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26 November 2018

**By Email: chambers.hatcher.vp@fwc.gov.au**

Associate
Vice President Hatcher
Fair Work Commission
Level 10, Tower Terrace
80 William Street
EAST SYDNEY NSW 2011

Dear Associate

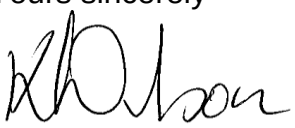
**Re: Supported Employment Services Award 2010**
**Four Yearly Review of Modern Awards**
**Matter No. AM2014/286**

We enclose copies of cases that AED Legal Centre has referred to in its submissions. We anticipate that this will allow the Full Bench an opportunity to read these cases in advance of the hearing, if they are so minded.

Additionally, hard copies will be made available to the parties or members of the Full Bench, upon request.

If you have any queries in relation to the above, please email us at noni.lord@aed.org.au or leave a voicemail message on (03) 9639 4333 with some convenient times for us to return your call.

Yours sincerely



Kairsty Wilson
Principal Legal Practitioner
AED Legal Centre

Encl. (4)

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[AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION]

# National Wage Case August 1989

MADDERN P, LUDEKE J, KEOGH DP, PETERSON J, JOHNSON, NOLAN, LAING JJ

7 August 1989

**WAGE FIXATION — National Wage principles — Structural efficiency principle — Adjustments — Work value changes — Allowances — Superannuation — Hours of work — Applications for changes in conditions — Anomalies and inequities — Paid rates award — Economic incapacity.**

STATEMENT

THE COMMISSION. In the current proceedings, there are two main issues:

- first, the quantum, timing and basis of any wage increase to be made available for effective structural efficiency exercises;
  and
- second, how the approach endorsed in principle by the Commission for ensuring stable relationships between awards and their relevance to industry is best translated into practice.

In addition, other issues concerning the effective implementation and future direction of the principles, raised in the February Review, need to be addressed.

Given the excessive level of imports, a fall-off in the level of export growth, the deterioration in the current account, a serious and continual deterioration in the balance of payments, the level of international debt, high interest rates, and renewed concerns about inflation, there are substantial economic grounds for rejecting any notion of wage increases at the present time.

There are however many interrelated elements involved in the work environment and economic considerations cannot be taken in isolation. Indeed to do so could bring about a perverse situation which may compound rather than reduce the economic difficulties.

Ultimately the test is not the pursuit of what is perfect in the abstract, but what is the best outcome, which is workable and sustainable immediately and over the medium and longer term. Further, there are both economic and non-economic considerations which point to an alternative conclusion. These include:

- the movement in prices and in particular the erosion of the real value of wages;
- the effect on employees of high interest rates;
- the level of capacity utilisation and company profits;
- the tight labour market as reflected in employment and unemployment statistics, labour shortages, and overtime and vacancy data;
- the attitudes of governments and private employers in increasing

management and executive salaries, and overaward payments in current economic circumstances;

- the agreement between the ACTU and the Commonwealth;
- support for that agreement by a number of State governments;
- the attitude of some large employer organisations and their membership covering a substantial number of individual employers in a number of industries;
- the expectations created by the agreement of the ACTU and the Commonwealth, and the support of State governments, the ACT and some major employers for that agreement;
- the current level of industrial disputes;
- the fact that commercial considerations, attitudes to comparative wage justice, the structure of trade union and employer organisations and the structure of awards remain fundamentally unchanged from the periods of earlier wage breakouts; and
- the importance of attaining the objectives of the structural efficiency principle.

In light of all the factors we have referred to we have come to the conclusion that we must reject the submissions of those who argued that there are no grounds to justify wages increases during the year 1989/90.

It is our decision that an adjustment in rates of pay will be allowable for completion of successful exercises under the structural efficiency principle. Such an adjustment will comprise:

(i) a first increase of $10.00 per week for workers at the basic skills/trainee level; $12.50 per week at the semi-skilled worker level; and $15.00 per week or 3%, whichever is the higher, at the tradesman or equivalent level and above;
and

(ii) a second increase of the same order as the first increase, to be paid not less than 6 months after the first increase.

We are of the view that many awards have scope for a less prescriptive approach and, without limiting the opportunities for innovation, we have set out some of the measures which are appropriate for consideration.

Proposals for changes of the nature we have outlined should not be approached in a negative cost-cutting manner and should as far as possible be introduced by agreement.

In its February 1989 Review decision, the Commission stated that minimum rates awards would be reviewed:

> "to ensure that classification rates and supplementary payments in an award bear a proper relationship to classification rates and supplementary payments in other minimum rates awards".

In these proceedings, the ACTU sought specific endorsement of various classification rates and supplementary payments.

Apart from the relationship between the metal industry tradesperson and the building industry tradesperson, we are not prepared to approve specific wage relativities proposed by the ACTU on behalf of the trade union movement. Nevertheless, we consider it appropriate for relativities to be established for both minimum classification rates and supplementary payments for the key classifications within the ranges set out in the decision.

We determine that the minimum classification rate and supplementary

payment exercise shall be applied in accordance with the following guidelines:

(i) the appropriate adjustments in any award will be applied in not less than four instalments which will become payable at six monthly intervals;

(ii) in appropriate cases longer phasing in arrangements may be approved or awarded and/or parties may agree that part of a supplementary payment should be based on service.

(iii) the first instalment of these adjustments will not be available in any award prior to 1 January 1990 or three months after the variation of the particular award to implement the first stage structural efficiency adjustment, whichever is the later;

(iv) the second and subsequent instalments of these adjustments will not be automatic and applications to vary the relevant awards will be necessary;

(v) consistent with the commitments given by the ACTU in these proceedings, individual unions will be required to accept absorption of these adjustments to the extent of equivalent overaward payments;

(vi) supplementary payments will not be prescribed in the wages clauses of awards but in separate clauses; and

(vii) where the existing minimum classification rate in an award exceeds the minimum rate for that classification assessed in accordance with this decision, the excess amount is to be prescribed in a separate clause: that amount will not be subject to adjustment.

The Commission will conduct a review of the progress of both structural efficiency and minimum rates adjustment exercises in May 1990.

A Full Bench will be constituted in due course for the purpose of hearing further argument about the future of paid rates awards.

We have decided that all special cases should be tested against other relevant principles at the same time as the structural efficiency principle is being applied.

As a consequence of this decision, the existing principles require amendment. Those amended principles are set out in Appendix A to this decision.

Each union will be required to give a no extra claims commitment before the benefits of this decision are available.

The commitment will continue to operate until the principles as amended in this decision are reviewed. Upon application, that Review will commence in September 1990.

We also publish decisions on rates of pay in relation to the Telecom/APTU Award 1986, the Aircraft Industry (Domestic Airlines) Award 1980 and the Aircraft Industry (Qantas Airways Limited) Award 1980.

REASONS FOR DECISION

THE COMMISSION. This *National Wage* case decision is the latest in a series in which the Commission has sought to provide a framework to encourage the parties, through a combination of restraint and sustained effort, to improve efficiency and productivity.

The first decision, that of March 1987 (1987) 17 IR 65, laid down wage fixing principles the key to which was the restructuring and efficiency principle. The proper application of that principle required a positive approach by trade unions, their members and by employer organisations, their members and individual employers. In the event, and although the final result was uneven, many made positive efforts and derived benefits which not only produced immediate efficiency and productivity improvements but also laid the basis for future developments.

In its August 1988 decision (1988) 25 IR 170; Print H4000, the Commission decided not to continue that principle in its then form: some parties had exhausted its usefulness and others were less than successful in applying it. However, in so deciding, the Commission took the view that it was essential that any new wage system should build on the steps already taken to encourage greater productivity and efficiency. It said:

> "Attention must now be directed towards the more fundamental, institutionalised elements that operate to reduce the potential for increased productivity and efficiency."

and

> "to sustain real improvement in productivity and efficiency, we must take steps to ensure that work classifications and functions and the basic work patterns and arrangements in an industry meet the competitive requirements of that industry."

That decision provided the structural efficiency principle as the central element in a new system of wage fixation. The object was to give incentive and scope to the parties to examine and modernise their awards so as to better meet the competitive requirements of industry.

The Commission sat again in February, March and April 1989 to receive detailed reports on individual award reviews and to consider any matters of general principle that might need to be resolved. The February 1989 Review decision (1989) 27 IR 196; Print H8200, should be read in conjunction with the August 1988 decision and this decision.

In the course of the February 1989 Review the Commission made it clear that structural efficiency exercises should canvass a broad agenda. It also endorsed in principle the proposal of the Australian Council of Trade Unions (ACTU) which it had argued would provide "a national framework or blueprint" which would involve restructuring all awards of the Commission to provide "consistent, coherent award structures, based on training and skills acquired, and which bear clear and appropriate work value relationships one to another". However, the Commission did not endorse the particular award relationships proposed by the ACTU. The Commission decided to sit again on 6 June 1989 "to determine whether any wage adjustment should be made having regard to the progress of award restructuring, the tax changes that have been announced, the state of the economy and the extent to which unions are prepared to make the necessary commitments".

In the current proceedings, therefore, there are two main issues:

- first, the quantum, timing and basis of any wage increase to be made available for effective structural efficiency exercises; and
- second, how the approach endorsed in principle by the Commission for ensuring stable relationships between awards and their relevance to industry is best translated into practice.

In addition, other issues concerning the effective implementation and future direction of the principles, raised in the February Review, need to be addressed.

STRUCTURAL ADJUSTMENT CLAIMS

The ACTU claimed increases of $10 per week for workers at the basic skills/trainee entry level; $12.50 per week at the semi-skilled worker level; and $15 per week or 3%, whichever is the higher, at the tradesman level and above. It submitted that such increases should be available on individual award variation, consistent with the structural efficiency principle, in the first half of 1989/90. It sought further increases of the same order to be available in the second half of 1989/90 and paid no less than 6 months and no more than 7 months after the first increases. It also sought the provision of a mechanism whereby higher increases might be achieved on a limited basis to meet special circumstances.

These claims were consistent with an agreement between the ACTU and the Commonwealth, reached on 7 April 1989, and were supported by the Commonwealth in these proceedings. They were also supported by the Governments of Victoria, Tasmania, the ACT and by the Metal Trades Industry Association of Australia (MTIA), the Australian Federation of Construction Contractors, the Master Builders' — Construction and Housing Association Australia Inc, the Plumbing Employers Industrial Secretariat and the Fire Sprinkler Contractors' Association of Australia.

The Confederation of Australian Industry (CAI) opposed the ACTU claims and argued that the maximum increase in award rates "should be in the region of two and a half to 3 per cent, but certainly not exceeding 3 per cent". It submitted that such a figure was in line with the trend rate in productivity growth and was the maximum sustainable increase, consistent with moderating inflation, which would not further damage Australia's international competitiveness. CAI argued further that the increase should be in a percentage form; be established as a maximum for each award; be available in at least two instalments; and should not precede implementation of the results of individual structural efficiency exercises.

The Australian Mines and Metals Association (Inc) (AMMA) and the Governments of NSW and the NT supported the thrust of the CAI submissions in relation to the appropriate amount of wage adjustment. In addition NSW argued that if improvements did not turn out to be as effective as originally claimed the second instalment should be deferred, reduced or negated and further, that if unions fail to co-operate, the first instalment should be rescinded.

The Business Council of Australia (BCA) did not oppose wage increases on the completion of structural efficiency exercises. However, it did not propose a specific order of increase or a maximum increase. It argued rather that negotiations should be on an enterprise basis and that the parties "should themselves determine the magnitude of increases, the nature, strength and directness of linkages between wage rises and performance improvement and the timing of increases". It saw the ultimate objective as being the reduction of the gap between Australian and overseas "wage inflation" and the need, consistent with that objective, for "smaller wage rises or wage rises which flow through more slowly or a combination of both".

The Queensland Government submitted that wage adjustments at this time would not be consistent with economic requirements. However, it accepted that an increase could be approved if the Commission was satisfied that significant progress had been made towards restructuring a particular award and that any initial increase should be commensurate with the assessed value of the resultant productivity increase. Any subsequent increase or increases would depend on the completion of negotiations in satisfaction of the structural efficiency principle.

The Australian Chamber of Commerce also opposed the ACTU claim and submitted that the maximum wage increase allowable in view of the economic situation was 2% for the year 1989/90.

The National Farmers' Federation (NFF) submitted that the economic evidence provided no justification for awarding wage increases during the year 1989/90. As to the period beyond June 1990, it proposed that the Commission should further review the state of the national economy in May 1990. The Australian Wool Selling Brokers Employers Federation supported and endorsed the thrust of the NFF's submission.

STRUCTURAL EFFICIENCY ADJUSTMENT

This case was conducted against an economic background that should concern all Australians. As the Commonwealth put it:

> "On the economic front Australia's external imbalances remain serious and wages policy must continue to play a key part in addressing them. The current account deficit and associated external debt remain pre-eminent economic problems. Growth in demand has been much stronger than expected, resulting in inflationary pressures, a delay in expected improvements to the current account deficit and increases in Australia's external debt. Controlling demand pressures and getting the medium term adjustment process back onto track are central objectives of government policy.
>
> They will require among other things reducing inflationary pressures, improving our international competitiveness, and raising productivity while avoiding a wages explosion and recession. This in turn calls for continuing nominal wage restraint as part of an integrated package of accord policies including concerted action to improve labour market flexibility and productivity on a sustained basis." (Transcript, 161).

This view of the state of the economy has much in common with the conditions discussed by the Commonwealth during the *National Wage* case which led to the decision of 10 March 1987. The Commission then noted:

> "In these proceedings the Commonwealth expressed succinctly the economic predicament Australia faces. It said:
>
> > 'Correction of the imbalances that have developed in Australia's external accounts is necessary. If this is not done, the economy runs the risk of becoming enmeshed in a vicious circle of exchange rate depreciation, mounting inflation and deepening external imbalances.
> >
> > This would result in an erosion in overseas and domestic confidence in the economy's future, seriously undermining private investment, economic activity and employment. The current account deficit would eventually be reduced, but at a cost of a deep recession in the economy.'" (1987) 17 IR at 96.

At that time all parties to the proceedings accepted that Australia's economic performance had to be improved. It was the decision of 10 March 1987 that provided the restructuring and efficiency principle which was designed to accelerate the contribution that parties to awards could make to improve Australia's economic performance.

The period both immediately before and after that decision has seen substantial real wage restraint; an improvement in the relative labour costs and inflation rates as between Australia and its international competitors; reduced industrial disputation; a very substantial rise in employment; high capacity utilisation; a high level of profits; a high level of investment; and rapid growth.

In spite of the improvements in the domestic economy the comments quoted above from the March 1987 *National Wage* case decision seem even more appropriate today than they were then. That this is so is of great concern. There is no doubt that labour market reform and, in particular, award wage restraint have over recent years contributed positively to the rapid growth in many sectors of the economy. That contribution has clearly not been matched in other areas because fundamental imbalances have continued and, in terms of external markets, have worsened.

Micro-economic adjustments and wage reform in particular are medium to longer term options which cannot be expected to provide a substitute for alternative macro-economic policy options. Nevertheless it is also apparent that continued efficiencies and improvements in labour flexibility as well as ongoing wage restraint will remain necessary. The structural efficiency principle will maintain the process started in 1987 but it is clearly not the only answer to Australia's international economic difficulties.

Given the excessive level of imports, a fall-off in the level of export growth, the deterioration in the current account, a serious and continual deterioration in the balance of payments, the level of international debt, high interest rates, and renewed concerns about inflation, there are substantial economic grounds for rejecting any notion of wage increases at the present time.

There are however many interrelated elements involved in the work environment and economic considerations cannot be taken in isolation. Indeed to do so could bring about a perverse situation which may compound rather than reduce the economic difficulties.

Ultimately the test is not the pursuit of what is perfect in the abstract, but what is the best outcome which is workable and sustainable immediately and over the medium and longer term. Further, there are both economic and non-economic considerations which point to an alternative conclusion. These include:

- the movement in prices and in particular the erosion of the real value of wages;
- the effect on employees of high interest rates;
- the level of capacity utilisation and company profits;
- the tight labour market as reflected in employment and unemployment statistics, labour shortages, and overtime and vacancy data;
- the attitudes of governments and private employers in increasing management and executive salaries, and overaward payments in current economic circumstances;
- the agreement between the ACTU and the Commonwealth;

- support for that agreement by a number of State governments;
- the attitude of some large employer organisations and their membership covering a substantial number of individual employers in a number of industries;
- the expectations created by the agreement of the ACTU and the Commonwealth, and the support of State governments, the ACT and some major employers for that agreement;
- the current level of industrial disputes;
- the fact that commercial considerations, attitudes to comparative wage justice, the structure of trade union and employer organisations and the structure of awards remain fundamentally unchanged from the periods of earlier wage breakouts; and
- the importance of attaining the objectives of the structural efficiency principle.

These are factors that we record as matters that must bear on our decision. In varying degrees they were recognised by the parties but, in their essentials, they were summarised by MTIA in describing the basic reasons for its proposed agreement with the Metal Trades Federation of Unions (MTFU). MTIA said:

> "Firstly, the metal and engineering industry has an earnest, indeed it could be said to be, a passionate desire to become internationally competitive. If we do not, the manufacturing industry in this country faces a bleak future.
>
> Secondly, an essential element in the quest for competitiveness is labour market reform. There is unanimity that the operation of our labour market is a substantial hindrance to improved efficiency and productivity.
>
> Thirdly, given the institutional framework we operate in, which includes a powerful and influential trade union movement which has achieved an agreement with the federal government on wage outcomes in 1989/90, and given the explosive pressures on wages caused by labour shortages, cuts in real wages over the last six years and current high interest rates, MTIA accepts the reality that we are not going to achieve the reforms that we so desperately need at a neutral cost in the short term.
>
> Fourthly, given what we have been able to achieve in our agreement on award restructuring, MTIA members, those who have to pay the wage increases, have overwhelmingly endorsed the agreement.
>
> And, fifthly, MTIA disagrees with the view expressed by some organisations that there is no risk of a wages explosion. We see it as a very real probability, a probability we have no desire to test. But we do not have to test it. Here, we have an opportunity to manage the wages outcome and at the same time, commence to implement our program of workplace reform."

MTIA represents employers covered by over 350 federal awards, 82 NSW State awards, 29 Victorian State awards, 72 Queensland State awards and 41 SA State awards.

In light of all the factors we have referred to we have come to the conclusion that we must reject the submissions of those who argued that there are no grounds to justify wages increases during the year 1989/90.

To achieve the goals sought, the structural efficiency principle must

increase flexbility by changing employment conditions, work patterns, employee mobility, education and training. These cannot be achieved without some cost to employers and it is unrealistic to suggest otherwise in the current environment.

We also reject the view of the BCA that no ceiling should be imposed: to accept such a proposal would be to risk economically unsustainable wage increases. Furthermore, we do not accept that the 3% ceiling advocated by CAI is practicable in light of the countervailing factors we have mentioned.

The ACTU and the Commonwealth contended that the increases proposed, properly applied, would not exceed the objective of a 6.5% increase in average weekly earnings in 1989/90. On the other hand, CAI, BCA and NFF, on the basis of differing estimates, contended that the effect would be much higher. The main area of difference between the ACTU and these organisations lay in their individual estimates of the effect of wage increases still flowing through the system. On the basis of the material and analysis put to us, we have concluded that the employer organisations have overestimated those effects.

In all these circumstances we are satisfied that the proposal put by the ACTU and the Commonwealth is capable of being limited to the level of increase in average weekly earnings which is contemplated. We have decided to adopt this proposal for the purposes of the structural efficiency adjustment.

Consequently it is our decision that an adjustment in rates of pay will be allowable for completion of successful exercises under the structural efficiency principle. Such an adjustment will comprise:

(i) a first increase of $10 per week for workers at the basic skills/trainee level; $12.50 per week at the semi-skilled worker level; and $15 per week or 3%, whichever is the higher, at the tradesman or equivalent level and above; and

(ii) a second increase of the same order as the first increase, to be paid not less than 6 months after the first increase.

A number of factors are relevant to the likely labour cost impact of this decision. These include:

- dates of operation of award variations;
- the extent to which translation arrangements from the old to new classification structures and their timing result in actual wage increases;
- the extent to which any increases over and above the structural efficiency adjustment are allowed;
- the extent of wages drift; and
- productivity improvements induced as a consequence of the structural efficiency principle.

Our view on each of these matters is as follows.

We have decided that the first increase should be accessible from the date of this decision. However, the actual date of operation for an award will be the date on which that award is varied following examination by the Commission of the proposals for restructuring and the giving of commitments. The second increase will not be automatic but subject to application.

This is consistent with the submission of the Commonwealth that the taxation and social wage measures being implemented as part of the ACTU/Commonwealth Agreement would "allow a much needed breathing

space for the development of genuine award restructuring initiatives, thereby consolidating the new directions in wage fixing laid down by the Commission". (Transcript, 163.)

We expect that many structural efficiency exercises will involve new classification structures. In those cases the parties to particular awards will need to apply specific procedures governing the translation of workers from the old to the new structure. This in turn demands that the new classification structure levels be clearly defined. In this connection we note that the MTIA/MTFU Agreement provides for a trial of the new classification structure before award changes are made. This is a sensible procedure and we consider that it should be adopted by other award parties, particularly where an award covers a substantial number of individual employers and establishments.

It is our intention that the translation of workers to new classification structures in the various awards should occur with little cost impact apart from that resulting from the structural efficiency adjustment. In this connection the ACTU stated:

> "... any award wage increases in terms of movement from the old to the new classification would be subject to absorption, subject to receipt of the restructuring adjustment as an actual rate increase". (Transcript, 856.)

When the structural efficiency exercise involves reducing the number of award classifications by broadbanding and multi-skilling, it is important that the intent of the broadbanding and multi-skilling be effectively implemented. Hence workers should not be placed in a classification unless they have the training and experience necessary to perform the full range of the functions comprehended by the new classification and are actually required to perform those functions. Consequently the parties should ensure that sufficient time is provided for immediate training needs and, where necessary, on the job experience before finalising the translation of existing employees to the new classification structure. In moving to the new classifications the parties should consider stepped wage increases up to the new classification levels.

Furthermore, we believe that the second instalment of the structural efficiency adjustment should only be available if the Commission is satisfied that the principle has been properly implemented and will continue to be implemented effectively. In this regard, our comments concerning the need for a wider agenda in the special case decisions dealing with the Telecom/APTU Award 1986 (30 IR 78; Print H8350) and the Aircraft Industry (Domestic Airlines) Award 1980 (30 IR 74; Print H8356) should be noted.

The conclusions of this Full Bench in relation to the operation of the other wage fixing principles and special cases should mean that increases from these sources are also limited.

We have particular concern about wages drift which has increased in recent months. While annual growth in award rates remains below 5%, average weekly earnings growth is currently running at just under 7%. The reason for this is not readily discernible but compositional changes in the workforce, the growth in managerial and executive salaries and the granting of overaward payments by employers would all have contributed. Too many employers still persist with their own form of market adjustment of wages based on area rates surveys. Such surveys and the actions that invariably

follow them are a recipe for wage breakouts. They have been instrumental in encouraging employers to participate in a type of area wages ranking system with an in-built and continuing escalation effect which has aptly been described as a spiral of nonsense. This practice is contrary to both the spirit and purpose of the wage fixation principles and encourages workers to break the commitments to those principles made by their unions on their behalf.

Compositional change in the workforce is unremarkable and desirable in a dynamic and growing community. However, over-fast growth in managerial and executive salaries and overaward payments inconsistent with the wage fixation principles inhibit attempts to maintain wage restraint. Simple commonsense, apart from equity, dictates that employers should not attempt to apply two sets of rules within their workforce. The nature of the structural efficiency principle and its potential to induce productivity improvement, its requirement for positive, co-operative effort by both employer and worker and the workers' unions, and the trade union movement's commitment to the wage fixation system demands that employers also scrupulously comply with the principles.

Providing the implementation of the award changes proceed in accordance with this decision, we consider the decision will not adversely affect the economy in the short term and will in time, assist in achieving improved economic performance. The major success in the economy in the past 5 years has been the creation of over a million new jobs. While this is expected to stabilise as a consequence of current policies, no immediate or significant increases in unemployment are anticipated as a direct result of this decision. We anticipate that the results will also be consistent with a reduction in inflation in the medium to longer term.

A final comment must be made on structural efficiency adjustment. Notwithstanding our affirmation in the February 1989 Review decision that there was no limitation imposed on the agenda available for structural efficiency exercises, we are concerned that conditions of employment have not been included in negotiations as a matter of course. Indeed, it was asserted by some employers that in a number of cases, restrictions had been placed on the restructuring agenda.

It will be recalled that in the August 1988 decision the Commission said that

> "The measures to be considered should include but not be limited to:
>
> - establishing skill-related career paths which provide an incentive for workers to continue to participate in skill formation;
> - eliminating impediments to multi-skilling and broadening the range of tasks which a worker may be required to perform;
> - creating appropriate relativities between different categories of workers within the award and at enterprise level; and
> - ensuring that working patterns and arrangements enhance flexibility and the efficiency of the industry."

In relation to the last measure in particular we are of the view that many awards have scope for a less prescriptive approach and, without limiting the opportunities for innovation, the following are some of the measures which are appropriate for consideration:

- averaging penalty rates and expressing them as flat amounts;
- compensating overtime with time off;
- flexibility in the arrangement of hours of work, for example:

  - wider daily span of ordinary hours
  - shift work, including 12 hour shifts
  - ordinary hours to be worked on any day of the week
  - job sharing;
- introducing greater flexibility in the taking of annual leave by agreement between employer and employee;
- rationalising the taking of annual leave to maximise production;
- reviewing the incidence of, and terms and conditions for, part-time employment and casual employment;
- reducing options for payment of wages other than by electronic funds transfer;
- extending options as to the period for which wages must be paid to include fortnightly and monthly payment;
- changes in manning consistent with improved work methods and the application of new technology and changes in award provisions which restrict the right of employers to manage their own business unless they are seeking from the employees something which is unjust or unreasonable;
- reviewing sick leave provisions with the aim of avoiding misuse; and
- developing appropriate consultative procedures to deal with the day to day matters of concern to employers and workers.

In addition, we consider that the following matters should be placed on the agenda for the better administration of awards:

- updating and/or rationalising the list of award respondents; and
- rationalising the number of awards covering any one employing body.

Proposals for changes of this nature should not be approached in a negative cost-cutting manner and should as far as possible be introduced by agreement.

MINIMUM RATES ADJUSTMENTS

In its February 1989 Review decision, the Commission stated:

> "The fundamental purpose of the structural efficiency principle is to modernise awards in the interests of both employees and employers and in the interests of the Australian community: such modernisation without steps being taken to ensure stability as between those awards and their relevance to industry would, on past experience, seriously reduce the effectiveness of that modernisation." (1989) 27 IR at 201.

The Commission went on to endorse in principle the approach proposed by the ACTU. That meant minimum rates awards would be reviewed:

> "to ensure that classification rates and supplementary payments in an award bear a proper relationship to classification rates and supplementary payments in other minimum rates awards". (1989) 27 IR at 201.

In these proceedings, the ACTU sought specific endorsement of the following classification rates and supplementary payments:

| Classification | Minimum classification rate | Supplementary rate |
|---|---|---|
| | $ | $ |
| Building industry tradesperson | 356.30 | 50.70 |
| Metal industry tradesperson | 356.30 | 50.70 |
| Metal industry worker, grade 4 | 341.90 | 48.80 |
| Metal industry worker, grade 3 | 320.50 | 45.80 |
| Metal industry worker, grade 2 | 302.90 | 43.10 |
| Metal industry worker, grade 1 | 285.00 | 40.60 |
| Storeperson | 325.50 | 46.50 |
| Driver, 3-6 tonnes | 325.50 | 46.50 |
| Filing clerk — 1st year | 337.00 | 28.00 |
| — 2nd year | 337.00 | 38.00 |
| — 3rd year | 337.00 | 48.00 |
| General clerk — 1st year | 354.40 | 30.60 |
| — 2nd year | 354.40 | 40.60 |
| — 3rd year | 354.40 | 50.60 |

The Commission was informed that these rates and the relationships they bear to each other had been endorsed collectively by the trade union movement after long deliberation; they were also supported by the agreement made by the ACTU and the Commonwealth. It was argued that they would provide a firm base for sustainable relationships across federal awards and thus provide a stable base for wage fixation.

The resolution of the issues in this part of the case was not made any easier by the reluctance of the various employer organisations to fully debate the major issues raised by the February 1989 Review decision. Employers generally took the view that no substantial problem existed, but alternatively, if any problem did exist, there were other ways of dealing with it.

The employers argued that the cost of implementing the decision would be substantial and, indeed, prohibitive given the current economic situation. CAI tendered the results of a survey it had conducted to show that a significant proportion of workers either received no overaward payments or were paid relatively small overawards. CAI argued that this survey showed that ACTU estimates based on broad Australian Bureau of Statistics figures understated the incidence of such workers. MTIA also tendered the results of a survey of 200 members to show a similar result.

We do not intend to analyse those surveys in this decision. Suffice to say that, while they might be open to criticism for their methodology, we acknowledge that the results are consistent with a broad view that there are a substantial number of workers who receive very little or no overaward payments. We also accept that this is a significant element in assessing the possible cost impact of these adjustments which were approved in principle in the Commission's decision in the February 1989 Review.

The employers submitted that proper relationships could not be established between awards until new classification structures and definitions were established. They also argued that the Commission should not adopt what were said to be the unilateral, arbitrary assessments put forward by the

ACTU as to appropriate relativities between the classifications in key awards.

Finally, the employers submitted that, notwithstanding trade union commitment on absorption of these adjustments where applicable, both the nature and practices of industrial relations in industry and past experience meant that the prospect of actual absorption had to be doubtful.

Without firm guidance on appropriate relativities, individual structural efficiency exercises could create situations which would not only continue but possibly worsen the very position that is required to be rectified. For this reason we reject the proposition that the question of relativities should be left completely until the details of structural efficiency exercises are completed.

Subject to what we say later in this decision, we have decided that the minimum classification rate to be established over time for a metal industry tradesperson and a building industry tradesperson should be $356.30 per week with a $50.70 per week supplementary payment. The minimum classification rate of $356.30 per week would reflect the final effect of the structural efficiency adjustment determined by this decision.

Minimum classification rates and supplementary payments for other classifications throughout awards should be set in individual cases in relation to these rates on the basis of relative skill, responsibility and the conditions under which the particular work is normally performed. The Commission will only approve relativities in a particular award when satisfied that they are consistent with the rates and relativities fixed for comparable classifications in other awards. Before that requirement can be satisfied clear definitions will have to be established.

We are not prepared to approve specific wage relativities proposed by the ACTU on behalf of the trade union movement. Nevertheless, we consider it appropriate for relativities to be established for both minimum classification rates and supplementary payments for the following key classifications within the ranges set out below:

| | *% of the tradesperson rate* |
|---|---|
| Metal industry worker, grade 4 | 90-93 |
| Metal industry worker, grade 3 | 84-88 |
| Metal industry worker, grade 2 | 78-82 |
| Metal industry worker, grade 1 | 72-76 |
| Storeman/packer | 88-92 |
| Driver, 3-6 tonnes | 88-92 |

In some cases, existing minimum classification rates will already contain an element of overaward payment which should more properly be included as part of the supplementary payment. This will require appropriate adjustment. Similarly, existing minimum classification rates may contain amounts for disabilities and these should be separately expressed.

It will be noted that with the exception of the clerical classifications, we have indicated a range of relativities between the key tradespersons and the other classifications which were the subject of debate. The material available on clerical rates was inadequate to permit the establishment of a similar range of relativities. Furthermore, the ACTU proposed relativities for a number of other classifications in a range of industries, but these too were accompanied by insufficient material to permit any conclusions.

In light of this decision it will no longer be necessary to conduct surveys in relation to overaward payments in individual award areas.

To achieve a proper and lasting reform of awards it is essential that the structural efficiency exercise and the proper fixation of minimum award rates be treated as a package. We are also conscious of the fact that:

(i) the minimum rates adjustment exercise can in itself cause a significant cost impact if the positive co-operation of both workers and employers so necessary to underwrite the exercise is found to be lacking; and

(ii) the minimum rates adjustment exercise could detract from the benefits to be obtained from the structural efficiency principle if priority is not given to that principle.

In making these observations, we are not overlooking the commitments that the ACTU has been authorised to give on behalf of the trade union movement.

However, bearing in mind the statutory injunction of s 90 of the *Industrial Relations Act* 1988 and the importance to the community of success in this endeavour, we determine that the minimum classification rate and supplementary payment exercise shall be applied in accordance with the following guidelines:

(i) the appropriate adjustments in any award will be applied in not less than four instalments which will become payable at six monthly intervals;

(ii) in appropriate cases longer phasing in arrangements may be approved or awarded and/or parties may agree that part of a supplementary payment should be based on service. In this connection the ACTU stated: "It is recognised by the ACTU that in some industries an amount of between $8 to $10 supplementary payment might be appropriately paid after three months service";

(iii) the first instalment of these adjustments will not be available in any award prior to 1 January 1990 or three months after the variation of the particular award to implement the first stage structural efficiency adjustment, whichever is the later;

(iv) the second and subsequent instalments of these adjustments will not be automatic and applications to vary the relevant awards will be necessary;

(v) consistent with the commitments given by the ACTU in these proceedings, individual unions will be required to accept absorption of these adjustments to the extent of equivalent overaward payments;

(vi) supplementary payments will not be prescribed in the wages clauses of awards but in separate clauses; and

(vii) where the existing minimum classification rate in an award exceeds the minimum rate for that classification assessed in accordance with this decision, the excess amount is to be prescribed in a separate clause: that amount will not be subject to adjustment.

The Commission will conduct a review of the progress of both structural efficiency and minimum rates adjustment exercises in May 1990.

On the submissions we heard in this case, there must be concern about the concept of absorption. We emphasise that absorption requires discipline on the part of both employers and unions and, in the May 1990 Review, the

Commission will make detailed inquiry of both employer and union parties in order to check actual practice.

We cannot overemphasise the importance of successfully applying the structural efficiency principle and the minimum rates adjustment process. These exercises provide an opportunity for the parties to display the maturity required to overcome the wage instabilities with which the community is only too familiar. It also provides the opportunity to take an essential step towards institutional reform which is a prerequisite to a more flexible system of wage fixation. As part of that future we envisage that minimum classification rates will not alter their relative position one to another unless warranted on work value grounds. On the other hand it is our expectation that supplementary payments might vary as between industries, industry sectors, individual employers or on a geographic or some other basis.

Finally, the inclusion of, and increase in, supplementary payments which form part of the exercise is designed, inter alia, to assist those "employees covered by minimum rates awards who have suffered from the inequities of the present system due to the level of their award rates and their lack of substantial overaward payments". ((1989) 27 IR at 200; Print H8200, at 5). However, the unions cannot expect to have supplementary payments included in awards to compensate for the lack of overaward payments for some employees and conduct overaward campaigns for others. To this extent the inclusion of supplementary payments in awards is a concomitant of the no extra claims commitment.

As was stated in the February 1989 Review decision, the alternative to the parties not seizing these opportunities and making them work is:

> "the Commission may be left with little choice but to resort to strict prescription of minimum rates only."

PAID RATES AWARDS

For a considerable period of time, the complex issue of paid rates awards and their interaction with minimum rates awards has been an ongoing problem. The complexity has arisen not merely because paid rates awards have been adjusted from time to time on the basis of market movements while, generally speaking, minimum rates awards have not. Although this has changed somewhat with the granting in recent times of supplementary payments there are other problems: for example, the timing of the review of paid rates awards; the market that is relevant to that review; and the appropriate position in that market. Moreover, changes in paid rates award prescriptions invariably have an immediate impact on the market used as the reference point, a market that may and normally includes both other paid rates and minimum rates awards. Again, problems of relativities have arisen where a particular paid rates award has been adjusted and this has affected workers in other areas, and other groups of workers in the same industry, industry sector or employing body.

The issue was discussed, albeit briefly, in the February 1989 Review and in its decision of 25 May 1989 the Commission, while drawing no final conclusions, commented that "On recent experience there are grounds for doubting the wisdom of attempting to maintain paid rates awards in the private sector".

In the current proceedings only brief submissions were put on this subject and these for the most part could be categorised mainly as expressions of

interest by some parties for the retention of paid rates awards rather than a debate as to their efficacy and means of overcoming the problems they create.

In view of this a Full Bench will be constituted in due course for the purpose of hearing further argument about the future of paid rates awards. In those proceedings, parties will be expected to address, inter alia, the following matters:

(i) whether any new paid rates awards should be made;

(ii) whether the parties to existing paid rates awards, both in the private and public sectors, should be required within a given period to apply for cancellation of their existing paid rates awards and their replacement with agreements certified under s 115 of the Act;

(iii) the basis on which rates of pay in paid rates awards or s 115 agreements should be assessed;

(iv) whether paid rates awards or s 115 agreements should only be approved where they cover all workers in an establishment conducted by a single employer; and

(v) whether paid rates awards or s 115 agreements within an industry or industry sector should only be reviewed collectively so as to ensure proper attention is given to internal relativities.

Pending the outcome of the foreshadowed Full Bench proceedings we have determined in relation to paid rates awards that:

- except in special cases, the Commission will not make new paid rates awards;
- it is no longer appropriate to apply the decision in *General Motors-Holden's Limited and Ford Australia Ltd* case, of awarding:

  > "an increase to restore to the rates under the awards the relationship which they had when established vis-à-vis rates actually paid for similar work in industries located near the establishments of these two companies." (1981) 260 CAR 3.

- rates in paid rates awards should not be fixed at a level which would affect the rates for other workers;
- paid rates awards or agreements should contain clear classification definitions;
- statutory declarations will be required from all parties involved to the effect that the integrity of those awards or agreements will be preserved;
- if breached, paid rates awards should be discontinued and appropriate minimum rates should be prescribed;
- no increase at the base rate which is greater than the structural efficiency adjustment will be allowed in a paid rates award; and
- subject to special cases, no special adjustment may be approved which cannot be justified on the basis of the creation of a proper career structure through structural efficiency.

An agreement which adopts paid rates, and in respect of which the parties seek certification under s 115 of the Act, will be subject to the foregoing requirements.

SPECIAL CASES

Both the ACTU and the Commonwealth contended that increases beyond those generally available for structural efficiency may be approved in special cases, provided that the cases are processed through a special case mechanism and provided there is negligible cost or it can be demonstrated that it should be approved on public interest grounds.

It was generally accepted that applications said to fall into the category of special cases must be dealt with at the same time as, and in the context of, the application of the structural efficiency principle.

We have decided that all special cases should be tested against other relevant principles at the same time as the structural efficiency principle is being applied. We consider also that where a special case is claimed, it should be the subject of an application for reference pursuant to s 107 of the Act. It will then be a matter for the President to decide whether it should be dealt with by a Full Bench.

We recognise that there might be some workplaces where the objectives of the structural efficiency principle have already been achieved and there is no scope for further efficiency improvements. We would expect such instances to be rare. However, any such instances may be processed as special cases.

REQUIREMENTS FOR SUCCESS

Having regard to the material before us, in particular the evidence of increases still passing through the system, the amount proposed as a result of these proceedings, and the increase in disposable incomes made available by the recent cuts in income tax, there are additional important requirements if the package is to achieve its aims.

First, to achieve the result expected, wage increases must be carefully phased-in in accordance with this decision.

Second, wages drift will need to return to lower levels. This can be achieved if employers actively support the consistent application of the principles. These principles provide that movements in wages and salaries and improvements in conditions — whether they occur in the public or private sector, whether they be award or overaward, whether they result from consent or arbitration — must fall within the limits established by this decision. We have already alluded to the difficulties created by employers applying differing rules to different people.

Further, it is fundamental to success that the unions make and keep the following commitments:

- commitment to new award structures including the reform of awards into base rates and supplementary payments;
- commitment to acceptance of the broad award framework and the relationships established;
- acceptance of classification change and new job specifications;
- preparedness to undertake training associated with a wider range of duties; and
- absorption of increases arising out of the minimum rates adjustment.

A no extra claims commitment from each union will also be required before the benefits of this decision are available.

We note that the ACTU stated that the unions were prepared to absorb increases other than the structural efficiency adjustment. We are satisfied

that the ACTU accepts that if these commitments are not met, the wages package cannot be sustained and the drive to reform the system will founder.

Further, if any union, or a group or class of its members, refuses to give the necessary commitments or indicates by its conduct that it is not prepared to work within the framework of the principles, then that union or a group or class of its members should not receive any benefits from this package.

There is also a need for consistency in approach on the part of all tribunals, Commonwealth and State. As noted in the February 1989 Review decision:

> "In many instances, employees in the same industry or enterprise may be bound by a mixture of federal and State awards and experience has shown that care must be taken to ensure that appropriate relativities are maintained in decisions of the relevant tribunals." (1989) 27 IR at 205,

and further,

> "In order to guard against industrial disputation and inappropriate wage outcomes, this Commission will utilise the co-operative powers available to it under Pt VII of the Act and will continue to pursue the objective of achieving a consistent approach."

INCENTIVE SCHEMES

In the 1989 Review a number of parties "raised the issue of treatment of profit sharing, performance based systems of pay and payment by results schemes in awards". In that decision the Commission said:

> "Our initial reaction is that such schemes can only operate in minimum rates awards without supplementary payments. However, the issue was not extensively debated in these proceedings and we therefore are not prepared to make a final determination without giving the parties the opportunity of addressing it in more detail." (1989) 27 IR at 203.

Debate in these proceedings again fell short of the detail which is necessary to make a final determination. Nevertheless, we are of the opinion that current payment by result schemes should continue to be part of the award structure and:

- it is essential that workers covered by such a scheme be subject to the protection of prescribed minimum rates plus supplementary payments for the work involved;
- additional payments derived from payment by results schemes should be absorbed into supplementary payments; and
- supplementary payments should not be used for the calculation of payment by results (although the re-expression of an existing base rate in an award as a minimum classification rate and a supplementary payment should not have the effect of prejudicing employees subject to existing incentive schemes).

THE PRINCIPLES

During the proceedings, the relationship between the structural efficiency principle and the other wage fixing principles was debated. In light of that debate, we have decided that:

(i) structural efficiency exercises should incorporate all past work value considerations;

(ii) any extensions of existing awards to include new classifications should form part of the structural efficiency exercises;

(iii) claims based on anomalies and/or inequities will continue to be treated as special cases;
(iv) there is no separate role for the operation of a supplementary payments principle; and
(v) claims for new allowances will be dealt with in accordance with the relevant portion of the allowances principle but, consistent with this decision, existing work-related allowances may be increased by up to 3% at the time of each instalment of the structural efficiency adjustment.

As a consequence of this decision, the existing principles require amendment. Those amended principles are set out in Appendix A to this decision.

NO EXTRA CLAIMS COMMITMENT

As noted earlier, each union will be required to give a no extra claims commitment before the benefits of this decision are available. That commitment shall be inserted into the award concerned in the following terms:

> "It is a term of this award (arising from the decision of the Australian Industrial Relations Commission in the *National Wage* case of 7 August 1989 the terms of which are set out in (1989) 30 IR 81; Print H9100) that the union(s) undertake(s), for the duration of the principles determined by that decision, not to pursue any extra claims, award or overaward, except when consistent with those principles."

The commitment will continue to operate until the principles as amended in this decision are reviewed. Upon application, that Review will commence in September 1990.

APPENDIX A

THE PRINCIPLES

These principles have been developed with the aim of providing, for their period of operation, a clear framework under which all concerned — employers, workers and their unions, governments and tribunals — can co-operate to ensure that labour costs are monitored; that measures to meet the competitive requirements of industry and to provide workers with access to more varied, fulfilling and better paid jobs are positively examined; and that lower paid workers are protected.

The principles provide that movements in wages and salaries and improvements in conditions — whether they occur in the public or private sector, whether they be award or overaward and whether they result from consent or arbitration — must fall within the level allowable in accordance with the *National Wage* case decision of 7 August 1989.

In considering whether wages and salaries or conditions should be awarded or changed for any reason either by consent or arbitration, the Commission will guard against contrived arrangements which would circumvent these principles and their aims.

COMMITMENT

Any claims for improvements in pay and conditions must be processed in accordance with these principles. No adjustments will be approved by the Commission unless a union concerned in an award gives a commitment that

it will not pursue any extra claims, award or overaward, except in compliance with these principles.

When this no extra claims commitment is given, it shall be inserted in the award concerned in the following terms:

> "It is a term of this award (arising from the decision of the Australian Industrial Relations Commission in the *National Wage* Case of 7 August 1989 the terms of which are set out in (1989) 30 IR 81; Print H9100) that the union(s) undertake(s), for the duration of the principles determined by that decision, not to pursue any extra claims, award or overaward, except when consistent with those principles."

WAGE ADJUSTMENTS

1. *Structural Efficiency Adjustment*

   There will be allowable under these principles:

   (i) a first increase of $10.00 per week for workers at the basic skills/trainee level; $12.50 per week at the semi-skilled worker level; and $15.00 per week or 3%, whichever is the higher, at the tradesman or equivalent level and above;

   (ii) a second increase of the same order as in (i) above to be paid not less than 6 months after the first increase;

   (iii) the first increase will be accessible from 7 August 1989 but the actual date of operation for an award will be the date on which that award is varied in accordance with the *National Wage* case decision of 7 August 1989; and

   (iv) the second increase will not be automatic, but subject to application.

2. *Minimum Rates Adjustment*

   Minimum rates adjustments allowable in the *National Wage* case decision of 7 August 1989 shall be in accordance with the following:

   (i) the appropriate adjustments in any award will be applied in not less than 4 instalments which will become payable at 6 monthly intervals;

   (ii) in appropriate cases longer phasing-in arrangements may be approved or awarded and/or parties may agree that part of a supplementary payment should be based on service;

   (iii) the first instalment of these adjustments will not be available in any award prior to 1 January 1990 or 3 months after the variation of the particular award to implement the first stage structural efficiency adjustment, whichever is the later;

   (iv) the second and subsequent instalments of these adjustments will not be automatic and applications to vary the relevant awards will be necessary; and

   (v) acceptance of absorption of these adjustments to the extent of equivalent overaward payments is a prerequisite to their being applied in any award.

