not relied upon by the parties opposing the SDA's claim: the President (at paragraph 6) agreed and adopted the account of the evidence and submissions given by the majority, which did not include a reference to such an argument. The substantive basis for the President's dissent are in the paragraphs that follow the paragraphs quoted in the Penalty Rates Decision; see paragraphs 12 to 28 of the dissent, which follow immediately after the paragraph quoted in the Penalty Rates Decision. At paragraph 12 he stated "In fixing penalty rates in a safety net award it is appropriate to have regard to the penalty rate structure in the award under consideration and in other relevant awards including awards applying to the same industry in other states". These matters appear to be the basis upon which the President came to his decision.

44. The Penalty Rates Decision notes that Giudice J dissented. The footnote referring to this aspect includes "We note that Giudice J was in the minority in the result, but the observation cited is consistent with the views of the majority at [124]." That paragraph in the majority decision reads:

> "In our view, those departures from the interim award, directed to reflecting the reality that retailing in Victoria is a seven-day a week industry, provide sufficient beneficial conditions for employers and there is no justification for further departure from the interim award in respect of penalty rates for Sunday work in ordinary hours. In the context of the departures from the interim award provisions arising out of the January 2003 decision, we are confident that our decision in respect of Sunday penalties strikes an appropriate balance between fair safety net conditions and proper compensation of employees in respect of the disabilities associated with Sunday work and flexibility for employers to staff their establishments on Sundays, without deterrence of Sunday trade."

45. ACCER submits that this does not amount to support Giudice J's view and that the view of the majority can be described as consistent with that view. The majority's extensive consideration of the issues involved (commencing at paragraph 90) includes the following passage under the heading Fair Minimum:

> "As indicated above, we think the primary focus in assessing a fair minimum standard for the penalty for work in ordinary hours on a Sunday, in the context of living standards generally prevailing in the Australian community, is found in the interim award provisions and beyond that, to a lesser degree, in award provisions operating more generally in the Victorian retail sector." (Paragraph 119)

46. This approach is consistent with the objective of providing fair compensation for employees on account of the disabilities associated with working on Sundays, with the

decision being based on the need to compensate employees, rather than on striking some kind of balance between the interests of employers and employees. There is no reason to conclude that the decision of the majority supports, even implicitly, the construction of the legislation in the dissent.

47. It appears clear that Giudice J did not seek to base his dissent on a construction of the legislation that decisions should be fair as between employers and employees, but on a consideration of the penalty rate structure in the award before him and in other relevant awards. It was not and, we submit, was not intended to be the reason for the dissent. A closer consideration of the majority and minority decisions shows that this footnote claims too much. The $2 Case should not be treated as "authority" as has been done by the FWC in both recent decisions.

48. Furthermore, the view expressed by Giudice J now relied upon by the FWC was made in respect of a different statutory scheme. It would serve no purpose now to debate the correctness of the observation; but we should note that, in regard to the setting of minimum wage rates, ACCER's submissions to the safety net review cases conducted by the AIRC under the same legislation until it lost its jurisdiction to set minimum wage rates in 2005 were inconsistent with the observation.

49. The second authority relied upon by the FWC in the Penalty Rates Decision is the *Equal Remuneration Decision 2015* [2015] FWCFB 8200. It endorsed the following passage in that Full Bench decision:

> 'We consider, in the context of modern awards establishing minimum rates for various classifications differentiated by occupation, trade, calling, skill and/or experience, that a necessary element of the statutory requirement for 'fair minimum wages' is that the level of those wages bears a proper relationship to the value of the work performed by the workers in question.'[footnote]"

50. This passage does not support the contention that the setting of award terms and conditions under the current legislation is a matter of determining a level of fairness between competing interests, i.e. those of employers and employees. In fact, it supports the view that the essential function in the setting of award wage rates is to recognise and give monetary reward the value of the work performed by the workers and not merely to provide a balance between the competing economic interests of employers and their workers. The essential purpose of the setting of these wage rates as part of the award safety net is to protect and ensure that workers who have and exercise skills and responsibilities are properly rewarded. Whether or not the outcome of this process may

be regarded as fair to employers is not relevant.

51. The Preliminary Decision, like the Penalty Rates Decision, fails to consider the nature and requirement of a safety net. The purpose of the NMW safety net under section 284(1), like the award safety net under section 134(1), is to ensure a level of protection for workers who do not have the capacity to bargain for a fair outcome for themselves.

52. We noted earlier that the Preliminary Decision repeated a passage used in past annual wage review decisions in regard to the obligation to take into account the needs of the low paid: "The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a 'decent standard of living' and to engage in community life, assessed in the context of contemporary norms."

