

Fair Work Commission

Fair Work Act 2009

Annual Wage Review 2017-18

Post-Budget Submission,

Submissions on Recent Data

and

Reply to Responses to Questions on Notice

by the

Australian Catholic Council for Employment Relations

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1. This submission by the Australian Catholic Council for Employment Relations (ACCER) is made following the handing down of the Federal Budget of May 2018. It deals with the Budget's proposed personal income tax changes proposals, with recently released data on measures of living standards and poverty, and replies to responses made by various parties to Questions on Notice issued by the Fair Work Commission (FWC).

A. The May 2018 Budget

2. The principal theme of the May 2018 Budget is its proposed substantial changes to the Australian personal income tax legislation which, it is claimed, will protect taxpayers from bracket creep. The Budget Papers equate action to prevent continuing bracket creep as delivering a tax cut.

Bracket creep

3. Bracket creep occurs when a taxpayer's average income tax increases even though his or her income is only increasing by the same rate as community-wide incomes. It occurs in progressive taxation systems when a higher proportion of a person's income falls into a higher taxed income bracket and also when increases in income take the taxpayer into a higher tax bracket. It is not necessary for a person's income to move into a higher income tax bracket in order to suffer bracket creep. Unless taxation thresholds are adjusted appropriately, bracket creep will occur even when a worker's wage has moved in line with community-wide wage increases or minimum wage increases. Bracket creep, as the term is used, does not apply when workers obtain a higher paid position and have to pay a higher proportion of tax out of the new wage.
4. The adjustment in tax scales to offset bracket creep should not be regarded as a tax cut.

Budget changes in three steps

5. The changes proposed by the May 2018 Budget are in three steps: from 1 July 2018, 1 July 2022 and 1 July 2024.
6. The first step covers four years and comprises two parts: the introduction of the Low and Middle Income Tax Offset (LAMITO) and changes to one of the tax thresholds. The tax threshold change would extend the 32.5% taxation rate from \$87,001 per year to \$90,001 per year, above which the 37% rate, and then the 45% rate, would apply.
7. The second step, from 1 July 2022, would see substantial changes to income thresholds, save that the current point at which tax would become payable (at 19%) would remain at \$18,200 per year. The threshold at which 32.5% would be payable would rise from the current \$37,001 to \$41,001 per year and the maximum of this 32.5% tax bracket would be extended to \$120,000. The two higher thresholds would remain the same. At this time LAMITO would be abolished, having served its purpose of providing taxation relief prior to the substantial changes in tax thresholds from 1 July 2022. At this point the Low Income Tax Offset (LITO), which will continue to operate alongside LAMITO, would be increased by \$200 per year, an amount equal to the LAMITO payment in respect of low income workers.
8. The third step, from 1 July 2024 would see the 37% tax bracket abolished by the extension of the 32.5% tax bracket to \$200,000 per year, with the top tax bracket of 45% applying to incomes in of \$200,000.

Bracket creep will continue

9. The current tax free threshold is \$18,200 per year, above which the first tax bracket is 19%. LITO, which declines in value from its maximum of \$445 per year as taxable income increases, effectively raises the tax free minimum income to \$20,542 per year. The Budget proposes that the income LAMITO and then LITO increase the taxation offset to \$645.00 per year, effectively raising the tax free threshold to \$21,594 per year from 1 July 2018. The Budget proposes that this will remain the case until sometime after 1 July 2024. This means that the income at which tax becomes payable would only increase by \$1,052 per year, or 5.1%, over 11 years or more. It locks in bracket creep for a range of low income workers.
10. This means that the number of part time workers who have to pay tax will increase even if their hours of work remain the same. Sole parents who can only work part time and part time workers in couple parent families who are working to supplement their family incomes will start to pay tax as general wage levels increase. Part time workers who are already paying tax will find an increasing percentage of their wage is taken by taxation because a higher proportion of their income is being taxed. Tax will take a bigger bite out of the wage packet even when wage increases are only keeping up with price increases.
11. The failure to increase the income level at which tax becomes payable is bad public policy, as well as being inequitable to low paid and part time workers who will be increasingly caught by the taxation system. The increased tax burden on these workers contrasts with the real tax cuts promised for high income earners. It also needs to be kept in mind that, to the extent that there is a connection between wage rates for low paid workers and employment opportunities, income tax on low paid workers operates as a disincentive to employment.

What the tax cuts would mean for low paid workers

12. To illustrate the impact that the Budget would have on the disposable incomes of low paid worker over the initial four year period, we might consider the position of workers on \$40,000 per year receiving a 10% increase over that period. We assume that a 10% increase would reflect community-wide increases in taxable income and would be an appropriate criterion to by which to assess bracket creep.
13. The current income tax scales will apply over this four year period, as will LAMITO. Bracket creep will still occur, with the tax payable (before LAMITO and LITO and excluding the Medicare Levy) from 11.37% of \$40,000 per year to 13.29% of \$44,000

per year. If the income of \$44,000 per year were to be taxed at the initial rate of 11.37% it would be \$586 per year, or \$16.27 per week, less than the tax that will have to be paid. The loss as a result of bracket creep under the tax scales would rise over this period to \$16.27 per week; bracket creep would cost \$16.27 per week by the end of the four years. However, LAMITO has to be taken into account. On \$40,000 per year it amounts to \$5.58 per week, but it rises to \$7.88 per week on \$44,000 per year. Whether LAMITO would offset the tax increases caused by bracket creep is a matter for further consideration; but it is not clear that it would.

14. The first step in the Budget's personal income tax plan is directed at offsetting future bracket creep. It does deal with the bracket creep that has occurred to date and which has been of concern to many, including ACCER in annual wage reviews. A number of earlier wage reviews have raised the question of whether claimed tax cuts should be taken into account so as to reduce wage increases or should be regarded as compensation for bracket creep. For example, ACCER pointed out in its March 2017 submission 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." (paragraph 745). None were; and the way in which the May 2018 Budget is presented, past bracket creep has been ignored.