3. *Special Cases*

Any claim for increases in wages and salaries or improvements in conditions which exceed the maximum increases allowable under the *National Wage* case decision of 7 August 1989 will be processed as a special case before a Full Bench of the Commission. Such cases should be

considered in accordance with the structural efficiency and other relevant principles.

STRUCTURAL EFFICIENCY

Structural efficiency adjustments allowable under the *National Wage* case decision of 7 August 1989 will be justified in accordance with this principle if the Commission is satisfied that the parties to an award have co-operated positively in a fundamental review of that award and are implementing measures to improve the efficiency of industry and provide workers with access to more varied, fulfilling and better paid jobs. The measures to be considered should include but not be limited to:

- establishing skill-related career paths which provide an incentive for workers to continue to participate in skill formation;
- eliminating impediments to multi-skilling and broadening the range of tasks which a worker may be required to perform;
- creating appropriate relativities between different categories of workers within the award and at enterprise level;
- ensuring that working patterns and arrangements enhance flexibility and the efficiency of the industry;
- including properly fixed minimum rates for classifications in awards, related appropriately to one another, with any amounts in excess of these properly fixed minimum rates being expressed as supplementary payments;
- updating and/or rationalising the list of respondents to awards; and
- addressing any cases where award provisions discriminate against sections of the workforce.

Structural efficiency exercises should incorporate all past work value considerations.

WORK VALUE CHANGES

(a) Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification.

These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this principle.

However, rather than create a new classification it may be more appropriate in the circumstances of a particular case to fix a new rate for an existing classification or to provide for an allowance which is payable in addition to the existing rate for the classification. In such cases the same strict test must be applied.

(b) Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work

is performed by a particular employee and not by increasing the rate for the classification as a whole.

(c) The time from which work value changes should be measured is the last work value adjustment in the award under consideration but in no case earlier than 1 January 1978. Care should be exercised to ensure that changes which were taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this principle.

(d) Where a significant net alteration to work value has been established in accordance with this principle, an assessment will have to be made as to how that alteration should be measured in money terms. Such assessment should normally be based on the previous work requirements, the wage previously fixed for the work and the nature and extent of the change in work. However, where appropriate, comparisons may also be made with other wages and work requirements within the award or to wage increases for changed work requirements in the same classification in other awards provided the same changes have occurred.

(e) The expression "the conditions under which the work is performed" relates to the environment in which the work is done.

(f) The Commission should guard against contrived classifications and over-classification of jobs.

(g) Any changes in the nature of the work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any principle, shall not be taken into account in any claim under this principle.

ALLOWANCES

(a) *Existing Allowances*

(i) Existing allowances which constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect the relevant change in the level of such expenses.

(ii) Existing allowances which relate to work or conditions which have not changed may be adjusted from time to time to reflect national wage increases, except where a flat money amount has been awarded, provided that shift allowances expressed in awards as money amounts may be adjusted for flat money amount national wage increases.

(iii) Existing allowances for which an increase is claimed because of changes in the work or conditions will be determined in accordance with the relevant provisions of the work value changes principle.

(b) *New Allowances*

(i) New allowances to compensate for the reimbursement of expenses incurred may be awarded where appropriate having regard to such expenses.

(ii) No new allowances shall be created unless changes in work have occurred or new work or conditions have arisen: where changes have occurred or new work and conditions have arisen, the question of a new allowance, if any, shall be determined in accordance with the relevant principle.

The relevant principle in this context may be work value changes or first awards and extensions to existing awards principle.

(c) *Service Increments*
  (i) Existing service increments may be adjusted in the manner prescribed in (a)(ii) of this principle.
  (ii) New service increments may only be allowed to compensate for changes in the work and/or conditions and will be determined in accordance with the relevant provisions of the work value changes principle.

SUPERANNUATION

(a) Agreements may be certified or consent awards made providing for employer contributions to approved superannuation schemes for employees covered by such agreements or consent awards provided those agreements or consent awards:
  (i) operate from a date determined or approved by the Commission; and
  (ii) do not involve the equivalent of a wage increase in excess of 3% of ordinary time earnings of employees.
(b) Where, following a claim for employer contributions to approved superannuation schemes for employees, the parties are unable to negotiate an agreement consistent with this principle, and conciliation proceedings before the Commission have also failed to achieve such an agreement, the Commission shall, subject to the provisions of the Act, arbitrate on that claim.
(c) The Commission will not grant retrospective operation for any matters determined in accordance with this principle.
(d) For the purposes of this principle, approved superannuation scheme means a scheme approved in accordance with the Commonwealth Operational Standards for Occupational Superannuation Funds.

STANDARD HOURS

(a) In dealing with claims for a reduction in standard hours to 38 per week, the cost impact of the shorter week should be minimised. Accordingly, the Commission should satisfy itself that as much as possible of the required cost offset is achieved by changes in work practices.
(b) Claims for reduction in standard weekly hours below 38, even with full cost offsets, will not be allowed.
(c) Changes in work practices designed to minimise the cost of introducing shorter hours will not be a consideration for claims under any other principle.

CONDITIONS OF EMPLOYMENT

Except for the flow-on of test case provisions, applications for changes in conditions other than those provided elsewhere in the principles will be considered in the light of their cost implications both directly and through flow-on and must be processed in national wage case proceedings or before a specially constituted Full Bench.

ANOMALIES AND INEQUITIES

(a) *Anomalies*
  (i) In the resolution of anomalies, the overriding concept is that the Commission must be satisfied that any claim under this principle will not be a vehicle for general improvements in pay and

conditions and that the circumstances warranting the improvement are of a special and isolated nature.

(ii) Decisions which are inconsistent with the principles of the Commission applicable at the relevant time should not be followed.

(iii) The doctrines of comparative wage justice and maintenance of relativities should not be relied upon to establish an anomaly because there is nothing rare or special in such situations and because resort to these concepts would destroy the overriding concept of this principle.

(b) *Inequities*

(i) The resolution of inequities existing where employees performing similar work are paid dissimilar rates of pay without good reason, shall be processed through the Anomalies Conference and not otherwise, and shall be subject to all the following conditions:

(1) The work in issue is similar to the other class or classes of work by reference to the nature of the work, the level of skill and responsibility involved and the conditions under which the work is performed.

(2) The classes of work being compared are truly like with like as to all relevant matters and there is no good reason for dissimilar rates of pay.

(3) In addition to similarity of work, there exists some other significant factor which makes the situation inequitable. An historical or geographical nexus between the similar classes of work may not of itself be such a factor.

(4) The rate of pay fixed for the class or classes of work being compared with the work in issue is a reasonable and proper rate of pay for the work and is not vitiated by any reason such as an increase obtained for reasons inconsistent with the principles of the Commission applicable at the relevant time.

(5) Rates of pay in minimum rates awards are not to be compared with those in paid rates awards.

(ii) In dealing with inequities, the following overriding considerations shall apply:

(1) The pay increase sought must be justified on the merits.

(2) There must be no likelihood of flow-on.

(3) The economic cost must be negligible.

(4) The increase must be a once-only matter.

(c) *Procedure*

Any claim made on the grounds of this principle shall be processed as a special case.

PAID RATES AWARDS

(a) Except in special cases, the Commission will not make new paid rates awards.

(b) In the making of a first paid rates award the conditions as provided in the first awards and extensions to existing awards principle must be complied with.

(c) Rates in paid rates awards should not be fixed at a level which would affect the rates for other workers.

(d) In assessing an adjustment in rates of pay in a paid rates award it is

inappropriate to apply the *General Motors-Holden's Limited and Ford Australia Ltd* case approach of:

> "awarding an increase to restore to the rates under the awards the relationship which they had when established vis-à-vis rates actually paid for similar work in industries located near the establishments of these two companies". (1981) 260 CAR 3.

(e) Subject to special cases, no special adjustment will be approved for paid rates awards which cannot be justified on the basis of the creation of a proper career structure through structural efficiency.

(f) In paid rates awards no increase at the base rate which is greater than the structural efficiency adjustment will be approved.

(g) The rates of pay prescribed by a new paid rates award must be expressed in terms of properly fixed minimum classification rates plus supplementary payments.

(h) Paid rates awards should contain clear classification definitions.

(i) Statutory declarations will be required from all parties to paid rates awards to the effect that the integrity of those awards will be preserved.

(j) If a paid rates award fails to maintain itself as a true paid rates award that award should be discontinued and replaced by a minimum rates award.

FIRST AWARDS AND EXTENSIONS TO EXISTING AWARDS

(a) In the making of a first award, the long established principles shall apply ie prima facie the main consideration is the existing rates and conditions.

(b) In the extension of an existing award to new work or to award-free work the rates applicable to such work will be assessed by reference to the value of work already covered by the award.

(c) In awards regulating the employment of workers previously covered by a State award or determination, existing rates and conditions prima facie will be the proper award rates and conditions.

(d) Where a first award is made it shall contain a minimum rate for each classification of employee covered by it. Where the total rate determined for each classification in accordance with (a) and (c) of this principle exceeds the appropriate minimum rate for that classification, the excess amount shall be prescribed as a supplementary payment. For the purposes of this paragraph, the appropriate minimum rate will be assessed by comparison with similar classifications in other minimum rates awards.

ECONOMIC INCAPACITY

Any respondent or group of respondents to an award may apply to reduce and/or postpone the application of any increase in labour costs determined under the principles on the ground of very serious or extreme economic adversity. The merit of such application shall be determined in the light of the particular circumstances of each case and any material relating thereto shall be rigorously tested.

# DECISION

*Fair Work Act 2009*
s.285—Annual wage review

## Annual Wage Review 2017–18
(C2018/1)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
DEPUTY PRESIDENT ASBURY
COMMISSIONER HAMPTON
MR COLE
PROFESSOR RICHARDSON
MR GIBBS

SYDNEY, 1 JUNE 2018

## Contents

# Abbreviations

| | |
|---|---|
| 2009–10 Review decision | *Annual Wage Review 2009–10* decision |
| 2010–11 Review decision | *Annual Wage Review 2010–11* decision |
| 2011–12 Review decision | *Annual Wage Review 2011–12* decision |
| 2012–13 Review decision | *Annual Wage Review 2012–13* decision |
| 2013–14 Review decision | *Annual Wage Review 2013–14* decision |
| 2014–15 Review decision | *Annual Wage Review 2014–15* decision |
| 2015–16 Review decision | *Annual Wage Review 2015–16* decision |
| 2016–17 Review decision | *Annual Wage Review 2016–17* decision |
| 2017–18 Review decision | *Annual Wage Review 2017–18* decision |
| 2018–19 Review | *Annual Wage Review 2018–19* |
| AAWI | average annualised wage increase |
| ABI and NSWBC | Australian Business Industrial and the NSW Business Chamber Ltd |
| ABS | Australian Bureau of Statistics |
| ACCI | Australian Chamber of Commerce and Industry |
| ACCER | Australian Catholic Council for Employment Relations |
| ACOSS | Australian Council of Social Service |
| Act | *Fair Work Act 2009* (Cth) |
| ACTU | Australian Council of Trade Unions |
| AFEI | Australian Federation of Employers and Industries |
| AHA | Australian Hotels Association |
| Ai Group | Australian Industry Group |
| All Trades matter | *All Trades Queensland Pty Limited v CFMEU and Ors* |
| ANZSIC | Australian and New Zealand Standard Industrial Classification |
| APCSs | Australian Pay and Classification Scales |
| *Apprentices decision* | *Modern Awards Review 2012—Apprentices, Trainees and Juniors*, [2013] FWCFB 5411 |
| ARA | Australian Retailers Association |
| AWE | average weekly earnings |
| AWOTE | average weekly ordinary time earnings |
| AWRS | Australian Workplace Relations Study |
| C4 | Engineering Associate/Laboratory Technical Officer Level 1 |
| C10 | Engineering/Manufacturing Tradesperson Level 1 |

| | |
|---|---|
| C14 | Engineering/Manufacturing Employee Level 1 |
| CCIQ | Chamber of Commerce and Industry Queensland |
| CCIWA | Chamber of Commerce and Industry Western Australia |
| CCS | Child Care Subsidy |
| Commission | Fair Work Commission |
| CPI | Consumer Price Index |
| CURF | confidentialised unit record file |
| DSP | Disability Support Pension |
| ERO | Equal Remuneration Order |
| EEH | Survey of Employee Earnings and Hours |
| EHDI | equivalised household disposable income |
| FMW | Federal Minimum Wage |
| FTB | Family Tax Benefit |
| GDP | gross domestic product |
| GFC | global financial crisis |
| GVA | gross value added |
| HES | Household Expenditure Survey |
| HIA | Housing Industry Association |
| HILDA | Household, Income and Labour Dynamics in Australia |
| IMF | International Monetary Fund |
| LCI | Living Cost Index |
| Manufacturing Award | *Manufacturing and Associated Industries and Occupations Award 2010* |
| MGA | Master Grocers Australia |
| MIHL | Minimum Income for Healthy Living |
| Miscellaneous Award | *Miscellaneous Award 2010* |
| NAB | National Australia Bank |
| NAPSA | Notional Agreement Preserving State Awards |
| NBER | National Bureau of Economic Research |
| NCVER | National Centre for Vocational Education Research |
| NLW | National Living Wage |
| NMW | national minimum wage |
| NRA | National Retail Association |
| NSA | Newstart Allowance |
| NTWS | National Training Wage Schedule |
| OECD | Organisation for Economic Co-operation and Development |
| Panel | Expert Panel for annual wage reviews |
| *Penalty Rates* decision | *4 yearly review of modern awards – Penalty Rates – hospitality and retail industries decision* |

| | |
|---|---|
| *Penalty Rates Review* decision | *Shop, Distributive and Allied Employees Association v The Australian Industry Group and Others* |
| PPP | Purchasing Power Parity |
| RCI | Restaurant and Catering Industrial |
| RBA | Reserve Bank of Australia |
| Review | Annual Wage Review |
| RNNDI | real net national disposable income |
| SAWIA | South Australian Wine Industry Association |
| SES Award | *Supported Employment Services Award 2010* |
| SPRC | Social Policy Research Centre |
| Statistical Report | *Statistical Report—Annual Wage Review 2017–18* |
| SWS | Supported Wage System |
| SWSS | Supported Wage System Schedule |
| Transitional Act | *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* |
| UK | United Kingdom |
| UNSW | University of New South Wales |
| US | United States of America |
| WAD | Workplace Agreements Database |
| WPI | Wage Price Index |

# 1. The Decision

## Introduction

**[1]** This Chapter summarises the matters we have considered, our reasoning and the increases we have decided upon. Chapters 2–4 of this decision deal with the statutory considerations we are required to take into account. We do not repeat that material here but the views expressed in this Chapter should be seen in the context of our decision as a whole.

**[2]** The *Fair Work Act 2009* (Cth) (Act) requires the Expert Panel for annual wage reviews (Panel) to conduct and complete a review of the national minimum wage (NMW) and modern award minimum wages, in each financial year (the Review). The Panel must make a NMW order and may set, vary or revoke modern award minimum wages. The NMW order applies to award/agreement free employees[1] and modern award minimum wages are the minimum wages contained in modern awards.[2]

**[3]** The number of employees who have their pay set by an award is estimated to be 2.3 million or 22.7 per cent of all employees.[3] The proportion of employees that are paid at the adult NMW rate is estimated to be 1.9 per cent. Further, a significant number of employees are paid at junior or apprentice/trainee rates based on the NMW rate and modern award minimum wages. The Panel's decision will also affect employees paid close to the NMW and modern award minimum wages and those whose pay is set by a collective agreement which is linked to the outcomes of the Review.

**[4]** The Panel is required to conduct each Review within the legislative framework of the Act, particularly the object of the Act in s.3, the modern awards objective and the minimum wages objective. As part of the Review, the Panel considers both the setting of the NMW rate and whether to make any variation determinations in respect of modern award minimum wages. Each of these tasks is undertaken by reference to the particular statutory criteria applicable to each function.

## The Statutory Framework

**[5]** The minimum wages objective applies to the exercise of functions and powers under Part 2-6 of the Act (which includes the Review),[4] and is set out in s.284(1) of the Act:

> **'284 The minimum wages objective**
>
> *What is the minimum wages objective?*
>
> (1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:
>
> (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
>
> (b) promoting social inclusion through increased workforce participation; and
>
> (c) relative living standards and the needs of the low paid; and

(d) the principle of equal remuneration for work of equal or comparable value; and

(e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

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

**[6]** The modern awards objective applies to the performance or exercise of 'modern award powers'[5] (which are defined to include the variation of modern award minimum wages),[6] and is set out in s.134(1) of the Act:

**'134 The modern awards objective**

*What is the modern awards objective?*

(1) 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, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

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

**[7]** Further, s.578(a) provides that the Panel must take into account the objects of the Act in performing its functions or exercising its powers in a Review.

**[8]** Sections 134, 284 and 578 of the Act each direct the Panel to take into account certain specified considerations in conducting and completing a Review. As noted in *Peko-Wallsend*,[7] matters which a decision maker must 'take into account' are matters the decision maker is bound to consider and treat as matters of significance in the decision-making process.[8]

**[9]** There is a substantial degree of overlap in the considerations the Panel is required to take into account under the minimum wages objective and the modern awards objective, though some of these considerations are not expressed in the same terms.[9] Both the minimum wages objective and the modern awards objective require the Panel to take into account:

- promoting social inclusion through increased workforce participation;[10]
- relative living standards and the needs of the low paid;[11]
- the principle of equal remuneration for work of equal or comparable value;[12] and
- various economic considerations.[13]

**[10]** There are differences in the expression of the economic considerations that the Panel is required to take into account under the modern awards objective and the minimum wages objective.[14] But the underlying intention of the various economic considerations referred to in ss 134 and 284 is that the Panel takes into account the effect of its decisions on national economic prosperity and in so doing gives particular emphasis to the economic indicators specifically mentioned in the relevant statutory provisions.

**[11]** The modern awards objective also requires the Panel to take into account 'the need to encourage collective bargaining,'[15] whereas the minimum wages objective makes no express reference to any such consideration. This is relevant because it is the minimum wages objective, *not* the modern awards objective, which is relevant to setting the NMW rate. But as the Panel observed in the *Annual Wage Review 2014–15* decision (2014–15 Review decision),[16] the fact that the minimum wages objective does not require the Panel to take this consideration into account does not make much difference, in practice, to the Panel's task. This is because the Panel is required to take into account the object of the Act and one of the stated means by which the object of the Act is given effect is 'through an emphasis on enterprise-level collective bargaining' (s.3(f)). While not expressed in the same terms as in the modern awards objective, it is plain from s.3(f) and a reading of the Act as a whole that one of the purposes of the Act is to encourage collective bargaining. It is appropriate that the Panel takes that legislative purpose into account in setting the NMW rate.

**[12]** We also observe that the considerations in ss.134(1)(da) and (g) have little relevance in the context of the Review.

**[13]** We turn first to deal with some general aspects of the proper construction of the modern awards objective and the minimum wages objective.

**[14]** The statutory tasks in ss 134 and 284 involve an 'evaluative exercise' which is informed by the considerations in s.134(1)(a)–(h) and s.284(1)(a)–(e). While these statutory considerations inform the evaluation of what might constitute 'a fair and relevant minimum safety net of terms and conditions' and 'a safety net of fair minimum wages', they do not

necessarily exhaust the matters which the Panel might properly consider to be relevant. The range of such matters 'must be determined by implication from the subject-matter, scope and purpose' of the Act.[17]

**[15]** The considerations which the Panel is required to take into account do not generally set a particular standard against which a modern award or the 'safety net of fair minimum wages' can be evaluated; many of them may be characterised as broad social objectives. As the Full Court of the Federal Court said in *National Retail Association v Fair Work Commission*:

> 'It is apparent from the terms of s 134(1) that the factors listed in (a) to (h) are broad considerations which the FWC must take into account in considering whether a modern award meets the objective set by s 134(1), that is to say, whether it provides a fair and relevant minimum safety net of terms and conditions. The listed factors do not, in themselves, however, pose any questions or set any standard against which a modern award could be evaluated. Many of them are broad social objectives. What, for example, was the finding called for in relation to the first factor ("relative living standards and the needs of the low paid")?'[18]

**[16]** The statutory provisions relating to the Review and to NMW orders are set out in Divisions 3 (ss 284–292) and 4 (ss 293–299) of Part 2-6 of Chapter 2 of the Act. The purpose of Chapter 2 of the Act is to prescribe minimum terms and conditions of employment for national system employees (including those terms and conditions arising from a NMW order).[19] We accept that it is appropriate to characterise the statutory provisions relating to the Review and to NMW orders as remedial, or beneficial, provisions. They are intended to benefit national system employees by creating regulatory instruments which intervene in the market, setting minimum wages to lift the floor of such wages. While these statutory provisions are properly characterised as remedial or beneficial provisions, the extent to which they are to be given 'a fair, large and liberal' interpretation in pursuit of that broad purpose is constrained by the fact that the relevant provisions seek to strike a balance between competing interests.

**[17]** Fairness is central to both the modern awards objective and the minimum wages objective. Section 134(1) refers to a '*fair* … minimum safety net' and s.284(1) refers to 'a safety net of *fair* minimum wages.' In the *Annual Wage Review 2016–17* decision (2016–17 Review decision) the Panel concluded that fairness in this context 'is to be assessed from the perspective of the employees *and* employers'[20] affected by the Review decision, and noted that:

> 'It seems to us that the statutory provisions relevant to the fixation of the NMW plainly seek to strike a balance between competing interests. So much is clear from the range of considerations the Panel is required to take into account in giving effect to the minimum wages objective (for example compare s.284(1)(a) and (c)). It is also clear from the minimum wages objective itself—to "establish and maintain a safety net of *fair* minimum wages". Fairness in this context is to be assessed from the perspective of the employees and employers covered by the NMW order. The object of the Act also speaks to multiple legislative purposes. Section 3 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' (emphasis added), by the means specified in sections 3(a) to (g).'[21]

**[18]** The Australian Catholic Council for Employment Relations (ACCER) submits that the Panel's construction of s.284(1) in the 2016–17 Review decision was erroneous and should be reconsidered.[22]

**[19]** ACCER contends that a beneficial reading of s.284(1) excludes decision making being based on the application of the criterion of fairness as between employers and employees[23] and that the Panel's 'primary obligation' in setting wage rates is to set a safety net wage rate that will provide a decent standard of living.[24] In particular, ACCER contends that the 'operational objective' of minimum wage setting under the Act is that:

> 'Full time workers have a reasonable expectation of a standard of living that will be in excess of poverty and one which will enable them to purchase the essentials for a "decent standard of living" and engage in community life, assessed in the context of community norms.'[25]

**[20]** ACCER acknowledges that the specified considerations in s.284(1)(a)–(e) inform and constrain this 'operational objective.'[26]

**[21]** We reject the proposition that 'fairness' in the context of the modern awards objective and the minimum wages objective excludes the perspective of employers.

**[22]** The Panel's conclusion in last year's decision was based upon observations made by the Full Bench in the *4 yearly review of modern awards – Penalty Rates – hospitality and retail industries decision* (the *Penalty Rates decision*)[27] about the proper construction of the expression 'a fair and relevant minimum safety net of terms and conditions' in the modern awards objective. The Full Bench's decision was the subject of an application for judicial review to the Federal Court which was dismissed by the Full Court of the Federal Court in *Shop, Distributive and Allied Employees Association v The Australian Industry Group and Others* (the *Penalty Rates Review decision*).[28]

**[23]** In the course of its judgment in the *Penalty Rates Review decision* the Full Court considered the expression 'a fair and relevant minimum safety net of terms and conditions' in the modern awards objective and held:

> '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…'
>
> …
>
> For the reasons already given it cannot be doubted that the perspectives of employers and employees and the contemporary circumstances in which an award operates are circumstances within a permissible conception of a "fair and relevant" safety net taking into account the s 134(1)(a)–(h) matters.'[29] (emphasis added)

**[24]** The above observations are entirely consistent with the proposition that fairness in the context of minimum wage fixation is to be assessed from the perspective of the employees *and* employers affected by Review decisions.

**[25]** We also reject ACCER's submission as to the 'operational objective' of minimum wage setting under the Act. The proposition advanced finds no support in the words of the statute and seeks to elevate one relevant consideration ('relative living standards and the needs of the low paid') above all others. As the Full Court observed in the *Penalty Rates Review decision*:

> 'It is not legitimate to take one element in the overall suite of potentially relevant considerations to the discharge of the FWC's functions … and discern from that one matter a Parliamentary intention that the scheme as a whole is to be construed with that end alone in mind.'[30]

**[26]** However, as we note later, we accept the proposition that it is reasonable for full time employees to expect a standard of living in excess of poverty. But, as noted in previous Review decisions, the Act requires the Panel to take into account *all* of the relevant statutory considerations,[31] and the relative living standards and needs of the low paid are but 'one of a number of considerations that [the Panel] must take into account.'[32]

**[27]** We now turn to consider some of the particular considerations which we are required to take into account.

**[28]** As noted earlier, the Panel is required to take into account the need to promote 'social inclusion through increased workforce participation' (ss 134(1)(c) and 284(1)(b)). Consistent with past Review decisions, we interpret this to mean increased employment. We also accept however that minimum rates of pay impact upon an employee's capacity to engage in community life and the extent of their social participation. Higher minimum wages can also provide incentives to those not in the labour market to seek paid work, which needs to be balanced against potential negative impacts of increases in minimum wages on the supply of jobs for low-paid workers. In each Review, we must take into account the employment impacts of the NMW and modern award minimum wages and any proposed increases to those rates.

**[29]** The minimum wages objective and the modern awards objective both require the Panel to take into account relative living standards and the needs of the low paid when setting minimum wage rates (ss 134(1)(a) and 284(1)(c)). Those matters are different, but related, concepts.

**[30]** The relative living standards of employees on the NMW and award-reliant employees are affected by the level of wages that they earn, the hours they work, tax-transfer payments and the circumstances of the households in which they live.[33] The net effect of these factors is summarised in the notion of equivalised household disposable income, a measure to which we return later in Chapter 3.

**[31]** The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and modern award minimum wages with those of other groups that are deemed to be relevant. We particularly focus on the comparison between

low-paid workers (including NMW and award-reliant workers) and other employed workers, especially non-managerial workers.[34] There is little basis for comparing the household income of the low paid and the award reliant with that of households that are principally reliant on social welfare benefits or private savings, when the purpose is to identify whether an increase in the NMW and modern award minimum wages will assist the relative standard of living of the low paid.

**[32]** 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.[35] In successive Review decisions the Panel has concluded that a threshold of two-thirds of median (adult) full-time ordinary earnings provides 'a suitable and operational benchmark for identifying who is low paid,' within the meaning of s.134(1)(a).[36] The risk of poverty is also relevant in addressing the needs of the low paid. We accept, as we have in previous Review decisions, that if the low paid are forced to live in poverty then their needs are not being met.[37]

**[33]** The modern awards objective and the minimum wages objective both provide that in a Review we must take into account 'the principle of equal remuneration for work of equal or comparable value' (s.134(1)(e) and s.284(1)(d)). The Dictionary section of the Act (s.10) directs attention to s.302(2) for the definition of the expression 'equal remuneration for work of equal or comparable value.' Section 302(2) is in Part 2-7 'Equal Remuneration' and defines this expression to mean 'equal remuneration for men and women workers for work of equal or comparable value.' It seems highly unlikely that Parliament intended this expression to mean something different in ss 134 and 284. Hence, the appropriate approach to the construction of ss 134(1)(e) and 284(1)(d) is to read the definition into the substantive provision.[38] Accordingly, the relevant consideration is to be read as follows:

> 'the principle of equal remuneration for men and women workers for work of equal or comparable value.'

**[34]** In the *Equal Remuneration Decision 2015*[39] the Full Bench concluded that the expression 'work of equal or comparable value' in s.302(1) refers to equality or comparability in 'work value.'[40] We agree and, further, the same meaning should be attributed to this expression in ss 134(1)(e) and 284(1)(d). As explained in the *Equal Remuneration Decision 2015*, the principle of equal remuneration for work of equal or comparable value is enlivened when an employee or group of employees of one gender do not enjoy remuneration equal to that of another employee or group of employees of the other gender who perform work of equal or comparable value. Further, as the Full Bench observed:

> 'This is essentially a comparative exercise in which the remuneration and the value of the work of a female employee or group of female employees is required to be compared to that of a male employee or group of male employees.'[41]

**[35]** The application of the principle of equal remuneration for work of equal or comparable value is such that it is likely to be of only limited relevance in the context of a Review. Indeed it would only be likely to arise if it were contended that particular modern award minimum wage rates were inconsistent with the principle of equal remuneration for work of equal or comparable value; or, if the form of a proposed increase enlivened the principle. We agree with the observations of a number of parties that Review proceedings are

of limited utility in addressing any systemic gender undervaluation of work. It seems to us that proceedings under Part 2-7 and applications to vary modern award minimum wages for 'work value reasons' pursuant to ss 156(3) and 157(2) provide more appropriate mechanisms for addressing such issues.

**[36]** But the broader issue of gender pay equity, and in particular the gender pay gap, is relevant to the Review. This is so because it is an element of the requirement to establish a safety net that is '*fair*.' It may also arise for consideration in respect of s.284(1)(b) ('promoting social inclusion through workforce participation'), because it may have effects on female participation in the workforce.[42]

**[37]** The gender pay gap refers to the difference between the average wages earned by men and women. It may be expressed as a ratio which converts average female earnings into a proportion of average male earnings on either a weekly or an hourly basis.[43] The *Statistical Report—Annual Wage Review 2017–18* (Statistical report) sets out three measures of the gender pay gap, ranging from 11.0 per cent to 15.3 per cent (see Table 4.1).

**[38]** As noted in the *Annual Wage Review 2015–16* decision (2015–16 Review decision), the causes of the gender pay gap are complex and influenced by factors such as: differences in the types of jobs performed by men and women; discretionary payments; workplace structures and practices; and the historical undervaluation of female work and female-dominated occupations.[44] We accept that moderate increases in the NMW and modern award minimum wages would be likely to have a relatively small, but nonetheless beneficial, effect on the gender pay gap.

**[39]** As the Panel has observed in previous Review decisions, there is a degree of overlap between the various considerations which the Panel must take into account.[45] A degree of tension is also evident between some of these considerations, for example, the extent to which minimum wage increases are able to meet the needs of the low paid may, depending on the magnitude of the increase and the prevailing circumstances, be constrained by the potential impact of such increases on employment. No particular primacy is attached to any of these considerations,[46] and it is this complexity that has led the Panel to reject a mechanistic or decision-rule approach to wage fixation.[47]

**[40]** The Act also sets out some important procedural fairness requirements for the Review. The Panel must ensure that all persons and bodies (referred to collectively as parties) are given a reasonable opportunity to make and reply to written submissions (s.289(1)). In this Review, a number of parties took this opportunity by lodging one or more written submissions and participating in consultations on 15 and 16 May 2018.

**[41]** The timetable for the Review and all of the submissions, transcripts, research reports, and some additional economic data were published on the Fair Work Commission's (Commission) website to ensure that all parties had a reasonable opportunity to participate. The Panel considered all the material received from parties, the information in the statistical report and the research referred to in the Research reference list in making its decision.

**The Panel's approach**

**[42]** As part of the Review, the Panel considers both the setting of the NMW rate and whether to make any determinations varying modern award minimum wages. These tasks are undertaken by reference to the particular statutory criteria applicable to each function.

**[43]** The review and variation of modern award minimum wages is a separate, though related, function to reviewing and making a NMW order. In exercising its powers to set, vary or revoke modern award minimum wages, the Panel 'must take into account the rate of the national minimum wage that it proposes to set in the Review.'[48] It follows that, as part of our decision-making process, we must first form a view about the rate of the NMW we propose to set, and then take that proposed NMW rate into account (along with the other relevant statutory considerations) in exercising our powers to set, vary or revoke modern award minimum wage rates.[49]

**[44]** The range of considerations we are required to take into account calls for the exercise of broad judgment rather than a mechanistic or decision rule approach to wage fixation. It is on this basis that past Review decisions have rejected proposals for the adoption of real wage maintenance;[50] a medium term target for the NMW;[51] and the variation of modern award minimum wages based on trends in market wages.[52]

**[45]** We accept that the Panel's decision-making process should be as transparent as possible and that the Panel should disclose the factors which are most relevant in a particular year, and we have done so in this decision.

**[46]** In assessing the various economic considerations, we take into account both actual data and forecasts. The actual indicators are the primary consideration because, by their nature, they are more reliable than forecasts.[53] But it is also appropriate to have regard to future projections that cast some light on the circumstances expected to apply during the period when any adjustment will operate. It is not uncommon for actual outcomes to differ from those forecast and those differences form part of our broad assessment and consideration of the actual indicators in subsequent reviews.

**[47]** We pay particular attention to trends, because of the volatility in some of the economic indicators[54] and routinely look to developments over the medium and long term, as well as to changes over the past year. This is evident in the material that is included in the Statistical Report that accompanies the Review. The longer-term perspective reduces our reliance on contemporary data that can be volatile and subject to revision. It also enables us to see the cumulative effects of the annual changes that we focus on, including our own decisions.

**[48]** We also compare past forecasts with actual economic outcomes, but this is not undertaken to enable some sort of quantifiable adjustment to minimum wage outcomes. There is no formulaic relationship between changes in particular indicators or factors over time and the outcome of Reviews.

**[49]** Given the range of considerations which we are required to take into account, it is neither necessary nor appropriate to quantify the weight given to particular considerations. This view is supported by the Full Court in the *Penalty Rates Review decision*, which held:

> 'The fact that the FWC did not attempt to explain the relative weight it gave to the competing considerations in reaching its overall conclusions is immaterial. It is difficult to know how the FWC might meaningfully have done so given the nature of the decisions it was making and the broad scope of facts, matters and circumstances which fed into the conclusions (*National Retail Association v Fair Work Commission* [2014] FCAFC 118; (2014) 225 FCR 154 at [109]). Nothing in the statutory scheme or otherwise required the FWC to attempt to explain the relative weight it gave to the competing considerations in reaching its overall conclusions. What is apparent is that the FWC found that the relevant considerations did not all point in the same direction. They pulled in different directions, which is to be expected given the nature of the task. Provided the relevant matters were considered, the attribution of weight was wholly a matter for the FWC. That the FWC may be taken from the determinations to have given more weight to matters other than the relative living standards and needs of the low paid does not mean the FWC abdicated its responsibility for considering those matters or failed to consider them.'[55]

**The Decision**

**[50]** The Panel received submissions from the Australian Government, several state governments, bodies that represent the interests of employees and employers, other entities and individuals. As in previous Reviews, the quantum and form of proposed increases to the NMW and/or modern award minimum wages varied significantly. The various proposals are set out in Appendix 2.

**[51]** National Retail Association (NRA) and Restaurant and Catering Industrial (RCI) proposed that no increase be made to minimum wage rates. RCI argued that 'the prevailing economic conditions do not warrant any increase'.[56] A number of other business and industry associations proposed percentage increases of varying amounts. Master Grocers Australia (MGA) proposed an increase of not more than 1.1 per cent. Australian Industry Group (Ai Group) proposed an increase of 1.8 per cent. Australian Chamber of Commerce and Industry (ACCI), Australian Business Industrial and the NSW Business Chamber Ltd (ABI and NSWBC), Australian Hotels Association (AHA), Australian Retailers Association (ARA), Australian Federation of Employers and Industries (AFEI) and Chamber of Commerce and Industry Queensland (CCIQ) all proposed an increase of no more than 1.9 per cent.

**[52]** The State Governments of Queensland and Victoria proposed increasing the NMW to $722.00 per week or $19.00 per hour (an increase of $27.10 per week or about 3.9 per cent) and that modern award minimum wages be adjusted by a 'fair and reasonable increase.'[57]

**[53]** The Australian Council of Trade Unions (ACTU) proposed that the NMW and modern award minimum wages be increased by 7.2 per cent. ACCER proposed a tiered adjustment to minimum wages, the NMW to be increased to $735.00 (an increase of $40.10 per week, or about 5.8 per cent); increasing modern award minimum wages up to and including the Engineering/Manufacturing Tradesperson Level 1 (C10) rate by $32.00 per week; and increasing modern award minimum wages above the C10 rate by 3.9 per cent.

**[54]** A number of submissions did not propose a particular level of increase in the NMW or modern award minimum wages, including the Australian Government and the NSW, SA and WA Governments. Australian Council of Social Service (ACOSS) proposed that the Panel 'increase real minimum wages substantially in order to specifically reduce the gap between

them and median pay levels'[58] and the Federal opposition proposed 'a fair and economically responsible real increase.'[59]

**[55]** The modern awards objective and the minimum wages objective require us to take into account various economic and labour market considerations. While some of these are specifically mentioned in the Act, the Panel also considers other relevant indicators.

**[56]** While we seek to explain our view of the circumstances (including forecasts or projections) prevailing in each Review in comparison with previous years, it is not feasible to quantify the weight given to particular factors in balancing the various considerations prescribed by the Act. Rather, we consider all information about the economic and social environment that is available (including forecasts and any divergence from prior forecasts) to inform our decision.

**[57]** The Panel's approach to its statutory function is encapsulated in the following extract from the 2014–15 Review decision:

> 'In taking into account available economic and social data, the Panel's approach is broadly to assess the changes in these data from year to year and determine how they inform the statutory criteria. Put another way, and consistent with ACCI's submission, if there were no change in the relevant considerations from one year to the next then, all other things being equal, a similar outcome would result.'[60]

**[58]** Broadly speaking, differently constituted Panels should evaluate the evidence and submissions before them in accordance with a consistent and stable interpretation of the legislative framework. Justice requires consistent decision making unless a difference can be articulated and applied.[61]

**[59]** The table below compares the data and Budget forecasts at the time of the 2016–17 Review with those before us in the current Review.

**Table 1: Budget forecasts and actual outcomes for selected economic indicators, per cent**

| | Information at time of 2016–17 Review | | | Information at time of 2017–18 Review | | |
|---|---|---|---|---|---|---|
| **Indicator** | **Most recent data at Decision (6 June 2017)** | **Budget forecast for 2016–17 (Year to Jun qtr)** | **Budget forecast for 2017–18 (Year to Jun qtr)** | **Most recent data** | **Budget forecast for 2017–18 (Year to Jun qtr)** | **Budget forecast for 2018–19 (Year to Jun qtr)** |
| Gross domestic product[(a)] | 2.4* (Dec qtr 2016) | 1¾ | 2¾ | 2.4* (Dec qtr 2017) | 2¾ | 3 |
| Consumer Price Index[(b)] | 2.1^ (Mar qtr 2017) | 2 | 2 | 1.9^ (Mar qtr 2018) | 2 | 2¼ |
| Wage Price Index[(c)] | 1.9^ (Mar qtr 2017) | 2 | 2½ | 2.1^ (Mar qtr 2018) | 2¼ | 2¾ |
| Unemployment rate[(d)] | 5.8[#] (April 2017) | 5¾ | 5¾ | 5.5[#] (April 2018) | 5½ | 5¼ |
| Employment growth[(c)] | 1.3[#] (April 2017) | 1 | 1½ | 2.9[#] (April 2018) | 2¾ | 1½ |
| Participation rate[(d)] | 64.8[#] (April 2017) | 64½ | 64½ | 65.7[#] (April 2018) | 65½ | 65½ |

Note: Forecasts are (a) through-the-year growth rate to the June quarter, original series; (b) through-the-year growth rate to the June quarter; (c) seasonally adjusted, through-the-year growth rate to the June quarter; (d) seasonally adjusted rate for the June quarter. *Seasonally adjusted, year to December quarter 2016/2017, [#]Trend, April 2017/2018, ^Seasonally adjusted, Year to March quarter 2017/2018.

Source: Australian Government, *Budget Paper No. 1: Budget Strategy and Outlook 2017–18*, Canberra, p. 2-6; Australian Government, *Budget Paper No. 1: Budget Strategy and Outlook 2018–19*, Canberra, p. 2-6; ABS, *Australian National Accounts: National Income, Expenditure and Product, Dec 2017*, Catalogue No. 5206.0; ABS, *Consumer Price Index, Australia, Mar 2018*, Catalogue No. 6401.0; ABS, *Wage Price Index, Australia, Mar 18*, Catalogue No. 6345.0; ABS, *Labour Force, Australia, Apr 2018*, Catalogue No. 6202.0; ABS, *Labour Force, Australia, Apr 2017*, Catalogue No. 6202.0; [2017] FWCFB 3500.

**[60]** Compared to the position at the time of the 2016–17 Review, the economic indicators now point more unequivocally to a healthy national economy and labour market. The recent data has shown strong growth in full-time employment together with a high participation rate.

**[61]** As the Treasurer and the Minister succinctly put it in their post Budget correspondence:

> 'The Australian economy has entered its 27th year of economic growth and has performed remarkably well in adjusting from the investment phase of the mining boom towards broader-based sources of growth. Real GDP is forecast to grow by 2¾ per cent in 2017–18 and to accelerate further to 3 per cent growth in 2018–19 and 2019–20.'[62]

**[62]** Some of the *key changes* to the economy evident in this Review include:

- Full-time employment grew by 3.1 per cent, significantly greater than the 1.0 per cent growth over the previous year.
- Hours worked increased by 3.3 per cent over the year to April 2018, compared with 1.8 per cent a year earlier.

- At 66.7 per cent in April 2018, the age-adjusted participation rate is at a record high and 0.8 percentage points higher than one year before.

- At 77.2 per cent, the employment to population ratio for persons aged 20–64 years, reached a historic high in December 2017.

- Strong contributions to gross domestic product (GDP) growth from non-mining business investment and household consumption.

- Business conditions are generally robust.

**[63]** The labour market has improved significantly with strong employment growth of 355 200 workers over the year to April 2018, of which 256 100 were full-time employees. Employment growth of over 3 per cent recorded at the end of 2017 and in early 2018 is much higher than at the time of the last Review. Further, as pointed out by the Reserve Bank of Australia (RBA), recent employment growth has been higher than population growth.[63]

**[64]** Three out of the four most award-reliant industries experienced positive growth in employment over the year. Table 2.9 in Chapter 2 shows the variation in the performance of the four industries that have the highest proportion of employees paid at the award rate. Some general conclusions may be made from the data:

- the most award-reliant industries mainly had higher than average rates of growth in output and in profits;

- with the exception of Retail trade, business entry rates exceeded exit rates, as they have for the whole economy;

- the Wage Price Index (WPI) mostly grew at a rate that was below or at the economy-wide average, and wage growth under new collective agreements was, except in Other services, mostly below average; and

- employment growth was mixed, with strong growth in employment and in hours worked in Retail trade but weaker growth, or some decline, in the other sectors.

**[65]** Over the past year the unemployment rate and the underemployment rate declined only slightly, reflecting a sharp rise in the participation rate. The shift from part-time employment to full-time employment may explain some of the fall in underemployment. Despite strong employment growth, the unemployment rate dropped only 0.2 percentage points to 5.5 per cent. The strong growth in employment has not translated into a lower unemployment rate because the age-adjusted participation rate is much higher than one year ago. These indicators provide further evidence that the labour market is strengthening.

**[66]** The labour market is currently supporting social inclusion through increased workforce participation and there is no evidence that this is being inhibited by the current level of minimum wages. Over the year to April 2018, the youth unemployment rate fell by 0.3 percentage points to 12.6 per cent, which is just below its average over the past five years. The persistence of long-term unemployment and the rise in disengagement among 20–24 year old adults are principally the result of rapid structural change in the economy that is causing a relatively high mismatch between the skills of the non-employed and those sought by employers. There is no evidence that it was caused by excessive levels of minimum wages.

**[67]** Measures of labour productivity declined during 2017, but annual measures of productivity must be approached with caution. When measured over the course of the current business cycle, the rate of growth in labour productivity is 1.9 per cent per annum. It is likely that the measure of productivity for 2017 was affected by a surge in the total number of hours worked. Further, as noted by the RBA, recent employment growth was concentrated in household services, which typically has low measured productivity growth.[64]

**[68]** GDP grew by 2.4 per cent, consistent with the five-year average for economic growth, and exceeded the average for the major seven Organisation for Economic Co-operation and Development (OECD) countries across three of the five quarters to the December quarter 2017. Growth in 2017 was broad-based, with 16 out of 19 industries recording growth. There was a significant contraction (8.8 per cent) in one industry only, Agriculture, forestry and fishing, following growth of 22.5 per cent in that sector in 2016.

**[69]** Business conditions remain positive. Profits grew by 4.3 per cent in 2017 and by 5.8 per cent in the non-mining sector. This growth, coupled with low wages growth, caused the profit share of total factor income to remain at its highest level since 2013. The business bankruptcy rate remained stable at a comparatively low level compared to the whole of the previous decade, business survival rates are the highest in at least a decade and business entry rates exceeded business exit rates by a larger than usual margin. Survey measures of overall business conditions are at their highest levels since the global financial crisis (GFC).[65]

**[70]** Inflation and wages growth remain low. The Consumer Price Index (CPI) increased by 1.9 per cent over the year to the March quarter 2018 and underlying inflation and the Living Cost Index (LCI) for employee households rose by 2.0 per cent. Despite substantial employment growth, there was no appreciable acceleration in wages growth in 2017. The WPI increased by 2.1 per cent, which is slightly below the average for the last five years and historically very low, and the rate of wage increases arising from enterprise agreements is substantially below their ten-year average.

**[71]** Low wages growth has significant economic and social consequences. As RBA Governor Philip Lowe has remarked sustained low wages growth diminishes the sense of shared prosperity.[66]

**[72]** The economic forecasts from the Australian Government, as presented in the 2018–19 Budget, the RBA and the International Monetary Fund (IMF) all point to improving economic conditions.