53. We note, however, that the principles identified by the FWC as those which it will apply in the current wage review do not include any reference to a passage that is also found in successive annual wage review decisions. In its June 2013 decision the FWC said:

> "We accept the point that if the low paid are forced to live in poverty then their needs are not being met. We also accept that our consideration of the needs of the low paid is not limited to those in poverty, as conventionally measured. *Those in full-time employment can reasonably expect a standard of living that exceeds poverty levels.* (*Annual Wage Review 2012-13, Decision*, [2013] FWCFB 4000, paragraph 33, emphasis added)

54. The last sentence has been repeated in all three subsequent decisions. It is a fundamentally important matter because it recognises the essential nature of the safety net: it should protect workers against poverty, at the least, yet it is not included in the principles to be applied in the current wage review. The FWC's use of the term "reasonable expectation" is significant because it recognises the need for workers to be given a basic level of protection without having to demonstrate fairness to employers. This objective is, we submit, an obligation under the legislation and not merely an aspiration.

55. The provenance of the first sentence of the previous quote is discussed in ACCER's March 2017 submission at paragraphs 169 and 395, which emphasise the requirement to protect workers against poverty.

Harvester

56. The essential purpose of minimum wage legislation is to protect workers. This beneficial nature has been accepted from the earliest days of minimum wage setting, as

illustrated by the first national decision on such a matter in the Commonwealth Court of Conciliation and Arbitration. In *Ex parte H. V McKay* (1907) 2 CAR 1 (the *Harvester case*) a manufacturer of agricultural implements, H.V. McKay, sought an exemption from the imposition of excise duties imposed by the *Excise Tariff Act 1906*. The Act provided that the duties would not be payable in respect of goods manufactured in Australia under conditions of remuneration which were declared by the President of the Court to be fair and reasonable. The President of the Court, Justice Higgins, was required to ascertain whether the terms of remuneration were fair and reasonable.

> "The provision for fair and reasonable remuneration is obviously designed for the benefit of the employees in the industry; and it must be meant to secure to them something which they cannot get by the ordinary system of individual bargaining with employers. If Parliament meant that those·conditions shall be such as they can get by individual bargaining - if it meant that those conditions are to be fair and reasonable, which employees will accept and employers will give, in contracts of service - there would have been no need for this provision. The remuneration could safely have been left to the usual, but unequal, contest, the "higgling of the market" for labour, with the pressure for bread on one side, and the pressure for profits on the other. The standard of "fair and reasonable" must, therefore, be something else; and I cannot think of any other standard appropriate than the normal needs of the average employee regarded as a human being living in a civilised community. I have invited counsel and all concerned to suggest any other standard; and they have been unable to do so. If, instead of individual bargaining, one can conceive of a collective agreement - an agreement between all the employers in a given trade on one side, and all the employees on the other side - it seems to me that the framers of the agreement would have to take, as the first and dominant factor, the cost of living as a civilised being. If A lets B have the use of horses, on the terms that he give them fair·and reasonable treatment, I have no doubt that it is B's duty to give them proper food and water, and such shelter and rest as they need; and as wages are the means of obtaining commodities, surely the State, in stipulating for fair and reasonable remuneration for the employees, means that the wages shall be sufficient to provide these things, and clothing, and a condition of frugal comfort estimated by current human standards. This, then, is the primary test, the test which I shall apply in ascertaining the minimum wage that can be treated as "fair and reasonable" in the case of unskilled labourers." (*Ex parte H. V McKay* (1907) 2 CAR 1, 3-4)

57. *Harvester* was based on the provision of a level of remuneration that we would now describe as a safety net wage, which was to protect the living standards of workers who, if exposed to the labour market and, in some cases, to unscrupulous employers, would be denied a decent standard of living for themselves and their families, i.e. "a condition of frugal comfort estimated by current human standards". This passage recognises that there is a minimum standard of living that should be guaranteed regardless of an

employer's economic interests. The minimum standard identified was not compromised by the level of profits in a particular establishment.

58. The *Harvester* standard of living is echoed in the formulation used by the FWC which we quoted earlier: one in which the lowest paid are able to "purchase the essentials for a 'decent standard of living' and to engage in community life, assessed in the context of contemporary norms." However, the living standard identified, and the income necessary for that standard, is the essential purpose of the safety net and not simply, as the FWC's analysis suggests, only one consideration in a range of considerations in the setting of the wage safety net.

59. ACCER submits that the purpose of a safety net wage set under the terms of section 284(1) is to provide the employee with the income to purchase the essentials for a 'decent standard of living' and to engage in community life, assessed in the context of contemporary norms. The error made by the FWC in the Preliminary Decision was to regard this matter as merely one of a number of factors to be balanced against, or constrained by, the estimated economic interests of employers generally.

60. These issues concerning the construction of sections 284(1) and 134(1) are matters of great importance to the application of the legislation and the minimum wage and award protection provided for Australian workers. It is clear that they cannot be sufficiently considered by all interested parties and the FWC in the time available before the handing down of the decision in the current annual wage review. ACCER proposes, therefore, that these matters be listed as a preliminary matter in the Annual Wage Review 2017-18, with appropriate directions for the filing of submissions. ACCER also proposes that the matter be listed in sufficient time for a decision to be handed down by December 2017.