Bracket creep to date

15. The current LITO arrangements, tax thresholds and rates of taxation covering low and middle income taxpayers in receipt of incomes of up to \$80,000 per year have not been adjusted since the 2012-13 financial year. As a result, there has been a significant degree of bracket creep with a higher percentage of a person's rising income being taxed in a higher tax bracket, even when income increases have moved in line with community-wide increases or minimum wage increases.
16. In the following section we assess the changes in the percentage of income tax paid by low paid workers by reference to changes in minimum wage rates determined by the FWC over the period since the income tax rates were last adjusted. In the case of low income earners, the last adjustment in income taxation rates was for the 2012-13 year, when changes were introduced for incomes up to \$80,000 per year. Tax cuts for incomes in excess of \$80,000 were introduced by the May 2016 Budget by moving the threshold for the 37% marginal tax rate to \$87,001 per year, with the effect that those on incomes of more than \$80,000 per year had a tax cut of \$315.00 per year. In

addition, the Budget Repair Levy on high incomes terminated at the end of the 2015-6 year.

17. Table 1 contains the gross and net wages of workers paid the National Minimum Wage (NMW) and workers paid the widely used C10 award classification over the period January 2013 to January 2018, and the percentage of income tax paid in each year. They can be used to calculate the positions at May 2013 and May 2018. We can see that, leaving aside LAMITO, the percentage of tax payable will continue to increase following minimum wage adjustments on 1 July 2018.

Table 1
Taxation rates for NMW and C10-dependent workers
January 2013 – January 2018
(\$ per week)

Year	NMW	NMW net	NMW % tax	C10	C10 net	C10 % tax
2013	606.40	556.87	8.17	706.10	636.14	9.91
2014	622.20	569.44	8.48	724.50	648.47	10.49
2015	640.90	581.11	9.33	746.20	658.72	11.72
2016	656.90	593.75	9.61	764.90	670.69	12.32
2017	672.70	606.23	9.88	783.30	682.48	12.87
2018	694.90	623.78	10.23	809.10	698.99	13.61

Source: ACCER submission, March 2018, Tables B6 and B8. The Medicare Levy and the Low Income Tax Offset are included.

18. The following calculates the tax paid per week on the NMW from May 2013 to May 2018
- Tax paid May 2018: \$71.12
 - Tax at 2012-13 rate on the May 2018 income: $\$694.90 \times .0817 = \56.77 .
 - NMW increased tax: \$14.35
 - Increased tax as a result of increase in Medicare Levy: \$3.48
 - NMW increase in tax after adjusting for increased Medicare Levy: \$10.87
19. In a similar way the following calculates the changes in tax paid over the period May 2013 to May 2018 for the C10-dependent worker.
- Tax paid May 2018: \$110.11
 - Tax at 2012-13 rate on the May 2018 income: \$80.18
 - C10 increased tax: \$29.93
 - Increased tax as a result of increase in Medicare Levy: \$4.05
 - C10 increase in tax after adjusting for increased Medicare Levy: \$25.88

20. In Table 2 we compare the increases in gross and net minimum wage rates and the Consumer Price Index (CPI). The impact of bracket creep by reference to price changes is substantial, particularly in the case of the C10 workers whose net wage has failed to keep up with price increases.

Table 2
Disposable incomes single person
January 2013 – January 2018
(\$ per week)

Year	NMW gross	NMW net	C10 gross	C10 net	CPI
2013	606.40	556.87	706.10	636.14	102.0
2014	622.20	569.44	724.50	648.47	104.8
2015	640.90	581.11	746.20	658.72	106.6
2016	656.90	593.75	764.90	670.69	108.4
2017	672.70	606.23	783.30	682.48	110.0
2018	694.90	623.78	809.10	698.99	112.1
Increase	14.59%	12.02%	14.59%	9.80%	9.90%

21. The position of working families is worse because they have suffered from bracket creep and cuts in family payments. Table 3 shows the position of couple parent and sole parent families. The two families can be shown in the one table because family payments (including rent assistance) are the same.

Table 3
Disposable incomes of couple parent and sole parent families
with two children
January 2013 – January 2018
(\$ per week)

Year	NMW	C10	CPI
2013	915.54	996.30	102.0
2014	938.24	1,018.81	104.8
2015	961.70	1,041.41	106.6
2016	980.78	1,059.88	108.4
2017	973.71	1,052.18	110.0
2018	992.61	1,070.40	112.1
Increase	8.42%	7.44%	9.90%
Real income cut	13.57	24.53	

22. Paragraph 18 shows that the NMW-dependent worker has already lost \$10.87 per week as a result of bracket creep since the taxation scales were last adjusted in 2012-2013. The proposed tax cut from 1 July 2018, through LAMITO, would be \$3.85 per week on

the current level of the NMW, substantially less than half of the loss already suffered. The NMW and other minimum wage rates will increase from July 2018, bringing a further increase in average taxation. If ACCER's claim for an increase in the NMW to \$735.00 per week is awarded, the LAMITO payment would rise to \$4.63 per week, still well short of compensation for the loss already suffered through bracket creep. Furthermore, there remains the question of whether LAMITO and the adjusted LITO from 1 July 2012 would provide adequate compensation to low paid workers for the bracket creep expected over the coming years.

23. A combination of bracket creep, cuts to family payments and inadequate wage increases have led to a substantial cut in the living standards of families with children and, together, have increased child poverty among Australian working families. As we have explained in our March 2018 submissions, this is a situation that calls for action by the FWC so that cuts in the social safety net, including by increased taxation, are compensated for by wage increases.