**[73]** The RBA's outlook for the economy is for GDP growth to be around trend in the near term before increasing, with employment to continue to grow faster than the working-age population leading to a slight decline in the unemployment rate.[67] GDP growth is forecast to be strongest over the year to the June quarter 2019.[68]

**[74]** The Budget forecasts presented in the 2016–17 Review expected wages growth, as measured by the WPI, to be 2½ per cent over 2017–18.[69] This has been reduced to 2¼ per cent in the 2018–19 Budget. The 2018–19 Budget also forecasts the WPI to increase to 2¾ percent in 2018–19 and to 3¼ percent in 2019–20. The RBA does not provide a forecast for the WPI but expects wages growth to 'pick up only gradually as labour market spare

capacity declines and any effects of structural factors that are weighing on wages growth start to dissipate.'[70]

**[75]** The latest data show that the WPI increased by 2.1 per cent over the year to the March quarter 2018, having increased by 0.5 per cent in each of the last two quarters. To reach the Budget forecast for 2017–18 would require a quarterly increase of 0.7 per cent, which would be the highest increase since the March quarter 2014. Such an outcome seems unlikely.

**[76]** The WPI forecast in the Budget is predicated on increased GDP growth leading to a tighter labour market and hence wages growth. Productivity growth and the forecast increases in inflation were also expected to result in an increase in the WPI.

**[77]** The international experience, particularly in the United States of America (US), shows that a lower unemployment rate has not translated to stronger wages growth. The RBA has cautioned that there is uncertainty around the level of the unemployment rate consistent with full employment which could turn out to be lower than previously assumed, and that there is a risk that it may take a lower unemployment rate than currently expected to generate higher wages growth. Both the Budget and RBA forecasts are for the unemployment rate to only fall to 5¼ per cent by 2019–20.

**[78]** The Budget forecasts in respect of the WPI appear overly optimistic, particularly as the RBA expects increases in wages growth to be gradual and the unemployment rate is only expected to decline slightly. For the reasons given in Chapter 2, while we expect wages growth to pick up over time, this is likely to be a more gradual process than that forecast in the Budget. We expect that our decision in this Review will result in an increase in the WPI but we do not expect any other significant sources of increase in wages growth in the short term.

**[79]** As mentioned earlier, in each Review we must take into account the employment impacts of the national NMW and modern award minimum wages and any proposed increases to those rates.

**[80]** We remain of the view that modest and regular minimum wage increases do not result in disemployment effects or inhibit workforce participation. Recent Australian research published by the RBA (Bishop 2018), discussed in Chapter 2, provides support for our view. Recent research in the UK continues to support this conclusion. The position is more contested in the US.

**[81]** A number of parties submitted that the increase of 3.3 per cent awarded in last year's Review was too high in the prevailing circumstances.[71] No party was able to identify any economic indicator which demonstrated any discernible detriment arising from last year's decision. However, we accept that the 2016–17 Review increase may have longer-term effects which are not yet discernible.

**[82]** As to the impact of last year's Review decision, we note that employment continued to grow strongly in the economy generally, and it also grew in three of the four most award-reliant industries. The increase did not lead to inflationary pressure. Nor did it have a discernible effect upon general wages growth. Surprisingly, the WPI figure over the year to the March quarter 2018 increased in two out of the four most award-reliant sectors by *less*

*than* for the economy as a whole, and in all four sectors the percentage WPI increase was substantially less than the percentage increase which we awarded in the 2016–17 Review.

**[83]** The prevailing economic circumstances provide an opportunity to improve the relative living standards of the low paid, and to enable them to better meet their needs.

**[84]** The real value of the NMW has increased by 5.8 per cent over the last decade, and by 4.3 per cent over the past five years. However, this has not resulted in improvements to the actual or relative living standards for many categories of NMW and award-reliant households due to changes in the tax-transfer system.

**[85]** The effect of taxes and transfers on the disposable incomes of the low paid is relevant to the needs of the low paid and their relative living standards, both in terms of specific changes to the tax-transfer system and in assessing broader information in relation to measures of relative income of the low paid.

**[86]** There has been a decline in real disposable incomes for households that are more reliant on the tax and transfer system. Real disposable income for 11 out of 14 hypothetical NMW households fell over the year to 1 July 2017. Over the five years to July 2017, real disposable income for 10 out of 14 household types fell despite the real NMW rising by 3.9 per cent over the same period. The only family types that experienced an increase in real disposable income over the past year were single adults and couples without children. As noted by the Australian Government, increases in minimum wages in recent years have 'been important for maintaining the real disposable incomes of many low-income households.'[72]

**[87]** Consistent with the view the Panel has taken in past, we have not taken into account the measures proposed in the recent Budget which are yet to be legislated.

**[88]** The minimum wage bite increased by 0.8 percentage points to 54.8 per cent between 2016 and 2017, and has increased since 2012 following a decline between 1994 and 2012. The majority of hypothetical household types on NMW or award wage rates have disposable incomes above a relative poverty line of 60 per cent of median income. However, a number of household types with a single earner and children remain below the relative poverty line at both the NMW and the C10 award wage rate. It is also notable that, despite the increase of 3.3 per cent awarded in last year's Review, the relative position of many NMW and award-dependent household types with children vis-a-vis the relative poverty line actually deteriorated due to changes in the tax-transfer system in 2017.

**[89]** The latest data suggests that income inequality in Australia has stabilised for some period with some indicators showing that income growth for households at the bottom of the distribution increased by more than for households at the top of the income distribution. However, inequality of household income remains high in Australia, relative to the past and to other comparable countries.

**[90]** A new report estimating budget standards based on the Minimum Income for Healthy Living (MIHL) standard has been released since the last Review. Overall, there was low support from the parties regarding the consideration of the new budget standards for this year's Review. Application of the budget standards concluded that, in 2016, the disposable incomes of families comprising a NMW earner who were single adults, sole parents with one child and couple households with one child (with a partner not in the labour force) were above

the corresponding MIHL budget standard. The remaining two family types that were evaluated had incomes below the standard. We consider the MIHL budget standards to be useful and relevant insofar as they provide direct, if imperfect, evidence that a full time job at the NMW rate is sufficient to provide a single adult with a reasonable standard of living. This concurs with the assessment based on the 60 per cent relative poverty line.

**[91]** Measures of financial stress and deprivation find that low-paid families have considerably more stress than all employee families. Rates of financial stress and deprivation fell in all 15 indicators for all employee households between 2009–10 and 2015–16, although the base for measurement is the immediate aftermath of the GFC. For low-paid families, levels of stress and deprivation on three indicators rose. They fell for the other 12 indicators, some by less than for all employee families. This suggests that the level of financial comfort for low-paid families has fallen relative to all employee families, but their absolute position has probably improved.

**[92]** A number of other matters are relevant to the outcome of the Review.

**[93]** The *Penalty Rates* decision[73] provides for the phased reduction of Sunday penalty rates in certain awards in the hospitality and retail sectors which will reduce the employment costs of some employers covered by the modern awards affected by the decision.[74] We note that there have also been other changes to modern awards that have increased employment costs. It is not appropriate to take account all of these matters in some quantifiable or mechanistic way to support a particular outcome in the Review. But these matters form part of the broad context in which the Review is conducted and are relevant considerations.

**[94]** As mentioned earlier, one of the matters we are required to take into account is 'the need to encourage collective bargaining.' As set out in Chapter 4, while we accept that there has been a decline in current enterprise agreement making, a range of factors impact on the propensity to engage in collective bargaining, many of which are unrelated to increases in the NMW and modern award minimum wages.

**[95]** We are not persuaded that the gap between modern award minimum wages and bargained wages, to the extent it can be identified with any precision, has reached a level where it is encouraging or discouraging collective bargaining.

**[96]** We maintain the view expressed in past Review decisions that given the complexity of factors which may contribute to decision making about whether or not to bargain, we are unable to predict the precise impact of our decision. We cannot be satisfied that the increase we have determined will *encourage* collective bargaining and this is a factor to be weighed along with the other statutory considerations. However, we are also of the view that it is likely that the increase we have determined in this Review will impact on different sectors in different ways and will not, in aggregate, *discourage* collective bargaining.

**[97]** The gender pay gap is a factor in favour of an increase in minimum wages and we have considered this together with the various statutory considerations we are required to take into account.

**[98]** We conclude by noting that we have taken into account the circumstances of different regions, industries and sectors as part of our broader consideration of the national economy. These circumstances include that there are economic challenges currently facing certain

regions and sectors as a result of the transition taking place in the economy and other factors including natural disasters. CCIQ again contended that there were 'extenuating circumstances' including Cyclone Debbie which hit North Queensland in March 2017 and more recent flooding events, which combined with ongoing drought in other parts of Queensland, warrant 'exemption from the minimum wage adjustment for a given period.'[75] CCIQ has advanced substantially the same proposition in past Review proceedings. As the Panel has observed in past Review decisions, we accept that such events cause hardship to both employers and employees.[76] However for the reasons we have set out at length in previous Review decisions in relation to the same submission that is advanced by CCIQ in these proceedings, CCIQ has failed to address the requirements to be met by a party seeking such an exemption.[77] No exceptional circumstances are demonstrated such as to warrant a deferral of the increases we have awarded. We are not persuaded to depart from the conclusions reached in past Review decisions in respect of this issue.[78]

**[99]** For completeness, we note that we also reject ARA's proposal that we adopt an award by award approach and provide an interim decision in this Review.[79] Submissions in substantially the same terms have been made previously, and rejected in past Review decisions.[80] We are not persuaded to depart from the conclusions the Panel has reached in past decisions in respect of this issue.

**[100]** The level of increase we have decided upon will not lead to undue inflationary pressure and is highly unlikely to have any measurable negative impact on employment. However, such an increase will mean an improvement in the real wages for those employees who are reliant on the NMW and modern award minimum wages and, absent any negative tax-transfer effects, an improvement in their living standards. We acknowledge that the compounding effect of increases over time may have a cumulative effect which is not apparent in the short term. We will continue to closely monitor this in future reviews.

**[101]** We have determined that it is appropriate to increase the NMW. The factors identified above have led us to award an increase of 3.5 per cent. The NMW will be $719.20 per week or $18.93 per hour. The hourly rate has been calculated by dividing the weekly rate by 38, on the basis of the 38-hour week for a full-time employee. This constitutes an increase of $24.30 per week to the weekly rate or 64 cents per hour to the hourly rate.

**[102]** Having regard to the proposed NMW and the other relevant considerations, we also consider that it is appropriate to adjust modern award minimum wages.

**[103]** ACCER proposed a higher adjustment to the NMW than the adjustment they proposed to modern award minimum wages (or to award rates above a certain classification level), with the intention of providing a more substantial increase to the lowest paid. ACCER also contended that since the *Annual Wage Review 2011–12* decision (2011–12 Review decision), the Panel has applied what it describes as a 'wages relativities policy', which it submits has been contrary to law.[81]

**[104]** We accept that if the low paid are forced to live in poverty then their needs are not being met and that those in full-time employment can reasonably expect a standard of living that exceeds poverty levels.[82] The increases we propose to award will not lift all NMW and award-reliant employees out of poverty (measured by household disposable income below a 60 per cent median income poverty line). But to grant an increase to the NMW and modern award minimum wages the size necessary to immediately lift all full-time workers out of

poverty, or an increase of the size proposed by ACCER and the ACTU, is likely to run a substantial risk of adverse employment effects. Such adverse effects will impact on those groups who are already marginalised in the labour market, with a corresponding impact on the vulnerability of households to poverty due to loss of employment or hours. An increase of the magnitude proposed by ACCER and the ACTU would also carry a substantial risk of reducing the employment opportunities for low-skilled workers, including many young persons, who are looking for work.

**[105]** Workers at the lower end of the wage distribution (such as those paid the NMW), including those on modern awards who tend to have less skill than other workers, are more vulnerable to disemployment. There is no justification to increase the NMW by a higher rate than modern award minimum wages (as proposed by ACCER). To do so would create a significant risk of disemployment effects—thus putting low-paid workers at risk of unemployment and poverty. Nor would it be fair to those on higher modern award minimum wages as it would erode the recognition of their higher skill and relative 'work value.'

**[106]** As to ACCER's 'wages relativities policy' argument, we considered, and rejected, a submission in substantially the same terms in the 2016–17 Review decision.[83] Nothing put in the present proceedings has persuaded us to depart from the views expressed in our previous decision.

**[107]** The proposed NMW and the relevant statutory considerations have led us to increase modern award minimum wages by 3.5 per cent.

**[108]** The determinations and order giving effect to our decision will come into operation on 1 July 2018. Weekly wages will be rounded to the nearest 10 cents.

## 2. Economic and Labour Market Considerations

**[109]** The economic and labour market considerations required to be taken into account in relation to the minimum wages objective in s.284(1)(a) and (b) and in relation to the modern awards objective in s.134(1)(c), (d), (f) and (h) are dealt with in this chapter. In addition, the Panel also considers a range of other relevant indicators. In doing so we examine information presented in the Statistical report, in submissions from parties, and in research published or referenced in the Research reference list by the Commission.

**[110]** We note at the outset the submission advanced by ABI and NSWBC that macroeconomic data are unlikely to be useful in a Review as they take a high-level view of the economy and that the Panel's 'primary consideration' should be on parts of the economy most affected by Review decisions.[84] ACCI advances a submission in similar terms.[85] We do not accept this view for a number of reasons.

**[111]** Firstly, although the degree of award reliance varies between industries, all industries contain a proportion of award-reliant employees, and in none are the majority of employees award reliant.[86] That requires us to have regard to developments in all industries and, in that context, macroeconomic data affecting all sectors is relevant and useful.

**[112]** Secondly, the Act requires that we make a national decision concerning the NMW and to consider variations to the minimum wages prescribed in all modern awards. Noting that no party (with one possible exception[87]) has submitted that we should differentiate between modern awards in respect of minimum wage increases to arise from this Review, that necessarily requires us to pay regard to developments in the national economy as a whole.

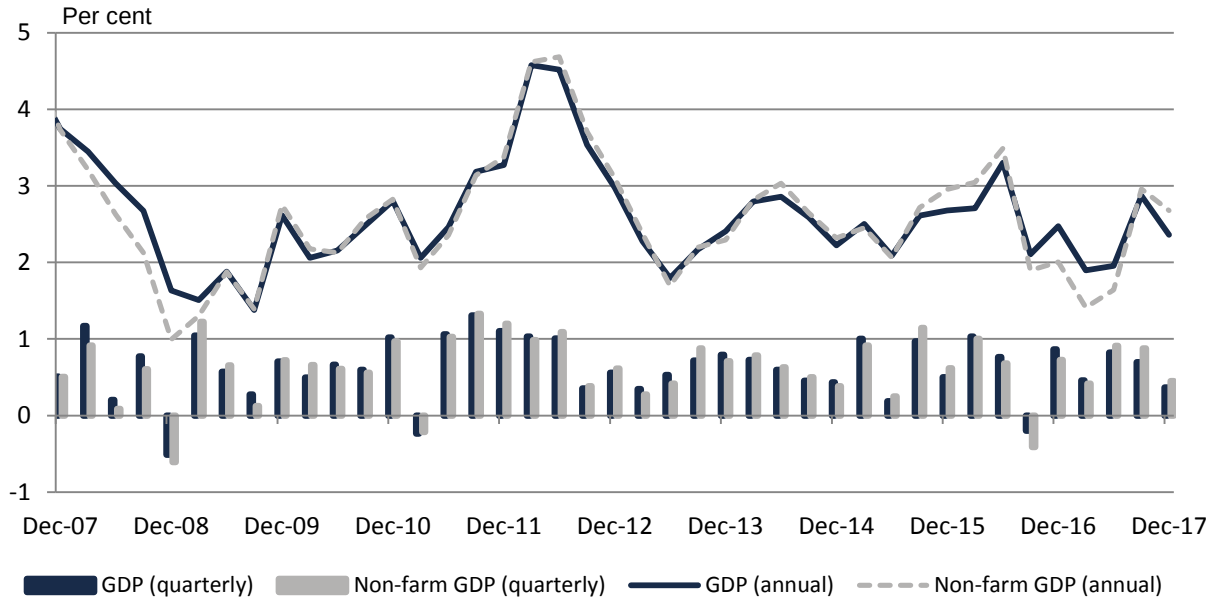
**[113]** Thirdly, the minimum wages objective in s.284(a) requires us to take into account 'the performance and competitiveness of the national economy,' and this must accordingly be treated as a matter of significance in the decision-making process.[88]

**[114]** Fourthly, the ABI and NSWBC submission implicitly assumes that employees in a particular industry are not, in respect of minimum wage adjustments, entitled to some share in the prosperity of the national economy if that sector is not doing as well as the economy as a whole. That is an assumption which we do not accept (nor its corollary that employees in a better-performing sector should, in respect of minimum wage adjustments, not share in any mitigation that might be required if the national economy is performing poorly). In a dynamic economy, there will always be firms and industries that are doing better or worse than the economy-wide average, and there will always be firms that are failing, together with new firms that are being created. We do, however, pay close attention to developments in the most award-reliant industries as we discuss later in this chapter.

### Economic growth

**[115]** Annual growth in GDP over the year to the December quarter 2017 was the same as its five-year average of 2.4 per cent[89] after falling below 2 per cent early in 2017 (Chart 2.1).

**Chart 2.1: Growth in GDP, annual and quarterly rates**

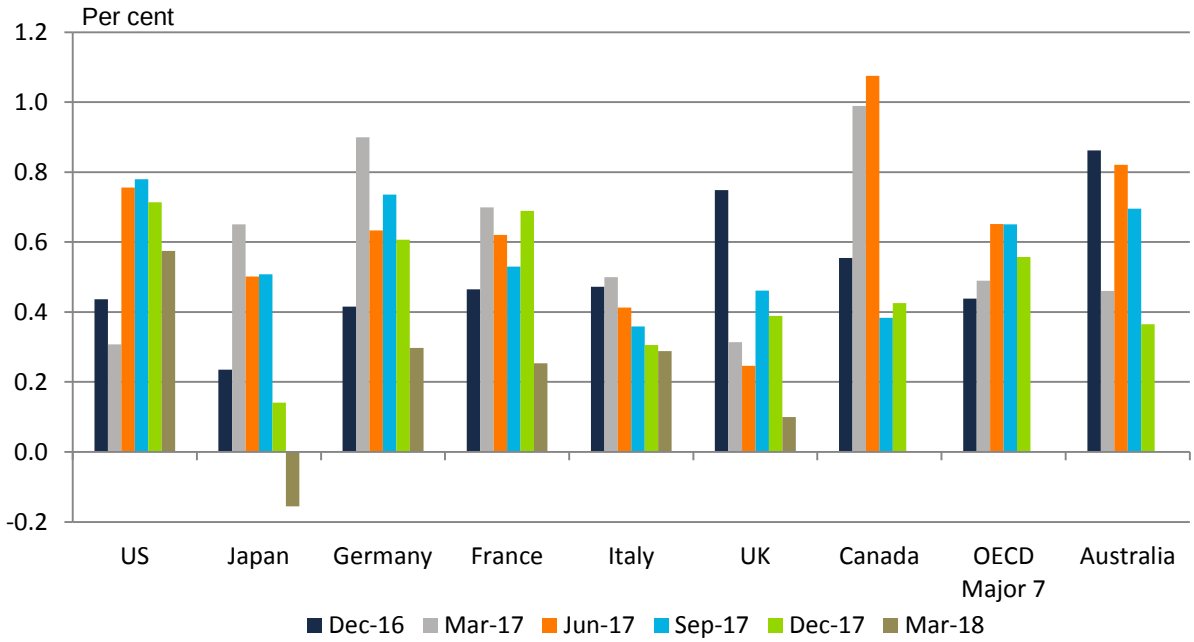



Source: Statistical report, Chart 1.1; ABS, *Australian National Accounts: National Income, Expenditure and Product, Dec 2017*, Catalogue No. 5206.0.

**[116]** Household consumption increased by 2.9 per cent over the year to the December quarter 2017, contributing 1.7 percentage points to GDP growth, both higher than the previous year.[90] Compensation of employees increased by 4.8 per cent over the year, largely due to strong employment growth, while the household saving ratio continued to decline, from 4.0 per cent in the December quarter 2016 to 2.7 per cent in the December quarter 2017. Public investment grew by 1.5 per cent over the year, much lower than the previous year, contributing only 0.1 percentage points of GDP growth. Exports increased by 0.8 per cent, contributing 0.2 percentage points of GDP growth. Mining; Information media and telecommunications; Rental, hiring and real estate services; Public administration and safety; and Health care and social assistance all made positive contributions to growth in the December quarter.[91]

**[117]** Australia's GDP growth exceeded the average growth rate for the major seven OECD economies in three of the five quarters to the December quarter 2017 (Chart 2.2).

**Chart 2.2: International comparisons of quarterly GDP growth rates**



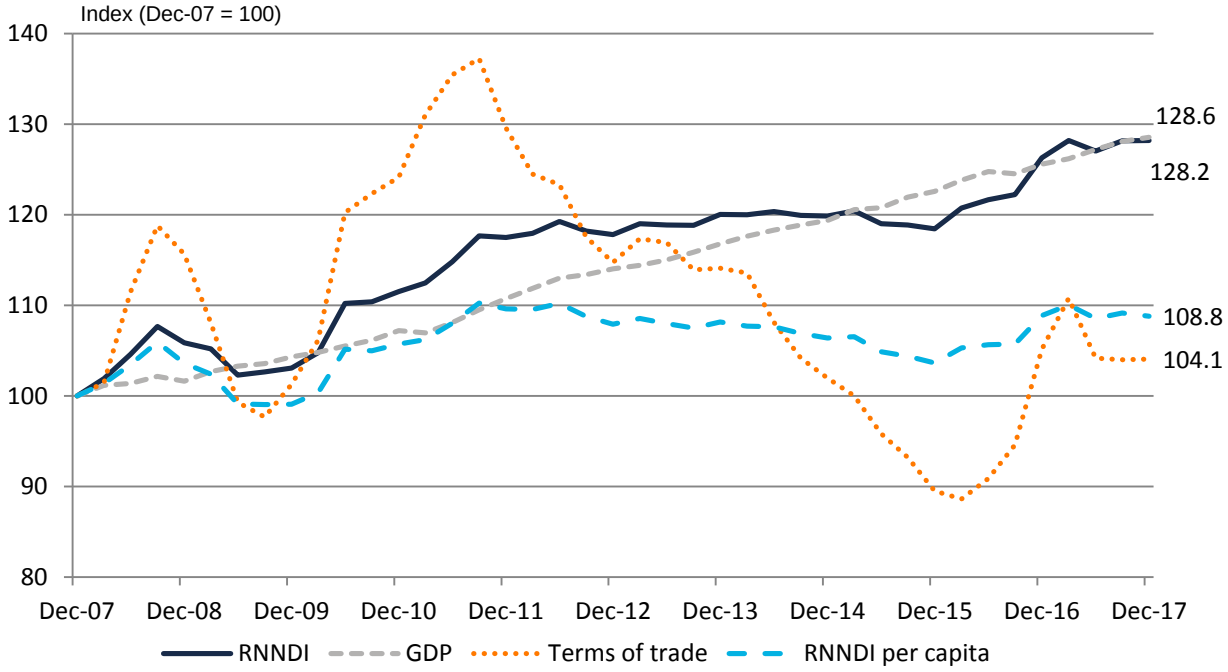

Note: March quarter 2018 data are not yet available for Canada and Australia.

Source: OECD (2018), *Quarterly GDP (indicator)*, <http://data.oecd.org/gdp/quarterly-gdp.htm>.

**[118]** The Panel has, for several Reviews, given consideration to real net national disposable income (RNNDI) which is influenced by movements in the terms of trade and net flows of income overseas and is a better measure of incomes available to Australians than GDP.[92] However, the Panel has noted that short-term movements in RNNDI have not formed part of its decision.[93]

**[119]** Chart 2.3 shows that, despite variation during the period, GDP and RNNDI have grown at similar rates over the last 10 years. On a per capita basis, RNNDI did not grow at all in 2017[94] and remains at the same level as in 2011, having dipped during the interim due to falls in the terms of trade.

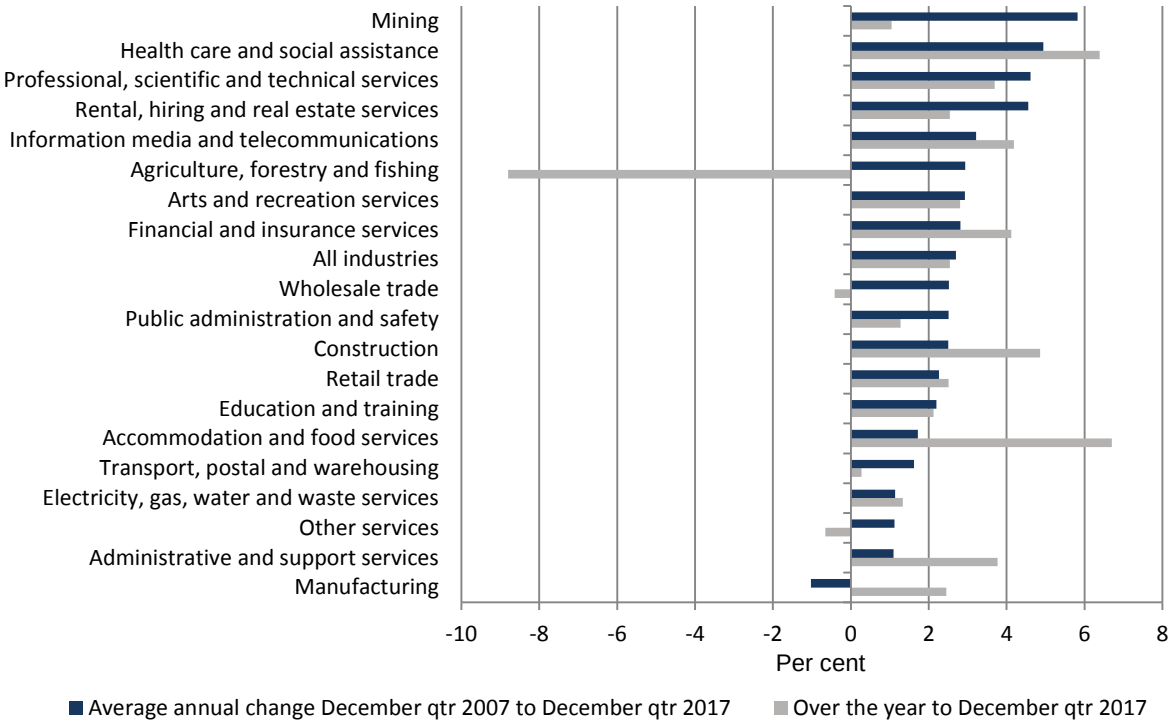
**Chart 2.3: RNNDI, real GDP and the terms of trade**




Source: Statistical report, Chart 1.3; ABS, *Australian National Accounts: National Income, Expenditure and Product, Dec 2017*, Catalogue No. 5206.0.

**[120]** Some submissions were concerned that growth was not broad-based across industries and that conditions in award-reliant industries were not as strong as in other parts of the economy.[95] However, Chart 2.4 shows that gross value added (GVA) grew over the year to the December quarter 2017 in all but three of the 19 industries. Growth was highest in the award-reliant industry Accommodation and food services (6.7 per cent) as well as Health care and social assistance (6.4 per cent). GVA fell by a large –8.8 per cent in Agriculture, forestry and fishing and also fell in Other services (–0.7 per cent).

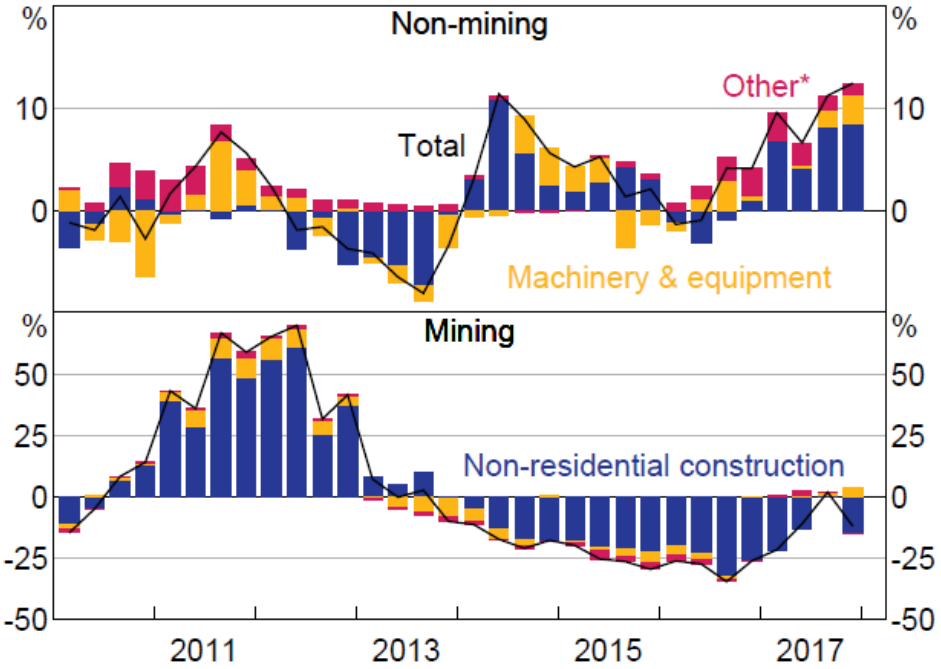
**Chart 2.4: Change in GVA by industry**




Source: Statistical report, Chart 1.4; ABS, *Australian National Accounts: National Income, Expenditure and Product, Dec 2017*, Catalogue No. 5206.0.

**[121]** In relation to investment, the Australian economy was transitioning from the investment phase of the mining boom to the production phase for some time. According to the RBA, this transition is continuing, but the 'drag from falling mining investment is expected to have disappeared completely towards the end of the forecast period; recent data suggest the trough in mining investment may occur later in 2018 or early 2019 (compared to the Bank's expectation in February that it would be around the middle of this year).'[96] Both the RBA's May 2018 *Statement on Monetary Policy* and the 2018–19 Budget point to the 'stronger than expected' growth in non-mining investment.[97] Non-mining business investment grew by 12½ per cent in 2017 according to the RBA.[98] Chart 2.5 presents RBA estimates of year-ended growth in non-mining and mining investment.

**Chart 2.5: Private business investment (year ended growth)**




Note: Includes cultivated biological resources (mainly livestock, vineyards and orchards), computer software, research development, mineral exploration and artistic originals.

Source: RBA (2018), *Statement on Monetary Policy*, May, p. 22, Graph 2.3.

**Productivity and unit labour costs**

**[122]** Both productivity and unit labour costs are relevant considerations in a Review. We have previously discussed these concepts[99] and continue to support the conclusion that 'increases in minimum wages are more likely to stimulate productivity measures by some employers directly affected by minimum wage increases, rather than inhibit productivity.'[100]

**[123]** The most recent data show that the absolute value of labour productivity across the whole economy and in the market sector declined over the course of 2017. However, we note the observation of the Australian Government that 'productivity measures over short time periods can be volatile, cyclical and are subject to revisions.'[101] ACCER provided as an illustration of revisions to productivity estimates, that the estimate for 2004 was revised from a decline to an increase of 1.2 per cent.[102] As shown in Table 2.1, GDP per hour worked fell by 1.0 per cent and GVA per hour worked in the market sector fell by 0.9 per cent over the year to the December quarter 2017. However, it also shows that hours worked increased strongly during this period, by 3.5 per cent across the whole economy and 3.1 per cent in the market sector.

**[124]** It is likely that the fall in measured labour productivity is caused in some part by the large rise in the measured number of hours worked over the year to the December quarter 2017. A similar phenomenon occurred over the year to the December quarter 2015. In that year, total hours worked rose by 2.8 per cent and GDP per hour worked fell by 0.1 per cent. As shown in Table 2.1, there is a clear negative relationship between the annual growth in hours worked and the associated growth in labour productivity. The three years of decline in labour productivity (2010, 2015 and 2017) are each associated with unusually large increases in hours worked. In the year following each of 2010 and 2015, the rate of increase of both

hours worked and labour productivity returned to more usual levels. As we did in the 2015–16 Review decision, we 'treat with caution the significantly higher hours growth reported over the year to the December quarter 2015 [2017] and the consequent reduction in productivity growth shown over the year to the December quarter 2015 [2017].'[103]

**[125]** In its May 2018 *Statement on Monetary Policy*, the RBA points out that recent employment growth has been particularly concentrated in Health care and social assistance over the past year, with an additional 130,000 jobs in this sector. Many of these jobs are for aged and disabled carers and child care workers and they expect this growth to continue. It concludes that the concentration of employment growth in household services has contributed to low growth in labour productivity 'because measured productivity growth in household services has typically been quite low,' and changes in the output and quality of such services are hard to measure.[104]

**Table 2.1: Productivity growth and its components, growth rate over the year**

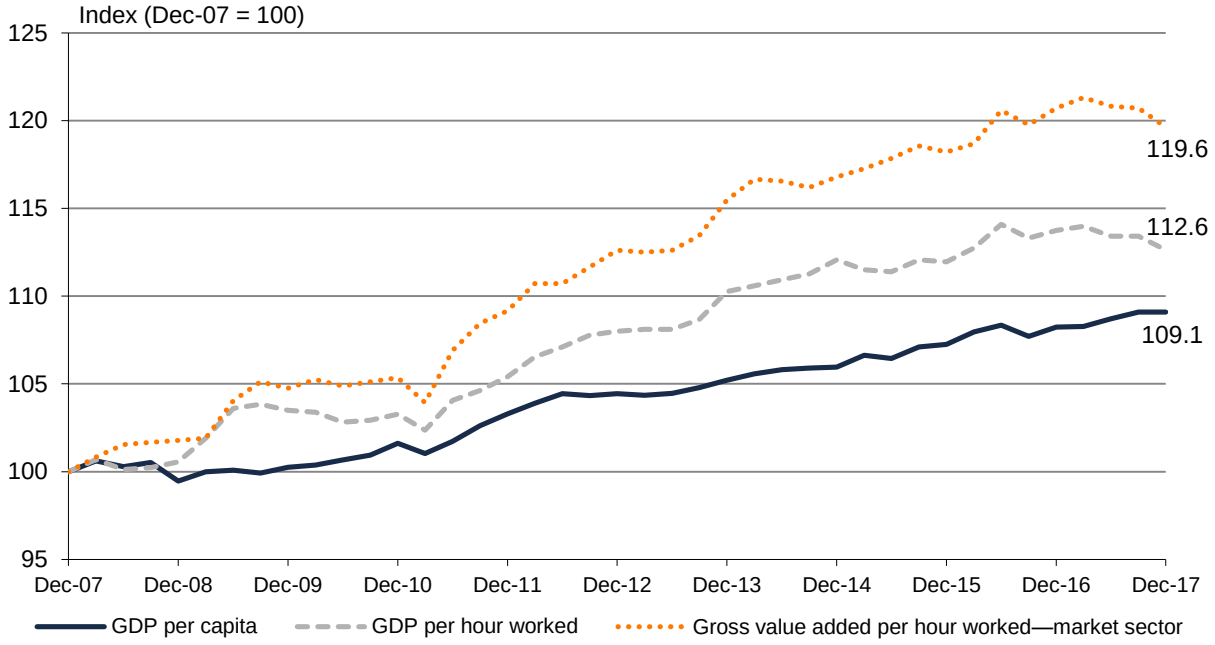
| | National Accounts Total | | | Market Sector | | | Labour Force |
|---|---|---|---|---|---|---|---|
| **Quarter** | **GDP (% change)** | **Hours worked (% change)** | **GDP/ hour worked (% change)** | **GVA (% change)** | **Hours worked (% change)** | **GVA/ hour worked (% change)** | **Hours worked (% change)** |
| Dec-07 | 3.7 | 3.3 | 0.6 | 3.6 | 3.3 | 0.2 | 3.4 |
| Dec-08 | 1.6 | 1.1 | 0.6 | 2.7 | 0.9 | 1.8 | 1.1 |
| Dec-09 | 2.6 | –0.3 | 2.9 | 1.5 | –1.4 | 2.9 | –0.1 |
| Dec-10 | 2.8 | 3.0 | –0.2 | 2.8 | 2.2 | 0.6 | 3.3 |
| Dec-11 | 3.3 | 1.2 | 2.1 | 3.9 | 0.4 | 3.6 | 0.6 |
| Dec-12 | 3.0 | 0.5 | 2.5 | 3.8 | 0.5 | 3.2 | 0.8 |
| Dec-13 | 2.4 | 0.3 | 2.1 | 2.3 | –0.2 | 2.5 | 0.1 |
| Dec-14 | 2.2 | 0.5 | 1.6 | 2.2 | 1.1 | 1.1 | 1.1 |
| Dec-15 | 2.7 | 2.8 | –0.1 | 2.7 | 1.4 | 1.2 | 2.5 |
| Dec-16 | 2.5 | 0.8 | 1.6 | 2.2 | 0.2 | 2.1 | 0.8 |
| Dec-17 | 2.4 | 3.5 | –1.0 | 2.3 | 3.1 | –0.9 | 3.1 |

Note: Data from the National Accounts are seasonally adjusted. The percentage changes are calculated in relation to the corresponding quarter of the previous year. Hours worked data from the Labour Force are expressed in trend terms. The percentage changes are calculated in relation to the corresponding month of the previous year.

Source: Statistical report, Table 2.2; ABS, *Australian National Accounts: National Income, Expenditure and Product, Dec 2017*, Catalogue No. 5206.0; ABS, *Labour Force, Australia, Apr 2018*, Catalogue No. 6202.0.

**[126]** Trends in productivity measures over the 10 years to the December quarter 2017 are presented in Chart 2.6.

**Chart 2.6: Measures of labour productivity**




Note: Labour productivity is measured as real GDP per hour worked. Gross value added measures the value of output at basic prices minus the value of intermediate consumption at purchasers' prices. The market sector includes all industries except for Public administration and safety, Education and training and Health care and social assistance.

Source: Statistical report, Chart 2.1; ABS, *Australian National Accounts: National Income, Expenditure and Product, Dec 2017*, Catalogue No. 5206.0.

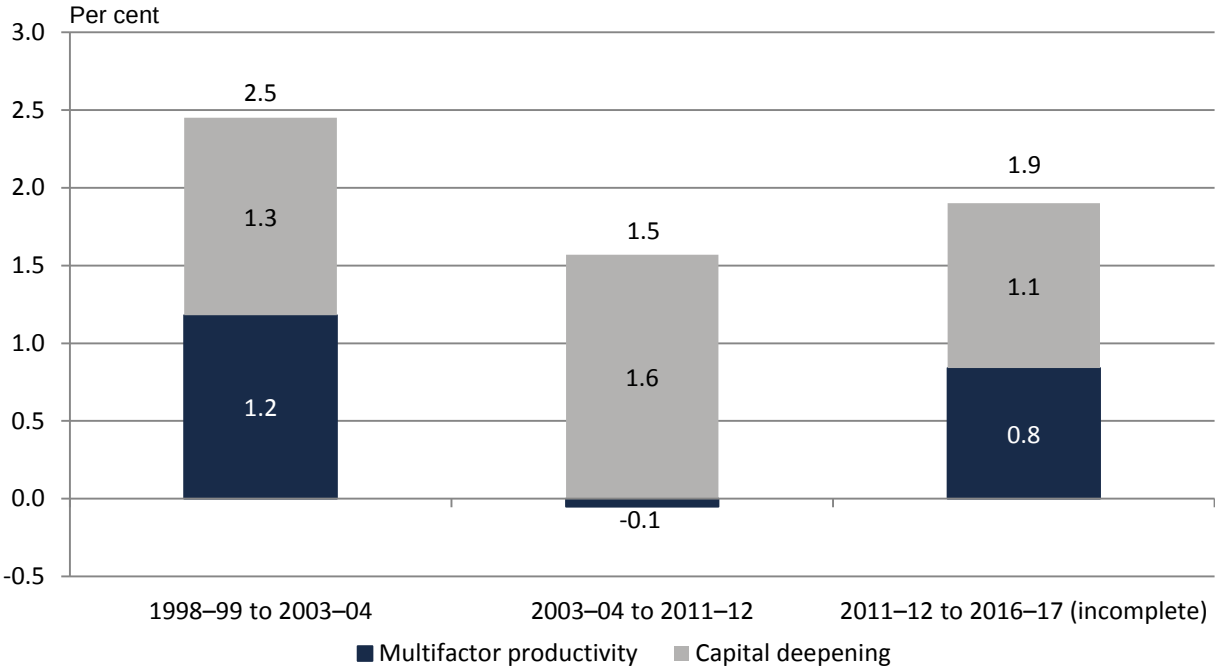
**[127]** We have previously concluded that short-term trends in labour productivity should be treated with caution as productivity is best measured over the business cycle, which is problematic as the business cycle does not align with the period of a Review.[105] A number of parties supported the assessment of productivity growth over the longer term or over cycles.[106] No party submitted that we should pay primary regard to the measurement of productivity over the most recent 12 months. However, we note that there appears to be no growth in labour productivity, measured as GVA per hour worked in the market sector, over the past 18 months, as shown in Chart 2.6. If this trend continues over a longer period, that is a matter to which the Panel would need to give greater weight in future Reviews, but for the reasons earlier given in paragraph [123] above we do not expect this trend to continue.

**[128]** Chart 2.7 presents changes in labour productivity over the most recent cycles together with its components: multifactor productivity and capital deepening. Since the last Review, the Australian Bureau of Statistics (ABS) has revised the time period of the last two business cycles and this is reflected in the chart. In last year's Review, the current business cycle was estimated to have begun in 2007–08, however, this has been revised to 2011–12.

**[129]** Ai Group submitted that productivity growth 'has been exceedingly weak over the past decade and over the current productivity growth cycle.'[107] This proposition is not supported by the available statistical material, nor by the Australian Government submission. The Australian Government submitted: '… labour productivity in the whole economy has grown at an average annual rate of 1.5 per cent over the past five years. This compares with a long-term average of 1.6 per cent over the past 30 years.'[108] Chart 2.7 shows that productivity growth was higher over the most recent cycle compared with the previous one, though it was lower than the 1998–99 to 2003–04 business cycle. The chart shows that, in contrast to the

previous cycle, a substantial proportion of the labour productivity growth in the current cycle has been due to multifactor productivity improvements, and not just due to capital deepening as in the previous cycle.

**Chart 2.7: Productivity cycles, annualised growth in labour productivity**




Note: Multifactor productivity is measured as output per combined unit of labour and capital. Capital deepening is the component of labour productivity growth which is due to the increase in the amount of capital that each unit of labour has to work with. Labour productivity is represented by the numbers above the bars, and is the sum of multifactor productivity and capital deepening. As a result of ABS revisions to the National Accounts, the productivity growth cycle has changed. The 2007–08 peak previously identified in the last publication has been revised to 2011–12.

Source: Statistical report, Chart 2.2; ABS, *Australian System of National Accounts, 2016–17*, Catalogue No. 5204.0.

**[130]** The ACTU referred to recent research from the Commonwealth Treasury (Campbell and Withers 2017, cited in the Research reference) list, that examined the impact of structural change on Australian productivity trends. The ACTU highlighted from this research that 'it is labour productivity growth in the services sectors that has been underpinning aggregate productivity growth in Australia over recent decades.'[109] Over half of annual aggregate labour productivity growth was from growth within the services sector and around one-quarter was attributable to mining. The research found that aggregate productivity growth is driven overwhelmingly by within-sector productivity growth rather than across sectors (that is, a structural shift from lower to higher productivity industries), except during a mining boom period. Just over 90 per cent of aggregate labour productivity growth came from the within-sector contribution from the period 1989–90 to 2015–16.[110]

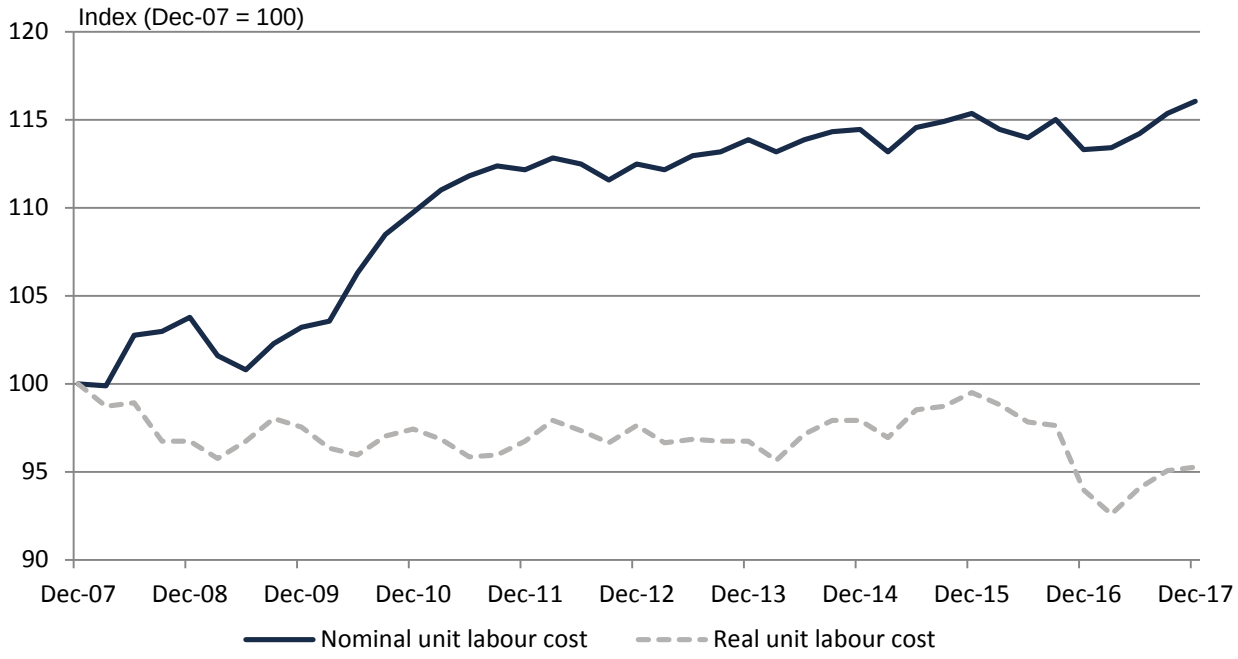
**[131]** In another paper included on the Research reference list, the Productivity Commission determined that structural change had a negative effect on productivity growth as Australia saw a long-term shift towards more labour-intensive service industries which, on average, have lower levels of productivity. This change is likely to reduce labour productivity growth during the adjustment following the mining boom period.[111]

**[132]** The Australian Government, citing the Productivity Commission study, agreed that structural change probably had a negative impact on growth in labour productivity in

Australia and in many other OECD countries.[112] The Victorian Government also submitted that slower productivity growth appears to be a trend across advanced economies, according to the IMF.[113]

**[133]** In last year's Review, the information before the Panel was that real unit labour costs had fallen, largely due to the rise in the terms of trade, and the Panel placed little weight on this fall as the RBA was of the view that the high levels of the terms of trade were unlikely to be sustained.[114] Over the course of 2017, the terms of trade did fall as anticipated, but only by a modest amount (see Chart 2.3 above), and hence real unit labour costs subsequently only rose by a small amount. The most recent data show that both nominal and real unit labour costs increased over the year to the December quarter 2017 (Chart 2.8).