A policy on restoring past living standards

61. ACCER's initial response to the FWC's rejection in the Preliminary Decision of the application for a medium term target was included in its April 2017 Reply submission,:

> "In the absence of such a target, ACCER will ask the FWC to adopt a policy to increase the relative living standards of low paid workers over a period of time with a view to restoring the eroded relative living standards of the low paid to at least the level that applied when the NMW was first established (as the Federal Minimum Wage) in 1997. It will argue that such a policy can be adopted consistent with the FWC's statutory obligations." (ACCER Reply, April 2017, paragraph 11)

62. This proposal has been raised in the context of the FWC's conclusion that low paid and

award reliant have fallen behind community increases, a matter acknowledged once again in the Preliminary Decision:

> "[54] The assessment of relative living standards focuses on the comparison between award reliant workers and other employed workers, especially non-managerial workers. [footnote] The relative position of award reliant workers has fallen over time. As noted in the *2015- 16 Annual Wage Review* decision:
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> > 'There is no doubt that the low paid and award reliant have fallen behind wage earners and employee households generally over the past two decades, whether on the basis of wage income or household income.'[see [2016] FWCFB 3500, paragraph 372]"

63. The FWC has accepted that there are other ways in which the longer term changes (which have occurred over the past two decades) may be addressed:

> "[73] We acknowledge the need to periodically assess the medium and long term consequences of successive Review decisions and have recognised that these decisions have both an immediate and cumulative impact. *But the adoption of a 'target' is not the only way of addressing the issue raised*. A chart on the minimum wage bite over the last 10 years is now included in the Statistical report. Parties can make submissions on the level and trends in the minimum wage bite in each annual wage review and the Panel can consider these submissions at that time. As outlined earlier, the Panel also tracks changes in other relevant indicators over time, including factors such as productivity, living costs and inflation, employment and financial stress. It is also appropriate that medium and longer term trends in these factors are considered as part of each Review." (Emphasis added)

64. If the longer term cuts in the living standards are to be addressed more is needed than the ability of parties to present longer term data in each successive wage case. The use of the word "addressing" suggests that, over time, but not necessarily each year, action can and will be taken by the FWC to remedy the detriment. Unless there is some direction and purpose for these kinds of submissions the parties can have no confidence in the prospect of them being addressed.

65. The policy that ACCER proposes has two parts. First, consistent with what the FWC has already said, the FWC accepts that since the NMW was first introduced in 1997 (and then called the Federal Minimum Wage), the relative living standards provided by the NMW and other minimum wage rates have fallen as a result of the falling relativity of those rates to Australian median wages. Second, the FWC accepts that, as a general objective to be pursued over time and consistent with its statutory obligations, it will progressively restore the relative value of those wage rates for the purpose of restoring the relative living standards of those workers and families who depend, directly or indirectly, on minimum wage rates..

66. ACCER submits that a policy of the kind proposed is consistent with the proper exercise of the statutory powers conferred on the FWC by sections 134(1) and 284(1) of the *Fair Work Act 2009*. The capacity to adopt a policy of this kind was summarised by Tracey J in *Gbojueh v Minister for Immigration and Border Protection* [2014] FCA 883, at 39:

> "At both common law and under statutory judicial review a decision-maker will not commit jurisdictional error merely by having regard to a principle or policy when exercising a statutory discretion. Error, may, however, occur if the decision-maker considers him or herself bound to apply the policy without regard to countervailing considerations and acts accordingly. In *Elias v Commissioner of Taxation* [2002] FCA 845; (2002) 123 FCR 499 at 506-7 Hely J summarised the position as follows:
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> > "The Commissioner is entitled to adopt a policy to provide guidance as to the exercise of the discretion, provided the policy is consistent with the statute by which the discretion is conferred. Thus if the statute gives a discretion in general terms, the discretion cannot be truncated or confined by an inflexible policy that it shall only be exercised in a limited range of circumstances. A general policy as to how a discretion will 'normally' be exercised does not infringe these principles, so long as the applicant is able to put forward reasons why the policy should be changed, or should not be applied in the circumstances of the particular case."
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> See also: *R v Moore; Ex parte Australian Telephone and Phonogram Officers' Association* [1982] HCA 5, (1982) 148 CLR 600 at 612; *Tang v Minister for Immigration and Ethnic Affairs* (1986) 67 ALR 177 at 189-190 (Pincus J); *Madafferi v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 220, (2002) 118 FCR 326 at 358."

67. The High Court judgment in *R v Moore; Ex parte Australian Telephone and Phonogram Officers' Association* referred to in this extract was a case where the general principle was applied to wage setting by the AIRC.

68. The history of wage fixation in Australia demonstrates that the exercise of a discretion to set wages can be based on the formulation and application of principles and policies. The awarding more than a century ago of the *Harvester* Basic Wage across a range of industrial disputes demonstrates that the exercise of a discretionary power may be based on the application of principles and policies. Various forms of wage fixing in the past century have reflected the application of changing principles and policies. This has been consistent with general legal principles.