B. Recent data

Recent data on poverty lines and relative living standards

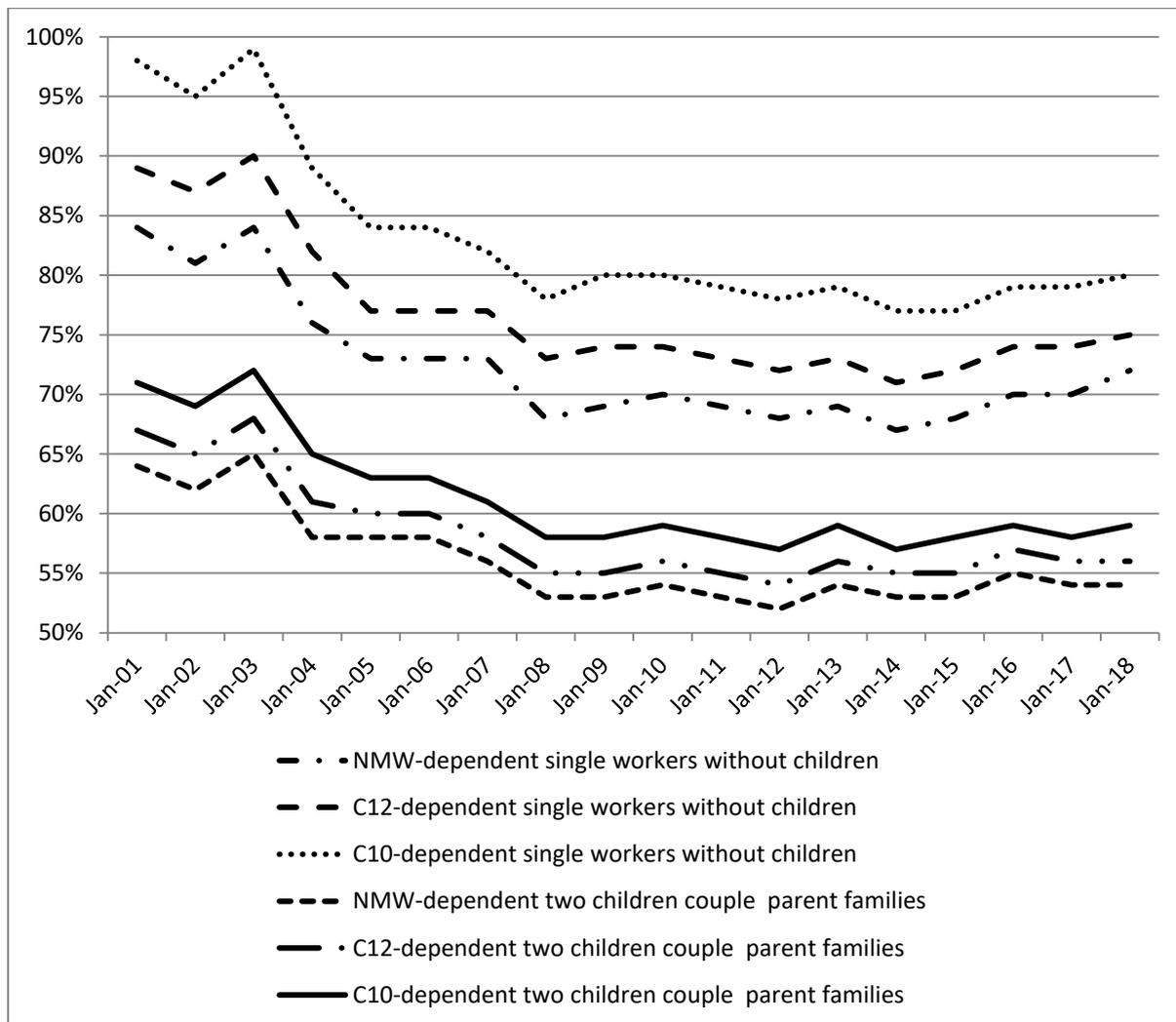
24. This section covers data that has become available since the filing of ACCER's March 2018 submission. The FWC's *Statistical Report* has recently been updated in response to data released by the Melbourne Institute in *Poverty Lines, Australia, December Quarter 2017*. Table 8.6 of the *Statistical Report* calculates the single adult's 60% of median poverty line at \$522.01 per week for December 2017. The median equivalised disposable household income (MEDHI) from which it was derived would have been \$870.02 per week. ACCER's calculations in its March 2018 submission used the Melbourne Institute's September quarter calculations in order to calculate living standards at the start of January 2018. The updated figures, for the poverty line and the underlying MEDHI, are 1.4% higher than the calculations used in ACCER's March 2018 submission. This means that the relative living standards of minimum wage-dependent workers and their families were lower and their poverty gaps were greater than indicated in that submission.
25. In Appendix A hereto we have set out the changes to Tables B1 to B5 in Appendix B of the March 2018 submission. The commentary on relative living standards in paragraphs 74 of that submission has been updated in the following paragraphs, together

with a revised Figure 2. Minimum wage-dependent households have experienced growing inequality. Their living standards have fallen relative to the community as a whole.

26. The NMW-dependent family of a couple and two children (in rented housing and in receipt of rental assistance) fell from 58.1% of the median in January 2004 to 54.3% in January 2018. The single NMW-dependent worker without children fell from 75.6% of the median to 71.7% over the same 14 year period. In the case of a C10-dependent family of a couple and two children (in rented housing and in receipt of rental assistance), the living standard fell from 64.6% to 58.6% of the median over the 14 years.
27. The C10-dependent single worker without children fell from 89.0% to 80.3% of the median over the same period. These figures are taken from Tables B1, B2 and B3 of Appendix B of the March 2018 submission and Appendix A hereto. Similar calculations to these can be made in respect of sole parent families and couple parent families with one child or more than two children; see Table B4 in the March 2018 submission.
28. The data in Tables B1 to B3 of Appendix B of the March 2018 submission, updated by the figures in Appendix A hereto are illustrated in Figure 2A, which is a revision of Figure 2 of the March 2018 submission. Figure 2A shows the disposable income of a single person and the couple and two children family as a percentage of median equivalised disposable household income at each of the three wage levels used in Tables B1 to B3 of the March 2018 submission, supplemented by Tables B1 to B3 in Appendix A hereto.
29. Figure 2A demonstrates dramatic cuts in the living standards of the most marginal workers and working families in Australia. Inequality has a cost. The consequences of increasing inequality and the loss of opportunities for children are particularly important. It cannot be said that this is a social problem that must be fixed by the Government when, as we saw in Figure 1 of the March 2018 submission, the root cause of this social dislocation has been decisions of successive wage setting tribunals.