**Chart 2.8: Unit labour costs, nominal and real, index**




Source: Statistical report, Chart 2.3; ABS, *Australian National Accounts: National Income, Expenditure and Product, Dec 2017*, Catalogue No. 5206.0.

**[134]** During the period of the last five years, real unit labour costs reached a peak in the December quarter 2015 before falling to their lowest level in the last decade in early 2017. They rose somewhat since then but remain at a lower level than at any time in the last decade prior to the December quarter 2016. The Australian Government observes that '[c]hanges in the wage share reflect essentially the same phenomenon as changes in real unit labour costs'[115] and that 'the fall in the wage share from the recent peak of 55 per cent in March 2016 to 53 per cent in December 2017 can largely be attributed to volatility in commodity prices.'[116] The Commonwealth Treasury found that, over the year to the June quarter 2017, real unit labour costs declined by 4.3 per cent. They explain that '[t]his means that the prices of firms' outputs have been growing faster than the labour costs of producing those outputs. The recent increases in the terms of trade have been an important part of the decline in real unit labour costs.'[117] We conclude that, as anticipated in last year's Review, there was some reversal of the previous sizeable fall in real unit labour costs (and associated fall in labour's share of national income), due to some decline in the terms of trade during 2017. Despite this, real unit labour costs and labour's share of national income remain at unusually low levels.

**Business competitiveness and viability**

**[135]** Profits growth of 4.3 per cent over the year to the December quarter 2017 was much lower than the particularly strong result in the preceding year, and also lower than the five-year and 10-year averages (Table 2.2). The lower result was mainly driven by weaker growth in mining profits, which were exceptional (at 75.8 per cent) in the previous year. While profits growth in the non-mining sector was also lower than the previous year, it was above its five-year and 10-year averages. The Australian Government submitted that the recent profits growth follows years of low growth of profits in the non-mining economy.[118] Evidence that supports this proposition is shown in Table 2.2 below.

**Table 2.2: Company gross operating profits, mining and non-mining industries, growth rates**

| | **Mining (%)** | **Non-mining (%)** | **Total (%)** |
|---|---|---|---|
| Dec-07 | –7.9 | 18.4 | 10.9 |
| Dec-08 | 95.4 | –5.0 | 18.8 |
| Dec-09 | –42.6 | 10.5 | –10.1 |
| Dec-10 | 62.5 | 1.2 | 16.4 |
| Dec-11 | 4.3 | 1.1 | 2.2 |
| Dec-12 | –27.3 | 3.3 | –7.6 |
| Dec-13 | 36.3 | 1.1 | 10.9 |
| Dec-14 | –21.3 | 0.9 | –6.7 |
| Dec-15 | –17.1 | 1.8 | –3.6 |
| Dec-16 | 75.8 | 10.6 | 26.8 |
| Dec-17 | 1.4 | 5.8 | 4.3 |
| **5 years to Dec-17*** | 9.7 | 4.0 | 5.7 |
| **10 years to Dec-17*** | 8.2 | 3.0 | 4.5 |

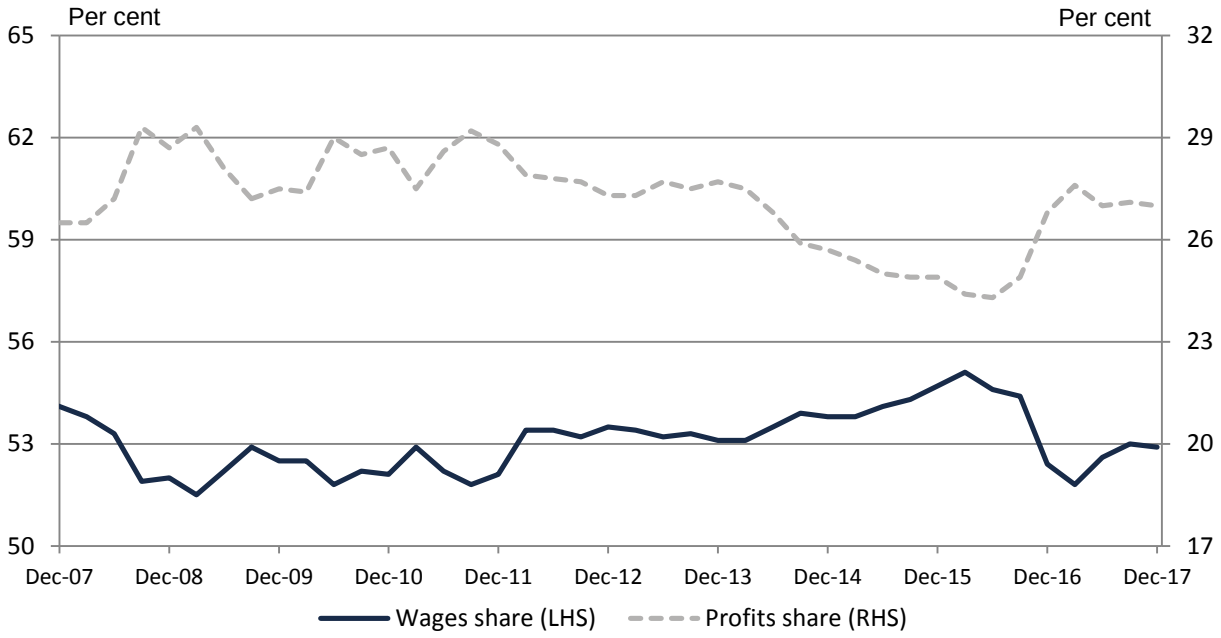
Note: *Annualised growth rates.

Source: Statistical report, Table 3.3; ABS, *Business Indicators, Australia, Dec 2017*, Catalogue No. 5676.0.

**[136]** The profits and wages share of total factor income experienced relatively large changes over the two years to the December quarter 2017 (Chart 2.9). After declining between the September quarter 2011 and the June quarter 2016, the profits share increased sharply and, at 27.0 per cent in the December quarter 2017, is similar to the previous December quarter. In contrast, the wages share increased between 2011 and 2016 before falling, particularly late in 2016 and early 2017. It has since risen to be 52.9 per cent in the December quarter 2017, above its level in the previous year and similar to the levels experienced in much of the past decade.

**[137]** The parties' submissions provided several explanations for the recent fluctuations in the wages and profits share. We accept that the most important recent factor is volatility in the price of commodities, which has a direct impact on the profitability of the affected exporters. The substantial growth in employment over the course of 2017 is likely to also have had some effect in increasing the wages share.[119]

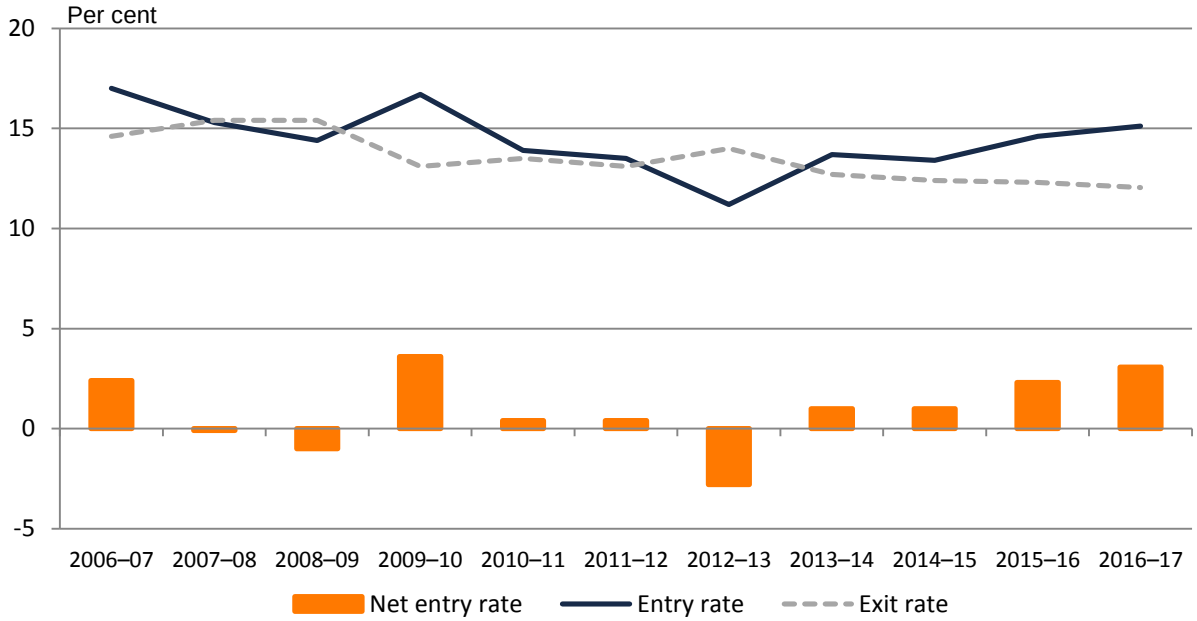
**Chart 2.9: Profits and wages share of total factor income**




Source: Statistical report, Chart 3.1; ABS, *Australian National Accounts: National Income, Expenditure and Product, Dec 2017*, Catalogue No. 5206.0.

**[138]** Chart 2.10 presents the business entry, exit, and net entry rates over the 10 years to 2016–17. It shows that, since 2012–13, the entry rate increased while the exit rate declined, resulting in a positive net entry rate since 2013–14. The net entry rate in 2016–17 was the highest since 2009–10.

**Chart 2.10: Business entry, exit and net entry rates**




Note: Entry rates are business entries in the financial year as a proportion of total businesses operating at the start of the financial year. Exit rates are total business exits in the financial year as a proportion of total businesses operating at the start of the financial year. Net entry rates are the difference between the entry and exit rates, and represent the percentage growth in the number of businesses over the respective financial year.

Source: Statistical report, Chart 3.4; ABS, *Counts of Australian Businesses, Including Entries and Exits*, various, Catalogue No. 8165.0.

**[139]** Business entry rates were higher than exit rates over the year to June 2017 across all industries except for Retail trade, Mining and Agriculture, forestry and fishing (Table 2.3).

**Table 2.3: Business entry and exit rates by industry, 2016–17**

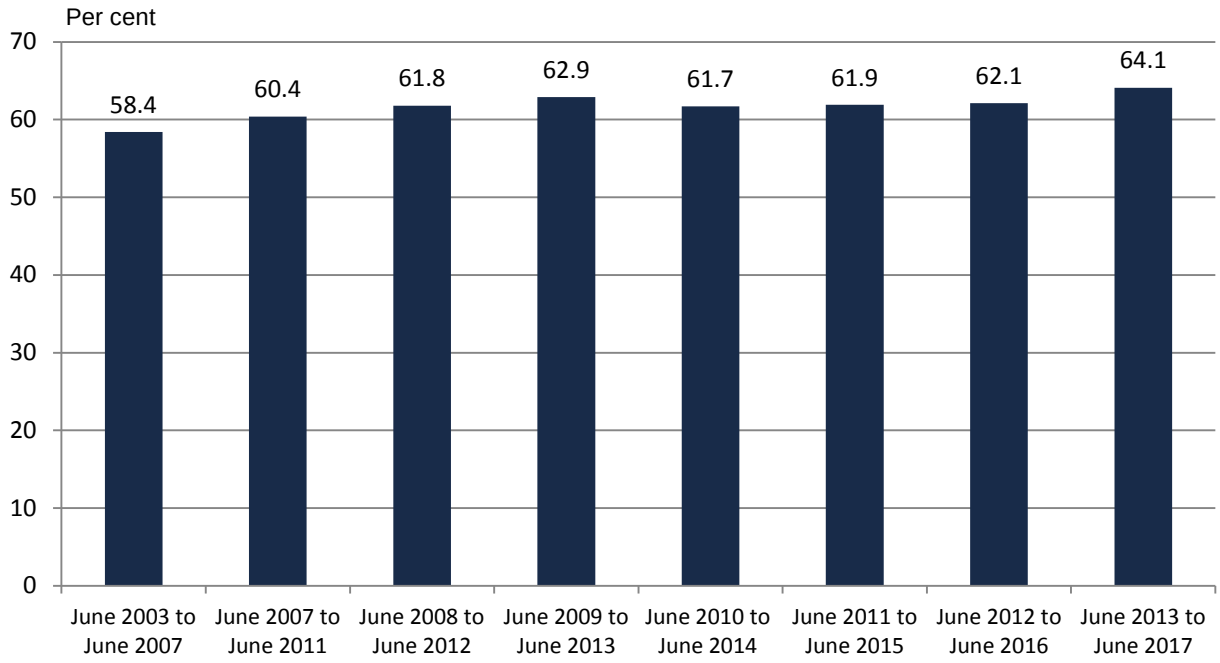
| | Proportion of businesses at June 2017 (%) | Entry rate (%) | Exit rate (%) |
|---|---|---|---|
| Agriculture, forestry and fishing | 8.0 | 7.3 | 8.0 |
| Mining | 0.4 | 10.8 | 12.0 |
| Manufacturing | 3.8 | 11.2 | 11.1 |
| Electricity, gas, water and waste services | 0.3 | 16.1 | 12.0 |
| Construction | 16.8 | 17.3 | 13.7 |
| Wholesale trade | 3.6 | 13.5 | 12.4 |
| Retail trade | 5.9 | 13.2 | 13.8 |
| Accommodation and food services | 4.2 | 18.7 | 15.9 |
| Transport, postal and warehousing | 6.8 | 26.8 | 14.6 |
| Information media and telecommunications | 1.0 | 18.7 | 14.2 |
| Financial and insurance services | 9.1 | 13.4 | 9.1 |
| Rental, hiring and real estate services | 11.2 | 11.5 | 9.3 |
| Professional, scientific and technical services | 12.2 | 16.1 | 13.1 |
| Administrative and support services | 3.9 | 19.3 | 15.2 |
| Public administration and safety | 0.3 | 18.1 | 15.9 |
| Education and training | 1.3 | 17.3 | 13.0 |
| Health care and social assistance | 5.8 | 12.4 | 8.4 |
| Arts and recreation services | 1.2 | 16.4 | 13.2 |
| Other services | 4.3 | 15.4 | 12.6 |
| **All industries** | **100.0** | **15.1** | **12.0** |

Note: Entry rates are business entries in the financial year as a proportion of total businesses operating at the start of the financial year. Exit rates are total business exits in the financial year as a proportion of total businesses operating at the start of the financial year. Only data for those businesses that were able to be classified to an industry division are presented. Of all businesses that were actively trading as at June 2017, 1.2 per cent were not classified to an industry.

Source: Statistical report, Table 3.5; ABS, *Counts of Australian Businesses, Including Entries and Exits, June 2013 to June 2017*, Catalogue No. 8165.0.

**[140]** Chart 2.11 shows business survival rates over four-yearly intervals, that is, the proportion of businesses in the initial period that were still trading four years later. The chart shows that business survival rates for the most recent period (June 2013 to June 2017) were the highest recorded over the past 10 years.

**Chart 2.11: Business survival rates**




Note: A surviving business is defined as a business which was actively trading in the first period and continued to be trading in the second period.

Source: Statistical report, Chart 3.5; ABS, *Counts of Australian Businesses, Including Entries and Exits*, various, Catalogue No. 8165.0.

**[141]** ACCI[120] and Ai Group[121] contended that the Panel should consider Australia's international competitiveness as part of this Review. In particular, Ai Group submitted that:

> 'Australia's relatively higher minimum wages reflect higher living costs and other factors in Australia over a very long period of time. Significantly, they do not appear to reflect higher labour productivity in Australia than in comparable economies. For example, OECD data indicate that on a PPP basis, Australia's average labour productivity (measured as real output per hour worked) has been lower than in the US since at least the 1970s and that it has fallen further behind the US over the past decade … This growing labour productivity 'gap' is indicative of Australia's poor competitiveness across a range of factors that affect our productivity and performance, absolutely and relative to our global peers.'[122]

**[142]** We deal with many of the issues that arise from this proposition, including business profitability and survival, productivity, and the degree to which minimum wage increases have in practice led to job or hours losses, elsewhere in this decision. It is not clear from the submissions how the broader issues of international competitiveness should bear upon our present considerations and the Panel may be assisted by hearing further from all parties in subsequent Reviews.

**Small business and surveys of business performance**

**[143]** The Panel gives consideration to small business as the general object of the Act is directed to providing a balanced framework for cooperative and productive workplace relations, which promote national economic prosperity and social inclusion for all Australians by, amongst other things, acknowledging the special circumstances of small and medium-sized businesses.[123]

**[144]** The Australian Government again submitted an analysis of the characteristics of small businesses, identifying that:

- Small businesses are found in every sector of the economy, although they are less prevalent in Mining, Manufacturing and Electricity, gas, water and waste services;[124]

- Small businesses contributed a higher proportion of employment compared with output for almost every industry, suggesting that they are more labour intensive relative to larger businesses, even within the same industry, and have lower labour productivity;[125]

- Labour costs for small employing businesses averaged 17 per cent of total expenses in 2015–16;[126] and

- Small businesses accounted for around 34 per cent of all award-reliant employees, with 35 per cent of employees in small businesses being award reliant, a higher proportion than for larger businesses (100–999 employees) but similar to the proportion businesses with (20–49 employees).[127]

**[145]** In response to a question on notice from the Panel, the Australian Government provided data that showed that, from 2014 to 2016, small businesses accounted for 17.8 per cent of the increase in total numbers of employees.[128] This is a much smaller proportion than their share of total non-financial private sector employment of 44 per cent.[129] Table 3.4 in the Statistical report shows that profit margins for small businesses (including non-employing businesses) exceeded those of all businesses both in the latest year for which data are available (2016–17) and in the five years to 2016–17. This higher small business profit margin was apparent also for most of the award-reliant industries (the exception being Accommodation and food services). While we are cognisant of the circumstances of small and medium enterprises, we have no reason to believe that their relative position in the Australian economy in 2017–18 is noticeably different from normal.

**[146]** Consistent with prior Reviews, the Panel has considered relevant business surveys that the Australian Government and RBA believe to 'be quite reliable predictors of output and employment growth.'[130] The Australian Government,[131] Ai Group,[132] and the Federal opposition[133] discussed various business surveys which showed that business conditions are improving both at an aggregate level, and across most major sectors of the economy. For example, the National Australia Bank (NAB) concludes that:

> 'Business conditions continued to look very healthy in the December quarter NAB Quarterly Business Survey… Investment expectations are looking strong for the year ahead, with most industries (outside retail) sitting above long-run average levels.

> Employment intentions were also higher, while the increased difficulty firms are having finding suitable labour suggests further labour market tightening.'[134]

**[147]** The same report finds that, by a small margin, more firms are saying that difficulty in finding suitable labour is a constraint on expansion than saying that this constraint comes from a lack of demand for their output.[135]

**[148]** The Australian Government commented that the NAB surveys show a difference between the economic conditions of small and larger-sized businesses, with all businesses reporting better conditions than small businesses.[136] Even so, business conditions for small businesses in the December quarter 2017 have risen quite strongly over the past two years, to be at their highest level for 10 years.[137] A separate NAB survey of small to medium enterprises finds that more small businesses are increasing than decreasing employment, especially businesses with a turnover of $2–$10m.[138] The Sensis small and medium business survey for the March quarter 2018 reported that the overall assessment of the economy improved for the fourth quarter in succession and is at the highest level recorded since December 2010.[139] In its May 2018 *Statement on Monetary Policy*, the RBA concluded:

> 'Survey measures of overall business conditions are around their highest levels since before the global financial crisis.'[140]

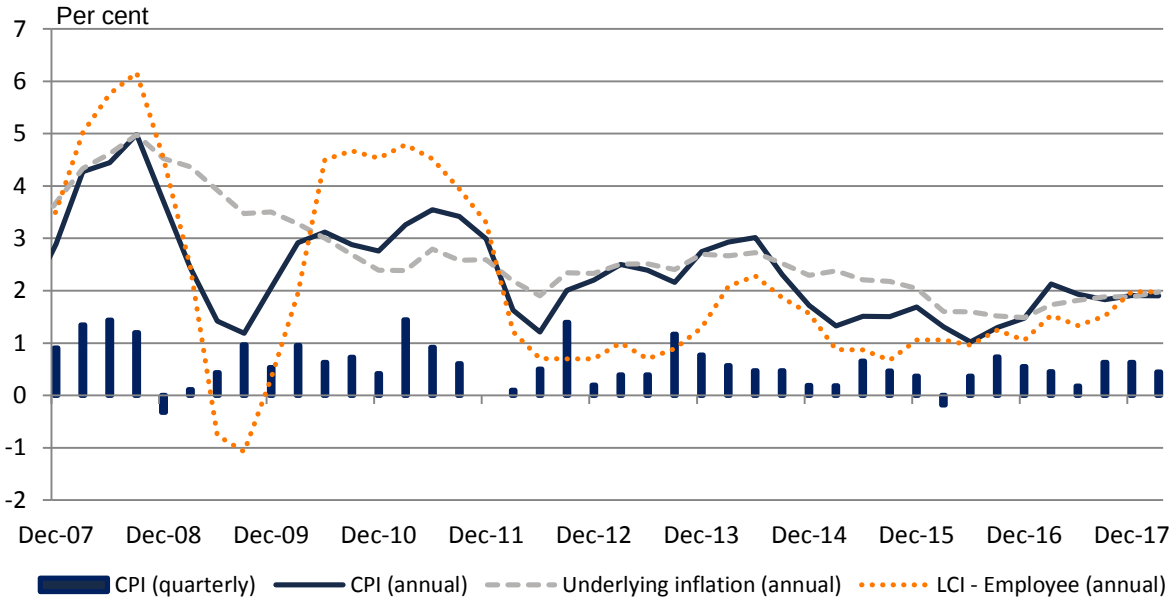
**Inflation and wages**

**[149]** The Review is being conducted during a period of low inflation and low wages growth. This is discussed in the following section.

**Inflation**

**[150]** Measures of inflation across 2017 were higher than the year before, although they remain at relatively low rates. The CPI increased by 1.9 per cent over the year to the March quarter 2018 and underlying inflation and the LCI for employee households increased by 2 per cent over the year, with the LCI increasing from a low of 1.0 per cent over the year to the December quarter 2016 (Chart 2.12).

**Chart 2.12: Measures of inflation—CPI, underlying inflation and LCI for employee households**



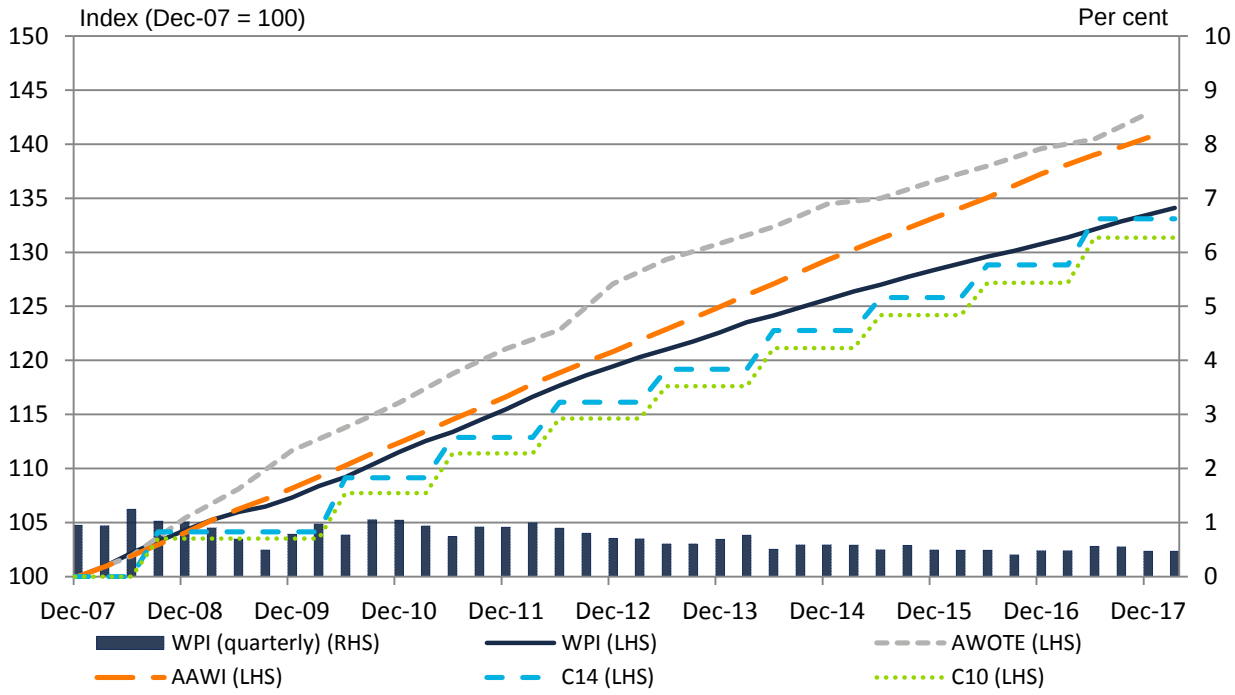

Source: Statistical report, Chart 4.1; ABS, *Consumer Price Index, Australia, Mar 2018*, Catalogue No. 6401.0; ABS, *Selected Living Cost Indexes, Australia, Mar 2018*, Catalogue No. 6467.0.

**[151]** Reasons for the relatively low inflation were discussed by parties and included low wages growth and heightened competition in the retail sector.[141] Employer organisations submitted that low inflation suggests businesses do not have much pricing power[142] and that their ability to raise prices to fund wage increases is limited.[143]

### Wages

**[152]** Low wages growth was discussed in last year's Review,[144] and measures of wages growth have not shown signs of strengthening over the past year. This is evident in Chart 2.13 by the quarterly increase in the WPI which has fallen from around 1.0 per cent in the March quarter 2012 to around 0.5 per cent in the March quarter 2018. As noted in the Statistical report, the most recent data show that the WPI increased by 2.1 per cent over the year to the March quarter 2018, average weekly ordinary time earnings (AWOTE) increased by 2.4 per cent over the year to the November quarter 2017 and the average annualised wage increase (AAWI) for federal enterprise agreements approved in the December quarter 2017 was 2.5 per cent, each around or below their five-year average[145], but substantially below their 10-year average. If the WPI is expressed in real terms (deflated by the CPI), there was a 0.2 per cent increase to the March quarter 2018, compared with the five-year average of 0.3 per cent. If the WPI is deflated by the GDP deflator (i.e., by producer prices) then it rose by 1.0 per cent in 2017, compared with a five-year average of 1.1 per cent.[146] Taken over a 10-year period, the Engineering/Manufacturing Employee Level 1 (C14) and C10 rates have increased at around the same level as the WPI (Chart 2.13).

**Chart 2.13: Measures of nominal wages growth, quarterly and cumulative percentage change, indexes—Dec-06 = 100**




Note: The WPI is an index for total hourly rates of pay excluding bonuses in both private and public sectors. It is unaffected by changes in the quality or quantity of work performed. AWOTE is calculated by dividing estimates of weekly ordinary time earnings by estimates of the number of employees. Ordinary time earnings refers to earnings attributable to award, standard or agreed hours of work. It is calculated before taxation and other deductions such as superannuation. It also excludes payments which are not related to the reference period such as overtime, leave loading and redundancy payments. AWOTE estimates refer to full-time adult employees. AAWI measures the average percentage increase in the base rates of pay across registered agreements for the year. It does not take into account payments such as allowances, bonuses and increases linked to productivity. The AAWI index is calculated by first deriving a quarterly rate from the AAWI per employee for agreements approved in the quarter for all sectors. The C14 and the C10 are minimum award rates set under the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award) and the former *Metal, Engineering and Associated Industries Award 1998*. AWOTE data are published half-yearly for May and November, hence, a quarterly series has been derived. AWOTE data are expressed in original terms.

Source: Statistical report, Chart 5.1; ABS, *Average Weekly Earnings, Australia, Nov 2017*, Catalogue No. 6302.0; ABS, *Wage Price Index, Australia, Mar 2018*, Catalogue No. 6345.0; Department of Employment, *Trends in Federal Enterprise Bargaining*, December quarter 2017, <http://employment.gov.au/trends-federal-enterprise-bargaining>; *Metal, Engineering and Associated Industries Award 1998;* Manufacturing Award (from 1 January 2010).

**[153]** In last year's Review, the Panel agreed with research from the RBA which stated that the reasons for low wages growth are somewhat puzzling.[147] Parties in this Review referred to factors including spare capacity in the labour market, lower inflation, more competition, structural adjustment after the mining boom, growth in part-time employment, lower business confidence and a focus on cutting costs as reasons for low wages growth.[148]

**[154]** The decline in collective bargaining was also considered in submissions as reasons for low wages growth. The ACTU submitted that employees' position in bargaining has weakened with the shift towards part-time employment.[149] ACCI also drew attention to the low growth in private demand, which they submit grew at 0.2 per cent in late 2016, compared with the 30-year average growth rate of 3.7 per cent.[150] ACCI associated this with the low growth in wages.[151] The most recent National Accounts data show that over the year to the December quarter 2017, domestic final demand increased by 3.1 per cent and private demand increased by 2.8 per cent.[152]

**[155]** Further research has since been undertaken on recent wages growth and was available for this Review (and included as part of the Research reference list). These include research from the IMF, RBA and the Commonwealth Treasury.

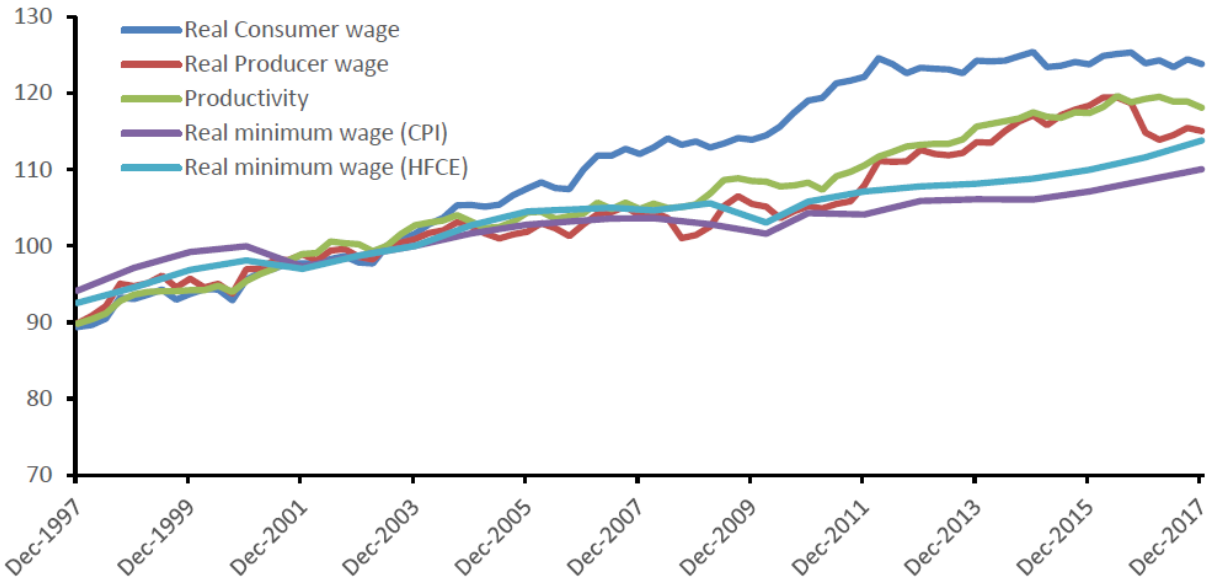
**[156]** The IMF analysed recent wage dynamics in advanced countries and concluded that the majority of the slowdown can be explained by labour market slack (both unemployment and underutilisation), low inflation expectations and trend productivity growth.[153] Although no specific analysis was undertaken of Australia, the research considered countries where the unemployment rate was still above the levels before the GFC (such as Australia).

**[157]** The Commonwealth Treasury has published a series of research papers that analysed different aspects of recent trends in wages growth. They start from a position that '[t]he key driver of wage growth over the long-term is productivity and inflation expectations. This means that real wage growth—wage growth relative to the increase in prices in the economy—reflects labour productivity growth.'[154] Further specific points from the research are that:

- over the past five years, annual real wage growth (measured by the WPI) has averaged 0.4 per cent, compared with 1.0 per cent in the decade prior;[155]
- all industries have experienced lower wage growth over the last five years, particularly in Mining;[156]
- the weakness in real wage growth has not been as pronounced as the weakness in nominal wage growth due to low inflation;[157]
- weaker labour productivity growth seems unlikely to be a cause of the current period of low wage growth in Australia and over the past five years labour productivity has grown at about the 30-year average;[158]
- the unwinding of the mining investment boom and spare capacity in the labour market are important cyclical factors that are currently weighing on wage growth;[159]
- wage growth is weaker than the historical relationship between wage growth and the unemployment rate would suggest;[160]
- the Treasury Labour Market Conditions index was positive as at September 2017—i.e. conditions in the labour market were tighter than average, following a prolonged period of weak labour market conditions;[161]
- inflation expectations are low and this is weighing on nominal growth in wages, because wage-setting decisions are forward-looking;[162]
- many advanced economies have experienced low wage growth, particularly since the GFC;[163] and
- structural change has caused a shift towards greater employment in the services industries which tend to have lower productivity and wages.[164]

**[158]** In response to a question on notice, the Australian Government amended a chart on growth in real wages and labour productivity during the mining boom that it had included in its initial submission to include the NMW deflated by each of the CPI and the household consumption deflator.[165] Their revised chart is included below (Chart 2.14).

**Chart 2.14: Real wages and labour productivity during the mining boom**




Note: The real producer wage is AENA (per hour) deflated by the GDP deflator; the real consumer wage is AENA (per hour) deflated by the household consumption deflator; labour productivity is per hour. March 2003 = 100; for real minimum wage June 2003 = 100.

Source: Australian Government response to questions on notice, 9 April 2018 at p. 10; ABS, *Australian National Accounts: National Income, Expenditure and Product, Dec 2017*, Catalogue No. 5206.0; Departmment of Treasury calculations.

**[159]** The chart uses measures of inflation derived from the ABS National Accounts, in addition to the usual CPI measure. It shows that the high levels of the terms of trade and the associated increases in the Australian dollar exchange rate that occurred during the resources investment boom had an unusual effect in driving a wedge between the growth in the prices facing consumers and the growth in the prices being received by producers. The net effect was that between 2002 and 2011, the real consumer wage rose by about 20 per cent while the real producer wage (deflated by the prices that producers received for their product) rose by only half that amount. Labour productivity grew in line with the real producer wage, while the real consumer wage rose at a substantially faster rate than labour productivity. Since 2011, the real consumer wage has not increased at all, while the real producer wage and labour productivity rose steadily until mid-2016 and since then both have declined.

**[160]** In the past 10 years, the real value of the NMW has grown much more slowly than the real consumer wage, but unlike that wage, it has had modest increases over the past five years. When measured by the household consumption deflator, the real value of the NMW has grown a little faster than it has when measured by the CPI over the past 10 years. But in neither case has it grown as fast as labour productivity, the real producer wage or (by a substantial margin) the real consumer wage.

**[161]** The Australian Government submitted that low wages growth 'is part of the adjustment as the economy transitions from the investment phase to the production phase of

the commodities boom.'[166] The Federal opposition also cited low GDP growth and some spare capacity in the labour market from weak demand as relevant factors.[167]

**[162]** Over the year to the December quarter 2017, the WPI for three of the most award-reliant industries increased by an amount less than the growth in award rates. In response to a question for final consultations, parties offered a number of possible reasons for the large discrepancy in increases in the WPI and that awarded in the 2016–17 Review decision. All agreed that the reasons given could not fully account for the difference. The possible reasons given included some non-compliance with the increase in the NMW and modern award minimum wages,[168] and the potential that over-award payments had been absorbed.[169] There are varying estimates about the degree of non-compliance and it is important for the integrity of the minimum wage system that the monitoring of compliance and appropriate enforcement measures are given a very high priority. However, whilst non-compliance may be a factor, it is unlikely to fully explain the most recent WPI results. In its response to the question, Ai Group provided a chart that showed the history over the past 10 years of increases to the NMW, the WPI and enterprise bargaining agreements.[170] The chart shows that the large gap between the 3.3 per cent increase from the 2016–17 Review decision and the subsequent levels of increase in the WPI (2.1 per cent for the WPI across all sectors and 1.9 per cent for the private sector WPI) is an anomaly and that these series have tracked each other more closely in the past. It is an issue which should be kept under consideration in subsequent Reviews.

**[163]** We conclude that since about 2011 a range of factors have operated to depress the rate of growth of nominal wages and, to a lesser extent, of real wages. The phenomenon is not fully understood and is not confined to Australia; and it must be noted that over the past decade real wages as measured by producer prices have continued to rise at about the rate of labour productivity. Further, the real value of the wage measured at consumer prices, while almost unchanged over the past six years, has still grown more rapidly than the real producer wage over the period since 2003.

**[164]** Whatever the relative weight that should be attributed to the many factors identified as weighing on wage growth, the low wage growth environment supports an increase to the NMW and modern award minimum wages. So too does the extent to which growth in the real values of the NMW and modern award minimum wages has lagged behind growth in labour productivity over time.

**Labour market**

**[165]** Trends relating to the labour market encompass employment and hours worked, as well as data on workforce participation indicators such as underemployment, long-term unemployment and participation rates. As in the Statistical report, trend data are used in this section unless otherwise indicated.

**Employment and hours worked**

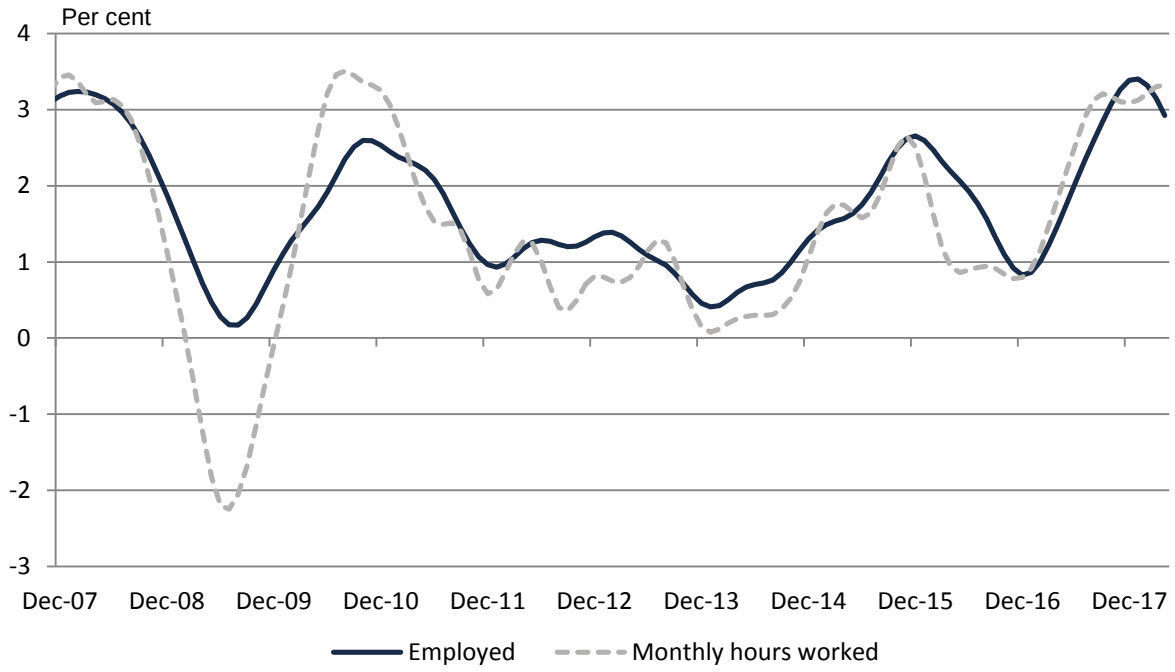
**[166]** According to the RBA's May 2018 *Statement on Monetary Policy*, conditions in the domestic labour market improved significantly over 2017 and into 2018, although spare capacity still remains:

> 'Employment grew by 3½ per cent over the past year. This is the strongest rate of growth since 2008 and full-time employment contributed the bulk of that growth.

> Employment growth has moderated in recent months, though it remains higher than working-age population growth. Leading indicators of labour demand, such as job vacancies and hiring intentions, continue to point to above-average growth in employment over the next six months, though it is not expected to be as strong as seen over the past year.'[171]

**[167]** Growth in employment and hours worked is shown in Chart 2.15. Over the year to April 2018 the number of employed persons increased by 2.9 per cent, a rate that was well above the five-year average of 1.7 per cent.[172] Similarly, hours worked increased strongly over the year, at 3.3 per cent.

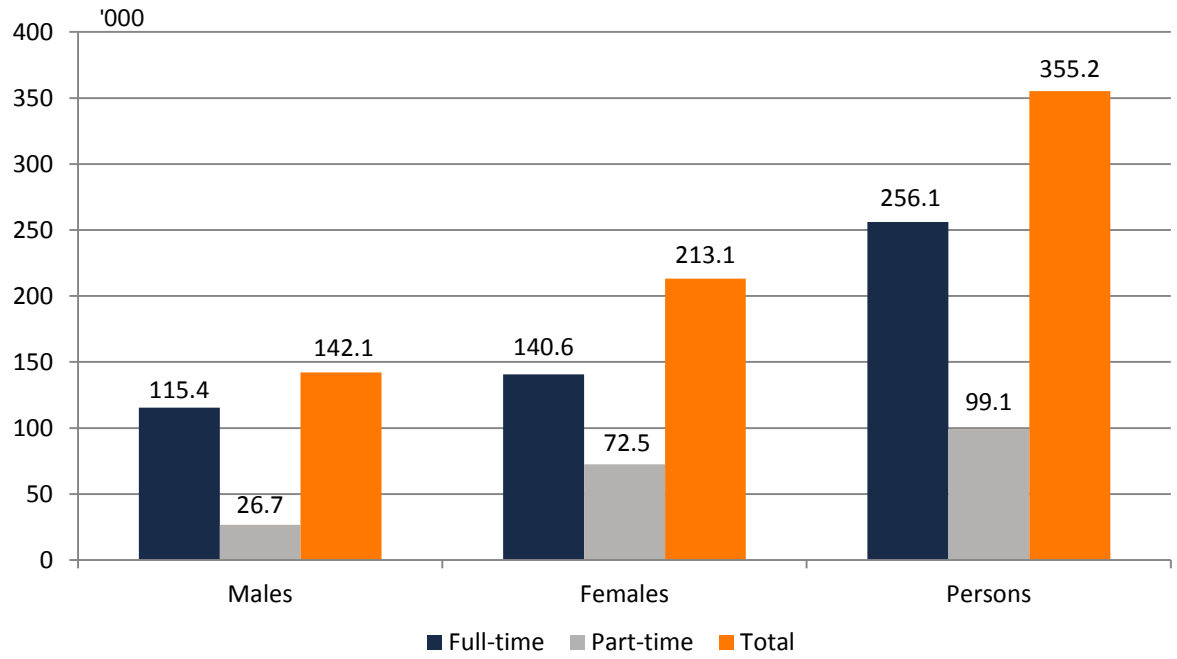
**Chart 2.15: Employed persons and monthly hours worked, growth rate over the year**




Source: Statistical report, Chart 6.2; ABS, *Labour Force, Australia, Apr 2018*, Catalogue No. 6202.0.

**[168]** Chart 2.16 shows the change in employment by full-time and part-time status and by gender over the year to April 2018. Total employment increased by 355,200 persons, with 72.1 per cent of the increase attributable to full-time employment. This is in contrast to the latest data for the previous year where only 32.4 per cent of employment growth came from full-time positions.[173] The majority of additional full-time employment went to females. Total employment growth was also higher among females, growing by 213,100 persons (3.8 per cent) compared with 142,100 persons for males (2.2 per cent).

**Chart 2.16: Change in full-time, part-time and total employment by gender, April 2017 to April 2018**




Note: All data are expressed in trend terms.

Source: Statistical report, Chart 6.4; ABS, *Labour Force, Australia, Apr 2018*, Catalogue No. 6202.0.

**[169]** Growth in employment across industries was again quite diverse: employment increased across the majority of the 19 industries over the year to the February quarter 2018, with the highest increase in Arts and recreation services (Table 2.4).