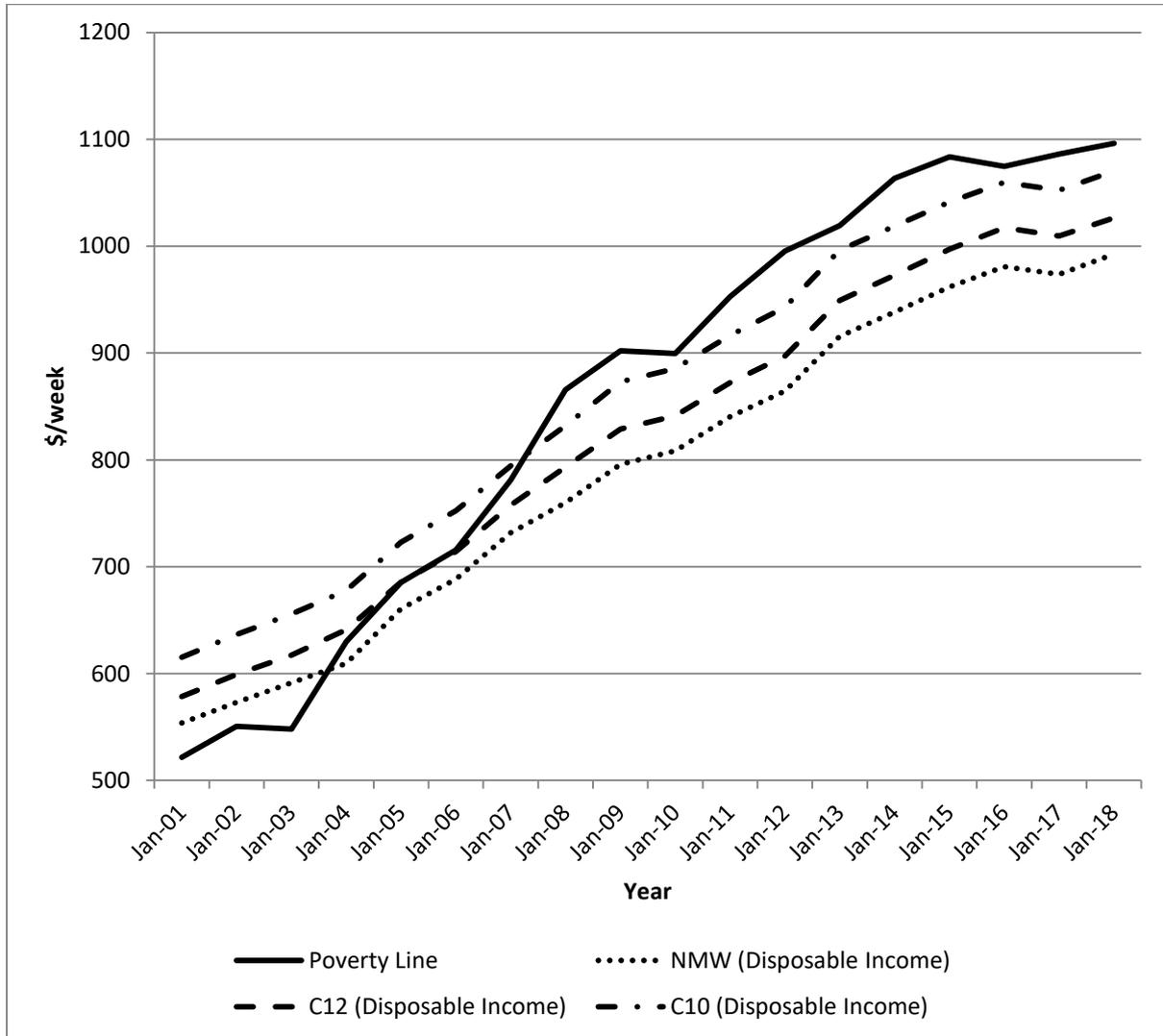
Figure 2A

**Relative living standards of safety net-dependent workers and couple parent families
January 2001 to January 2018**



30. In regard to poverty lines, paragraphs 88-90 and Figure 3 of ACCER's March 2018 also need to be updated in the light of the revised data in the *Statistical Report* and the revised figures in the tables in Appendix A hereto. Figure 3A, below, updates Figure 3.

Figure 3A
Disposable Incomes of Safety Net-dependent Families Relative to 60% Poverty Line
(Couple and two children)
January 2001 – January 2018



31. The revised data show that the NMW-dependent family of a couple and two children fell further into poverty over these 14 years: from 3.2% below the 60% of median poverty line, with a poverty gap of \$20.37 per week, to 9.5% below it, with a poverty gap in January 2018 of \$103.62 per week. In January 2004 the NMW-dependent worker was 26.0% above the 60% of median poverty line, but by January 2018 had fallen to 19.5% above the poverty line.
32. Similar changes have impacted on C12-dependent workers and their families. At January 2018 the C12 family had a poverty gap of \$69.92 per week.
33. We draw attention to the position of the C10-dependent family of a couple and two children. The tables demonstrate that even the acquisition of skills and

responsibilities that come with a trade, or trade equivalent occupation, the C10 (or equivalent wage rate) is still insufficient to lift the family above the 60% relative poverty line and provide it with a decent standard of living. In January 2018 it was 2.4% *below* the poverty line, but in January 2004 it was 7.1% *above* the poverty line. The poverty gap was \$25.83 per week in January 2018.

C. Reply to Responses to Questions on Notice

C.1 Introduction: the construction of section 284(1)

34. The FWC's Questions on Notice of 29 March 2018 invited the parties to respond to ACCER's submissions regarding the minimum wage setting provisions of the *Fair Work Act*; see Question 1.1 (i) - (iii). Responses to these Questions were made by the Australian Government, the Australian Industry Group (Ai Group), the Australian Chamber of Commerce and Industry (ACCI), Restaurant and Catering Industrial (RCI) and the Australian Council of Trade Unions (ACTU).
35. Question 1.1 (i) was

"ACCER submits that the Panel's construction of s.284(1) was erroneous and should be reconsidered (see especially [214], [234]–[237], [240], [249] and [253] of ACCER's submission)."
36. The Australian Government's response to Question 1.1(i) provides a succinct statement of the FWC's view on the construction of section 284(1):

"In determining a fair increase to minimum wages that meets the Object of the *Fair Work Act 2009*, the Expert Panel is required to take into account the various paragraphs in subsection 284(1) of the Act. However, the Expert Panel has discretion as to how these considerations are balanced against each other."
37. This is the *complete* response by the Government to a contentious issue raised by the FWC. It simply summarises the way in which the FWC has viewed its statutory duty: the balancing of the particular matters specified in the paragraphs of section 284(1).
38. In order to reply to the responses to the FWC's question it is useful to summarise the way in which ACCER raised the construction issue. There are two aspects to this matter. First, the relationship between the introductory part of section 284(1), which imposes an obligation on the FWC to set safety net wage rates, and the particular paragraphs that deal with matters or considerations that are to be taken into account when setting those wage rates. Second, the way in which fairness is to be assessed when setting safety net wage rates. The first of these is the primary construction issue,

while the latter is the subsidiary construction issue.

The primary construction issue

39. The primary construction issue is one of substantial importance in the setting of minimum wage rates, in particular the NMW, which is the basis upon which award wage rates are intended to be based. ACCER's submissions argued that the FWC's view of section 284(1), as summarised by the Australian Government, is inconsistent with the proper construction of the subsection.
40. ACCER's construction submission was that the statutory obligation on the FWC is found in the introductory words of section 284(1), to set a safety net of fair wages, and, in doing so, it is required to take into account the matters set out in the paragraphs of the subsection. This is consistent with the words and structure of the subsection. The nature and purpose of the subsection is evident in the term "safety net", which is to protect workers, and in the use of the adjective "fair" to describe the safety net.
41. ACCER argued that the nature and purpose of the safety net wage can be described as providing workers, in words that had been used by the FWC, with the income "which will enable them to purchase the essentials for a 'decent standard of living' and engage in community life, assessed in the context of contemporary norms". This describes a standard of living that is in excess of poverty. It describes the essential purpose of a minimum wage system in which "those in full-time employment can reasonably expect a standard of living that exceeds poverty levels". These quoted passages, which are taken from previous annual wage review decisions, provide what can be described as the basic operational objective of minimum wage setting under the *Fair Work Act*. ACCER has accepted that the protection described in the passages does not extend to unusual circumstances, but applies to the ordinary and expected circumstances of wage-dependent workers.
42. On the other hand, the FWC regarded the provision of a NMW that would support a decent standard of living as part of "the needs of the low paid", which is but one of the matters specified in the paragraphs of section 284(1). The significance of the distinction is emphasised by the FWC's view that no single matter in those paragraphs has "any particular primacy"; for example, *Annual Wage Review 2016-17, Decision*, (June 2017 decision) [2017] FWCFB 3500, paragraph 155. At paragraph 154 of the decision the FWC said:

"While we do not resile from either of the passages referred to above it is important to bear in mind that these observations were made in the context of the

Panel's consideration of one of the various statutory considerations we are required to take into account. ACCER's submission suffers from the elevation of one consideration—'relative living standards and the needs of the low paid'—above all others."

43. In ACCER's submission, a wage "which will enable them [workers] to purchase the essentials for a 'decent standard of living' and engage in community life, assessed in the context of contemporary norms" cannot be treated as a consideration that has no primacy. Rather, it is the purpose of the minimum wages objective in section 284(1). ACCER contended that "the needs of the low paid" are the needs and costs of food, clothing, housing, transport and the like which must be taken into account if an informed safety net wage is to be set, as intended by the statute. Parliament has made it clear that the setting of that wage is to be informed by the matters specified in the paragraphs, some of which may constrain the FWC's capacity to fully realise that objective. Setting minimum wage rates only by the balancing to the particular matters in the paragraphs of section 284(1) would ignore the fundamental purpose of the subsection: the setting of safety net wages.
44. The term "safety net", which is not defined in the *Fair Work Act*, has to be given its ordinary meaning: it is meant to support and protect. It is a protection and benefit given to workers which they would not otherwise receive. Furthermore, this purpose is evident from the objects of the Act (at section 3), which include promoting social inclusion and giving effect to Australia's international labour obligations. Those obligations include, in regard to minimum wages, the obligation in the *International Covenant on Economic, Social and Cultural Rights* in respect of the human right to remuneration that provides a decent living for workers and their families. The legislation in respect of minimum wages is beneficial legislation promoting these objectives, but taking into account the proper consideration of economic matters that might constrain the achievement of those objectives.
45. ACCER's submission on the primary construction issue is supported by the judgment of the Full Court of the Federal Court in *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, which concerned the setting of penalty rates under section 134(1) of the *Fair Work Act*. The structures of section 134(1) and section 284(1) are the same. Section 134(1) contains a general obligation to "ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions,

taking into account" a number of matters set out in paragraphs that follow. Section 284(1) requires the setting of a fair safety net of minimum wages, whereas section 134(1) requires the setting of a fair and relevant safety net of minimum award terms and conditions. However, this difference is not relevant to the primary construction question.

46. One of the contentions made by the Applicants in the Full Court was that the FWC was obliged to take into account all of the matters in the paragraphs in section 134(1) and was precluded from considering any other matter (paragraph 47). The Court responded:

"48. This submission should be rejected. It fails to recognise that the modern awards objective requires the FWC to perform two different kinds of functions, albeit that the modern awards objective embraces both kinds of function. The FWC must "ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions" and in so doing, must take into account the s 134(a)-(h) matters. What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 134(a)-(h) inform the evaluation of what might constitute a "fair and relevant minimum safety net of terms and conditions", they do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters "must be determined by implication from the subject matter, scope and purpose of the" Fair Work Act (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at 39-40).

49 This construction of s 134(1) necessarily rejects the applicants' argument that the words "fair and relevant" qualify the considerations in s 134(1)(a)-(h) and not the minimum safety net of terms and conditions. This submission is untenable. It is apparent that "a fair and relevant minimum safety net of terms and conditions" is itself a composite phrase within which "fair and relevant" are adjectives describing the qualities of the minimum safety net of terms and conditions to which the FWC's duty relates. Those qualities are broadly conceived and will often involve competing value judgments about broad questions of social and economic policy. As such, the FWC is to perform the required evaluative function taking into account the s 134(1)(a)-(h) matters and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance. It is entitled to conceptualise those criteria by reference to the potential universe of relevant facts, relevance being determined by implication from the subject matter, scope and purpose of the Fair Work Act.

50. Accordingly, the applicants' submissions that what is fair and relevant is to be determined by weighing the matters in s 134(1)(a)-(h), with no other facts, matters or circumstances being permitted to be taken into account, should not be accepted. The statutory criteria of "fair and relevant" qualify the nature of the safety net which is the subject of the duty. They inform the taking into account of the matters in s 134(1)(a)-(h) but are not confined by those matters. They are confined only by implication from the subject matter, scope and purpose of the Fair Work

Act." (Emphasis added)

47. These passages support the view that the setting of safety net wage rates under section 284(1) is the purpose of the subsection, with the function being informed by the matters set out in its paragraphs, but not constrained by them. The setting of safety net wages only by reference to the terms of those paragraphs (illustrated in the Australian Government's response, quoted earlier) is contrary to the duty imposed by the legislation.
48. The nature and scope of the safety net is to be discerned from its ordinary meaning and, in the words adopted by the Full Court, "the subject matter, scope and purpose of the" legislation. This supports the contention that the purpose of the wage setting provisions, and the NMW in particular, is the setting of wages "which will enable them [workers] to purchase the essentials for a 'decent standard of living' and engage in community life, assessed in the context of contemporary norms". This description, used by the FWC, is the purpose of the safety net wage and not merely, as the FWC has concluded, a factor among a range of considerations without any primacy. Treating the provision of decent standard of living as the purpose of the safety net provides the basis upon which those in full time employment can have a reasonable expectation of a standard of living that exceeds poverty levels.