**[170]** Three out of the four most award-reliant industries experienced positive growth in employment over the year. Total employment in Retail trade increased strongly at 5.5 per cent, above the all industries average. Employment in Other services also increased above the all industries average, however, employment growth was below the all industries average in Accommodation and food services, while it fell in Administrative and support services. The employment growth in Retail trade is notable, given both the relatively rapid recent growth in multifactor productivity in that sector[174] and the generally pessimistic views about the circumstances of the retail industry that was expressed in a number of submissions.[175]

**Table 2.4: Employment by industry for selected periods**

| | Average annual growth rates (%) | Annual percentage changes (%) | | |
|---|---|---|---|---|
| | Feb-08 to Feb-18 | Feb-16 | Feb-17 | Feb-18 |
| Agriculture, forestry and fishing | –0.3 | 4.0 | –7.1 | 9.0 |
| Mining | 4.4 | –1.6 | 2.4 | 1.6 |
| Manufacturing | –1.7 | –4.1 | 4.7 | –2.4 |
| Electricity, gas, water and waste services | 2.7 | –1.2 | –2.3 | 10.6 |
| Construction | 2.2 | 2.7 | 3.7 | 9.0 |
| Wholesale trade | –0.6 | –4.1 | –2.1 | 1.9 |
| Retail trade | 0.6 | 4.3 | –3.0 | 5.5 |
| Accommodation and food services | 2.3 | 0.4 | 3.8 | 1.6 |
| Transport, postal and warehousing | 1.8 | 4.0 | –1.8 | 5.8 |
| Information media and telecommunications | –0.6 | –1.0 | 4.0 | –2.2 |
| Financial and insurance services | 0.5 | 9.1 | –0.5 | –3.2 |
| Rental, hiring and real estate services | 1.1 | 3.0 | –2.9 | 3.2 |
| Professional, scientific and technical services | 2.7 | 2.7 | 0.3 | 1.3 |
| Administrative and support services | 1.8 | 7.5 | –0.5 | –2.6 |
| Public administration and safety | 1.1 | 1.7 | 5.3 | –10.3 |
| Education and training | 2.7 | 1.3 | 5.2 | 5.6 |
| Health care and social assistance | 4.5 | 7.0 | 1.5 | 8.1 |
| Arts and recreation services | 2.8 | –0.4 | –7.9 | 17.6 |
| Other services | 1.0 | –1.1 | 2.6 | 4.8 |
| **All industries** | **1.6** | **2.4** | **1.2** | **3.3** |

Note: All data are expressed in trend terms.

Source: Statistical report, Table 6.3; ABS, *Labour Force, Detailed, Quarterly, Feb 2018*, Catalogue No. 6291.0.55.003.

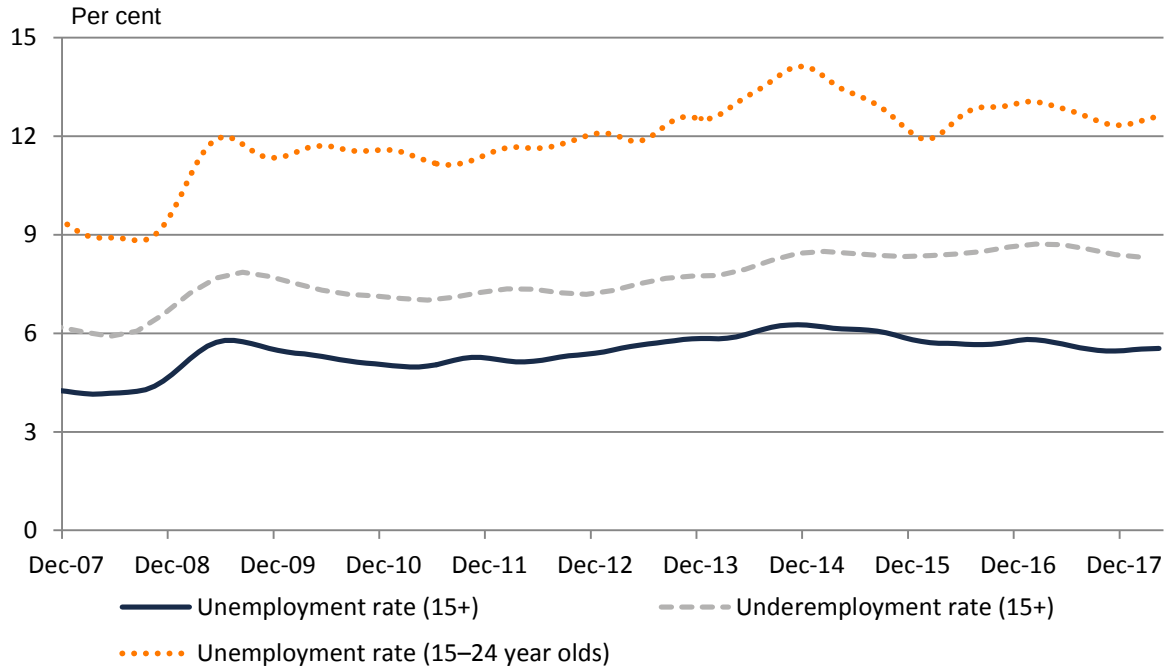
### Unemployment and underemployment

**[171]** In last year's decision, the Panel noted that since the mid-2000s the unemployment rate and underemployment rate had generally moved similarly, but had recently diverged somewhat.[176] Over the past year to April 2018, the two rates have fallen, particularly the underemployment rate. The Australian Government submitted that the increase in full-time employment has come at the same time as the decline in underemployment.[177] It may be that some of these people would have previously been classified as underemployed but ceased to be underemployed once additional hours were obtained. This would have the effect of decreasing the underemployment rate without affecting the unemployment rate.

**[172]** Despite strong employment growth, the unemployment rate only declined by 0.2 percentage points to 5.5 per cent over the year to April 2018.[178] The unemployment rate remained unchanged for the nine months to April 2018 and is below its five-year average of 5.8 per cent (Chart 2.17).[179]

**[173]** Over the year to February 2018, the underemployment rate fell 0.4 percentage points to 8.3 per cent, the equal lowest figure since August 2014. The shift from part-time employment to full-time employment may explain some of the fall in underemployment.

**Chart 2.17: Unemployment and underemployment rates**




Note: The unemployment rate and the underemployment rate is the number of unemployed and underemployed persons, respectively, expressed as a percentage of the labour force. A person is underemployed if they want, and are available, to work more hours than they currently have. Underemployment is only considered for people employed part-time and for full-time persons who, for economic reasons, worked part time hours during the reference week. All data are expressed in trend terms. The unemployment rates are monthly, while the underemployment rate is quarterly.

Source: Statistical report, Chart 6.1 and Chart 6.5; ABS, *Labour Force, Australia, Apr 2018*, Catalogue No. 6202.0.

**[174]** Over the year to April 2018, the youth unemployment rate fell by 0.3 percentage points to 12.6 per cent, which is just below its average over the past five years.[180] It has broadly followed aggregate unemployment, but with a greater degree of fluctuation, as shown in Chart 2.17.

**[175]** The Panel has previously stated that the youth unemployment rate is generally more sensitive to demand or supply shocks affecting aggregate unemployment.[181] The Australian Government explained that:

> 'When labour markets rebound, disadvantaged groups, such as youth, are generally the last to reap benefits from strong jobs growth since they are competing with cohorts possessing greater skills and experience. Similarly, when labour market conditions are weak, youth are particularly vulnerable as they often have fewer skills, and less experience and education and are therefore the first to be retrenched by employers in times of economic difficulty.'[182]

**[176]** This explanation is consistent with the greater amplitude shown in the youth unemployment rate.

**[177]** The youth unemployment rate encompasses youth who were actively looking for work. The Australian Government drew attention to the rise in the proportion of youth who were disengaged; i.e., not in the labour force and not in full-time education.[183] The increase has been driven entirely by those aged 20–24 years, especially males, whose rate of disengagement has risen from 9.2 per cent in September 2008 to 12.9 per cent in January 2018.[184] In response to a question on notice, the Australian Government submitted that the higher rate of disengagement of young men is likely to be the result of the structural changes in the economy away from male-intensive occupations towards female-intensive occupations.[185] We accept these interpretations of the causes of high levels of youth unemployment and disengagement, and the implied conclusion that the level of minimum wages for youth is not a significant cause.

**[178]** The characteristics of the underemployed were examined in research for this Review (Research Report 2/2018—*The characteristics of the underemployed and unemployed*). The research involved two parts: the first examined whether underemployed workers were similar to unemployed and other employed workers; the second involved analysis of the duration of underemployment and how underemployed workers transition out of underemployment.

**[179]** The paper found that personal and household characteristics of underemployed workers were similar to those of the unemployed. These included characteristics such as age, family type, whether born in a non-English speaking country and being a full-time student. However, after including work characteristics (therefore excluding unemployed workers), underemployed workers more closely resembled other part-time workers (not preferring to work more hours). This was the case for particular industries (Accommodation and food services, Education and training and Health care and social assistance) and casual employment.

**[180]** The dynamic analysis of underemployment found that most workers who were underemployed in one year were not underemployed in the following year, including almost half who moved to full employment (where they did not prefer to work more hours) and usually remained with the same employer. Males were more likely to exit underemployment to full employment, particularly partnered males. Older workers and those with a work-limiting health condition were more likely to exit underemployment to non-employment.

**[181]** The second part of the paper concluded that, for most people who experience underemployment, it appears to be a relatively short-term experience, although some exit underemployment to non-employment while others have a change in their preferred working hours.

### Long-term unemployment

**[182]** Long-term unemployment has risen 5.2 per cent over the past 12 months and remains relatively high, at 24.5 per cent of all unemployed.[186] Long-term unemployment is particularly damaging to skills, confidence and to the prospect of re-employment. One source of long-term unemployment is a mismatch between the skills of the unemployed and those required by employers. The Australian Government cites a 2017 report by the OECD that found that Australia has a comparatively high incidence of skills mismatch, in part caused by the restructuring of the economy away from manufacturing and towards services such as health care, education, retail and hospitality.[187]

**Workforce participation**

**[183]** The reason that strong employment growth has not translated into a much lower unemployment rate is that there has been a corresponding increase in individuals participating in the labour force.

**[184]** It is interesting to note the views expressed by the Deputy Governor of the RBA, Dr Guy Debelle, on the behaviour of unemployment. He stated that:

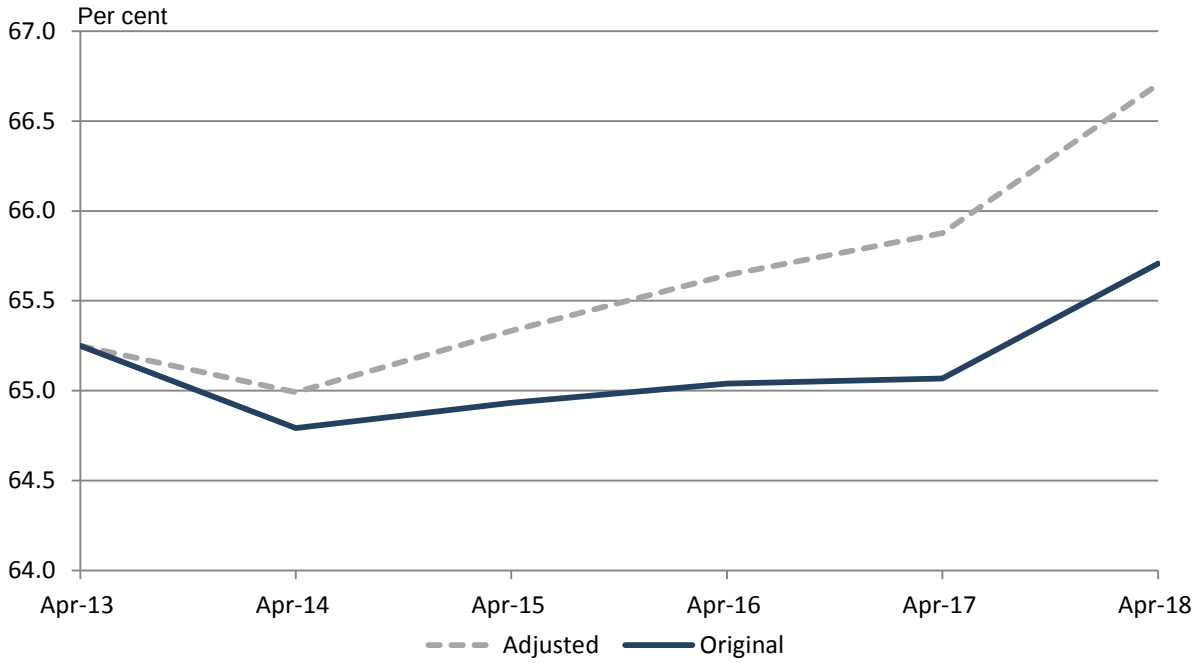
> 'The reduction in the unemployment rate has stalled for some months. I find the unemployment rate is the most useful single statistic to assess the state of the labour market. The unemployment rate has remained steady in an environment where employment growth has been measured to be particularly strong. Labour supply has risen strongly alongside it. Part of the explanation for this is an increase in female participation and older workers remaining in employment longer than previously. The strong employment growth has reduced unused capacity, which is a positive development, but not in a way that has lowered the unemployment rate.'[188]

**[185]** The Australian Government added that on their estimate, cyclical factors produced an encouraged worker effect that added 0.33 percentage points to the participation rate.[189]

**[186]** The RBA also referred to the strong employment growth—of more than 150,000 in the year to February 2018—in the Health care and social assistance industry. They noted that this particularly encouraged women aged between 25 and 44 years to enter the labour force to take these jobs.[190]

**[187]** In their submission, the Australian Government estimated that had there been no change in the age distribution of the population since January 2013, the participation rate would be 1 percentage point higher than it was in January 2018.[191] That is, the ageing of the population is having a depressing effect on the participation rate that is independent of the state of the labour market. Chart 2.18 uses the same methodology to adjust the participation rate, updating the data for April 2018. The chart shows that both measures of the participation rate increased strongly over the past year, to be at their highest levels in at least five years.

**Chart 2.18: Age-adjusted participation rates, April 2013 to April 2018**




Source: Australian Government submission at para. 111, Chart 4.4; ABS, *Labour Force, Australia, Detailed—Electronic Delivery, Apr 2018*, Catalogue No. 6291.0.55.001.

**[188]** Because of the changes in the age composition of the population, in previous decisions the Panel has preferred measures of participation for the adult working age population (20–64 years) (Table 2.5). Over the year to April 2018, this measure of the working-age participation rate continued its upward trend, increasing 0.5 percentage points to 80.3 per cent.[192] The female working age participation rate increased by 1.1 percentage points, much higher than the male working age participation rate which decreased by 0.1 percentage points. This continued a recent trend. The RBA reported that '[t]he increase in labour market participation has been most notable for females, especially those aged 25–44 years, and older males.'[193]

**Table 2.5: Participation rate by gender, 20–64 years**

| Month | Participation rate - male | Participation rate - male (ppt change) | Participation rate - female | Participation rate - female (ppt change) | Participation rate - total | Participation rate - total (ppt change) |
|---|---|---|---|---|---|---|
| Dec-07 | 86.5 | | 71.2 | | 78.8 | |
| Dec-08 | 86.3 | –0.2 | 71.6 | 0.4 | 78.9 | 0.1 |
| Dec-09 | 86.1 | –0.2 | 71.5 | –0.1 | 78.8 | –0.1 |
| Dec-10 | 86.9 | 0.8 | 72.0 | 0.5 | 79.4 | 0.7 |
| Dec-11 | 85.9 | –1.0 | 72.0 | 0.0 | 78.9 | –0.5 |
| Dec-12 | 86.4 | 0.5 | 72.0 | 0.0 | 79.1 | 0.2 |
| Dec-13 | 85.8 | –0.6 | 71.9 | 0.0 | 78.8 | –0.3 |
| Dec-14 | 85.8 | 0.0 | 72.5 | 0.6 | 79.1 | 0.3 |
| Dec-15 | 86.2 | 0.4 | 73.6 | 1.1 | 79.8 | 0.7 |
| Dec-16 | 86.0 | –0.2 | 73.7 | 0.1 | 79.8 | 0.0 |
| Dec-17 | 86.7 | 0.7 | 75.3 | 1.5 | 80.9 | 1.1 |
| Apr-18 | 85.9 | –0.1 | 74.9 | 1.1 | 80.3 | 0.5 |

Note: The participation rate is the number of persons in the labour force expressed as a percentage of the civilian population. The percentage point change is calculated in relation to the corresponding month in the previous year. All data are expressed in original terms.

Source: Statistical report, Table 6.9; ABS, *Labour Force, Australia, Detailed—Electronic Delivery, Apr 2018*, Catalogue No. 6291.0.55.001.

**[189]** The increase in participation rates is further evidence that the labour market is strengthening. Ai Group submitted that the increase in participation was a sign that current wage rates are attracting more people into the labour force.[194] We note that a change in wage rates has an ambiguous impact on labour force participation. On the one hand, a higher wage rate increases the reward for working, and hence, encourages greater participation. This is the effect on which Ai Group focussed. But a higher wage rate also means that a given level of earnings can be achieved with a reduction in working hours, and might therefore induce a lower level of family labour supply.

**[190]** Over the year to April 2018, the employment to population ratio among the adult working age population increased by 0.6 percentage points (Table 2.6). This was underpinned by an increase in the proportion of people working full time, which increased by 0.8 percentage points, above the decrease of 0.2 percentage points for part-time work.

**Table 2.6: Employment to population ratio, total and by full-time/part-time status, persons 20–64 years**

| Month | Full-time | Change over year (ppts) | Part-time | Change over year (ppts) | Total | Change over year (ppts) |
|---|---|---|---|---|---|---|
| Dec-07 | 57.6 | | 18.7 | | 76.2 | |
| Dec-08 | 57.0 | –0.6 | 19.0 | 0.4 | 76.0 | –0.2 |
| Dec-09 | 55.6 | –1.4 | 19.7 | 0.7 | 75.3 | –0.7 |
| Dec-10 | 56.6 | 1.0 | 19.8 | 0.1 | 76.4 | 1.1 |
| Dec-11 | 56.4 | –0.2 | 19.3 | –0.5 | 75.7 | –0.7 |
| Dec-12 | 56.1 | –0.3 | 19.5 | 0.2 | 75.6 | 0.0 |
| Dec-13 | 54.9 | –1.2 | 20.0 | 0.4 | 74.8 | –0.8 |
| Dec-14 | 55.2 | 0.3 | 20.0 | 0.0 | 75.2 | 0.3 |
| Dec-15 | 55.6 | 0.5 | 20.3 | 0.3 | 76.0 | 0.8 |
| Dec-16 | 55.0 | –0.6 | 20.9 | 0.6 | 75.9 | –0.1 |
| Dec-17 | 56.0 | 1.0 | 21.2 | 0.2 | 77.2 | 1.3 |
| Apr-18 | 54.8 | 0.8 | 21.5 | –0.2 | 76.4 | 0.6 |

Note: The employment to population ratio is the number of employed persons expressed as a percentage of the civilian population. Change over year (ppts) calculates the percentage point change from the corresponding month in the previous year. All data are expressed in original terms.

Source: Statistical report, Table 6.6; ABS, *Labour Force, Australia, Detailed—Electronic Delivery, Apr 2018*, Catalogue No. 6291.0.55.001.

**[191]** As was the case with the increase in the participation rate, much of the growth in the employment to population ratio was driven by increases in female employment. The female working age employment to population ratio increased by 1.3 percentage points to 71.0 per cent and the male working age employment to population ratio decreased 0.2 percentage points to 81.8 per cent.[195]

**[192]** This increase in the working-age employment to population ratio, in conjunction with the increase in employment, hours worked and participation rate, point to a labour market that is stronger than it has been in recent years.

**Labour market transitions**

**[193]** As in previous Reviews, the Australian Government presented data from the Household, Income and Labour Dynamics in Australia (HILDA) survey on duration in low-paid employment, updated for the latest release (Tables 2.7 and 2.8). It reported that '35 per cent of people who enter the workforce do so by taking a low-paid job' and that this is the case for 45 per cent of workers aged under 25 years and 43 per cent of workers with Year 12 qualifications or below.[196] The Australian Government submitted that the analysis supported its argument that low-paid employment provides opportunities or a 'stepping stone' to higher-paid employment.[197] As the Panel noted in the 2016–17 Review, the data again show that about half of low-paid workers[198] spend less than a year in low-paid work before moving to higher-paid work.[199] The remainder either spend more than one year in low-paid work, or move from a low-paid job into unemployment or not in the labour force.

**Table 2.7: Duration in low-paid employment, per cent**

| Duration | Less than 1 year | 1 to 2 years | 2 to 5 years | More than 5 years |
|---|---|---|---|---|
| Proportion | 66.6 | 18.4 | 12.8 | 2.3 |

Note: Data is based on flows into low-paid work, not the number of people in low-paid work at a point in time. Numbers are mutually exclusive.

Source: Australian Government submission, 13 March 2018 at p. 57, Table 7.1; HILDA survey, pooled waves 1 to 16.

**Table 2.8: Destination on leaving low-paid employment, per cent**

| Duration in low-paid employment | Higher paid work | Left the labour force | Unemployment |
|---|---|---|---|
| Less than 1 year | 76.8 | 16.5 | 6.7 |
| 1 to 2 years | 76.4 | 16.8 | 6.8 |
| 2 to 5 years | 80.7 | 13.1 | 6.1 |

Note: Those remaining in low pay for 5 years or more are not shown due to a small sample size.

Source: Australian Government submission, 13 March 2018 at p. 57, Table 7.2; HILDA survey, pooled waves 1 to 16.

**[194]** The above data are not significantly different to that submitted by the Australian Government in the 2016–17 Review. As such, while in the 2016–17 Review decision we agreed that employment in low-paid work is a stepping stone for many into higher-paid work, as discussed above there are many others for whom this is not true. We have also previously observed that '[w]e cannot be indifferent to the standard of living of low-paid workers just because many do not stay in that situation for long periods.'[200]

**Award-reliant industries**

**[195]** Table 2.9 summarises various indicators for award-reliant industries that were provided in previous sections. The Panel continues to use these data to assist with an understanding of the overall conditions of these industries.

**Table 2.9: Current economic indicators by award-reliant industries**

| | Accommodation and food services | Administrative and support services | Other services | Retail trade | All industries |
|---|---|---|---|---|---|
| • Percentage of non-managerial employees reliant on award wages, May 2016[a] | 42.7 | 42.1 | 34.3 | 34.5 | 24.5 |
| • Gross value added: percentage growth over the year to December quarter 2017 | 6.7 | 3.8 | –0.7 | 2.5 | 2.5 |
| Company gross operating profits: percentage growth over the year to December quarter 2017[b] | 7.0 | 53.8 | –15.0 | 10.7 | 4.3 |
| • Business entry rate, over year to June 2017 | 18.7 | 19.3 | 15.4 | 13.2 | 15.1 |
| • Business exit rate, over year to June 2017 | 15.9 | 15.2 | 12.6 | 13.8 | 12.0 |
| • Wage Price Index: percentage growth over the year to March quarter 2018a | 2.1 | 1.9 | 2.4 | 1.5 | 2.1 |
| • Percentage annual wage growth under new collective agreements December quarter 2017 | 2.1 | 2.4 | 2.8 | 2.3 | 2.5 |
| • Employment: percentage increase over the year to February quarter 2018 | 1.6 | –2.6 | 4.8 | 5.5 | 3.3 |
| • Hours worked: percentage increase over the year to February quarter 2018 | 0.3 | –4.0 | 1.3 | 10.2 | 4.2 |

Note: (a) All industries excludes Agriculture, forestry and fishing; (b) All industries excludes Education and training, Health care and social assistance and some subdivisions of Finance and insurance services. The award-reliant industries selected are the four industries with the highest proportion of employees reliant on award rates of pay according to the Employee Earnings and Hours 2016 survey. The WPI and actual hours worked data are expressed in original terms. Employment data are expressed in trend terms. Entry rates are business entries in the financial year as a proportion of total businesses operating at the start of the financial year. Exit rates are total business exits in the financial year as a proportion of total businesses operating at the start of the financial year.

Source: Statistical report, Table 7.2; ABS, *Australian National Accounts: National Income, Expenditure and Product, Dec 2017*, Catalogue No. 5206.0; ABS, *Business Indicators, Australia, Dec 2017*, Catalogue No. 5676.0; ABS, *Counts of Australian Businesses, including Entries and Exits, Jun 2013 to Jun 2017*, Catalogue No. 8165.0; ABS, *Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0; ABS, *Labour Force, Australia, Detailed, Quarterly, Feb 2018*, Catalogue No. 6291.0.55.003; ABS, *Wage Price Index, Australia, Mar 2018*, Catalogue No. 6345.0; Department of Jobs and Small Business, *Trends in Federal Enterprise Bargaining*, December quarter 2017, <http://employment.gov.au/trends-federal-enterprise-bargaining>.

**[196]** The table shows mixed fortunes for the four industries that have the highest proportion of their workforces that are paid at the award rate. We are aware that some of the indices, including growth rates of value added and profits, are quite volatile when disaggregated to this industry level. Nonetheless, we can draw some general conclusions from the data. These include:

- The most award-reliant industries mainly had higher than average rates of growth in output and in profits.

- With the exception of Retail trade, business entry rates exceeded exit rates, as they have for the whole economy.

- The WPI mostly grew at a rate that was below or at the economy-wide average, and wage growth under new collective agreements was, except in Other services, mostly below average.

- Employment growth was mixed, with strong growth in employment and in hours worked in Retail trade but weaker growth, or some decline, in the other sectors.

**[197]** The evidence from this table suggests that the four most award-reliant industries have performed relatively well over the past year. Accommodation and food services and Administrative and support services both had good growth in output, profits and entry of new businesses, but had relatively low growth in bargained wages and below average or negative growth in employment. In contrast, Other services showed a decline in profitability but relatively high growth in employment. Retail trade stands out as having both a significant improvement in profitability and a high growth in employment (but little growth in wages). The data on Retail trade do not support the somewhat negative picture that was provided in a number of submissions.[201] ACCI noted the relatively strong productivity growth in Retail trade.[202] This is consistent with the industry's relatively strong profit growth but not with its strong employment growth. The observation by the Australian Government that Retail trade 'might be passing on productivity increases through lower consumer prices rather than higher nominal wages'[203] may provide a partial explanation for the low growth in wages in that sector. We accept that the retail industry is experiencing technological disruption and strong international competition, together with subdued demand from consumers. Further, there will be diversity of experience among different parts of the retail sector. Nonetheless, it appears that the sector has recently managed to increase output, profits and employment in the face of these challenges.

**[198]** As shown in Table 2.9, the WPI grew by 2.1 per cent for Accommodation and food services; 1.9 per cent for Administrative and support services; and 1.5 per cent for Retail trade over the year to the March quarter 2018. During that year, the NMW and modern award minimum wages increased by 3.3 per cent. It remains a puzzle as to why the increase in minimum wages that was awarded in the 2016–17 Review is not reflected more fully in the WPI for the industries that are most affected by this decision. As we have mentioned, in response to a question on notice on this matter, the parties offered a number of possible reasons, but all agreed that the reasons given could not fully account for the difference.[204]

**Apprenticeships and traineeships**

**[199]** ACCI, ACOSS, ARA and Housing Industry Association (HIA) all highlighted in their submissions the ongoing reduction in commencement and in-training rates for apprenticeships and traineeships since 2012.[205] Both ACCI and HIA also referred to an increase in cancellation and withdrawal rates for apprenticeships and traineeships over the year to June 2017.[206]

**[200]** ACCI[207] and ARA[208] attributed the long-term decline in apprenticeship and traineeship commencement rates to demand-side factors (that have reduced employer demand for apprentices), specifically, on-going increases in modern award minimum wages and their cumulative effects.

**[201]** Conversely, ACOSS attributed the long-term decline in trade commencement rates to supply-side factors (that have reduced the number of people wanting to undertake apprenticeships), including, but not limited to, age-related cultural issues, wage rates and the duration of apprenticeships.[209] ACCI also noted the removal of government subsidies for adult apprentices in reducing commencement and completion rates for trade apprenticeships for those aged 25 years and older.[210]

**[202]** As outlined in the last Review, the Commission published Research Report 3/2017– *Factors affecting apprenticeships and traineeships* in February 2017.[211] This report discussed both supply-side and demand-side factors that can affect people commencing and completing apprenticeships and traineeships.

**[203]** Part II of this report contended that demand-side factors were dominant in determining apprenticeship and traineeship rates, as opposed to supply-side factors, and suggested that commencement and in-training rates would be higher if more apprenticeships and traineeships were offered.

**[204]** The report concluded that the decline in government subsidies clearly contributed to the decline in commencement rates, whilst the decision made by the Full Bench in the 2013 Modern Awards Review (*Apprentices decision*)[212] to increase apprentice wages 'may have played a role, but it seems that any effect appears minor.'[213] The report also concluded that 'employers are becoming increasingly less enamoured with the apprenticeship and traineeship model.'[214]

**[205]** The Panel concluded from this research that although both the removal of government subsidies and the *Apprentices decision* contributed to a decline in commencement rates, the *Apprentices decision* only had a minor effect.[215] The latter conclusion was supported by the occurrence of over-award payments to apprentices and the lack of uniformity in commencement trends across industries. Nothing advanced in the submissions in this Review would cause us to reach any different conclusion.

**Economic outlook**

**[206]** The economic forecasts from the Australian Government, as presented in the 2018–19 Budget, the RBA and the IMF all point to improved economic conditions.

**Global forecasts**

**[207]** The IMF global growth forecasts are presented in Table 2.10 and show a projected increase in Australian GDP growth to around 3 per cent or more in 2018 and 2019, a significant increase from 2017 and higher than for other advanced economies. Growth in world GDP is expected to increase slightly to 3.9 per cent.

**Table 2.10: IMF real GDP growth forecasts**

| | 2017 (estimates) | 2018 (projections) | 2019 (projections) |
|---|---|---|---|
| Australia | 2.3 | 3.0 | 3.1 |
| Advanced economies | 2.3 | 2.5 | 2.2 |
| World | 3.8 | 3.9 | 3.9 |

Note: Year-on-year percentage changes shown. World and domestic economy growth rates are calculated using GDP weights based on purchasing power parity (PPP).

Source: Statistical report, Table 12.2; IMF (2018), *World Economic Outlook*, April, http://www.imf.org/en/Publications/WEO/Issues/2018/03/20/world-economic-outlook-april-2018?cid=em-COM-123-36912.

**[208]** According to the 2018–19 Budget, global growth over 2017 was at its fastest pace since 2011, with the economic strength seen across most advanced and emerging economies expected to continue in the near term. The Australian Government forecasts, provided in Table 2.11, show that growth in Australia's major trading partners is expected to remain above world growth. Short-term risks are evenly balanced. The possibility of growth exceeding expectations in some economies is an upside risk, whilst the RBA listed a number of downside risks to global growth including an escalation in protectionist measures or geopolitical events, the risk that global inflation will be higher than expected prompting a faster tightening of monetary policy and the continuing high debt levels in China. Europe continues to face legacy issues following the GFC and upward movement in US interest rates is also a source of uncertainty.[216]

**Table 2.11: 2018–19 Budget forecasts of international GDP growth**

| | 2017 (actuals) | 2018 (forecasts) | 2019 (forecasts) | 2020 (forecasts) |
|---|---|---|---|---|
| World | 3.8 | 3¾ | 3¾ | 3¾ |
| Major trading partners | 4.6 | 4¼ | 4¼ | 4¼ |

Note: World growth rates are calculated using GDP weights based on PPP, while growth rates for major trading partners are calculated using export trade weights.

Source: Statistical report, Table 12.1; Australian Government, *Budget Paper No. 1: Budget Strategy and Outlook 2018–19*, Canberra, p. 2-10.

## Australian forecasts

**[209]** The 2018–19 Budget stated that the Australian economy strengthened in the second half of 2017 due to contributions from non-mining business investment and household consumption which are forecast to continue.[217] Recent employment growth has led to a strengthening in household consumption which is forecast to continue to grow faster than household income, leading to a continued fall in the household saving rate. However, uncertainty remains with regards to the extent of decline in this rate, with changes in asset prices and attitudes to savings and debt to affect the outlook for both household consumption and income.[218]

**[210]** Wage growth is forecast to increase as the economy improves above its potential rate and spare capacity is absorbed. While leading indicators suggest continued jobs growth, the

higher participation rate presents uncertainty around the amount of spare capacity in the labour market and wage pressures.[219] Inflation is also forecast to increase over the period.[220]

**[211]** The effect of falling mining investment is diminishing and while it is expected to decline further, its impact on the Australian economy is almost complete.[221] The final transition to the production phase of the mining boom is expected by the end of the forecast period.[222] The 2018–19 Budget forecasts that non-mining investment will increase by 10½ per cent in the 2017–18 financial year, then moderate to a 'still solid pace' of 5½ per cent in 2018–19 and 5 per cent in 2019–20.[223]

**[212]** Table 2.12 presents the Australian Treasury forecasts for the domestic economy.

**Table 2.12: 2018–19 Budget, domestic economic forecasts[(a)]**

| | Outcomes[(b)] | Forecasts | | |
|---|---|---|---|---|
| | **2016–17** | **2017–18** | **2018–19** | **2019–20** |
| **Real gross domestic product** | **2.1** | **2¾** | **3** | **3** |
| Household consumption | 2.6 | 2¾ | 2¾ | 3 |
| Dwelling investment | 2.8 | –3 | 1½ | 0 |
| Total business investment[(c)] | –4.0 | 4½ | 3 | 4½ |
| Mining investment | –24.2 | –11 | –7 | 3½ |
| Non-mining investment | 6.1 | 10½ | 5½ | 5 |
| Private final demand[(c)] | 1.4 | 2½ | 2½ | 3 |
| Public final demand[(c)] | 5.1 | 4¾ | 3 | 2¾ |
| Change in inventories[(d)] | 0.1 | –¼ | 0 | 0 |
| Gross national expenditure | 2.4 | 3 | 2¾ | 3 |
| Exports of goods and services | 5.5 | 2½ | 4 | 2½ |
| Imports of goods and services | 4.9 | 5 | 2 | 2½ |
| Net exports[(d)] | 0.0 | –½ | ¼ | 0 |
| Nominal gross domestic product | 5.9 | 4¼ | 3¾ | 4¾ |
| Prices and wages | | | | |
| Consumer price index[(e)] | 1.9 | 2 | 2¼ | 2½ |
| Wage price index[(f)] | 1.9 | 2¼ | 2¾ | 3¼ |
| GDP deflator | 3.8 | 1¾ | ¾ | 1½ |
| Labour market | | | | |
| Participation rate (per cent)[(g)] | 65.0 | 65½ | 65½ | 65½ |
| Employment[(f)] | 1.9 | 2¾ | 1½ | 1½ |
| Unemployment rate (per cent)[(g)] | 5.6 | 5½ | 5¼ | 5¼ |
| Balance of payments | | | | |
| Terms of trade[(h)] | 14.4 | 1½ | –5¼ | –2¼ |
| Current account balance (per cent of GDP) | –2.1 | –2¼ | –2¾ | –3¼ |

Note: The forecasts for the domestic economy are based on several technical assumptions. The exchange rate is assumed to remain around its recent average level—a trade-weighted index of around 63 and a US dollar exchange rate of around 77 US cents. Interest rates are assumed to move broadly in line with market expectations. World oil prices (Malaysian Tapis) are assumed to remain around US$71 per barrel.

(a) Percentage change on preceding year unless otherwise indicated.
(b) Calculated using original data unless otherwise indicated.
(c) Excluding second-hand asset sales from the public sector to the private sector.
(d) Percentage point contribution to growth in GDP.
(e) Through-the-year growth rate to the June quarter.
(f) Seasonally adjusted, through-the-year growth rate to the June quarter.
(g) Seasonally adjusted rate for the June quarter.
(h) The forecasts are underpinned by price assumptions for key commodities: Iron ore spot price remaining at US$55/tonne free-on-board (FOB); metallurgical coal spot price falling over the June and September quarters of 2018 to reach US$120/tonne FOB by the December 2018 quarter; and the thermal coal spot price remaining at US$93/tonne FOB.

Source: Statistical report, Table 12.3; Australian Government, *Budget Paper No. 1: Budget Strategy and Outlook 2018–19*, Canberra, p. 2-6.

**[213]** The RBA expects GDP growth to be around trend in the near term, peaking at 3½ per cent over the year to the June quarter 2019.[224] The RBA's GDP forecasts are for stronger growth than in the Budget. The unemployment rate is forecast by the RBA to remain at around 5½ per cent over 2018 before falling gradually. Growth in the CPI is forecast to pick up to be around 2¼ per cent over most of the forecast period with underlying inflation increasing more gradually (Table 2.13).

**Table 2.13: RBA economic forecasts**

| | Dec-17 | Jun-18 | Dec-18 | Jun-19 | Dec-19 | Jun-20 |
|---|---|---|---|---|---|---|
| GDP growth | 2.4 | 2¾ | 3¼ | 3½ | 3¼ | 3 |
| Unemployment rate* | 5.5 | 5½ | 5½ | 5¼ | 5¼ | 5¼ |
| CPI inflation | 1.9 | 2 | 2¼ | 2¼ | 2¼ | 2¼ |
| Underlying inflation | 1¾ | 2 | 2 | 2 | 2 | 2¼ |

Note: *Average rate in the quarter. Percentage change for the year-ended shown. Technical assumptions include A$ at US$0.75, Trade Weighted Index at 62, Brent crude oil price at US$71 per barrel. Shaded regions are historical data.

Source: Statistical report, Table 12.4; RBA (2018), *Statement on Monetary Policy*, May, p. 58, Table 5.1.

**[214]** The RBA's forecast of strengthening GDP growth is due to the drag from decreasing mining investment subsiding and the current monetary policy settings providing support for growth in household income and consumption as well as non-mining business investment.[225] GDP growth is expected to slow towards the end of the forecast period due to the production of liquefied natural gas reaching its 'steady-state' level.[226] Growth in non-mining business investment is expected to remain 'solid over the coming year.'[227]

**[215]** The RBA identifies a number of potential risks to its domestic forecasts being:

- Uncertainty about how much spare capacity there is in the labour market and how quickly it might decline, particularly given the recent improvements in the participation rate;
- Uncertainty about how much decline in spare capacity will build into wage pressures and inflation;
- Uncertainty about the outlook for household income growth which translates into uncertainty about household consumption and so GDP; and
- High levels of household debt are likely to increase the sensitivity of households' consumption decisions to changes in their income and wealth.[228]

**[216]** The Budget forecasts presented in the 2016–17 Review expected wages growth, as measured by the WPI, to be 2½ per cent over 2017–18.[229] This has been reduced to 2¼ per cent in the 2018–19 Budget. The 2018–19 Budget also forecasts the WPI to increase to 2¾ percent in 2018–19 and to 3¼ percent in 2019–20. The RBA does not provide a forecast for the WPI but expects wages growth to 'pick up only gradually as labour market spare capacity declines and any effects of structural factors that are weighing on wages growth start to dissipate.'[230]

**[217]** In response to questions about the WPI forecasts during the consultations on 15 May 2018, the Australian Government representatives submitted that the WPI was expected to increase as higher GDP growth leads to a tighter labour market. Productivity growth and the forecast increases in inflation were also expected to result in an increase in the WPI.[231]

**[218]** While we expect wages growth to pick up over time, a number of considerations suggest that this is likely to be a more gradual process than that forecast in the Budget.

**[219]** First, the latest data show that the WPI increased by 2.1 per cent over the year to the March quarter 2018, having increased by 0.5 per cent in each of the last two quarters. It would therefore require an increase of 0.7 per cent in the June quarter 2018 to achieve the Budget forecast of 2¼ percent. An increase of 0.7 percent would be the highest quarterly increase since the March quarter 2014. Such an outcome seems unlikely.

**[220]** Second, the international experience shows that a reduced unemployment rate has not immediately translated into stronger wages growth. Wages growth has remained subdued in the US despite strong labour markets, low unemployment and a pick-up in overall economic performance.[232] As the RBA has cautioned, 'there is uncertainty around the level of the unemployment rate that is consistent with full employment (that is, spare capacity in the labour market having been fully absorbed). If experience overseas is any guide, this level of the unemployment rate could turn out to be lower than previously assumed.'[233] Further, in a recent speech, RBA Deputy Governor Dr Guy Debelle observed:

> 'The experience of other countries with labour markets closer to full capacity than Australia's is that wages growth may remain lower than historical experience would suggest. In Australia, 2 per cent seems to have become the focal point for wage outcomes, compared with 3–4 per cent in the past.'[234]

**[221]** The Deputy Governor concluded that there is a risk that it may take a lower unemployment rate than currently expected to generate higher wages growth, that is, above 2 per cent growth. Recent research supports this contention, with an estimate of the long run annual WPI growth at less than 3 per cent in Australia[235] and researchers in the United Kingdom (UK) suggesting that the natural rate of unemployment (or NAIRU) is closer to 3 per cent in the UK and 'is well below 4% and perhaps even below 3%' in most advanced countries.[236] We note that both the Budget and RBA forecasts are for the unemployment rate to only fall to 5¼ per cent by 2019–20.

**[222]** Third, the AAWI for approved federal enterprise agreements reached a low of 2.2 per cent in the September quarter 2017, increasing to 2.5 per cent in the December quarter 2017. As the RBA has observed, these agreements will be in place for a little over three years,[237] suggesting that 'new enterprise bargaining agreements with lower wage growth than current agreements will exert downward pressure on overall wage growth for the next couple of years.'[238]

**[223]** The information before us in this Review does not suggest that wages growth will accelerate significantly in the near term. The Budget forecasts in respect of the WPI appear overly optimistic, particularly as the RBA expects increases in wages growth to be gradual and the unemployment rate is only expected to decline slightly. In sum, while we expect that our decision in this Review will result in an increase in the WPI, we do not expect any other significant increase in wages growth in the short term.

**Employment effects of minimum wage increases**

**[224]** Given its significance, the Panel pays close attention to new research that might provide additional insight on the impact of minimum wages on employment, hours worked and unemployment. Since the last Review, there were an unusually large number of new studies, most of them based on other countries.

**[225]** The ACTU identified, and briefly described, four papers written on the Seattle experience, six other new papers for the US, four papers on the German experience, the many papers commissioned by the UK Low Pay Commission, and a number of others including those by international agencies.[239] All these were published within the past 18 months.

**[226]** The UK Low Pay Commission has commissioned research on a range of possible consequences of the decisions that they make. Of particular interest are studies on the effect of the introduction of the National Living Wage (NLW) and meta studies that seek to draw lessons from the full range of relevant literature. The NLW increased the minimum wage for those over the age of 24 years by 7.5 per cent in 2016 and led to a minimum wage bite of 56.4 per cent.[240]

**[227]** In the US, particular attention has focussed on the implementation in the city of Seattle of an increase to their minimum wage of 58 per cent for large employers (to $15.00) and 37 per cent (to $13.00) for smaller employers, between April 2015 and January 2018.

**[228]** Of particular interest for this Review is a paper by Bishop of the RBA. Bishop (2018) used unpublished job-level data from a survey of firms undertaken for the construction of the ABS WPI survey.[241] The survey has not previously been used for an assessment of any types of employment changes.

**[229]** A feature of the WPI survey is that the unit of analysis is a job rather than an employee. The survey can identify if a job is paid at an award rate, and if it continues from one period to the next (independent of who might be employed in that job). Firms and their jobs are followed for a period of five years. The sample for the research was restricted to private sector jobs (full or part time) filled by adults on award rates of pay and excluded juniors, apprentices and trainees. The data used have several distinct advantages over other sources of data used in Australian (and many international) studies. The jobs that are paid the award rate, the rate of pay and the hours worked in those jobs, are obtained from firms' payroll records. Further, this information for each individual job is observed every quarter for five years. There are about 18,000 jobs observed in each quarter, 15–20 per cent of which are paid exactly at the award rate.[242]

**[230]** Bishop analysed the period between 1998 and 2008 when minimum wages increased by a flat dollar amount, which led to larger percentage increases for lower-paid award-reliant jobs compared with higher-paid award-reliant jobs. Using the difference-in-difference method, Bishop found that changes in the NMW and modern award minimum wages were almost fully passed through to wages.[243] To determine any employment effects, Bishop estimated the impact on the number of hours worked and the extent to which jobs were eliminated in response to increases in award rates. He found no statistically significant effect on either measure.[244]

**[231]** However, Bishop (2018) cautioned that this does not rule out an adverse effect on employment borne by job seekers rather than job holders.[245] He also observed that 'the results may not necessarily generalize to large, unanticipated changes in award wages.'[246]

**[232]** The research by Bishop has been published by the RBA, but is yet to be fully evaluated by other researchers. Nonetheless, it is an important addition to the very limited research that is available for Australia.

**[233]** Research commissioned by the UK Low Pay Commission includes an interim report on the impact of the NLW on employment and hours.[247] The interim report found that the NLW led to large increases in real wages for NLW workers, particularly for those who were previously paid the UK NMW, and larger for those paid just above the NLW than for those earning higher wages. Using variations of the difference-in-difference approach, the report did not find evidence of a robust impact on employment, although the report found mixed evidence on hours worked for those who retained their jobs.[248] We note that this is an interim, not the final, report.

**[234]** Researchers in the UK are now reasonably settled on the view that, at the levels and rates of change in the minimum wages experienced, there is little or no disemployment effect. The situation in the US is quite different. The impact on employment from minimum wages and adjustments remain a point of contention for US labour economists. This dispute has intensified as substantial wage increases have been implemented: more than 30 US states, cities or counties have implemented or have committed to implement minimum wage policies ranging from $11.00 to $15.00 per hour.[249] The first jurisdiction to begin implementation was Seattle.

**[235]** In April 2015, Seattle increased its minimum wage from $9.47 an hour to $11.00—an increase of 16.2 per cent. In January 2016, the minimum was increased to $13.00 an hour for large employers that do not provide health insurance—an increase of 18.2 per cent. For these large employers, the rate increased again in January 2017 by 15.4 per cent to reach $15.00. For small employers and those contributing to health insurance, the rate will increase progressively to $15.00 at various times out to 2021.[250] The minimum wage for large companies that do not provide health insurance has risen by a cumulative 58.4 per cent over a little less than three years.

**[236]** These increases are far beyond what we and other participants would consider 'modest.' However, academic researchers who have been pressing for higher minimum wages argue that the increases to $13.00 are within the range of increases that research has shown had little or no impact on employment. They focus on the starting point and the ratio of minimum wages to median wages (i.e., the minimum wage bite). According to Zipperer and Schmitt (2017), increasing the minimum wage up to a level that is about half or less of an area's median wage is expected to lead at most to a small reduction in employment. The observed range of the minimum wage bite that covers 90 per cent of cases is 32 per cent to 55 per cent.[251] The $13.00 increase lifted the Seattle bite to 50.7 per cent. The increase to $15.00 lifted the bite to a little over 55 per cent.[252]

**[237]** Two academic teams have studied the impact of the first two steps implemented by Seattle—i.e., the increase to $13.00. Neither has, at this point, been peer reviewed. While their findings were vastly different, they were consistent with each group's prior views. Reich et al. (2017) conducted the first of these studies. They also used the synthetic control method.