Fairness

49. The basis upon which a "fair" safety net wage is to be set is the subsidiary construction issue in ACCER's submissions. The FWC has applied the criterion of balancing fairness to employers and employees on the basis of what ACCER has contended is an erroneous construction of section 284(1). There is, however, a broader issue: whether, on a proper construction of the subsection, the setting of a fair safety net for the protection and benefit of workers is to be made on the basis of an assessment of fairness to employers and employees.
50. The FWC's view concerning the setting of a "fair" safety net involves the balancing of the factors in the paragraphs of section 284(1) according the criterion of fairness as between employers and employees. In referring to "fair" in section 134(1) and section 284(1) it said "fairness in this context is to be assessed from the perspective of the employees and employers covered by the NMW or the modern award in question" (June 2017 decision, paragraph 128). In particular, it said fairness in relation to the NMW "is to be assessed from the perspective of the employees and employers covered by the

NMW order"; (June 2017 decision, paragraph 141).

51. The FWC's conclusion to set the NMW on the criterion of fairness to employers and employees is based on a conclusion that the "statutory provisions relevant to the fixation of the NMW plainly seek to strike a balance between competing interests" (June, 2017 decision, paragraph 141). The FWC found support for this in the terms of section 3 of the *Fair Work Act*, which provides that the object of the Act "is to provide a balanced framework for cooperative and productive workplace relations that promotes national prosperity and social inclusion for all Australians by" means of the matters specified in sections 3(a) to (g).
52. The FWC also supported its view regarding the criterion of fairness to employers and employees on the conclusion that the legislation seeks to strike a balance between "competing interests" (June 2017 decision, paragraph 141). This term had emerged from the FWC's consideration of authorities on the question of whether the wage setting provisions of the Act should be given a beneficial construction (June 2017 decision, paragraphs 132-142). The term "competing interests" should not be limited to financial interests of particular parties. Section 284(1), like section 134(1) is not so narrowly drawn. In the setting of a safety net wage, fairness includes an assessment of community values, basic human rights and the protection of those who depend on the wages of workers, especially children. It is a broad evaluative process for the purpose of providing a decent standard of living in contemporary Australia.
53. The legislation requires, ACCER contends, that the FWC sets a "safety net" of "fair" minimum wages. The adjective "fair", ACCER argues, applies to the safety net wage which is to operate for the benefit of workers. Adapting the words used by the Full Court (at paragraph 49) "fair" is the adjective that describes the qualities of the wages safety net to which the FWC's duty in section 284(1) relates. It is the workers' safety net that has to be fair. ACCER submits that it has to be fair from the perspective of employees, having regard to a range of social and economic factors, with economic factors including economic conditions that may affect employers.
54. ACCER has contended it is not necessary to frame the setting of the safety net wage in terms of fairness to employers and employees in order to take into account the interests, or perspectives, of employers. The economic interests of employers are covered by some of the matters that the FWC is required to take into account; for example, "the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth" and

promoting social inclusion through increased workforce participation"; section 284(1)(a) and (b). These matters take into account the interests, or perspectives, of employers without the need to factor in fairness to employers when deciding what is a fair safety net for employees.

55. The use of the criterion of fairness as between employers and employees in the determination of what is a fair safety net for the benefit of workers is too narrow and inconsistent with the proper exercise of the statutory obligation of setting a safety net of fair wages.
56. Support for this proposition is found in *Shop, Distributive and Allied Employees Association v The Australian Industry Group*. One of the issues in that case was the propriety of the FWC's reliance on "contemporary circumstances" in arriving at its decisions on penalty rates. The Applicants had claimed that there was no statutory text from which that criterion could be derived (paragraph 51). The claim was rejected, with the Court saying that "it is inconceivable that contemporary circumstances are immaterial" to the achievement of the relevant statutory objects (paragraph 51). However, there was an associated issue:

"The issue is this: did the FWC confine its conception of a fair and relevant safety net to one that was suited to contemporary circumstances having regard to the perspective of employers and employees and, if so, was that an impermissible approach to the performance of its functions?" (Paragraph 53)

57. That question was posed after setting out three observations made by the FWC on the proper construction of "a fair and relevant safety net of terms and conditions" in awards. The reproduced passage included the following passage which was also adopted by the FWC in the June 2017 decision:

"First, fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question ..."

58. As a judicial review of the FWC's decision, the critical question was whether there was failure by the tribunal's exercise of its jurisdiction. The answer to that question does not depend on any particular part of, or terminology used in, the decision under review. In this case the success or otherwise of the review did not simply depend on the correctness of the FWC's view on the assessment of fairness. After reviewing the evidence the Full Court said:

"64. Accordingly, the FWC did not confine its conception of a fair and relevant safety net to one that was suited to contemporary circumstances having regard to the perspective of employers and employees. While it said at [120] that "the word

‘relevant’ is intended to convey that a modern award should be suited to contemporary circumstances” and repeated that (for example at [885]) its actual application of the modern awards objective was not so confined. Had the FWC, in substance, done nothing more than decide that Sunday penalty rates were not suited to contemporary circumstances and thus had to be varied then, no doubt, its discharge of its functions would have miscarried. It would have given too narrow a meaning to “fair and relevant” which embraces a broad universe of considerations confined only by the particular function being performed in the context of the subject matter, scope and purpose of the Fair Work Act. It also would have failed to take into account the s134(1)(a)-(h) matters in the task of ensuring that “modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions”. For the reasons given, however, it is apparent the FWC did no such thing.

65 As such, this is not a case in which the FWC misapplied the statutory provisions. Its description of “relevant” as meaning “suited to contemporary circumstances” at [120] and elsewhere is too narrow if it is to be read literally as meaning suited to modern circumstances. As discussed “fair and relevant”, which are best approached as a composite phrase, are broad concepts to be evaluated by the FWC taking into account the s 134(1)(a)-(h) matters and such other facts, matters and circumstances as are within the subject matter, scope and purpose of the Fair Work Act. Contemporary circumstances are called up for consideration in both respects, but do not exhaust the universe of potentially relevant facts, matters and circumstances. But, as we have tried to demonstrate, the primary reasons when read as a whole amply demonstrate that the function, as in fact performed by the FWC, was not confined by reference to the criterion of contemporary circumstances. Nor, do the reasons demonstrate that, as a criterion, contemporary circumstances were elevated or given undue priority. This suggests that by “contemporary circumstances” the FWC may have simply meant “present circumstances” or, in other words, the circumstances at hand." (Emphasis added)

59. The Full Court found in the context of award-making, that it was permissible to take into account "contemporary circumstances having regard to the perspective of employers and employees", but made it clear this could not be the only basis for decision making and that other matters had to be taken into account. The criterion of fairness to employers and employees was not accepted. The judgment makes it clear that fairness in decision-making does not depend on the balancing of fairness to employers and employees, but the perspectives of employers may be taken into account in the wider range of matters that need to be considered.

C.2 Responses to the construction issue in Question 1.1 (i)

The Australian Government

60. The Australian Government's brief response on this matter (which is quoted earlier) fails to respond in a meaningful way to the FWC's request for submissions on the construction and operation of an important part of Commonwealth legislation.

Australian Industry Group

61. Ai Group does not deal with the primary construction issue. In regard to the subsidiary issue regarding fairness, it argues in support of decision making being based on an assessment of fairness to employers and employees:

- "There is no doubt that s.284 and various other provision of relevance to Annual Wage Reviews are intended to strike a balance between the competing interests of employees and employers." (Page 5)
- "The overarching objective in s.284 is to '*establish and maintain a safety net of fair minimum wages*'. Once again, there is nothing in this objective which gives any indication that the interests of employees are to be elevated ahead of the interests of employers. The objective emphasis[es] fairness to employees and employers. Instead the objective emphasises a balanced approach." (Page 6)
- "Whether beneficial provisions or not, all of the relevant considerations in ss.284 and 134 need to be considered in the current social and economic context, without placing the interests of employees, ahead of the interests of employers and the broader community." (Page 6)

62. Ai Group's submission relies on two earlier decisions in support of the view that fairness is to be assessed from the perspective of both employers and employees: *4 yearly review of modern awards* [2015] FWCFB 3177, at [109] and *Re Shop, Distributive and Allied Employees' Association* (2003) 135 IR 1, at [11]. The authority cited by the FWC in the former case is the second authority cited by Ai Group. The view relied upon in the earlier case was in the decision of Giudice J, made under earlier legislation, which was not supported the other two members of the bench. ACCER responded to that 2003 decision in its Post-Budget submission of May 2017 in the context of a response to the FWC's decision on the application for the setting of a medium term target for the NMW. ACCER referred to this response in its March 2018 submission (at paragraph 228), submitting that, in any event, it did not support the view that under the current legislation fairness is to be assessed from the perspective of the employees and employers. For convenience, we have set out the relevant part of the May 2017 submission in Appendix B hereto.

63. In this context Ai Group referred to ACCER's submission on the beneficial construction of the legislation:

"Similarly, the approach to beneficial construction that ACCER appears to be urging the Expert Panel to adopt would lead to the needs of the low paid being elevated ahead of other considerations." (Page 6)

64. This passage assumes that a decent standard of living (which the FWC had included within the scope of "the needs of the low paid") is merely a consideration in setting a

safety net wage, rather than the objective of a safety net wage. It is contrary to ACCER's primary construction point, which is consistent with a beneficial construction of the legislation.

65. Ai Group's submission are inconsistent with the statutory objective of providing a safety net wage, the beneficial construction of the legislation and the views of the Full Court in *Shop, Distributive and Allied Employees Association v The Australian Industry Group*, referred to earlier.

Australian Chamber of Commerce and Industry

66. The ACCI submission avoids the primary construction contention put by ACCER. It does so on the basis of the matters mentioned in paragraph 234 of ACCER's submissions, where ACCER makes that not all of the provisions of the *Fair Work Act* are concerned with balancing fairness as between employers and employees. It claims that ACCER has sought to rely on matters that are not within the range of matters that the tribunal is required to take into account; and for this reason claims that it is "unnecessary to engage with the merit of this argument as these considerations are not relevant to the Annual Wage Review". This is not a credible excuse for the failure to engage in a fundamental question about the nature of decision making under section 284(1).
67. ACCI does, however, address the further question regarding fairness in the setting of minimum wages:

".. the Australian Chamber rejects any proposition that consideration of fairness does not extend to employers, and that employer interests do not need to be balanced with other relevant considerations in the Act such as the needs of the low paid when embarking on its task.

It is clearly apparent from the objects of the Act in section 3, the modern award objective in section 284 and the minimum wages objective in section 134 that the notion of 'fairness' from the perspective of not only those who are the recipients of those who will be paid wages but from the perspective of those who are required to fund those wages." (Paragraphs 4 and 5)

68. ACCI's submission emphasise the requirement to take into account general economic circumstances, the economic interests and perspectives of businesses, potential employment impacts, the interests of the broader community and the like. ACCER accepts that these kinds of factors may, from time to time, operate as a constraint on the capacity of the FWC to provide adequate safety net wages. However, they do not support the view that wage setting should be on the criterion of fairness to employers and employees. The statutory objective is to set a fair safety net wage for the protection

and benefit of workers after taking proper account of relevant economic factors.

Restaurant and Catering Industrial.

69. RCI does not agree with ACCER's submissions that the FWC's construction of section 284(1) is erroneous and refers to what it sees as ACCER's "main argument" in this regard: the issue of whether wages are to be set by reference to fairness as between employers and employees (page 2). The submission then deals with, what we have described as, the subsidiary construction issue. The submission recites the views of the FWC on this matter and the 2003 decision of Giudice J in *Re Shop, Distributive and Allied Employees' Association* (which we have referred to earlier). RCI supports the setting of wages by the balancing of fairness as between employers and employees, but raises no other matters calling for a response. The RCI submission does not deal with ACCER's principal submission on the construction of section 284(1).

Australian Council of Trade Unions

70. The ACTU does "not concur [with the submission] that the Panel's construction of s. 284 was erroneous" (page 17). This is in response to the principal construction issue. Nevertheless, it states that "ACCER's 'Operational Objective' is a laudable one which we fully support and one that is in our view capable of being met concurrently with the minimum wages objective and the modern awards objective" (page 17).
71. The ACTU's submission refers to ACCER's subsidiary construction issue, concerning fairness in decision making, and economic factors and concludes it is "not convinced that weighing those factors in the overall assessment of fairness and relevance should lead to a situation where ACCER's 'Operational Objective' is unachievable" (page 18).
72. The ACTU's view of how this end point can be achieved is based on a construction of section 284(1) which is explained in its March 2018 submission. ACCER has addressed this in section A.3 of its Reply and Response to Questions on Notice of 9 April 2018. ACCER submits that the ACTU's submission on this matter is not consistent with the proper construction of the legislation.