Their focus was on the food service and restaurant sectors. This is also common practice and is based on the view that the impact of the minimum wage on employment will be largest for those workers whose wages experience the largest rise in the minimum wage.[253] The study's results show that wages in food services did increase—indicating the policy achieved its goal. Wages increased much less among full services restaurants, indicating employers took advantage of the tip credit which is quite common across the US but was only introduced in Seattle as part of the minimum wage package. However, employment in the food sector was not affected. The authors contend the Seattle experience extends knowledge of minimum wage effects to policies as high as $13.00. However, they note that the 'new wave of minimum wages policies'[254] and the extent of the increases being implemented lie well beyond previous studies of the topic.[255]

**[238]** The second Seattle study was undertaken by Jardim et al. (2017). The study used administrative data on quarterly payroll records for all workers who receive wages in Washington and are covered by unemployment insurance for the period between 2005 and the third quarter of 2016. The data included earnings and hours for each quarter for each worker. For workers earning below $19.00 per hour, the study found no statistically significant impact on employment and hours resulting from the increase in the minimum wage from $9.47 to $11.00. For the increase to $13.00 it found negative effects of around 7 per cent for employment and 9 per cent for hours worked.[256]

**[239]** The data used by Jardim et al. (2017) enabled them to analyse individual industries. They used these data to analyse the impact on the restaurant industry as it is often the only sector studied. They found a zero or near zero impact on headcount employment, which, of course, was also found by Reich et al. and many earlier studies which have focussed on restaurant workers and teenagers.

**[240]** Zipperer and Schmitt (2017) have criticised the Jardim et al. study saying it has a number of 'data and methodological problems that bias the study in the direction of finding job loss, even where there may have been no job loss at all.'[257]

**[241]** Neumark (2017) examined why, even with developments in data and new methodologies, the employment effects of minimum wages remains contentious. Like Reich, he is very conscious that what is happening across many states and counties is well outside past experience. He notes that '[t]rying to predict the effects of large minimum wage increases from simple extrapolation of reduced-form estimates of the employment effects of minimum wages, based on evidence from much lower minimum levels and much more moderate changes, is a highly dubious exercise.'[258]

**[242]** In a peer reviewed paper, Totty (2017) used factor model methods 'to resolve issues in the minimum wage-employment debate', explaining that the methods are 'robust to critiques from either side of the debate.'[259] He analysed data on restaurant workers and teenagers and found that estimates from factor model methods were smaller than those produced by other methods.[260] Overall, Totty found little to no effect of minimum wage increases on restaurant or teenage employment over the last three decades but cautioned that the size of the minimum wage increase is important and that his study may not be informative about the effects of larger increases.[261]

**[243]** Australia has not had a long period in which its minimum wages have been frozen in nominal terms. Consistent with this we have a minimum wage bite that is relatively high.

Although our circumstances are very different from those in the US, we will observe future developments and invite parties to consider this research in their submissions to future Reviews.

**[244]** Most of the new research, particularly that of Bishop, reinforces the view of the Panel that moderate and regular increases to the NMW and to modern award minimum wages do not cause significant job losses or reductions in hours worked.

**[245]** For completeness, we turn to consider the position put by the ACTU that increased wages for the low paid would likely raise aggregate demand 'because low paid people spend most or all of their incomes'[262] and thereby have positive employment effects. In response to a question from the Panel, the ACTU estimated that an increase in minimum wages by the amount of its claim would (using two different methodologies) result in an increase in employment of between 40 000 and 57 000 in the first year and 27 000 and 30 000 in the second year.[263]

**[246]** Ai Group argued that there would be a number of offsetting considerations which would 'impede the impact on aggregate demand of an increase in minimum wage rates.'[264] These included the effect of taxes and the changes to income transfers on the amount finally received by the worker, that many low-paid individuals are in middle and high-income households, and that those who have to pay wage increases may correspondingly reduce spending and investment.[265] ACCI responded by arguing that '[a]ggregate household consumption is best encouraged by policies that promote greater workforce participation, employment growth and a low unemployment rate.'[266]

**[247]** The Australian Government concluded that '[t]he net effect of raising minimum wages on aggregate household incomes is ambiguous and rough calculations suggest that the net effect can be close to zero.'[267]

**[248]** This issue was canvassed in last year's Review when the Panel found that the impact of an increase in minimum wages was 'not likely to be comparable to that of a public sector macroeconomic stimulus.'[268] Nonetheless, the ACTU submission makes the important point that increases to the NMW and award wages are likely to have some effect on consumer demand that needs to be taken into account.'[269] We remain of that view. Its significance for this Review is not that we seek to have an effect on macroeconomic outcomes, as suggested by ACCI.[270] Rather, it provides some part of the reasoning for why a modest increase in minimum wage rates has little negative impact on employment.

**The incentive to seek employment at the NMW and the tax-transfer system**

**[249]** The Panel has previously stated that the incentives for people to obtain paid work are a relevant consideration in a Review[271] and that the level of the NMW and modern award minimum wages 'will play some, but probably a small, part' in determining household and individual appetite for paid employment.[272]

**[250]** As in previous Reviews,[273] the Australian Government modelled the effect of the tax-transfer system on changes in disposable income when unemployed members of various hypothetical household types obtain employment at the NMW.[274]

**[251]** The modelling found that all household types were better off after an unemployed member gained employment,[275] with some variation between households. For example, a single adult household without children increased disposable income by 127.9 per cent by obtaining a full-time NMW job. However, a second member of a household with two children (with child care) increased disposable income by only 5.6 per cent when they found a part-time NMW job.[276]

**[252]** As we noted in the 2016–17 Review, those who received the greatest financial benefit from obtaining employment are also those who receive the least in payments from the tax-transfer system.[277]

**[253]** Based on the Australian Government's modelling, as at 1 January 2018, the NMW was set at a sufficient level to ensure all persons employed at the NMW would be better off than if unemployed and in receipt of welfare benefits. It is important to note, however, that in some cases, this net financial gain is quite small and may become negligible once incidental costs of employment (including transport costs) are taken into account.

**Conclusion**

**[254]** As compared to the 2016–17 Review, the economic indicators point more unequivocally to a healthy national economy and labour market. GDP grew by 2.4 per cent, consistent with the five-year average for economic growth, and equalled or exceeded the average for the major seven OECD countries across three of the five quarters to December 2017. RNNDI has grown at a rate (1.5 per cent) that is close to the five-year average. We draw attention, however, to the fact that RNNDI per capita is no higher in the December quarter 2017 than it was in the December quarter 2011. Growth in 2017 was broad-based, with 16 out of 19 industries recording growth. There was a significant contraction (8.8 per cent) in one industry only, Agriculture, forestry and fishing, but this followed growth of 22.5 per cent in 2016.

**[255]** Business conditions remain positive. Profits grew by 4.3 per cent in 2017 and by 5.8 per cent in the non-mining sector. This growth, coupled with low wages growth has caused the profit share of total factor income to remain at around its highest level since 2013. The business bankruptcy rate remained stable at a comparatively low level compared to the whole of the previous decade,[278] business survival rates are the highest in at least a decade and business entry rates exceeded business exit rates by a larger than usual margin. Business surveys, including those for small and medium businesses, show that business conditions are very healthy, with above average expectations for future investment and employment.

**[256]** The labour market is strong. Total employment increased by 355,200 over the year to April 2018, with about three-quarters of the growth being in full-time employment (unlike previous years in which growth in part-time employment predominated). Employment grew in 14 of the 19 industry sectors. The unemployment rate and the underemployment rate have declined only slightly, reflecting a sharp rise in the participation rate. The age-adjusted participation rate reached a historic high in April 2018. The employment to population ratio is also at a historic high. We accept the view that the persistence of long-term unemployment and the rise in disengagement among 20–24 year old adults are principally the result of rapid structural change in the economy that is causing a relatively high mismatch between the skills of the non-employed and those sought by employers. There was no evidence that it has been caused by excessive levels of minimum wages. We consider that the labour market is

currently supporting social inclusion through increased workforce participation and that this is not being inhibited by the current safety net of the NMW and modern award minimum wages.

**[257]** Inflation and wages growth remain low. The CPI increased by 1.9 per cent over the year to the March quarter 2018 and underlying inflation and the LCI for employee households rose by 2 per cent. Despite substantial employment growth, there was no appreciable acceleration in wages growth in 2017. The WPI increased by 2.1 per cent, which is slightly below the average for the last five years and historically very low, and the rate of wage increases arising from federal enterprise agreements is significantly below the five-year average.

**[258]** Measures of labour productivity showed a decline during 2017. As discussed earlier, annual measures of productivity, which may be the subject of subsequent revision, must be approached with caution. It is likely that the measure of productivity for 2017 has been affected by a surge in the total number of hours worked. When measured over the course of the business cycle, the rate of growth in labour productivity is 1.9 per cent per annum, and improvements to multifactor productivity have been making a substantial contribution to this.

**[259]** We remain of the view that modest and regular minimum wage increases do not result in disemployment effects or inhibit workforce participation. The strongest new evidence in support of this view is that provided for Australia in the 2018 paper by Bishop. Recent research in the UK, including that commissioned by the UK Low Pay Commission, continues to support this conclusion. The position is more contested in the US where studies, including those of the very large minimum wage increases in Seattle, have rendered mixed and conflicting results. The recent US studies are, in our view, of limited relevance given that the minimum wages increases involved were as high as 37 per cent, and implemented in a short space of time from a low base (that is, they did not, in any view, involve 'modest and regular' increases).

**[260]** We expressed the view in the 2016–17 Review that the international research, particularly that from the UK, suggested that the Panel's past assessment of what constitutes a 'modest' increase may have been overly cautious in terms of its assessed disemployment effects.[279] This influenced our decision to increase the NMW and modern award minimum wages in modern awards by 3.3 per cent. We also stated '[t]he level of increase we have decided upon will not lead to inflationary pressure and is highly unlikely to have any measurable negative impact on employment.'[280]

**[261]** A number of parties submitted that the increase of 3.3 per cent we awarded in the 2016–17 Review was too high in the prevailing circumstances. However, no party was able to identify any economic indicator which demonstrated any discernible detriment arising from the 2016–17 Review decision. Employment continued to grow strongly in the economy generally, and it also grew in three of the four most award-reliant industries. The employment to population ratio, a key indicator, rose to record high levels during 2017. The increase did not lead to inflationary pressure. Nor did it have a discernible effect upon general wages growth. Surprisingly, the WPI figure over the year to the March quarter 2018 increased in two out of the four most award-reliant sectors *less than* for the economy as a whole, and in all four sectors the percentage WPI increase was substantially less than the percentage increase which we awarded in the 2016–17 Review.

**[262]** We accept it is possible that the 2016–17 Review increase may have longer-term effects which are not yet discernible in the available economic information. Furthermore, the compounding effect of increases over time may have a cumulative economic effect which is not apparent in the short term. We will continue to closely monitor this in future Reviews. However the information available to us at the present time tends to affirm the view we expressed in the 2016–17 Review that our previous assessments as to what constituted a 'modest' increases without disemployment effects may have been too conservative.

# 3. Relative living standards and the needs of the low paid

**[263]** In this chapter we deal with the social considerations in s.284(1)(c) in respect of the minimum wages objective and in s.134(1)(a) in relation to the modern awards objective. We do so by providing an assessment of the relative living standards of workers reliant on the NMW and modern award minimum wages and an examination of the extent to which low-paid workers are able to meet their needs, judged as their ability to purchase the essentials for a decent standard of living.[281]

**[264]** The assessment of some of these considerations has benefited from new data released by the ABS that has not been updated for six years.[282] Although the Survey of Employee Earnings and Hours (EEH) data referred to in the last Review remains the most recent, we take note of the recent budget standards study of the Minimum Income for Healthy Living (MIHL).

**Award-reliant employees and the low-paid workforce**

**[265]** The number of award-reliant employees (that is those employees that are paid exactly an award rate) is estimated to be 2.3 million or 22.7 per cent of all employees.[283] The proportion of employees that is paid at the adult NMW rate is estimated to be 1.9 per cent. Further, a significant number of employees are paid at junior or apprentice/trainee rates based on the NMW rate and modern award rates.[284] This makes it clear that most workers whose pay is directly affected by a rise in the NMW and modern award minimum wages are on rates that exceed the NMW. However not all of the estimated 2.3 million workers who are award reliant will be affected by this decision, because a proportion of these are state public sector employees and private sector employees in non-incorporated businesses in Western Australia who are not in the federal industrial relations system.

**[266]** The Panel's decision is also likely to affect employees 'paid close to the national minimum wage rate and workers whose pay is set by collective agreement which is linked to the outcomes of the Annual Wage Review.'[285] It is also likely that there are workers whose pay is set by individual arrangements which are referenced to an award rate—for example, by being paid a certain dollar amount or percentage above the modern award. The Australian Government also submitted that employers 'may also pass on the minimum wage rate adjustments to higher wage earners in order to maintain wage relativities.'[286]

**[267]** Research by Commission staff undertaken for this Review (Research Report 3/2018—*Characteristics of workers earning the national minimum wage rate and of the low paid*) used the EEH to provide the most recent information on characteristics of employees earning around the adult NMW and low-paid adult employees. The findings from the report are consistent with previous studies. The analysis found that a relatively high proportion of NMW earners were female, employed on a casual basis, working part time, award reliant, and 22 per cent were aged between 15 and 20 years.

**[268]** The analysis of the characteristics of low-paid (as distinct from NMW) adult employees was undertaken using data from the HILDA survey for 2016. A 'low-paid employee' was defined as an adult employee paid below two-thirds of median hourly earnings, consistent with the approach used in prior Reviews.[287] The analysis found that 13.1 per cent of all employees were low-paid adult employees,[288] which compares to the

Australian Government submission to last year's Review (using data from the 2016 EEH) which found that 12.4 per cent of all employees were low-paid employees.[289]

**[269]** The analysis found some substantial differences between higher-paid adult employees and low-paid adult employees. Low-paid adult employees were more likely to be employed on a casual basis, work part time, prefer to work more hours, work in the private sector, and work in small businesses. They were also more likely to be award reliant, have Year 12 or below as their highest level of education, work in the Accommodation and food services and Retail trade industries, and be aged between 21 and 24 years. Low-paid adult employees were also substantially more likely to be non-dependent children and, among couple households, substantially more likely to be secondary earners.

**[270]** A detailed analysis by the Australian Government, also using data from the HILDA survey for 2016, covered all low-paid workers, juniors, as well as adults. It showed, among other things, that of the low paid 41 per cent were aged 15–24 years; 62 per cent were single; 71 per cent had no children; 19 per cent had a long-term health condition; 77 per cent had two or more years of work experience and 63 per cent were on casual contracts; and they were predominantly employed as Community and personal service workers, Sales workers and Labourers.[290]

**[271]** Overall, the Commission's research found that NMW earners and low-paid adult employees had very similar characteristics. The Victorian Government submitted that the research identifies groups where minimum wages can address disadvantage.[291] ACOSS also highlighted the following findings from the research report:

- people under 25 years accounted for 41 per cent of all NMW employees;[292]
- 22 per cent of low-paid workers were non-dependent children living with their parents;[293] and
- for low-paid employees in couple households, 38 per cent were either sole or primary earners.[294]

**Award-reliant and low-paid households in the income distribution**

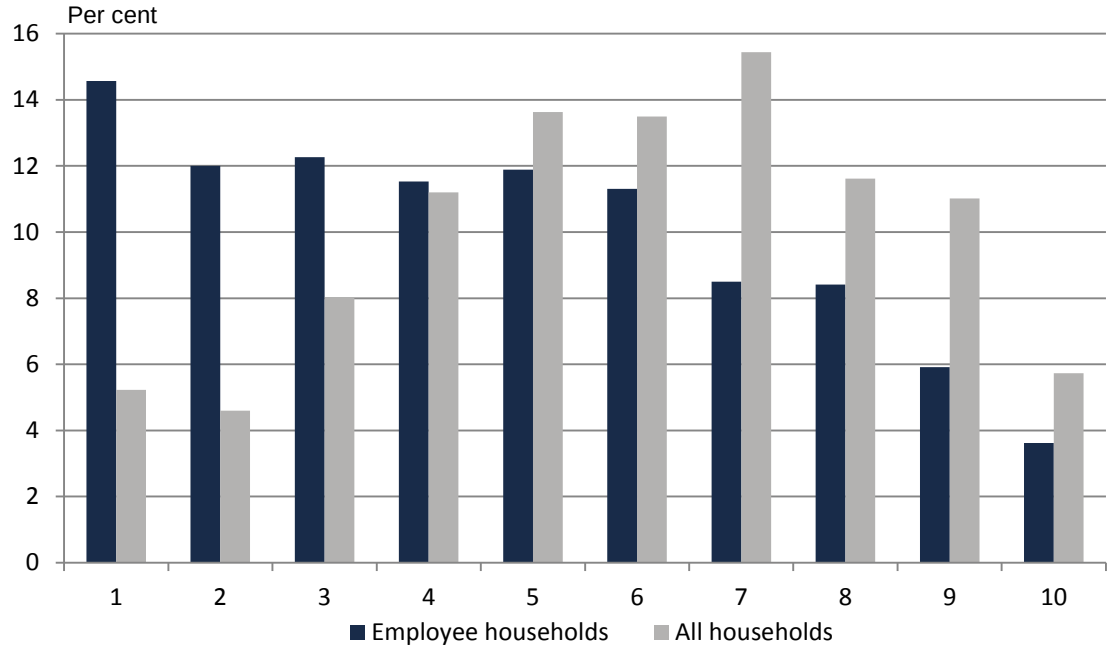
**[272]** The Australian Government presented data, updated from the last Review, on the distribution of low-paid employees across equivalised household disposable income for both employee households (with at least one employee) and all households (including jobless and retiree households), using data from the 2016 HILDA survey.[295] The Panel continues to consider that the former distribution 'provides the best basis for assessing the relative living standards and the needs of the low paid on the basis of where they fall within the distribution of household income.'[296]

**[273]** Similar to analysis presented in previous Reviews,[297] the Australian Government found that, while the low paid are spread across the income distribution of employee households, they are concentrated in the lower deciles: 64.6 per cent of low-paid employees were in the bottom half of the distribution of employee households.[298] This is consistent with the Panel's conclusion in the 2015–16 Review that around two-thirds of low-paid employees are in the bottom half of the income distribution for employee households.[299]

**[274]** The Statistical report included data on the distribution of low-paid employees across equivalised household disposable income for employee and all households using data for 2015–16 from the ABS Household Expenditure, Income and Housing (Chart 3.1). In contrast to the Australian Government's definition of employee households using the HILDA survey, this analysis defined employee households as those whose principal source of income is from wages and salary.

**[275]** The results from the two different estimates are similar. Chart 3.1 shows that across all employee households, the low paid are disproportionately found in the bottom deciles, with 62.3 per cent of the low paid in the bottom half of the distribution.

**Chart 3.1: Distribution of low-paid employees across equivalised household disposable income for employee and all households, 2015–16**




Note: Low-paid employees refer to all employees whose hourly earnings are below two-thirds of median hourly earnings of full-time adult employees, including juniors. Hourly earnings are calculated as current weekly cash employee income from main job (including salary sacrifice) divided by usual hours worked per week in main job. Usual hours worked in main job are top-coded at 60 hours per week. No allowance for casual loading has been made as casual employees cannot be identified. Employee households are those whose principal source of income is from wages and salary.

Source: Statistical report, Chart 8.7; ABS, *Microdata: Household Expenditure, Income and Housing, 2015–16,* Detailed Microdata, DataLab, Catalogue No. 6540.0.

**[276]** On the basis of this evidence, we remain of the view that low-paid workers, whose wages are likely to be affected by the NMW or modern award minimum wages, are disproportionately located in the lower deciles of equivalised household disposable income.

**Real earnings**

**[277]** The NMW increased in real terms by 5.8 per cent over the decade to the December quarter 2017, and by 4.3 per cent in the last five years, and there has been a real increase across each calendar year since 2014 (Table 3.1). The real increase of 1.4 per cent over the year to the December quarter 2017 was the highest since the year to the December quarter 2010.

**Table 3.1: Real national minimum wage and percentage change, December quarter 2017 dollars**

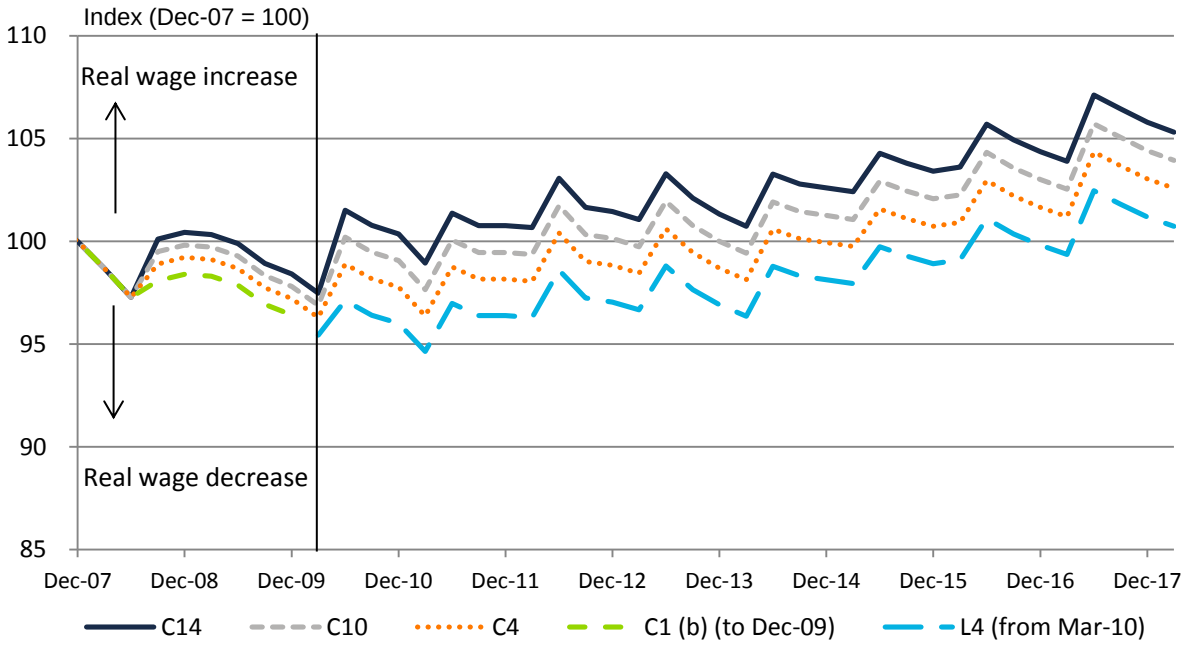
| Year | Real national minimum wage ($) | Change (%) |
|---|---|---|
| Dec-07 | 656.90 | –0.9 |
| Dec-08 | 659.72 | 0.4 |
| Dec-09 | 646.42 | –2.0 |
| Dec-10 | 659.30 | 2.0 |
| Dec-11 | 661.93 | 0.4 |
| Dec-12 | 666.45 | 0.7 |
| Dec-13 | 665.54 | –0.1 |
| Dec-14 | 673.97 | 1.3 |
| Dec-15 | 679.32 | 0.8 |
| Dec-16 | 685.54 | 0.9 |
| Dec-17 | 694.90 | 1.4 |
| **Change over decade** | **38.00** | **5.8** |

Note: Real minimum wage calculated from the NMW/FMW and CPI from the December quarter of each year.

Source: Statistical report, Table 9.1; Australian Fair Pay Commission/Fair Work Australia/Commission decisions; ABS, *Consumer Price Index, Australia, Mar 2018*, Catalogue No. 6401.0.

**[278]** Chart 3.2 compares the growth in the real value of selected modern award minimum wages from the December quarter 2007 to the March quarter 2018. The chart shows that the real value of each of these modern award minimum wages is above its value from 10 years ago and highlights the consistent increases in value from 2014. The relative values of modern award minimum wages have not changed since the Panel awarded uniform percentage increases across all minimum rates in the *Annual Wage Review 2010–11* (2010–11 Review) and each subsequent Review.

**Chart 3.2: Real value of selected minimum wage rates, index—Dec-07 = 100**




Note: Up to 30 June 2009, the minimum rates are those in Australian Pay and Classifications Scale (and from 1 July 2009, transitional Australian Pay and Classification Scale) derived from the *Metal, Engineering, and Associated Industries Award 1998*; post 1 January 2010 minimum rates C14, C10 and C4 are those in the Manufacturing Award and the L4 rate from the *Professional Employees Award 2010*. For the purpose of the analysis, the L4 rate was calculated by dividing the annual salary for the L4 classification by 365 and multiplying by 7 to get a weekly rate.

Source: Statistical report, Chart 9.1; ABS, *Consumer Price Index, Australia, Mar 2018*, Catalogue No. 6401.0; *Metal, Engineering and Associated Industries Award 1998*; Manufacturing Award*; Professional Employees Award 2010*.

**[279]** In the last two Reviews, we indicated that it was our intent to provide a level of minimum wage increase that would result in an improvement in real wages and relative living standards of those reliant on the NMW and modern award minimum wages.[300] There has been an increase in real wages, but this has not resulted in an improvement in actual or relative living standards for all categories of such employees due to changes in the tax-transfer system, as discussed later in this chapter.

**Household disposable income and tax-transfer system changes**

**[280]** The Panel has accepted that the effect of taxes and transfers on disposable incomes of the low paid is relevant to the needs of the low paid and their relative living standards, both in terms of specific changes to the tax-transfer system and in assessing broader information in relation to measures of the relative income of the low paid.[301]

**[281]** The measure of income most commonly used in analysis of living standards is equivalised household disposable income. This measure considers the type of household and also incorporates both labour market earnings and income from other sources, as well as the net impact from taxes and transfers.

**[282]** In this section we discuss changes made to the tax-transfer system and changes in disposable income following the 2016–17 Review decision for selected household types.

**[283]** In its initial submission, the Australian Government advised that a single adult household working full time at the NMW would not attract transfer payments, but 'those working part-time, couples with one partner earning the full-time minimum wage and families with children can receive significant additional assistance … For full-time minimum wage workers in single-income households with children, transfer payments are typically around a third of disposable income.'[302] The Australian Government also submitted that:

> '… full-time workers without children retained the greatest fraction of the minimum wage increase after taxes and transfers (nearly 80 per cent), since they receive no transfer payments and therefore face no income tests. Part-time workers and workers with children kept less, since they are affected by the means tests on payments such as Newstart and FTB [Family Tax Benefit]. Couples with one partner on Newstart retained the least.'[303]

**[284]** The points made by the Australian Government above highlight the tension in the interaction between the level of minimum wages and the tax-transfer system in providing for the needs of the low paid. Families with children or an unemployed partner face the greater challenge in meeting their needs, but also receive the smallest benefits from increases in minimum wages. Despite this, all family types that have been modelled do receive some increase in their disposable income from an increase in the NMW. In this respect, we note the view of the Australian Government that '[i]ncreases to the minimum wage have, over recent years, been important for maintaining the real disposable incomes of many low-income households … however the tax-transfer system remains the primary means of redistributing income to low-income households.'[304]

**[285]** The *Social Services Legislation Amendment Act 2017* included a measure to freeze the base and the maximum rate of Family Tax Benefit (FTB) (Part A) and FTB (Part B) for low-income families commencing from 1 July 2017 to 2019. This change reduces the real incomes of families receiving these benefits over the two years.[305]

**[286]** From July 2018, the Child Care Subsidy (CCS) will replace the current Child Care Benefit and the Child Care Rebate with a single means-tested subsidy.[306]As these changes will apply when our decision is in operation they are potentially relevant to this Review.

**[287]** Amongst the parties who addressed this issue there were quite different views. The Federal opposition submitted that the changes to child care assistance will leave 279 000 families worse off, including those on low incomes.[307] In contrast, Ai Group argued that the CCS will provide 'significant benefit to most low income workers who are currently receiving childcare assistance' and that the Panel should award a lower increase than it otherwise would in consequence.[308]

**[288]** It is difficult to evaluate the impact of the changes to child care assistance on low-paid employees, in part because the current arrangements are complex. While the new arrangements are intended to simplify them, they remain difficult to assess. The previous arrangements included a means tested scheme and a non-means tested scheme. An activity test (encompassing the self-employed, employees, and those engaging in study or training or looking for work) applied to the previous non-means tested scheme. The new scheme is both means tested and activity tested. The maximum benefit is payable at a family income of $66,958 and is phased out to zero at $351,248.[309] The means test on the current scheme

provides maximum payments at incomes below $45,114 and reduces to zero at a family income of $156,914 with one child in approved care.[310]

**[289]** Perhaps the most helpful summary of the impact of the changes is provided in the media release of the Minister for Education and Training at the time of the announcement of the changes. This release included the advice that the new child care package would deliver:

- 'the highest rate of subsidy to those on the lowest income levels and more hours of subsidy to those who work the most'; and

- 'increasing the base subsidy from around 72 per cent to 85 per cent for the more than 370 000 families earning around $65,000 or less a year.'[311]

**[290]** On the information available, the Panel cannot determine what the precise financial impact of the changes to child care assistance will be on low-wage families, although we accept that it will probably be of some benefit. Because the impact is uncertain, we have given it little weight in this decision. If thought relevant, the parties are invited to provide further material to the *Annual Wage Review 2018–19* (2018–19 Review).

**[291]** The Australian Government's 2018–19 Budget, announced proposed changes to income tax rates for individuals to be phased in over a number of years. The earliest step in the proposed changes is a tax offset increase targeted at low to middle income taxpayers for 2018–19. The benefit is payable as a tax refund at the end of the 2018–19 tax year.

**[292]** Because the tax changes have not been legislated for, and in any event would not as a practical matter provide any financial benefits to employed persons on or before 30 June 2019, the Panel does not propose to take them into account in this Review.

**[293]** Table 3.2 presents the changes to nominal disposable income for a range of hypothetical household types reliant on the NMW. It incorporates the increase to the NMW and modern award minimum wages of 3.3 per cent from the 2016–17 Review decision, and the reductions in a range of benefits for low-income families, including the removal of the Schoolkids Bonus. Over the year to July 2017, changes in nominal disposable incomes ranged between a fall of –2.0 per cent (single parent working part time with two children) to an increase of 3.0 per cent (dual-earner couple, no children). Six out of the 14 selected household types experienced a decline in their nominal disposable incomes. Growth in nominal disposable income exceeded the CPI in only three of the 14 selected household types. Those which had a real increase were adult singles or couples without children. Since the increases to the NMW and modern award minimum wages exceeded inflation over the year to July 2017, the falls in nominal and real disposable incomes have come from the effects of, and changes to, the tax-transfer system.

**[294]** Over the five years to July 2017, growth in nominal disposable income for 10 out of the 14 selected household types was below CPI. Over the same five-year period, increases to the NMW and modern award minimum wages exceeded the CPI by 3.9 per cent, which highlights the negative impact of changes to the tax-transfer system. Of the selected household types, dual-earner couples with no children had the highest growth in nominal disposable income while single parents with two children and working part time had the lowest.

**[295]** While there has been a real increase in minimum wages over the past five years, changes to the tax-transfer system have negatively affected disposable incomes for some household types. As the Australian Government submitted, '[o]utcomes for families receiving transfer payments were … affected by measures such as the ceasing of the School Kids Bonus, closure of Energy Supplement paid with FTB for new entrants, and the measure to maintain the current FTB rates for two years from 1 July 2017.'[312]

**Table 3.2: Nominal disposable income of selected NMW-reliant households**

| Household type | Disposable income July 2017 ($pw) | Change July 2016 to July 2017 ($pw) | Change July 2016 to July 2017 (%) | Change July 2012 to July 2017 (%) |
|---|---|---|---|---|
| Single adult | 624.03 | 17.54 | 2.9 | 12.0 |
| Single parent working FT, 1 child | 882.30 | 8.39 | 1.0 | 9.9 |
| Single parent working PT, 1 child | 591.82 | –4.27 | –0.7 | 9.6 |
| Single parent working FT, 2 children | 987.86 | –1.42 | –0.1 | 8.4 |
| Single parent working PT, 2 children | 697.38 | –14.08 | –2.0 | 7.6 |
| Single-earner couple (with NSA) | 805.75 | 8.50 | 1.1 | 11.0 |
| Single-earner couple | 637.93 | 12.22 | 2.0 | 12.7 |
| Single-earner couple, 1 child (with NSA) | 993.70 | –0.41 | –0.0 | 9.2 |
| Single-earner couple, 1 child | 882.30 | 8.39 | 1.0 | 9.9 |
| Single-earner couple, 2 children (with NSA) | 1100.79 | –9.62 | –0.9 | 8.0 |
| Single-earner couple, 2 children | 987.86 | –1.42 | –0.1 | 8.4 |
| Dual-earner couple | 971.48 | 28.64 | 3.0 | 12.9 |
| Dual-earner couple, 1 child | 1162.09 | 13.54 | 1.2 | 10.0 |
| Dual-earner couple, 2 children | 1267.65 | 2.51 | 0.2 | 8.9 |
| **CPI** | | | **1.9** | **10.3** |

Note: The percentage change in the CPI over July 2016 to July 2017 and July 2012 to July 2017 were calculated with reference to the June quarter.

Assumptions: Single-earner households earn 100 per cent of the weekly NMW. Single parents working part time (PT) are earning 50 per cent of the weekly NMW rate, those working full time (FT) earn 100 per cent of the NMW. Dual-earner households comprise one partner earning 100 per cent of the NMW, the other earns 50 per cent of this rate. Applicable minimum wage rates (equivalent to the C14 rate) per week are: $606.40 in July 2012; $672.70 in July 2016; and $694.90 in July 2017.

Tax/transfer parameters as at July each year. Disposable income includes all available income transfers, unless otherwise specified. Children are aged 8–12 years and attending primary school. Households paying sufficient rent to receive maximum Rent Assistance where applicable. Single-earner couples are modelled in two scenarios: 1) the non-earning partner is in the labour force and receiving proportional rates of Newstart Allowance (NSA) and 2) the non-earning partner is not in the labour force and therefore not in receipt of NSA. Single-parent households and secondary earners in dual-earner households are not seeking further work and not in receipt of income support.

Households with children receive the fixed value of the Education Tax Refund (ETR) transitional lump-sum payment in 2012 and the Schoolkids Bonus from 2013 to 2016. Disposable incomes for households with children for 2012 to 2016 reflect the average weekly rate of the ETR transitional lump-sum payment, or Schoolkids Bonus instalments, in the given year. In 2016 the Schoolkids Bonus accounted for a weekly average of $8.27 per child in the disposable income for all households with children modelled (excepting dual earner households earning AWOTE as they were not eligible for this transfer). The Schoolkids Bonus was not payable in 2017.

Source: Statistical report, Table 8.4; ABS, *Consumer Price Index, Australia, Mar 2018*, Catalogue No. 6401.0; Fair Work Commission modelling.

**[296]** The Australian Government's submission also contained modelling of changes in real disposable household income for identified household types for the period 2013–2018. That modelling showed that there was a reduction in real income for a single-parent family earning the NMW full-time with one child (aged 3 or 9), a single parent family on the NMW part-time with one child (aged 9), a single-income couple with one parent on the NMW full-time and one or two children, and dual-income couples with one parent on the NMW full-time and the other part-time with two children. The Australian Government's modelling showed that

NMW increases had a net positive effect on income in relation to each household type modelled, but that the tax-transfer system made a negative contribution in 10 out of the 14 households types, including the six household types where real income declined over the five year period. This is consistent with the Commission's own modelling and demonstrates that changes to the tax-transfer system have caused a reduction in real income for a number of household types, notwithstanding real increases to the NMW over the period.

**[297]** We concur with the Australian Government's submission that '[i]ncreases in the minimum wage are not fully reflected in household disposable income, although it plays a large role in improving household income for low-income, minimum wage families.'[313]

**[298]** Table 3.3 shows the proportion of the increase awarded in the 2016–17 Review which was retained by the same range of household types. Almost all households had their disposable income reduced by the income tax: single parents working part-time retained 100 per cent of the increase while a single-earner couple receiving Newstart Allowance (NSA) retained less than one-sixth of the increase. In addition, single-earner couples with a partner receiving NSA, with and without children, and dual-earner couples with children also had a reduction in their transfer payments. Households that received NSA retained the smallest share of the increase to the NMW.

**Table 3.3: Modelling the 2017 NMW increase, wage increase retained and components of change in disposable income of selected NMW-reliant households, July 2017**

| Household type | Change in disposable income ($ pw) | Components of change | | | NMW increase retained (%) |
|---|---|---|---|---|---|
| | | Wage increase ($) | Taxes ($) | Transfers ($) | |
| Single adult | 17.54 | 22.20 | –4.66 | 0.00 | 79.0 |
| Single parent working FT, 1 child | 17.98 | 22.20 | –4.22 | 0.00 | 81.0 |
| Single parent working PT, 1 child | 11.10 | 11.10 | 0.00 | 0.00 | 100.0 |
| Single parent working FT, 2 children | 17.98 | 22.20 | –4.22 | 0.00 | 81.0 |
| Single parent working PT, 2 children | 11.10 | 11.10 | 0.00 | 0.00 | 100.0 |
| Single-earner couple (with NSA) | 3.51 | 22.20 | –5.37 | –13.32 | 15.8 |
| Single-earner couple | 17.98 | 22.20 | –4.22 | 0.00 | 81.0 |
| Single-earner couple, 1 child (with NSA) | 6.16 | 22.20 | –5.37 | –10.66 | 27.8 |
| Single-earner couple, 1 child | 17.98 | 22.20 | –4.22 | 0.00 | 81.0 |
| Single-earner couple, 2 children (with NSA) | 7.32 | 22.20 | –4.22 | –10.66 | 33.0 |
| Single-earner couple, 2 children | 17.98 | 22.20 | –4.22 | 0.00 | 81.0 |
| Dual-earner couple | 28.64 | 33.30 | –4.66 | 0.00 | 86.0 |
| Dual-earner couple, 1 child | 20.69 | 33.30 | –4.66 | –7.95 | 62.1 |
| Dual-earner couple, 2 children | 18.23 | 33.30 | –7.12 | –7.95 | 54.7 |

Note: Tax/transfer parameters as at July 2017. The NMW increase retained is calculated as the change in disposable income as a proportion of the wage increase. Other assumptions as per Table 3.2.

Source: Statistical report, Table 8.5; Fair Work Commission modelling.

**[299]** One important additional change to the tax-transfer system has been legislated reductions to corporate taxation rates. As part of a progressive reduction in tax rates for small and medium-sized incorporated business, the taxation rate was reduced for 'small business

entities' with a threshold of $2 million turnover from 30 per cent to 28.5 per cent in 2015–16, and to 27.5 per cent in 2016–17 with a threshold of $10 million turnover. For 'base rate entities' with a turnover threshold of $25 million, the rate was reduced to 27.5 per cent in 2017–18, and the threshold is to increase to $50 million in future years.[314]

**[300]** The Australian Government has modelled the long-term impact of corporate taxation reductions. However, this modelling includes the effect of the reductions that are yet to take effect and further proposed reductions which are yet to be legislated. The modelling in general predicts that the reductions will lead to higher business investment and productivity and drive an improvement in real wages. However, the modelling 'does not describe the transition path to the long-term,' and the Australian Government submitted that 'it will be difficult to identify when business investment is responding to the tax cut.'[315] This means that it is not possible to ascertain what, if any, effect the tax reductions which have already come into effect have had on investment, productivity, employer profitability, employees' wages or income and wealth inequality. Only the ACTU submitted that we should take into account the corporate tax reductions in this year's Review, on the basis that their impact 'ought to be that the Panel is less restrained in its awarding of increases than it otherwise would be.'[316] However, the impact of the changes at this point cannot be assessed, and as a result we will not take them into account in this Review. The Panel will look for reliable evidence of their effect, if any, in future Reviews.

**[301]** We accept that changes to the tax-transfer system are relevant to our consideration of the needs of the low paid and their relative living standards. The identified changes to the tax-transfer system and their adverse effects on low-paid employees have been taken into account pursuant to s.134(1)(a) and s.284(1)(c). Consistent with the approach taken in the 2016–17 Review decision, we do not accept that a mechanistic or formulaic approach can be taken in regard to our consideration on this matter.[317] However, the above evidence does emphasise, once changes to the tax-transfer system which have occurred are taken into account, the importance of increases to the NMW and modern award minimum wages in maintaining the real disposable income of many low-income households.

**Relative earnings and earnings inequality**

**[302]** As the Panel has previously noted, the relative living standards of low-paid workers are affected by the degree of dispersion in earnings. If the earnings of workers in the lowest deciles are growing more slowly than those in the higher deciles, then the relative earnings of the low paid will fall.[318]

**[303]** In this section we consider earnings inequality with reference to changes in the minimum wage relative to median earnings of full-time employees (the minimum wage bite) and, more broadly, in the distribution of real weekly earnings for full-time non-managerial adult employees.

**[304]** The minimum wage bite was estimated at 54.8 per cent in 2017, 0.8 percentage points higher than in 2016. This followed a decline between 1994 and 2012 to a low of 52.7 per cent, with the bite increasing by 2.1 percentage points since 2012.

**[305]** The Australian Government submitted that the NMW has increased by an average of 2.8 per cent per annum over the last 10 years, compared with an average increase of 2.7 per cent in median full-time earnings.[319] ACOSS and the Federal opposition submitted that a

major reason for the recent increase in the minimum wage bite is slow overall wages growth.[320] The Australian Government attributed part of the decline in the minimum wage bite prior to 2008 to the mining boom, which pushed up median wages.[321] Clearly, the behaviour of median wages is a significant contributor to the level of the minimum wage bite.

**[306]** The minimum wage bite is usually based on the median earnings of full-time workers. An ABS measure of hourly earnings is available from 2004. The benefit of using hourly earnings is that it can incorporate part-time workers. As noted previously, more than three-quarters of NMW employees work part time (including youth who are paid at reduced rates).

**[307]** The Australian Government did not specify a preference for the use of an hourly or weekly minimum wage bite, but noted that it used the median wage bite of full-time employees and owner managers of incorporated enterprises in its submission, which is the same approach as the OECD.[322] ACCI argued that while the Panel should have regard for all the different measures of the minimum wage bite, the hourly measure for all employees is the closest to how minimum wages are applied.[323] The ACTU did not have a preference for the weekly or hourly measure, but argued that 'for as long as the dominant form of employment is full time, the full time median should be used.'[324] RCI preferred the current approach, which is using the full-time weekly measure of the minimum wage bite.[325]

**[308]** Chart 3.3 compares the different measures of the minimum wage bite using the following measures of median earnings:

- weekly median earnings of full-time employees;
- hourly earnings of full-time employees; and
- hourly earnings of adult full-time and part-time employees.

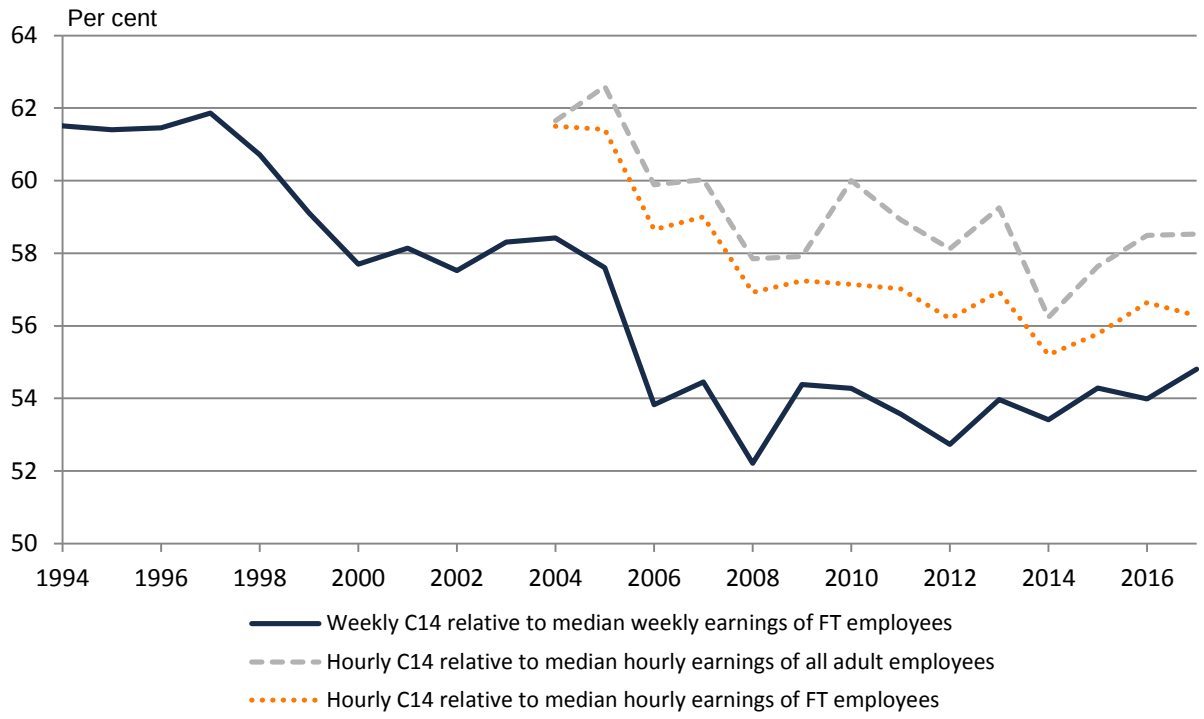
**[309]** Although the trends between 2004 and 2017 are broadly similar across the different measures, the chart shows that using median hourly earnings of full-time employees raises the minimum wage bite to 56.3 per cent in 2017. This higher bite is likely to be the result of including reported hours worked, which will include any unpaid hours worked, thereby reducing the hourly earnings of workers and increasing the minimum wage bite.

**[310]** Using the median hourly earnings of adult full-time and part-time employees raises the minimum wage bite to 58.5 per cent in 2017. This is most likely to be because part-time workers tend to be concentrated at the lower end of the wage distribution.

**[311]** There is a clear case for continuing to pay attention to the conventional measure of the minimum wage bite, i.e. the NMW as a percentage of weekly median earnings of full-time employees and owner managers of incorporated enterprises. This measure has a long history, and is used in standard international comparisons. We think it is also valuable to consider the wage bite expressed in hourly terms, because it includes the many employees who are paid at or near to the NMW who work part time.

**[312]** Whatever the measure chosen, it can be seen that there has been some modest rise in the wage bite since 2014.

**Chart 3.3: C14 rate relative to median weekly earnings of employees in main job, 1994 to 2017**




Note: Median earnings are measured in August of each year. Following the amendments to the *Workplace Relations Act 1996* (Cth) taking effect in 2006, the Federal Minimum Wage (FMW) was set at $12.75 per hour, equivalent to $484.50 per week. Earnings are for employees including owner-managers of incorporated enterprises. Median earnings from 2004 onwards are taken from the August 2017 *Characteristics of Employment* survey.

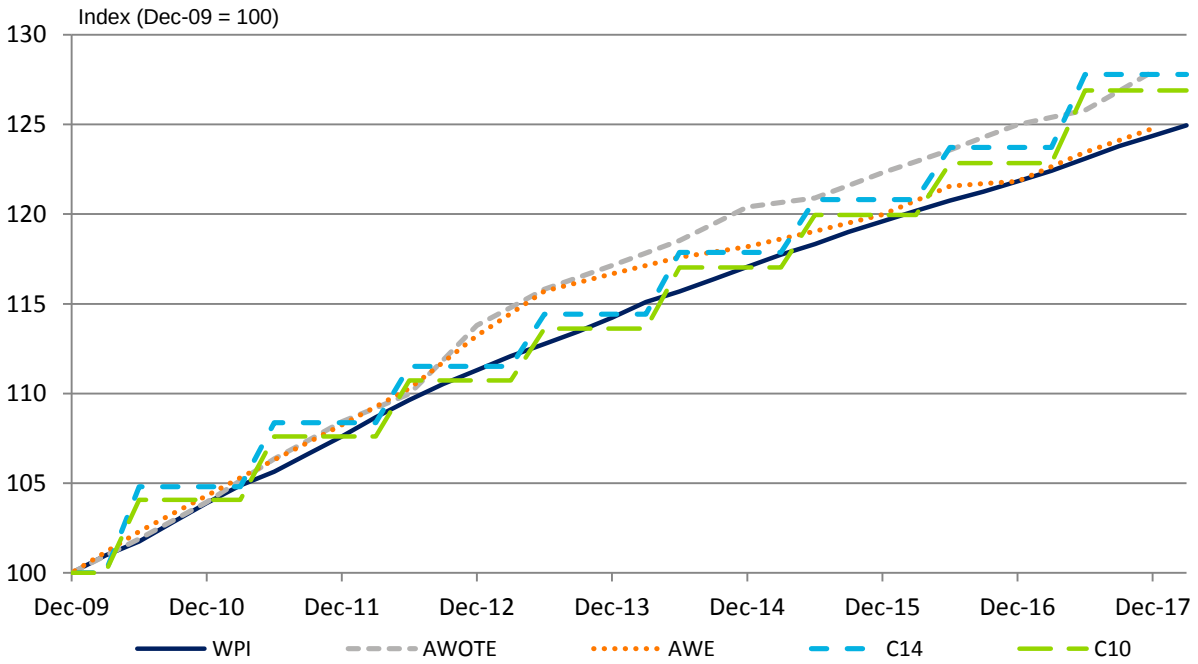
Source: ABS, *Characteristics of Employment, Australia*, August 2017, Catalogue No. 6333.0; ABS, *Employee Earnings, Benefits and Trade Union Membership, Australia*, various, Catalogue No. 6310.0; ABS, *Weekly Earnings of Employees (Distribution), Australia*, various, Catalogue No. 6310.0; *Metal, Engineering and Associated Industries Award 1998*; Manufacturing Award.

**[313]** The Australian Government submitted that the median full-time award-reliant wage, that is, the median wage among all full-time award-reliant employees, not just those on the NMW, was 82.8 per cent of the median full-time wage among all employees.[326]

**[314]** The Australian Government also provided a list of the lowest adult rates across modern awards in the most award-reliant industries as a proportion of the median wage of all full-time employees. Among the list of 14 modern awards, only two included wage rates equivalent to the NMW, at a minimum wage bite of 54.8 per cent. Of the remaining modern awards, the wage bite was calculated as between 56.0 per cent and 60.7 per cent.[327]

**[315]** Another way of measuring earnings inequality is to compare changes in modern award minimum wages with broader measures of wage growth. Chart 3.4 compares the growth in the C14 and C10 classifications with AWOTE, average weekly earnings (AWE), and the WPI between the December quarter 2009 and the March quarter 2018. While their relative growth rates varied somewhat over the period, by the March quarter 2018 the rate of growth in modern award minimum wages had exceeded that of the WPI and matched that of AWOTE. This recent development has made some contribution towards improving the relative position of the low paid.

**Chart 3.4: Growth in C14 and C10 relative to AWOTE, AWE and WPI, index**




Note: WPI is the index for total hourly rates of pay excluding bonuses in both private and public sectors. It is unaffected by change in the quality or quantity of work performed. AWOTE is calculated by dividing estimates of weekly ordinary time earnings by estimates of the number of employees. It is calculated before taxation and other deductions such as superannuation. It also excludes payments which are not related to the reference period such as overtime, leave loading and redundancy payments. AWOTE estimates refer to full-time adult employees. AWE is the gross (before tax) earnings of employees (excluding salary sacrifice). The C14 and the C10 are minimum award rates set under the Manufacturing Award and the former *Metal, Engineering and Associated Industries Award 1998*. AWOTE and AWE data are published half-yearly for May and November; hence, a quarterly series has been derived. AWOTE and AWE data are expressed in original terms.

Source: ABS, *Average Weekly Earnings, Australia, Nov 2017*, Catalogue No. 6302.0; ABS, *Wage Price Index, Australia, Mar 2018*, Catalogue No. 6345.0; *Metal, Engineering and Associated Industries Award 1998*; Manufacturing Award.

**[316]** No new data were available to update movements in the distribution of real weekly total earnings of full-time non-managerial employees. As we noted in the 2016–17 Review decision, over the decade to 2016, total earnings at the 90$^{th}$ percentile rose faster (22 per cent) than for the 10$^{th}$ percentile (13 per cent) but real earnings rose for all points in the earnings distribution.[328] Much of the increase in inequality occurred in the first part of the decade and there has been no clear growth in inequality of earnings over the last five years.

**Income and wealth inequality**

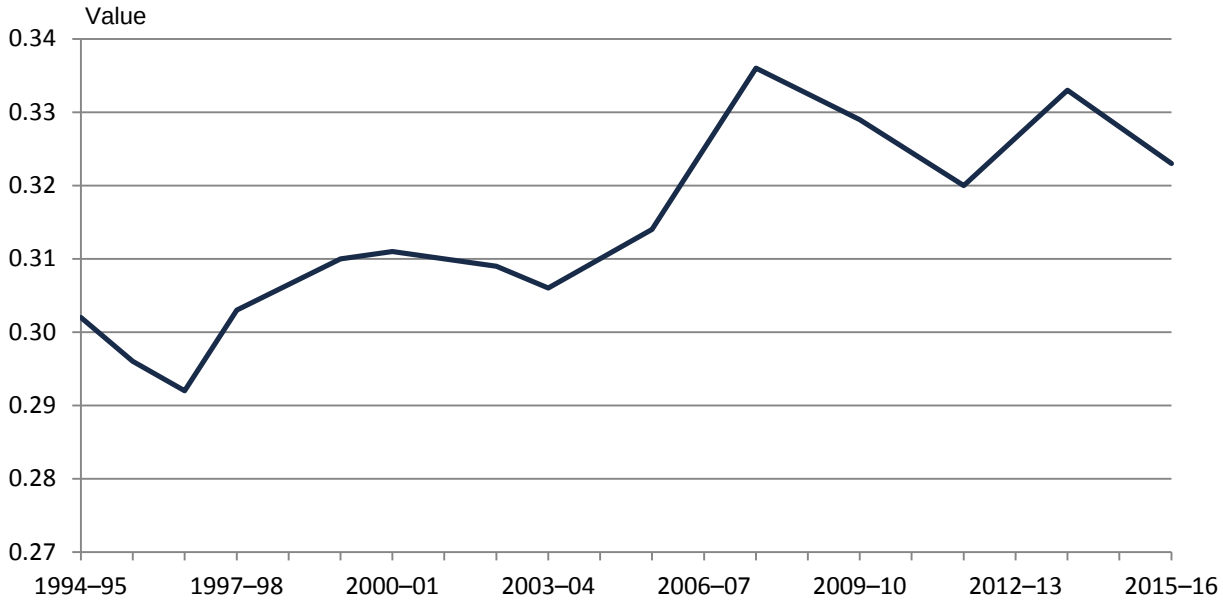
**[317]** The Panel takes into account a broad range of measures when assessing inequality, which is relevant to a consideration of the relative living standards of the low paid.

**[318]** As we explained earlier, the most appropriate analysis when making comparisons of living standards is at the household level, specifically, equivalised household disposable income.[329]

**[319]** In the 2016–17 Review decision, the Panel referred to trends in two measures of inequality: the Gini coefficient and the distribution of equivalised household disposable income, which reflected data from 2013–14. These measures have been updated with new data for 2015–16.

**[320]** A measure of the Gini coefficient is shown in Chart 3.5.[330] By this measure, income inequality in 2015–16 is higher than in the mid-1990s but has stabilised from at least 2007–08, with the Gini coefficient falling from 0.336 then to 0.323 in 2015–16.

**Chart 3.5: Gini coefficient of equivalised household disposable income**




Note: Estimates presented for 2007–08 onwards are not fully comparable with estimates for previous cycles due to improvements made to measuring income introduced in the 2007–08 cycle. Estimates for 2003–04 and 2005–06 have been recompiled to reflect those improvements; however, not all components introduced in 2007–08 were available for earlier cycles. Changes in the methodology are likely to have exaggerated income growth at the top of the distribution over this period (see Australian Government submission, 13 March 2018 at para. 248, fn. 34).

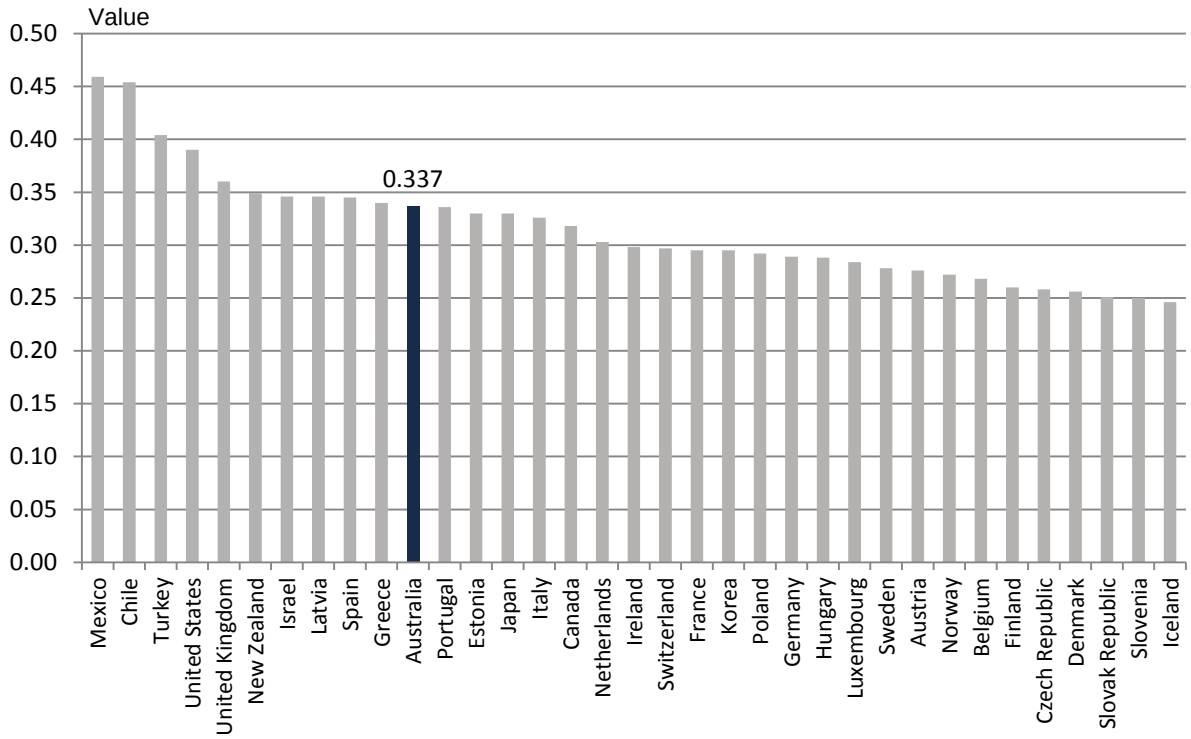
Source: Statistical report, Chart 8.5; ABS, *Household Income and Wealth, Australia, 2015–16*, Catalogue No. 6523.0.

**[321]** The Australian Government referred to data from the HILDA survey on the Gini coefficient from 2001 to 2015. In comparison to the ABS estimates, the Gini coefficient estimated from the HILDA survey was lower and more stable, falling from 0.303 to 0.296 over the period. The report also showed that real equivalised household disposable income increased by 38.3 per cent at the 10$^{th}$ percentile from 2001 to 2015, higher than at the median (28.5 per cent) and the 90$^{th}$ percentile (29.9 per cent).[331]

**[322]** The Australian Government provided data showing that Australia was ranked 11th out of the 35 OECD countries in terms of inequality, one place higher than last year,[332] and remains more unequal than a number of major European economies including France and Germany (Chart 3.6). It is, however, more equal compared to the US, UK and New Zealand.

**[323]** It is not possible to make such international comparisons with precision, so small differences should be ignored. But Australia's position in the distribution suggests that a number of similar countries, including Canada, the Netherlands, France and Germany, are able to achieve higher degrees of equality than the current level in Australia.

**Chart 3.6: Gini coefficient measures of inequality among OECD countries: household disposable income, 2015 or latest year**




Note: Latest available data refer to 2015, except for except for Israel (2016); Japan (2012); and Mexico, New Zealand, Australia, Italy, Ireland, Switzerland, Germany, Hungary, Luxembourg, Czech Republic and Iceland (2014).

Source: Australian Government, 13 March 2018, at Chart 8.1; OECD Stat, *Income Inequality*, <https://data.oecd.org/inequality/income-inequality.htm>.

**[324]** Table 3.4 presents the growth in real weekly equivalised household disposable income for selected percentiles from 2007–08 to 2015–16 (and therefore provides a consistent time series unaffected by methodological changes). It shows that real growth at the 10th percentile exceeded growth at the median and 90th percentile over both the first and second half of the period. This suggests that there has been a significant decline in the inequality of household disposable income over the past 10 years.

**Table 3.4: Growth in real weekly equivalised household disposable income, by selected percentiles, 2007–08 to 2015–16**

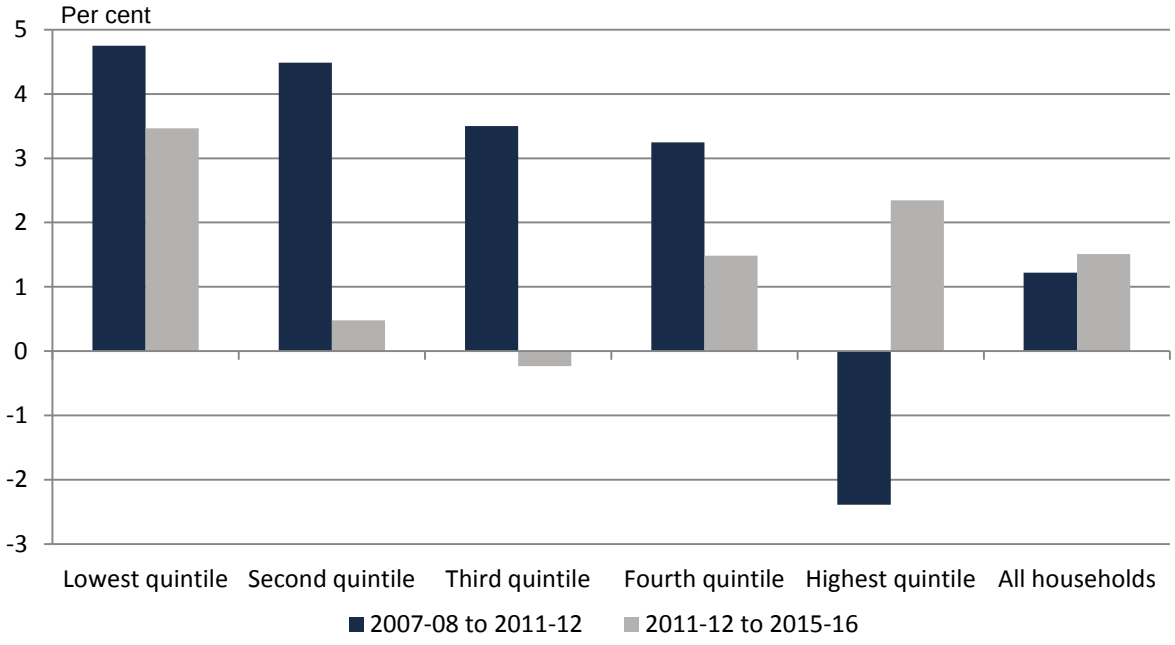
| | 2007–08 to 2011–12 (% change) | 2011–12 to 2015–16 (% change) |
|---|---|---|
| 10th percentile | 7.9 | 6.3 |
| 50th percentile (median) | 3.1 | –0.4 |
| 90th percentile | 1.8 | 1.2 |

Source: Statistical report, Table 8.7; ABS, *Household Income and Wealth, Australia, 2015–16*, Catalogue No. 6523.0.

**[325]** Chart 3.7 presents a more complete picture, showing growth in the real weekly equivalised household disposable income for each quintile, comparing the same two periods as Table 3.4 above. Over the four years to 2011–12, the two lowest quintiles experienced the

highest rates of growth, increasing by 4.7 and 4.5 per cent, respectively. In comparison, income at the highest quintile fell by 2.4 per cent. Over the following four years, real household income growth was again highest at the lowest quintile, at 3.5 per cent, while income at the highest quintile increased by 2.3 per cent. Real weekly equivalised household disposable income fell in this period for the third, or middle, quintile. The overall consequences for inequality are less clear than they appear to be in Table 3.4, although households in the lowest quintile have had strong gains over the decade.

**Chart 3.7: Growth in real weekly equivalised household disposable income, by quintile, 2007–08 to 2015–16**




Source: Statistical Report, Chart 8.6; ABS, *Household Income and Wealth, Australia, 2015–16*, Catalogue No. 6523.0.

**[326]** In the 2016–17 Review, the Panel found that 'there was no evidence of recent rises in inequality of household disposable income among at least the bottom half of the income distribution for all households.'[333] The latest data suggest that income inequality has stabilised for some period, with some indicators showing income growth for households at the bottom of the distribution increasing more than households at the middle and top of the income distribution. However, referring to ABS data, the ACTU pointed out that after taking into account the number and age of people in the household, households in the highest income quintile received 40 per cent of total income in 2015–16.[334] By comparison, households in the lowest income quintile received just 8 per cent of total income. Income inequality, while it has fallen recently, is still quite high, relative to the past in Australia and relative to other OECD countries.

**[327]** The ACTU submitted that the Panel should take into account wealth inequality in Australia when considering relative living standards and the needs of the low paid. In support of this submission, it referred to several studies that showed that wealth and income inequality are correlated and have a negative impact on economic growth. They also provided data from the ABS that showed that wealth inequality in Australia is high and rising.[335]

**[328]** The Panel considers that, notwithstanding the evidence of substantial and increasing wealth inequality, it is a matter which may only be assigned limited weight in this Review. While there is undoubtedly a link between income levels and wealth accumulation, there are a range of factors which contribute more significantly to wealth inequality (as the ACTU's submissions recognised[336]). We consider it unlikely that any adjustment to the NMW or modern award minimum wages arising from this Review, within the range of outcomes proposed by the various interested parties, could have any discernible effect upon wealth inequality.

**Poverty and poverty lines**

**[329]** Consideration of the needs of the low paid involves an assessment of an employee's capacity to purchase the essentials for a 'decent standard of living' and to engage in community life, assessed in the context of contemporary norms. In this regard, the Panel assesses measures, or the risk, of poverty for NMW-reliant and award-reliant employees and their ability to meet basic needs.[337] As we have previously stated:

> 'If the low paid are forced to live in poverty then their needs are not being met and those in full-time employment can reasonably expect a standard of living that exceeds poverty levels.'[338]

**[330]** Because families differ in their size, composition and extent of employment, it is not feasible that minimum wages on their own could ensure that all families with a full-time minimum wage worker have incomes that exceed poverty levels. Larger families may need help from the welfare system.

**[331]** In each Statistical report, the Panel presents the disposable incomes of hypothetical households earning the NMW, selected modern award minimum wages and AWOTE and compares them against a relative poverty line.

**[332]** Relative poverty lines are essentially a measure of inequality at the lower end of the income distribution. They are not based on an observed incapacity to meet needs. This incapacity is better indicated by measures of deprivation and financial stress. The recent publication of research on budget standards, based on the MIHL,[339] provides an additional benchmark against which to assess the ability of the low paid to meet their needs. The MIHL is discussed later in this chapter.

**[333]** The Panel has generally relied on poverty lines that are based on median income, using a 60 per cent threshold on the basis that those in full-time employment can reasonably expect some margin above a harsher measure of poverty.[340]

**[334]** Table 3.5 compares the equivalised household disposable income for a range of hypothetical households reliant on the NMW and selected modern award minimum wages with a 60 per cent median income poverty line. The table includes additional households to that in the last Review,[341] including a single parent working part time (assumed to be working half of 38 hours). We remain aware, however, that the margin between the selected poverty line and the equivalised disposable income of award-reliant households provides, at best, a broad indicator of the extent to which the needs of the low paid are met.

**[335]** We can observe from this table that most of the hypothetical household types have a disposable income above the relative poverty measure. Households earning the NMW with disposable income below the relative poverty line were single-earner households working part time with children, and couple households where the non-earning partner is outside the labour force and not receiving NSA.

**[336]** We give particular weight to the capacity of the NMW and modern award minimum wages to provide an adequate standard of living to a single adult. This worker receives no assistance from the welfare system and is entirely reliant on his or her earnings. The table shows that a single adult on the NMW had a disposable income that exceeded the 60 per cent poverty line by 20 per cent in 2017, a little higher than in 2016. The margin for a worker on the C10 rate was 34 per cent. In contrast, the disposable income of a single-earner couple, with or without children, was about 10 to 20 per cent below the 60 per cent poverty line and either stayed the same or fell compared with the relative poverty measure over the year, notwithstanding the 3.3 per cent adjustment which resulted from last year's Review. As noted by ACOSS, this is reflective of 'ongoing reductions in the real value of family tax benefits and the abolition of the Schoolkids Bonus' in 2017.[342] ACOSS concluded that this has led to low-income families being more reliant on wage increases, with which we concur.[343]

**Table 3.5: Ratio of disposable income of selected households earning various wage rates to a 60 per cent median income poverty line**

| | December 2016 | | | | | December 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 | | | |
| | ($ pw) | NMW | C10 | C4 | AWOTE | ($ pw) | NMW | C10 | C4 | AWOTE |
| Single adult | 515.95 | 1.18 | 1.32 | 1.52 | 2.26 | 522.01 | 1.20 | 1.34 | 1.54 | 2.28 |
| Single parent working FT, 1 child | 670.74 | 1.30 | 1.42 | 1.55 | 1.97 | 678.61 | 1.30 | 1.41 | 1.55 | 1.93 |
| Single parent working PT, 1 child | 670.74 | 0.89 | 0.96 | 1.06 | 1.40 | 678.61 | 0.87 | 0.95 | 1.05 | 1.39 |
| Single parent working FT, 2 children | 825.53 | 1.20 | 1.29 | 1.41 | 1.74 | 835.21 | 1.18 | 1.28 | 1.39 | 1.68 |
| Single parent working PT, 2 children | 825.53 | 0.86 | 0.92 | 1.00 | 1.28 | 835.21 | 0.84 | 0.90 | 0.98 | 1.26 |
| Single-earner couple (with NSA) | 773.93 | 1.03 | 1.04 | 1.04 | 1.51 | 783.01 | 1.03 | 1.04 | 1.04 | 1.52 |
| Single-earner couple | 773.93 | 0.81 | 0.90 | 1.01 | 1.51 | 783.01 | 0.81 | 0.90 | 1.03 | 1.52 |
| Single-earner couple, 1 child (with NSA) | 928.72 | 1.07 | 1.08 | 1.12 | 1.42 | 939.62 | 1.06 | 1.06 | 1.12 | 1.39 |
| Single-earner couple, 1 child | 928.72 | 0.94 | 1.02 | 1.12 | 1.42 | 939.62 | 0.94 | 1.02 | 1.12 | 1.39 |
| Single-earner couple, 2 children (with NSA) | 1083.50 | 1.03 | 1.04 | 1.07 | 1.32 | 1096.22 | 1.01 | 1.01 | 1.06 | 1.28 |
| Single-earner couple, 2 children | 1083.50 | 0.91 | 0.99 | 1.07 | 1.32 | 1096.22 | 0.90 | 0.97 | 1.06 | 1.28 |
| Dual-earner couple | 773.93 | 1.22 | 1.39 | 1.59 | 2.38 | 783.01 | 1.24 | 1.41 | 1.62 | 2.39 |
| Dual-earner couple, 1 child | 928.72 | 1.24 | 1.33 | 1.45 | 1.98 | 939.62 | 1.24 | 1.33 | 1.45 | 2.00 |
| Dual-earner couple, 2 children | 1083.50 | 1.17 | 1.25 | 1.35 | 1.70 | 1096.22 | 1.16 | 1.23 | 1.34 | 1.71 |

Note: Poverty lines are based on estimates of median equivalised household disposable income for 2015–16 for December 2015 and for December 2016, and adjusted for movements in household disposable income per head as calculated by the Melbourne Institute of Applied Economic and Social Research, and adjusted for household composition using the modified OECD equivalence scale. AWOTE data are expressed in original terms.

Assumptions: Tax-transfer parameters as at December 2016 and December 2017. Wage rates for 2016: NMW = $672.70 pw; C10 = $783.30 pw; C4 = $940.90 pw; and AWOTE of full-time employees = $1533.40. Wage rates for 2017: NMW = $694.90 pw; C10 = $809.10 pw; C4 = $971.90 pw; and AWOTE of full-time employees = $1569.60. Other assumptions as per Table 3.2.

Source: Statistical Report, Table 8.6; ABS, *Average Weekly Earnings, Australia, Nov 2017*, Catalogue No. 6302.0; ABS, *Household Income and Income Distribution, Australia, 2011–12*, Catalogue No. 6623.0; ABS, *Household Income and Wealth, Australia, 2015–16*, Catalogue No. 6523.0; Fair Work Commission modelling; *Manufacturing and Associated Industries and Occupations Award 2010*; Melbourne Institute of Applied Economic and Social Research (2018), *Poverty Lines: Australia*, December quarter 2017.

**[337]** We have previously stated that the tax-transfer system plays a major role in raising the living standards of families reliant on the NMW and modern award minimum wages that have

children.[344] However, it does not support them to the point that single parents working part time and single-earner couples with one partner not in the labour force are able to maintain an income above the poverty line. Single adults and single parents able to obtain full-time employment and those couples where the second partner gains part-time employment at the NMW have a substantial margin above the poverty line.

**[338]** ACCER argued, as it has previously, that the minimum wage should be sufficient to support sole parents and single-earner couples with one or two children,[345] with the implication that the Panel should set a NMW for these families at a margin above the 60 per cent relative poverty line.[346] ACCER referred the Panel to the Panel's earlier comments that a full-time employee should reasonably expect a standard of living exceeding the poverty line and questioned why the single breadwinner family falls below this standard.[347]

**[339]** On this matter, we note that we have one instrument available, namely the level of minimum wages, and a number of statutory considerations that we have to take into account. We are required to set the NMW and modern award minimum wages that are fair to both employees and to employers. It is not possible, with this one instrument, to accommodate the normal variation in the composition of families and in the levels of household labour supply. The level of the NMW and modern award minimum wages that would be sufficient alone to exceed 60 per cent of median equivalised household disposable income for a single breadwinner family with several children would be more than sufficient for a single adult or dual-income couple without children. In this context, we note the data provided by the Australian Government that 77.5 per cent of low-paid workers have no children (between 0–17 years).[348] We also note that 40 per cent of all the hours worked by employees paid at or below the C12 level (i.e. close to or a little above the NMW) were worked by youth aged 15–19 years and a further 24 per cent of such hours were worked by adults aged 20–24 years.[349] We may reasonably presume that most of these young people do not have dependent children, yet they would, under the ACCER proposal, be the main beneficiaries of a large rise in the NMW and nearby modern award minimum wages.

**[340]** The size of the adjustment required to reach such a level would also, in our judgement, run a substantial risk of causing job losses and reduced employment opportunities for low-skilled workers, including many youth. We are reassured that the NMW and modern award minimum wages that we have set are at least sufficient to enable a single adult who works full time to have an income that is significantly above the 60 per cent poverty line. This will contribute to providing an adequate income to other household types, but those with dependents also need assistance from the tax-transfer system.

**Budget standards**

**[341]** Budget standards estimate what is needed, in terms of material goods and services, by a particular family type in order to achieve a particular standard of living. In previous Reviews, parties have referred to research on budget standards conducted in the mid-1990s.[350] The Panel concluded that the budget standards estimated in that research 'were not seen to provide useful contemporary information about the needs of the low paid.'[351]

**[342]** In a Statement issued on 11 August 2017,[352] the Panel referred to a current project to provide contemporary budget standards data and that the Panel would consider a preliminary hearing on their outcomes. The report was published on 23 August 2017 (Saunders and Bedford 2017).[353] A further Statement,[354] released on 25 August 2017, invited parties to give

consideration to the report and provide comment on the utility of holding a preliminary hearing to discuss its outcomes for the Review. Following submissions which did not support a separate hearing on the matter, a Statement[355] on 20 September 2017 was released that cancelled the proposed hearing and noted that Commission staff would seek another forum for the discussion of the budget standards research.[356]

**[343]** The Commission invited interested parties to attend a presentation by the authors of the report, Professor Peter Saunders and Megan Bedford, held on 27 November 2017. The session was recorded and materials were made available on the 2017–18 Review website.

**[344]** The new budget estimates are based on the MIHL standard which encompasses the 'ingredients of a healthy life in all of its dimensions, including diet, clothing, personal hygiene, health promotion, exercise and other forms of social engagement and activity.'[357] They state that they are intended to provide 'a set of contemporary budget standards that reflect the needs of low-income working and unemployed individuals and families that can be used to assess income adequacy and guide decision-making.'[358] They therefore differ from the earlier budget standards calculated for Australia that focussed on income adequacy to avoid poverty.

**[345]** Saunders and Bedford (2017) provided the MIHL budget estimates for five different family types and compared these to their disposable income if one member was earning the NMW as at June 2016. Their analysis showed that the disposable incomes of families comprising single adults, sole parents with one child and couple households with one child (with the female partner not in the labour force) earning the NMW were above the corresponding MIHL budget standard (ranging from $8.84 to $61.91 per week above). However, the disposable income of the remaining two family types, couple household with no children (with the female partner unemployed) and couple household with two children (with the female partner not in the labour force), fell below the estimated budget standard (by $39.03 and $88.74 per week, respectively).[359]

**[346]** These findings differ somewhat from findings of adequacy that are based on the application of the 60 per cent of median income poverty line. Specifically, they find that, in 2015–16, several NMW-reliant family types with children had disposable incomes that exceeded the MIHL. Two family types that were evaluated had incomes below the standard. Both indicators concluded that a full-time job at the NMW was sufficient to provide a single adult with a reasonable standard of living.

**[347]** ACOSS submitted that, while the approach of the research is transparent and adaptable, there are problems with relying on the judgements of experts and the need to update the standards to reflect changes in a 'basic' standard of living.[360] ACOSS noted that the 'new budgets are more stringent' compared with the previous research and would only support a 'frugal living standard, arguably below that which the [NMW] should support… .'[361]

**[348]** Overall, there was low support from parties regarding the consideration of the budget standard for this year's Review. Parties identified particular aspects of the methods used to calculate the standards that they felt undermined their confidence in the outcomes.[362] The ACTU submitted that the budget standards be given 'no special status' and were 'far too modest to in fact reflect the needs of a person or household today.'[363] The ACTU also argued

that the research 'failed to enumerate or address the many costs of working that are not immediately apparent.'[364]

**[349]** ACCI submitted that the availability of the research does not 'elevate relative living standards and the needs of the low paid above other considerations.'[365] ACCI urged the Panel to use caution in forming a decision based on the new budget standards research, and that '[t]o the extent that the Panel is attracted to the Budget Standards material and wishes to accord weight to it in its decision making, we suggest the Panel advance any conclusions tentatively or provide suggestions of its thinking at this point which can be responded to and engaged with in 2019 and beyond.'[366]

**[350]** ACCER broadly supported the use of the budget standards research as it identifies and measures a contemporary decent standard of living consistent with the Panel's statements that an 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.'[367] In its submission in reply, ACCER noted the reservations articulated by the ACTU, ACOSS, ACCI and Ai Group. It concluded that despite these reservations, 'the budget standards research presents the FWC and the parties to annual wage reviews with a very valuable resource… .'[368]

**[351]** The new budget standards research is the first time that a serious effort has been made, using contemporary scholarship in this field, to estimate the needs of low-paid employee households. We judge it to be useful and relevant, while recognising its limitations and the Panel has taken it into account along with all of the relevant material we have before us. We note the comment from the authors that '[b]udget standards are not a panacea but they provide important information that can inform and assist decisions taken about adequacy… .'[369]

**[352]** We agree with ACCER's submission that the research is the 'best evidence available in regard to the needs of the low paid Australian workers and their families,'[370] but also with ACCI's submission that the 'budget standards cannot of themselves be determinative of the NMW or any uprating of minimum award rates.'[371]

**Other measures of relative living standards**

**[353]** To understand the relative standard of living and the needs of the low paid we also consider data on patterns of expenditure and levels of financial stress.

**[354]** Updated data on expenditure patterns and financial stress indicators of households was released by the ABS since the last Review and included in this year's Statistical report. This data was last released in 2009–10.

**Expenditure**

**[355]** Table 3.6 presents data on the composition of household expenditure of low-paid and all employee households in 2015–16. Low-paid employee households are defined as those in the bottom quintile of equivalised household disposable income of employee households. Employee households are those whose main source of income is from wages and salary.

**[356]** We find little difference in the pattern of expenditure between low-paid employee households and all employee households. Most expenditure is directed to current housing

costs, food and non-alcoholic beverages, and transport. Low-paid households allocate relatively more expenditure to current housing costs and food and non-alcoholic beverages, and relatively less to transport. We note that even for low-paid households, only 3.3 per cent of total expenditure went to payment for domestic fuel and power, although this percentage has probably increased in light of recent sharp rises in power prices. These conclusions are similar to those reached by the Minimum Wage Panel in the *Annual Wage Review 2012–13* decision (2012–13 Review) based on data from 2009–10.[372]

**[357]** Table 3.6 shows that the difference in average total expenditure between low-paid and all employee households is smaller than the difference in their average total income. The table also shows that the average expenditure of low-paid households exceeds their income (this was also found in 2009–10[373]).

**[358]** The data used in Table 3.6 is only updated by the ABS every six years, and as such, it has greater value as a point-in-time estimate of expenditure patterns. We do find, however, that similar proportions of average expenditure were evident in the 2009–10 data, presented in the *Statistical report—Annual Wage Review 2014–15*.[374]

**Table 3.6: Estimated proportion of average weekly expenditure, employee households in bottom quintile of equivalised household disposable income and all employee households, 2015–16**

| Expenditure group | Employee households in bottom quintile of EHDI (%) | All employee households (%) |
|---|---|---|
| Current housing costs (selected dwelling) | 22.0 | 19.0 |
| Domestic fuel and power | 3.3 | 2.5 |
| Food and non-alcoholic beverages | 17.3 | 15.7 |
| Alcoholic beverages | 1.8 | 2.2 |
| Tobacco products | 1.1 | 0.8 |
| Clothing and footwear | 3.0 | 3.1 |
| Household furnishings and equipment | 3.7 | 3.8 |
| Household services and operation | 2.9 | 3.1 |
| Medical care and health expenses | 5.4 | 5.1 |
| Transport | 12.6 | 14.6 |
| Communication | 3.6 | 3.1 |
| Recreation | 9.3 | 11.4 |
| Education | 3.4 | 3.1 |
| Personal care | 1.9 | 2.0 |
| Miscellaneous goods and services | 5.4 | 6.7 |
| Other capital housing costs (restricted) | 3.1 | 3.9 |
| | **100.0** | **100.0** |
| **Average household expenditure on goods and services (including other capital housing costs (restricted)) ($)** | **1319.63** | **1781.27** |
| Average household income ($) | 1246.38 | 2680.06 |
| Observations | 1027 | 5181 |

Note: Employee households are those whose principal source of income is from salary and wages. Other capital housing costs (restricted) excludes Mortgage repayments—principal component (other property), Purchase of selected dwelling or other property and Capital housing costs not elsewhere classified (nec). About 28.9 per cent of all adult employees in the bottom quintile of EHDI are classified as low paid, with hourly earnings equal to or below two-thirds of median hourly earnings of full-time adult employees. Hourly earnings are calculated as current weekly income (including salary sacrifice) divided by usual hours worked per week in main and second job. Communication and Education were introduced as separate categories of expenditure in the 2015–16 Household Expenditure Classification.

Source: ABS, *Microdata: Household Expenditure, Income and Housing, 2015–16*, Detailed Microdata, DataLab, Catalogue No. 6540.

### Financial stress and deprivation

**[359]** The Statistical report also includes a comparison of financial stress and deprivation indicators from 2009–10 and 2015–16 using data from the ABS. The Panel considers that changes in the levels of financial stress and deprivation reported by low-paid households over time, both in absolute terms and relative to other households, assists with its assessment of the extent to which the needs of the low paid are being met, and that minimum wages are fair.[375]

**[360]** Table 3.7 presents this information for all employee households and for households with only low-paid adult employees. The table generally shows a decline in the proportion of households experiencing financial stress or deprivation. We note, however, that the data for 2009–10 are for the period immediately after the GFC, when the economy was coping with a substantial negative shock. It is to be expected that levels of financial stress were elevated in that year.

**[361]** Households with only low-paid adult employees were more likely than all employee households to report experiencing financial stress and deprivation, which is not surprising. By 2015–16, both sets of households had noticeable falls in the proportions who reported experiencing specific indicators of financial stress, such as not being able to pay utility bills on time. The one exception was a rise in the proportion of households with low-paid adult employees who felt unable to raise $2000 in a week for something important.

**[362]** The situation reflected by the indicators of deprivation was different. For all employee households, the experience of specific indicators of deprivation fell substantially. But for low-paid households, their gains were either small, or in the case of two out of the six indicators, the levels of deprivation rose. For example, 13 per cent of low-paid families said that they could not afford to have friends or family over for a meal once a month (this was 11 per cent five years earlier) while 18 per cent said they could only afford second hand clothes most of the time (previously 17 per cent). This provides some evidence that the economic gains that have flowed more generally to the workforce have not been fully shared with the low paid. It is also evidence that some employee families are struggling to have a decent standard of living.

**Table 3.7: Financial stress and deprivation experienced by all households with adult employees and households with only low-paid adult employees**

| | All households with adult employees | | Households with only low-paid adult employees | |
|---|---|---|---|---|
| **Financial stress indicators** | **2009–10** | **2015–16** | **2009–10** | **2015–16** |
| | **(%)** | **(%)** | **(%)** | **(%)** |
| In the last 12 months, spent more money than received/usually spend more than income | 17.6 | 12.2 | 24.4 | 19.0 |
| Unable to raise $2000 in a week for something important | 17.6 | 11.5 | 21.1 | 23.1 |
| Could not pay electricity, gas or telephone bills on time | 14.1 | 10.2 | 20.9 | 14.1 |
| Could not pay car registration or insurance on time | 5.8 | 4.2 | 10.2 | 4.2 |
| Pawned or sold something | 3.6 | 2.3 | 5.8 | 2.6 |
| Went without meals | 3.7 | 1.5 | 6.8 | 4.5 |
| Could not afford to heat home | 2.8 | 1.0 | 2.2 | 1.3 |
| Sought assistance from welfare/community organisation | 4.2 | 1.1 | 6.5 | 2.2 |
| Sought financial help from friends or family | 8.9 | 6.5 | 14.7 | 9.2 |
| **Deprivation indicators** | | | | |
| Could not afford holiday for at least one week a year | 31.4 | 21.1 | 38.4 | 36.7 |
| Could not afford a night out once a fortnight | 24.3 | 16.0 | 31.5 | 30.6 |
| Could not afford friends or family over for a meal once a month | 10.5 | 5.2 | 10.9 | 13.2 |
| Could not afford a special meal once a week | 16.8 | 9.7 | 21.2 | 19.1 |
| Could only afford second hand clothes most of the time | 13.7 | 8.5 | 16.6 | 17.5 |
| Could not afford leisure or hobby activities | 14.7 | 7.9 | 19.6 | 14.6 |

Note: Low-paid adult employees defined as employees whose hourly earnings are at or below two-thirds of median hourly earnings of full-time adult employees. Households whose principal source of income is from own unincorporated business are excluded. Hourly earnings calculated as current weekly income (including salary sacrifice) divided by usual hours worked per week in main and second job. About 15.6 per cent of all adult employees were low paid in 2009–10 and 16.4 per cent were low paid in 2015–16.

Source: Statistical report, Table 16.2; ABS, *Household Expenditure Survey Expanded Confidentialised Unit Record File, 2009–10*, Catalogue No. 6540.0; ABS, *Microdata: Household Expenditure, Income and Housing, 2015–16*, Detailed Microdata, DataLab, Catalogue No. 6540.0.

**[363]** Analysis by the Australian Government using data from the HILDA survey for 2016 showed that 24.4 per cent of low-paid employees experienced at least one indicator of financial stress compared with 16.4 per cent of higher-paid employees and 37.7 per cent of unemployed persons.[376]

**[364]** When it is available, the ABS Household Expenditure Survey (HES) is a preferred source for indicators of expenditure and financial stress, mainly because of its larger sample size. Indicators of financial stress from the HILDA survey are likely to be presented in future Reviews until the release of new HES data from the ABS, as has been the case in previous Reviews.

**Conclusion**

**[365]** The Panel's decision arising from this Review will directly affect the 1.9 per cent of all employees who are NMW earners and the 22.7 per cent of all employees who are award reliant (except state public sector employees and some other workers who are award reliant but not in the federal industrial relations system). It is also likely to indirectly affect a larger pool of employees who are paid close to the NMW or modern award minimum wages, whose pay rates under collective agreements or individual arrangements are linked to the outcome of the Review, or whose employer may pass on Review increases in order to maintain relativities, but it is not possible to quantify this.

**[366]** It is clear that, having regard to those directly affected, the Panel's decision is significant to the needs of the low paid and their relative living standards, since workers who receive the NMW or a modern award minimum wage are disproportionately located in the lower deciles of employee household disposable income. The real value of the NMW has increased by 5.8 percent over the last decade, and by 4.3 per cent in the last five years. However, this has not resulted in improvements to the actual or relative living standards for many categories of NMW and award-reliant households. Real disposable income for 11 out of 14 hypothetical NMW households fell in the year to 1 July 2017 and, over the five years to July 2017, fell for 10 out of 14 household types. This has primarily affected families with children, and has occurred because of changes to the tax-transfer system. By contrast, single adults and couples without children, who have not been affected by the changes to the tax-transfer system, have enjoyed an increase in their real disposable income.

**[367]** The minimum wage bite increased by 0.8 percentage points to 54.8 per cent between 2016 and 2017, and has increased since 2012 following a decline between 1994 and 2012. The majority of hypothetical household types on NMW or modern award minimum wages have disposable incomes above a relative poverty line of 60 per cent of median income. However, a number of household types with a single earner and children remain below this relative poverty line at both the NMW and the C10 rate. It is also notable that, despite the increase of 3.3 per cent awarded in last year's Review, the relative position of many NMW and award-dependent household types with children vis-a-vis the relative poverty line actually deteriorated due to changes in the tax-transfer system in 2017.

**[368]** The latest data suggest that income inequality in Australia has stabilised for some period with some indicators showing that income growth for households at the bottom of the distribution increasing more than for households at the top of the income distribution. However, inequality of household income remains high in Australia, relative to the past and to other comparable countries.

**[369]** A new report estimating budget standards based on the MIHL has been released since the last Review. Overall, there was low support from the parties regarding the consideration of the new budget standards for this year's Review. Application of the budget standards concluded that, in 2016, the disposable incomes of families comprising a NMW earner who were single adults, sole parents with one child and couple households with one child (with a partner not in the labour force) were above the corresponding MIHL budget standard. The remaining two family types that were evaluated had incomes below the standard. We consider the MIHL budget standards to be useful and relevant insofar as they provide direct, if imperfect, evidence that a full time job at the NMW rate is sufficient to provide a single adult

with a reasonable standard of living. This concurs with the assessment based on the 60 per cent relative poverty line.

**[370]** Measures of financial stress and deprivation find that low-paid families have considerably more stress than all employee families. Rates of financial stress and deprivation fell in all 15 indicators for all employee households between 2009–10 and 2015–16, although the base for measurement is the immediate aftermath of the GFC. For low-paid families, levels of stress and deprivation on three indicators rose. They fell for the other 12 indicators, some by less than for all employee families. This suggests that the level of financial comfort for low-paid families has fallen relative to all employee families but their absolute position has probably improved.