C.3 Responses to the wages relativities policy in Question 1.1 (ii)

73. Question 1.1(ii) concerns the wages relativities policy by which uniform wage increases have been awarded:

"ACCER maintains its contention that the Panel has adopted a 'wages relativities policy' which it submits is contrary to law and also asks that the Panel reconsider its decision in respect of this issue (see especially [255]–[272] and [287] of ACCER's submission)"

74. The Australian Government has responded:
- "Part 2-6 in the *Fair Work Act 2009* does not constrain how the Expert Panel might vary the national minimum wage rate or modern award minimum wages."
75. This response is patently wrong. It does not respond to ACCER's submission that the wages relativities policy is inconsistent with the proper exercise of the FWC's discretion, which is constrained by the terms of the legislation. The FWC cannot set wages, and other terms and conditions in awards with an unfettered discretion. Apart from a plain reading of the text of the legislation, this position is made clear in *Shop, Distributive and Allied Employees Association v The Australian Industry Group*.
76. Ai Group and RCI support the FWC's previous decision to reject the ACCER's submission on the wages relativities policy in its *Annual Wage Review 2016-2017 Decision* for the reasons identified in that decision. A similar position is put by ACCI, with the suggestion that changes in award relativities should be by way of application under other provisions of the Act. The opportunity to make application for changes in award wage rates under those provisions cannot, we submit, prevent the changes in relativities in Annual Wage Review decisions by, for example, a uniform money increase.
77. ACTU's response is short: it sees "no error of law in the decision of the Panel to set the C14 rate at the same rate as the National Minimum Wage". This is not a response to the issues raised in regard to the consistency of the wages relativities policy with the terms of the legislation. The wages relativities policy is the policy of awarding a uniform percentage increase. In regard to the efficacy of the policy, see section A.1 of ACCER's Reply and response to Questions on Notice, which deals with the ACTU's 2018 wage claim for a uniform percentage increase.

C.4 Responses to the equal remuneration issue in Question 1.1 (iii)

78. Question 1.1 (iii) was:
- "ACCER makes a number of observations about 'equal remuneration' and the consideration in s.284(1)(d), noting that the gender pay gap is caused by factors outside the modern award system and is not relevant to the matter in s.284(1)(d) (see especially [275]–[281] of ACCER's submission)."
79. Australian Government has responded:
- "It remains open to any party to make submissions as to how the gender pay gap and the reasons for it (as far as they relate to the principle of equal remuneration for work of equal or comparable value) should be taken into account."

80. This unsatisfactory response says no more than parties have a right to be heard on these issues and it does not address this important issue.
81. Ai Group and RCI agree with the FWC's past position on this aspect, without elaboration. ACCI states that "because the setting of the NMW and award rates of pay occurs on a gender neutral basis and we agree with ACCER's submission that essentially agrees with ACCER's position that the aggregate differential between male and female earnings is attributable to factors outside the award system" (paragraphs 29)
82. The ACTU's position on this issue is referred to in question 5.1 of the FWC's Questions on Notice, which "...suggests that the 'principle of equal remuneration for work of equal or comparable value', as referenced in ss.134(1)(e) and 284(1)(d), is not relevant to the Panel's functions in an Annual Wage Review". Its response to Question 1.1 (iii) appears to confirm that position. The ACTU's response also refers to an associated issue in regard to equal remuneration: whether the gender pay gap might be affected by the form of increase awarded (relatively more for the low paid or a uniform pay increase). The ACTU does not accept that granting relatively greater increases (under its earlier hybrid claims) would necessarily do less to cover the gender pay gap.

APPENDIX A

Updating of selected tables in Appendix B of ACCER's March 2018 submission

Table B1
Median equivalised disposable household income
January 2001 – January 2018
(\$ per week)

	Median equivalised disposable household income (ABS)	Household Disposable Income per head (Melbourne Institute)	Median equivalised disposable household income (MEDHI)
January 2018		829.36	870.02

Table B2
Relative living standards single workers without children
January 2001 – January 2018
(\$ per week)

	Median equivalised disposable household Income (MEDHI)	Disposable income (DI) NMW-dependent	DI of NMW as % of MEDHI	Disposable income (DI) C12-dependent	DI of C12 as % of MEDHI	Disposable income (DI) C10-dependent	DI of C10 as % of MEDHI
January 2018	870.02	623.78	72%	656.23	75%	698.99	80%

Table B3
Relative living standards of
Couple parent families with two children
January 2001 – January 2018
(\$ per week)

	Median equivalised disposable household Income (MEDHI)	Disposable income (DI) NMW-dependent	DI of NMW as % of MEDHI	Disposable income (DI) C12-dependent	DI of C12 as % of MEDHI	Disposable income (DI) C10-dependent	DI of C10 as % of MEDHI
January 2018	1827.04	992.61	54%	1,026.31	56%	1,070.40	59%

Table B4
Relative living standards of
Sole parent with two children families
January 2001 – January 2018
(\$ per week)

	Median equivalised disposable household Income (MEDHI)	Disposable income (DI) NMW- dependent	DI of NMW as % of MEDHI	Disposable income (DI) C12- dependent	DI of C12 as % of MEDHI	Disposable income (DI) C10- dependent	DI of C10 as % of MEDHI
January 2018	1392.03	992.61	71%	1,026.31	74%	1,070.40	77%

Table B5
Poverty lines for workers and families
January 2001 – January 2018
(\$ per week)

	Median equivalised disposable household income	Poverty Line Single	Poverty Line Couple and 2 children	Poverty Line Sole parent and 2 children
January 2018	870.02	522.01	1096.23	835.22

APPENDIX B

Extract from ACCER's Post-Budget submission of May 2017

This extract concerns paragraphs 117-8 of the Penalty Rates Decision (*4 yearly review of modern awards – Penalty Rates, Decision* [2017] FWCFB 1001)

1. [Paragraphs 117-8 of the Penalty Rates Decision stated]:

"[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]"

2. 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 employees 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.

3. 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*.

4. 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.
5. 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.
6. 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."

7. 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)

8. 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.
9. 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.
10. 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.