**[371]** We consider that an increase to the NMW and modern award minimum wages of the size necessary to ensure that all household types, most particularly single-earner families with children, earn more than the relative poverty line would likely lead to discernible disemployment effects. An increase in minimum wages makes an important contribution to the maintenance and improvement of relative and actual living standards for the low paid, but it is not sufficient by itself to perform this function and must necessarily be supported in relation to families with children by the tax-transfer system. However, the fact that recent changes to the tax-transfer system have resulted in a deterioration in the real disposable income and relative living standards of NMW and award-reliant single-earner households with children places a greater burden on minimum wage adjustments, and tends to favour a larger rather than smaller increase to the NMW and modern award minimum wages.

# 4. Other relevant considerations

**[372]** This Chapter deals with the remaining considerations we must take into account, including the need to encourage collective bargaining and some other relevant matters.

**Encouraging Collective Bargaining**

**[373]** In giving effect to the modern awards objective, the Panel must take into account 'the need to encourage collective bargaining' (s.134(1)(b)). In making the NMW order, the Panel must give effect to the minimum wages objective. While the minimum wages objective does not refer to 'the need to encourage collective bargaining,' one of the objects of the Act is to encourage collective bargaining and it is therefore appropriate to consider that legislative purpose in making the NMW order.[377]

**[374]** The ACTU submitted that these provisions (ss 3 and 134) permit consideration of not only the incentive to bargain but the type of collective bargaining that should be promoted.[378] It contended that a larger increase would help to encourage bargaining that promotes national economic prosperity and social inclusion, and achieves productivity and fairness.[379]

**[375]** A number of submissions referred to a decline in both collective agreement-making and the AAWI in federal enterprise agreements. We have considered the reasons for these trends including the impact of the gap between modern award minimum wages and bargained wages and the regulatory issues associated with agreement approvals.

**[376]** In the 2016–17 Review decision, we noted that each of the two major data sources from which information is derived about coverage and wages outcomes in collective agreements—the EEH and the Workplace Agreements Database (WAD)—has limitations. The EEH captures employees covered by collective agreements while current agreements in the WAD only capture employees covered by federal enterprise agreements that have not passed their nominal expiry date.[380]

**[377]** The EEH provides data on method of setting pay and is conducted every two years. The most recent release was for data collected in May 2016, discussed in the 2016–17 Review, where we observed a decline in the proportion of employees reported as covered by collective agreements and an increase in the extent of reported award reliance between 2014 and 2016.[381]

**[378]** The 2016–17 Review decision also discussed changes to the application of the Method of Setting Pay conceptual framework undertaken by the ABS, which resulted in the shift of a significant proportion of employees in the NSW public sector to the 'Award only' category between 2014 and 2016 and other recoding from collective agreements to awards.[382] We also referred to Research Report 4/2017 *Explaining recent trends in collective bargaining* (Peetz and Yu 2017) which examined factors that influenced recent changes in the collective agreement coverage of employees.[383] Among other things, that report found that the decline in public sector employment between 2000 and 2014 had a large negative effect on collective agreement coverage. Analysis of the WAD between 2014 and 2016 also found that the decrease in the incidence of collective agreement coverage was due to falls in Retail trade, Public administration and safety and Health and community services.[384] The fall in union density was also considered to be a contributing factor.[385]

**[379]** Research Report 1/2018 *Employee and employer characteristics and collective agreement coverage* (Peetz and Yu 2018) released in February 2018 utilises confidential unit record file data from the 2016 EEH to estimate the probability of an employee being covered by a collective agreement relative to all other forms of wage setting: award rates of pay; and an individual agreement.[386] The report found that the main determinants of collective agreement coverage were the sector of the economy in which the employees were employed, employer size, and, union density. Public sector employees and those who worked in medium/large firms had a higher probability of collective agreement coverage and there was a strong and positive association between union density and the likelihood of being covered by a collective agreement. The authors concluded that the analysis did not 'substantially change' the findings of their 2017 report.[387]

**[380]** In reference to the finding on the association between union density and collective agreement coverage, the ACTU commented that this was consistent with analysis drawn from the Fair Work Commission General Manager's 2015 report, which showed that the most popular reason cited by employers for making an enterprise agreement was 'Employee organisation/employee association demands/log of claims.'[388] The ACTU submitted:

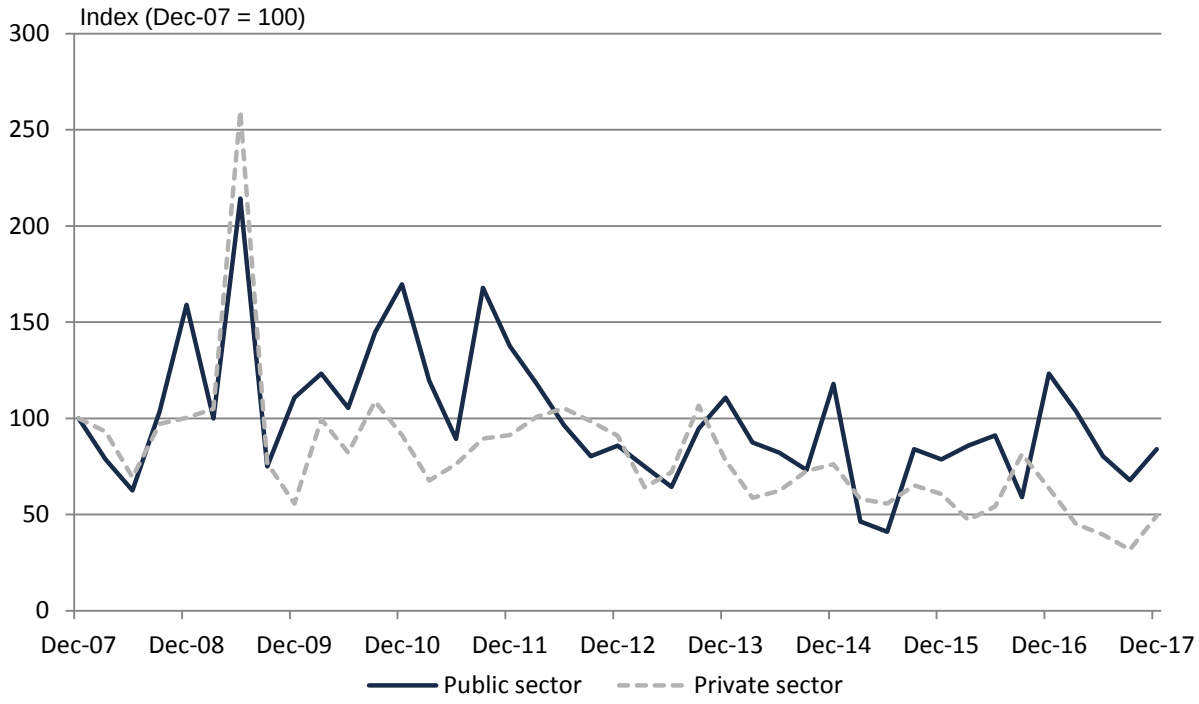
> 'These observations do provide some insight into the patterns and predictability of collective agreement coverage, but do not inform the inquiry as to what may be done to encourage or incentivise the making of collective agreements through changes in minimum wage movements.'[389]

**Trends in federal enterprise agreements**

**[381]** The *Trends in Federal Enterprise Bargaining Report* provides information on trends in federal enterprise bargaining agreements, including the AAWI and the number of agreements approved and current in each quarter. A number of submissions referred to the September quarter 2017 *Trends in Federal Enterprise Bargaining Report*; drawing attention to the reduction in both the number of agreements approved and the AAWI in those agreements for the September quarter 2017 when compared with the same quarter in previous years. The December quarter 2017 *Trends in Federal Enterprise Bargaining Report* was released in May 2018.

**[382]** Chart 4.1 presents an index of the number of federal enterprise agreements approved by sector between the December quarter 2007 and the December quarter 2017. The data show that the number of agreements approved per quarter in the private sector has decreased since 2013, while the trend in the number of agreements approved in the public sector has been more stable. We note that there has been an increase in the number of agreements approved since the September 2017 quarter.

**Chart 4.1: Number of agreements approved in the quarter by sector, indexes**




Source: Statistical report, Chart 10.1; Department of Jobs and Small Business, *Trends in Federal Enterprise Bargaining*, December quarter 2017.

**[383]** The Australian Government submitted that the decline in the approval of new federal enterprise agreements, particularly in the private sector, is 'driven primarily by a reduction in agreements covering small numbers of employees,' and that while the decline is seen in almost all industries, it is larger in Construction, Retail trade and Accommodation and food services.[390] The Australian Government also noted that, despite the decline in new federal enterprise agreement approvals, over one-third of all employees are still covered by collective agreements.[391]

**[384]** ACCI submitted that larger businesses (in Accommodation and food services) 'continue to bargain and finalise' agreements while fewer smaller and medium-sized businesses do so.[392] ACCI also identified what it described as a significant decline in bargaining in the retail sector and contended that there has been a 77.4 per cent decrease in the numbers of retail agreements and an 84.8 per cent fall in the number of employees covered by those agreements between December 2013 and December 2016. According to ACCI, in the December quarter 2013 there were 1049 current retail agreements applying to 390,700 employees, compared to the December quarter 2016 when there were 237 current retail agreements applying to 59,300 employees.[393] The source of these data are not stated in the ACCI submission. However, on the assumption that it is derived from the *Trends in Federal Enterprise Bargaining Report* for the September quarter 2017, the figures for the December quarter 2016 indicate that there were 238 agreements current at the end of that quarter covering some 59,400 employees.[394]

**[385]** The *Trends in Federal Enterprise Bargaining Report* use the WAD which, as we have mentioned, capture data relating to current agreements and not agreements that are still in effect but have passed their nominal expiry dates. We accept that there is a decline in current enterprise agreement-making but there are a range of factors which contribute to this decline, many of which are unrelated to increases in the NMW and modern award minimum wages. A

closer examination of the retail sector data referred to by ACCI suggests that a number of factors may have contributed to the decline in collective bargaining in the period cited and highlights the difficulty in drawing conclusions about the reasons for a decline in bargaining in particular industries or in particular time periods. We make three points in this regard.

**[386]** First, the period identified by ACCI as the starting point for its analysis—the end of the December quarter 2013—was prior to the transitional arrangements in modern awards ceasing and those modern awards becoming fully operational. The timing of the cessation of transitional arrangements in modern awards may have provided an incentive for retail employers to bargain in 2013, which was the last full year in which transitional arrangements applied. By the December quarter 2014, the number of current retail agreements was 318 covering some 294,100 employees. At the end of the December quarter 2017, there were 213 retail agreements covering 50,500 employees. The reduction in the number of current agreements between the December quarter 2013 and the December quarter 2014 is more significant than in subsequent periods.

**[387]** An examination of numbers of agreements in the retail sector prior to the commencement of modern awards in 2010 and, in the period up to the end of transitional provisions, shows a similar picture. Significant levels of bargaining occurred in the retail sector in 2009, immediately prior to the introduction of modern awards and the number of current agreements in the sector peaked in the March quarter 2011, when there were 2013 current Retail trade agreements. This number reduced to 1,048 by the December quarter 2013 which is the start of the timeframe identified by ACCI in its analysis of Retail trade bargaining. The timing of the peak and the reduction in the number of Retail trade agreements suggests that the implementation of modern awards impacted on bargaining in this sector. It is apparent also that the decline referred to by ACCI commenced before the period in its analysis.

**[388]** Second, the ACCI submission does not have regard to expired agreements that have not been terminated or replaced. Data from the WAD, obtained from the Department of Jobs and Small Business, show that in the December quarter 2017, there were 34,497 expired agreements that have not been terminated or replaced, covering around 2.3 million employees.[395] However, these data provide only an estimate on the number of employees covered by 'potentially still operational agreements' that are not included in an analysis of current agreements.[396]

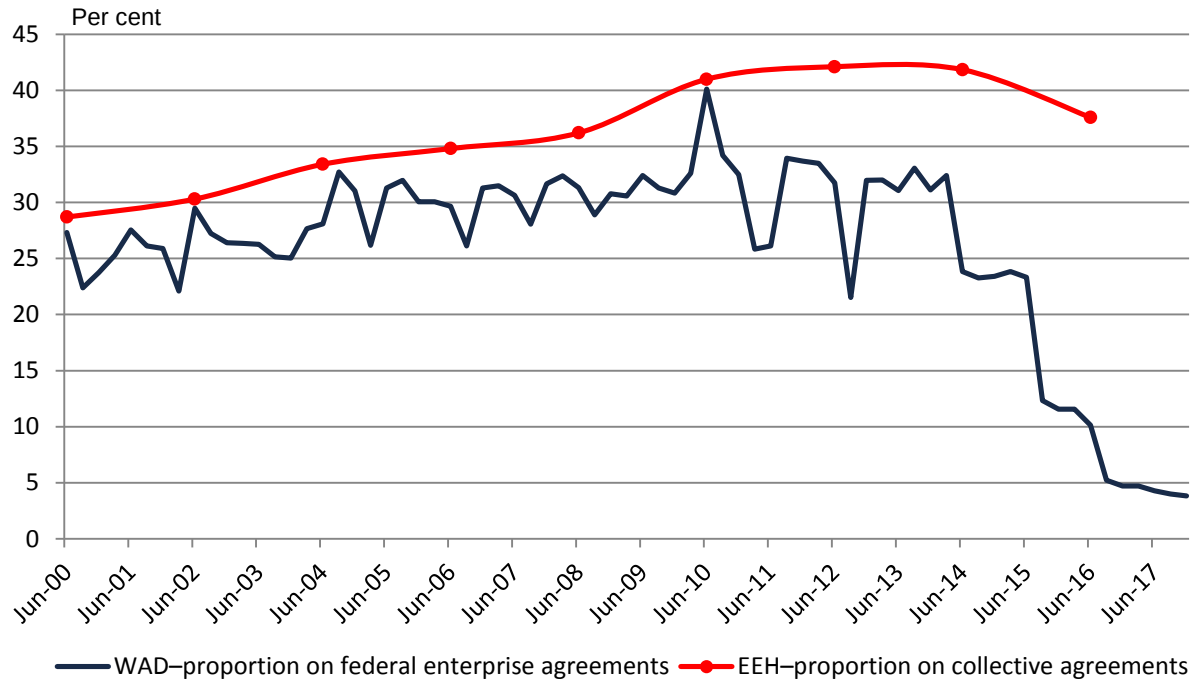
**[389]** While there has been a decline in the numbers of current agreements, and in the employees covered by current agreements, in the Retail trade sector, there may be small to medium-sized employers in that sector still using expired agreements as an alternative to modern awards. Those employers may also be using a combination of expired agreements supplemented with increases in the base rates under those agreements in accordance with the requirements in s.206 of the Act.

**[390]** Third, the bargaining figures for the Retail trade sector are skewed somewhat by the number of agreements covering large employers which reached their nominal expiry dates. For example, the Coles Agreement covering 79,754 employees reached its nominal expiry date in May 2014; the Woolworths Agreement covering 95,571 employees reached its nominal expiry date in June 2015; the Big W Stores Agreement covering 19,703 employees reached its nominal expiry date in August 2015; the K-Mart Agreement covering 23,853 employees reached its nominal expiry date in April 2016; and the Target Retail Agreement

covering 20,226 employees reached its nominal expiry date in July 2016.[397] A new agreement for Coles was approved on 23 April 2018 covering 82,638 employees.[398] The other Retail sector agreements referred to are still in effect.

**[391]** Chart 4.2 illustrates the effects of expired agreements that may still be operational in Retail trade. Using the EEH and WAD data, the chart compares the proportion of employees covered by collective agreements (from the EEH) with the proportion of employees covered by current federal enterprise agreements (from the WAD).

**Chart 4.2 Proportion of employees covered by current enterprise agreements in Retail trade**




Note: Data from the EEH for 2016 are non-managerial employees as data for all employees by method of setting pay and industry are not available. Data from the Labour Force are expressed in original terms.

Source: ABS, Employee Earnings and Hours, Australia, various, Catalogue No. 6306.0; ABS, Labour Force, Australia, Detailed, Quarterly, Feb 2018, Catalogue No. 6291.0.55.003; Department of Jobs and Small Business, Trends in Federal Enterprise Bargaining, December quarter 2017.

**[392]** The chart shows that movements in the proportion of employees covered by federal enterprise agreements were broadly consistent with those from employees on collective agreements (from the EEH) until June 2010.[399] After June 2010, the two series appear to diverge. In May 2016, there is a 27.5 percentage point difference between the proportions of employees on collective agreements compared with those covered by federal enterprise agreements. The difference between these two data sources likely reflects the large number of employees covered by Retail trade agreements which have passed their nominal expiry date, but which are still in operation.

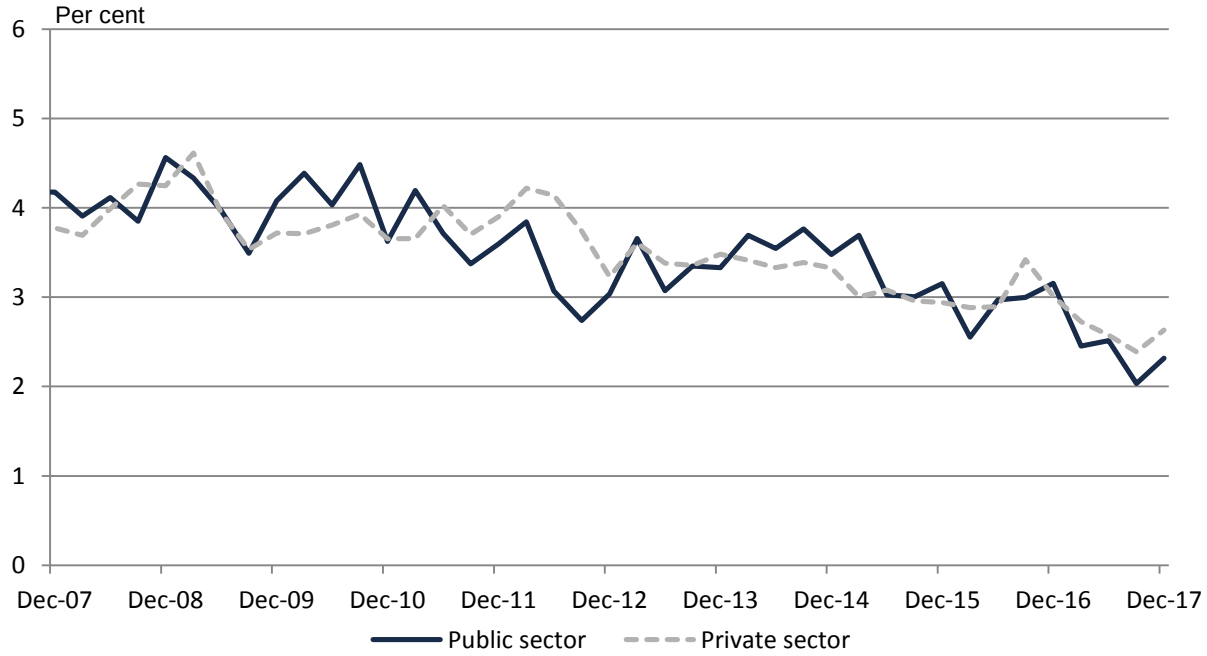
**[393]** A close consideration of the data in relation to Retail trade agreements does not indicate that increases in the NMW or in modern award minimum wages have contributed to a decline in collective bargaining. It is clear that other factors are at play, including reliance on expired agreements; bargaining currently underway; or recently completed in large enterprises employing significant numbers of employees. It is also likely that reliance on expired

agreements by employers in the Retail trade sector is not motivated by disincentives to bargain but rather by maintaining conditions as they existed prior to the full introduction of modern awards. We also note that in the December quarter 2017 a total of 20 agreements were approved covering employers in the Australian and New Zealand Standard Industrial Classification (ANZSIC) Division for Retail trade, up from 10 agreements in the September quarter 2017.[400]

**[394]** The general increase in award reliance resulting from the decline in enterprise bargaining noted in previous Reviews, may also have been impacted by the award modernisation process, which has resulted in simplified and more flexible awards. We also note that the most recent *Trends in Federal Enterprise Bargaining Report* for the December quarter 2017 covered more than 1.8 million employees on current agreements.[401] There are also agreements covering a number of large employers finalised and awaiting approval reflecting that bargaining is trending upwards, albeit slightly.[402]

**[395]** AAWIs in both public and private sector federal enterprise agreements approved are at relatively low levels (Chart 4.3). The AAWI for all federal enterprise agreements approved in the December quarter 2017 was 2.5 per cent, up from 2.2 per cent in the previous quarter but down from 3.1 per cent in the December quarter 2016. The fall in the AAWI has followed the trends of other wage measures.

**Chart 4.3: AAWI for agreements approved in the quarter by sector, December quarter 2007 to December quarter 2017**




Source: Department of Jobs and Small Business (2018), *Trends in Federal Enterprise Bargaining*, December quarter 2017.

**[396]** The WAD also provides data on federal enterprise agreements where wage increases defined as 'non-quantifiable' are not included in the calculation of the AAWI. This excludes, among others, agreements where wage increases are linked to Review decisions, as future Review decisions are not known and cannot be quantified.[403] The ACTU submitted that a 'sizeable increase to minimum wages' would have a direct impact on the proportion of agreements linked to Review decisions.[404] However, the number of employees linked to Review decisions is small, with the Australian Government submitting that the Panel's

decision would directly affect 62,200 employees, or 3.5 per cent of employees on federal enterprise agreements.[405]

**[397]** The ACTU also submitted that while minimum wages 'served as a guide to negotiating wages,' any spillover effects of the Panel's decision are 'difficult to quantify precisely and admittedly likely small.'[406]

**[398]** We note that the December quarter 2017 Report indicates a slight increase in AAWI for public sector agreements from 2.0 per cent in the September quarter 2017 to 2.3 per cent in December quarter 2017. In the same period, AAWI for private sector agreements also increased slightly from 2.4 per cent to 2.6 per cent.

### Implications of these trends for the setting of the NMW and minimum award wages

**[399]** A number of submissions discussed the impact of the gap between modern award minimum wages and bargained wages on collective bargaining. The ACTU submitted that narrowing the gap between award and bargained wages may provide incentive for employers to bargain for productivity reasons.[407] The ACTU pointed to, among other things, reductions in the numbers of non-managerial employees on collective agreements and individual arrangements as an indication that employers have a diminished incentive to bargain, given that minimum rates have fallen so far relative to average or median wages.[408]

**[400]** The ACTU submitted that many employers who do not bargain have little incentive to do so at the contemporary level of the gap between bargained and award wages, notwithstanding that they have the financial capacity to do so.[409] The Federal opposition made a similar point submitting that the gap between agreement and modern award minimum wages is discouraging bargaining by employers and warranted an increase in the minimum wage.[410]

**[401]** The Queensland Government submitted that improving the real value of modern award minimum wages will not result in bargaining becoming less attractive to employees, as not all employees are able to bargain with their employers for a variety of reasons.[411]

**[402]** A number of parties contended that a reduction in the gap between modern award minimum wages and bargained wages is, and will continue to be, an impediment to bargaining. AFEI submitted that modern award minimum wages and entitlements have reached levels which adversely impacted on the incentive to bargain. AFEI also submitted that the more modern award minimum wages are pushed up into what would be market rates, the less encouragement there is for enterprise bargaining and the less flexibility there is for the employer to accommodate the widely differing circumstances of individual business, including within the same market or industry.[412]

**[403]** Ai Group submitted that it is important that the level of increase in minimum wages awarded by the Panel does not limit the scope or motivation for bargaining over wages at the enterprise level. Ai Group submitted that, in its experience, the level of minimum wage increase granted in the Review is a factor considered by employers and employees when deciding to consider whether to make an enterprise agreement, and that the higher the minimum wage increase granted by the Panel the less likely an employer and its employees will seek an enterprise agreement.[413] For this reason, Ai Group submitted that the level of any

minimum wage increase should generally be set at a level that is lower than AAWIs in enterprise agreements.[414]

**[404]** The extent of the gap between modern award minimum wages and bargained wages is difficult to quantify. It can be estimated with reference to Table 8.2 in the 2016–17 Review decision, which sets out average hourly total cash earnings for full-time non-managerial employees paid at the adult rate by industry and method of setting pay in May 2016.[415] The table compares the average hourly total cash earnings of full time non-managerial employees on awards, collective agreements and individual arrangements by industry. It shows that, overall, the ratio of average hourly earnings for award-reliant employees to employees on collective agreements was lower than employees on individual arrangements. However, this was not consistent across each industry. No more recent data are available.

**[405]** Using the data from Table 8.2 and the ratio of average hourly earnings in award only and collective agreement rates, it can be estimated that the average gap between earnings under awards and collective agreements for all industries is about 22 per cent. The extent of the gap using this method varies between industries.

**Other considerations affecting bargaining**

**[406]** A number of parties submitted that the regulatory and legislative environment associated with the bargaining process and agreement approval is contributing to a decline in enterprise bargaining. Ai Group pointed to problematic drafting of various provisions of the Act (including the better off overall test) and the absence of an express provision allowing the Commission to overlook minor procedural defects in the agreement-making process, as impediments to agreement making.[416]

**[407]** ACCI submitted that the regulatory environment is failing to adequately support and encourage enterprise bargaining.[417]

**[408]** The legislative environment in which bargaining is occurring is a matter for Parliament and is outside the scope of the Review. The Commission's processes for approving agreements have led to greater consistency and provide a systematic method for identifying and addressing common errors made by parties to agreements which would otherwise render such agreements (if approved) open to challenge and risk of being found to be invalid, and incapable of approval. We reject any suggestion that this process is an impediment to bargaining.

**Conclusions**

**[409]** We maintain the view expressed in past Review decisions that, given the complexity of factors which may contribute to decision making about whether or not to bargain, we are unable to predict the precise impact of our decision.[418] We cannot be satisfied that the increase we have determined will *encourage* collective bargaining and this is a factor to be weighed along with the other statutory considerations. However, we are also of the view that it is likely that the increase we have determined in this Review will impact on different sectors in different ways and will not, in aggregate, *discourage* collective bargaining.

**[410]** We are not persuaded that the gap between modern award minimum wages and bargained wages, to the extent it can be identified with any precision, has reached a level

where it is encouraging or discouraging collective bargaining. We maintain the view that the decline in agreement making and levels of current agreements is impacted by a range of factors, many of which are unrelated to the Review process.

**Equal Remuneration**

**[411]** In giving effect to both the modern awards objective and the minimum wages objective, the Panel must also take into account the principle of equal remuneration for work of equal or comparable value (s.134(1)(e) and s.284(1)(d)).

**[412]** A number of submissions in the present Review questioned the relevance of the equal remuneration principle. The ACTU submitted that the principle of equal remuneration prevents the Panel from taking into account the underlying causes of the gender pay gap or gender-based undervaluation of modern award minimum wages.[419] The ACTU also submitted that the equal remuneration principle 'as defined is accordingly not a useful tool in the context of an AWR for addressing systemic undervaluing of female dominated occupations or industries.'[420]

**[413]** In response to questions on notice raised by the Panel about this proposition, ACCER agreed[421] and submitted that:

> '… the practical application of the equal remuneration principle is to be found in the making and reviewing of awards. The fact that gender-based breaches of the principle may be pursued under Part 2-7 of the *Fair Work Act* does not exclude this process.'[422]

**[414]** ACCI submitted that the principle was 'potentially applicable to these reviews'[423] but contended that wages operating in accordance with an industrial instrument (i.e. a modern award or enterprise agreement) are determined on a gender neutral basis[424] and that the Review should not be 'distorted to become vehicles' for equal remuneration applications 'for which a separate part of the Act applies.'[425]

**[415]** The modern awards objective and the minimum wages objective both provide that in a Review we must take into account 'the principle of equal remuneration for work of equal or comparable value' (ss 134(1)(e) and 284(1)(d)). The Dictionary section of the Act (s.10) directs attention to s.302(2) for the definition of the expression 'equal remuneration for work of equal or comparable value.' Section 302(2) is in Part 2-7 'Equal Remuneration' and defines this expression to mean 'equal remuneration for men and women workers for work of equal or comparable value.' It seems highly unlikely that Parliament intended this expression to mean something different in ss 134 and 284. Hence the appropriate approach to the construction of ss 134(1)(e) and 284(1)(d) is to read the definition into the substantive provision.[426] Accordingly the relevant consideration is to be read as follows:

> 'the principle of equal remuneration for men and women workers for work of equal or comparable value.'

**[416]** In the *Equal Remuneration Decision 2015*[427] the Full Bench concluded that the expression 'work of equal or comparable value' in s.302(1) refers to equality or comparability in 'work value.'[428] We agree and, further, the same meaning should be attributed to this expression in ss 134(1)(e) and 284(1)(d). As explained in the *Equal Remuneration Decision*

*2015*, the principle of equal remuneration for work of equal or comparable value is enlivened when an employee or group of employees of a particular gender do not enjoy remuneration equal to that of another employee or group of employees of the opposite gender who perform work of equal or comparable value. Further, as the Full Bench observed:

> 'This is essentially a comparative exercise in which the remuneration and the value of the work of a female employee or group of female employees is required to be compared to that of a male employee or group of male employees.'[429]

**[417]** The application of the principle of equal remuneration for work of equal or comparable value is such that it is likely to be of only limited relevance in the context of a Review. Indeed it would only be likely to arise if it was contended that particular modern award minimum wages were inconsistent with the principle of equal remuneration for work of equal or comparable value; or if the form of a proposed increase enlivened the principle. We agree with the observations of a number of parties that Review proceedings are of limited utility in addressing any systemic gender undervaluation of work. It seems to us that proceedings under Part 2-7 and applications to vary modern award minimum wages for 'work value reasons' pursuant to ss 156(3) and 157(2) provide more appropriate mechanisms for addressing such issues. But the broader issue of gender pay equity, and in particular the gender pay gap, is relevant to the Review.

**Gender pay gap**

**[418]** The gender pay gap becomes a relevant consideration in our task because, as was stated in the *Penalty Rates decision*, it is an element of the requirement to establish a safety net that is fair as well as relevant.[430] It may also arise for consideration in respect of s.284(1)(b) ('promoting social inclusion through workforce participation'), because it may have effects on female participation in the workforce.

**[419]** The gender pay gap refers to the difference between the average wages earned by men and women. It may be expressed as a ratio which converts average female earnings into a proportion of average male earnings on either a weekly or an hourly basis.[431] The Statistical report sets out three measures of the gender pay gap, ranging from 11.0 per cent to 15.3 per cent, which are presented in Table 4.1.[432]

**Table 4.1: Estimates of the gender pay gap**

| Measure | Male earnings | Female earnings | Gender pay gap |
|---|---|---|---|
| AWOTE (*Nov 2017*) | $1662.70 | $1409.00 | 15.3% |
| EEH adult hourly ordinary time cash earnings *(May 2016)* | $42.03 | $36.13 | 14.0% |
| EEH non-managerial adult hourly ordinary time cash earnings *(May 2016)* | $39.41 | $35.09 | 11.0% |

Note: AWOTE is expressed in trend terms and refers to full-time adult employees.

Source: Statistical report, Table 11.1; ABS, *Average Weekly Earnings, Australia, Nov 2017*, Catalogue No. 6302.0; ABS, *Microdata: Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0.55.001.

**[420]** Peetz and Yu 2018 found that women were less likely than men to be covered by a collective agreement, which appeared to reflect the relative concentrations of men and women by industry and occupation, rather than their behaviour in terms of collective negotiation or desires for representation.[433]

**[421]** In previous Reviews, the Panel has been informed by research about the extent to which the Review may have a role in addressing the gender pay gap.[434] The Australian Government referred to past research undertaken by the Commission and concluded that it 'shows little evidence of an hourly gender pay gap for workers on awards. The gender pay gap, therefore, appears to be mostly driven by higher paid workers.'[435]

**[422]** To support this proposition, the Australian Government presented data from the EEH 2016 which showed a negative hourly gender pay gap for non-managerial employees on awards, suggesting that females on awards are paid a higher hourly rate than males and that there are 'no wage disparity issues among non-managerial employees on awards.'[436]

**[423]** In other research, Broadway and Wilkins (2017) analysed the difference in hourly wages between award-reliant males and females aged 25–54 years and whether the award system mitigates or exacerbates the gender pay gap. Using data from the HILDA survey between 2008 and 2014, the study found a gap of 10 per cent between the mean wages of award-reliant men and women, smaller than the 19 per cent found for non-award-reliant employees. The analysis also found that the award system contributes to closing the gender pay gap as the wages of award-reliant males and females are less dispersed across the hourly wage distribution.[437] As a higher proportion of women were award reliant, the study concluded that the award system prevents the wages of females falling even further behind those of men.[438]

**[424]** The research also considered whether the gap among award-reliant employees could be explained by differences in human capital (education and work experience) between men and women—that is, whether the levels of education and work experience, or the returns to education and work experience, affected the gender pay gap.

**[425]** Differences in returns to education and work experience can arise in two ways—that men progress to higher classifications faster than women, or that progression in 'typical male' careers leads to larger wage increases than for 'typical female' careers.[439] To test this, the research analysed the effect of working in 'female-dominated' industries compared with working in 'male-dominated' industries.

**[426]** While the pay gap was not found to be due to differences in the levels of education or experience, the research determined that a large part could be explained by the returns to education and experience.[440] The paper found a 'strong penalty' associated with working in a female-dominated industry, for both males and females, however it only applied to workers without university education (with no evidence that work experience is associated with the gender pay gap).[441] The industries where this was found to be a major cause were retail, hospitality and personal care.[442] We note that these are amongst the award-reliant sectors.

**[427]** Broadway and Wilkins discussed several reasons for this finding: male-dominated industries may have benefited from a long history of unionisation that resulted in higher average wages which is less common among the service sector; or that certain jobs may also receive compensation for being dangerous or dirty work.[443]

**[428]** In terms of the impact of the gender pay gap upon this Review, the Victorian Government referred to this research and stated that there is a 'wage penalty' in the award system for jobs more commonly held by women.[444] The Western Australian[445] Government recognised that many factors influenced the gap but contended, as did the Victorian[446] and Queensland[447] Governments, that in effect, an increase to the NMW and modern award minimum wages would impact positively upon pay equity.

**[429]** The Federal opposition submitted that increasing minimum wages is 'critical to reducing the gender pay gap.'[448]

**[430]** The ACTU continued to adopt the view that 'the existence of a gender pay gap is a factor which supports an increase to minimum wage and modern award minimum … wages.'[449] It added that, with strong employment growth in award-reliant industries, the Panel's decision 'might have a greater impact' this year.[450] Despite proposing a percentage increase to this Review, rather than a 'hybrid' proposal as in previous Reviews, the ACTU did not accept that a hybrid increase would necessarily do less to address the gender pay gap than a uniform increase.[451] It did, however, acknowledge that whilst not all causes of the gender pay gap lie outside of the award system, any systematic gender-based undervaluation of female-dominated work between awards is not readily capable of being addressed in the Review.[452]

**[431]** ACCER contended that the uniform percentage increase 'compromised the setting of a fair safety net for the women who are most in need of financial support.'[453] ACCER maintained its position that a flat dollar increase would best serve the economic interests of women, particularly lower-paid women,[454] but that a tiered increase, as it has proposed, 'would recognise the interests of higher and lower paid women.'[455] ACCER also submitted that the gender pay gap 'is caused by factors outside the award system … in the practices of employers.'[456]

**[432]** ACCI submitted that the causes of the gender pay gap were complex and multifaceted and that the obligation of the Panel to consider this factor is best satisfied by setting wages that do not discriminate between men and women.[457] It also indicated a view that the particular form of an increase (i.e., uniform percentage or tiered amount) did not impact this consideration '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 the aggregate differential between male and female earnings is attributable to factors outside the award system.'[458]

**[433]** ACCI also cautioned against an approach that would see a higher level of wage increase 'merely on account of the fact that more women are paid pursuant to awards than other instruments.'[459]

**Conclusions**

**[434]** As noted in the 2015–16 Review decision, the causes of the gender pay gap are complex and influenced by factors such as: differences in types of jobs performed by men and women; discretionary payments; workplace structures and practices; and the historical undervaluation of female work and female-dominated occupations.[460] We accept that moderate increases in the NMW and modern award minimum wages would be likely to have a relatively small effect on the gender pay gap.

**[435]** Based upon the material discussed earlier, and the conclusions from last year's Review,[461] the following general observations may be made:

- there are more women than men who are award reliant;
- award-reliant workers are more likely to be low paid than other workers;
- women are significantly more likely to be paid at the award rate than are men at all levels of education and experience (except in their first year of work)[462]; and
- men are more likely to receive over-award payments or be subject to collective agreements (with higher wages) due to the industry or occupation in which they work.

**[436]** Women are disproportionately represented among the low paid and, hence, an increase in minimum wages is likely to promote gender pay equity. Increases in minimum wages, particularly adjustments that might exceed increases evident through bargaining, are likely to have a beneficial impact. This is so because of the dispersion of women within award classification structures and the greater propensity for women to be paid award rates.

# 5. Transitional Instruments and Other Matters

## Transitional Australian Pay and Classification Scales, Division 2B State awards and other transitional instruments

**[437]** The Panel is required to review, and may make a determination varying a number of transitional instruments as part of the Review. Transitional instruments include:

- Transitional Australian Pay and Classification Scales (APCSs);[463]
- State reference transitional awards, which include:
  - Division 2A State reference transitional awards;[464]
  - Division 2A State reference transitional enterprise awards;
  - Division 2A State reference public sector transitional awards;
  - Division 2B State reference transitional awards;[465]
  - Division 2B State reference public sector awards; and
  - Division 2B State awards.[466]
- Transitional Pay Equity Orders;[467]
- Certain copied State awards.[468]

**[438]** The content and coverage of most of these instruments were addressed in the Panel's *Annual Wage Review 2009–10* decision (2009–10 Review decision)[469] and Fair Work Australia's Research Report 6/2010.[470] The application of annual wage review decisions on copied State awards was also considered in the Fair Work Commission's Background Paper[471] and the Panel's decision correcting errors in the 2016–17 Review decision.[472]

**[439]** Transitional instruments also include those award-based transitional instruments subject to modernisation processes which continue to operate, and those preserved by operation of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Transitional Act). Most transitional instruments have been terminated or have ceased to operate; however, some continue to operate subject to the conclusion of the modernisation process. These instruments include, but are not limited to:

- transitional instruments which cover employees also covered by enterprise instruments;[473]
- transitional instruments which cover employees also covered by State reference public sector awards which have not been terminated by the Commission or replaced by a State reference public sector modern award;[474] or
- transitional instruments which cover employees which were not terminated as part of the termination of modernisable instruments commenced in 2010.[475]

**[440]** Transitional instruments preserved by the Transitional Act include Transitional APCSs; State reference transitional instruments and Division 2B State awards preserved by operation of the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009*; and transitional pay equity orders created by the Transitional Act.[476] These instruments may be considered as part of the Panel's review.[477]

**[441]** Transitional APCSs and State reference transitional awards operate until the Commission makes an order to terminate them,[478] or they are terminated by legislative provisions.[479] The 2016–17 Review decision[480] referred to the Commission's decision in *All*

*Trades Queensland Pty Limited*,[481] that was affirmed on appeal in *All Trades Queensland Pty Limited v CFMEU and Ors*[482] (the All Trades matter) and a subsequent application for judicial review was dismissed by the Federal Court.[483] The Court held that the employees were modern 'award covered employees for the purpose of s.206 of the Act'[484] and that their award based transitional instruments[485] (Notional Agreements Preserving State Awards (NAPSAs[486])) had terminated as a result of sunsetting provisions in the Transitional Act.[487] While these transitional instruments may be relevant for the purpose of calculating accrued entitlements, they will not cover a person now covered by a modern award.[488]

**[442]** A number of transitional instruments covering employees also covered by the Social, Community, Home Care and Disability Industry Award 2010 and the Social, Community and Disability Services Industry Equal Remuneration Order 2012 (ERO) are yet to be terminated by the Commission[489] and the Panel must review and may make a determination varying these instruments.[490] In the Preliminary Decision for the 2016–17 Review[491] we considered that we should not proceed to terminate any transitional instruments for reasons outlined in that decision.[492]

**[443]** Also within this category of transitional instruments are copied State awards. These apply in relation to employees of non-national system State public sector employers who transfer their employment to a national system employer as part of a transfer of business.[493] The Panel is required to review and, if appropriate, make a determination varying minimum wages in copied State awards.[494]

**[444]** The method for adjusting wages in copied State awards was the subject of a decision by the Panel issued on 4 January 2018.[495] In that decision, the Panel expressed the following provisional view:

> 'It is our *provisional view* that AWR adjustments should generally apply to copied State awards, subject to a different outcome being determined in respect of particular copied State awards. In other words, rather than seeking to apply a tiered approach as a decision rule to mitigate 'double dipping' we propose to address any 'double dipping' on a case by case basis. We invite submissions on our *provisional* view in the context of the 2017–18 Review proceedings.'[496]

**[445]** Parties were invited to comment on our *provisional* views in the context of these proceedings.

**[446]** The ACTU submitted that 'the Commission's provisional view is consistent with the function of distinct Reviews in each year and is a more orderly approach, notwithstanding that it does rely on parties to come forward should they contend for a different outcome.'[497]

**[447]** However, the ACTU also submitted that:

> 'The difficulty from our perspective is the lack of certainty regarding how a future Panel might deal with an application that a different increase, or no increase, apply to employees to whom a particular copied state award applies. If the Panel were inclined to confirm its provisional view, it would in our view be usefully supplemented by an expression of support for the merits of the approach adopted in the 2012–13 decision - and re-applied to the 2016–17 decision by the correction order issued this year - when dealing with requests for an exemption.'[498]

**[448]** The CPSU submitted that:

> '… the current Annual Wage Review should make a fresh determination in relation to copied State awards such that
>
> a. wages increases mandated by Annual Wage Review decisions apply as a matter of course to copied State awards; and
>
> b. should a party to a copied State award make an application to vary (by reducing) the Annual Wage Review increase applied to a copied State award, then (and only then) the tiered approach developed by the Commission in the 2012-2013 Annual Wage Review decision should be applied.'[499]

**[449]** ABI submitted that the rates in the relevant transitional instruments be increased consistent with any increase determined for modern award minimum wages and made no submissions about the variation of copied State awards arising from this Review.[500]

**[450]** On 29 March 2018 we published a question on notice noting that the ACTU had invited the Panel to confirm its provisional view and asking if any other party took a different view.

**[451]** No party took a contrary view to that expressed by the ACTU. ACCI observed that '[w]here there are concerns regarding 'double dipping' there should be scope for an employer or employer representative to raise this with the Commission.'[501] No employer or employer representative raised any concern regarding 'double 'dipping' in the event that we varied copied State awards consistent with the increase determined for modern award minimum wages.

**[452]** We confirm the *provisional* view expressed in our decision of 4 January 2018. The adjustment to the rates in modern awards that we have determined in this Review will be applied to copied State awards.

**[453]** There is no requirement to publish the variations.

## Modern award minimum wages for junior employees, employees to whom training arrangements apply, employees with disability and piece rates

**[454]** The Panel is required to review modern award minimum wages, including wages for junior employees, employees to whom training arrangements apply, employees with disability, and piece rates.[502]

**[455]** As noted by the ACTU, the practical effect of tying juniors, trainees and apprentices in modern awards to a percentage below the adult rate of pay, or by some other formula in the case of traineeship rates, makes them some of the 'lowest paid workers in the country' by definition.[503]

**Juniors**

**[456]** The ACTU,[504] Ai Group,[505] and ABI and NSWBC[506] supported flowing on any Review decision to junior rates of pay in modern awards. No party contended otherwise. A number of submissions discussed the performance of youth labour market outcomes, which we reviewed as part of Chapter 2.

**[457]** We have decided that the adjustment to minimum wages will flow through to the operation of provisions for calculating junior rates in modern awards.

**Apprentices and Trainees**

**[458]** The ACTU,[507] Ai Group,[508] and ABI and NSWBC[509] supported flowing on any Review decision to modern award minimum wage of pay for employees to whom training arrangements apply through the National Training Wage Schedule (NTWS) under the relevant awards. The ACTU also endorsed a similar adjustment for those modern awards that contain separate trainee rates outside of the NTWS.[510]

**[459]** The ACTU referred to the plain language re-draft of the NTWS under the *Miscellaneous Award 2010* (the Miscellaneous Award), which has been updated as part of the 4 yearly review of modern awards. This process has led to the replacement of the NTWS under most modern awards with reference to the NTWS in the Miscellaneous Award. The ACTU submitted that the new NTWS 'remains appropriate for adjustment in the manner we propose.'[511]

**[460]** The Panel notes that nine modern awards will retain their own award-specific NTWS to be finalised at a later date. The ACTU noted that it is 'uncertain how the wages in them will be expressed.'[512] As these awards have retained their existing schedules, the ACTU recommended that the wages in them should also be adjusted accordingly and accounted for in the process to finalise the NTWS in those awards.[513] A number of submissions referred to data on the commencement and completion rates of apprentices and trainees, which we reviewed as part of Chapter 2.

**[461]** We have decided that the adjustment to minimum wages will flow through to employees to whom training arrangements apply in modern awards, including the rates under the NTWS.

**Employees with disability**

**[462]** Ai Group[514] supported flow on of any Review decision to the modern award rates of pay for employees with a disability. No other party suggested otherwise.

**[463]** Several submissions provided data on the labour market outcomes for employees with a disability. Briefly, the Australian Government submitted that 52 per cent of persons aged 15 to 64 years with a disability were participating in the labour force in 2015, with an unemployment rate of 10 per cent.[515] The Victorian Government submitted that the median incomes of persons with a disability were less than half of those without a disability and that more than half lived in households in the lowest two quintiles of equivalised gross household income.[516]

**[464]** We have decided that the adjustment granted in this Review will flow through to employees with a disability through the operation of the Supported Wage System Schedule (SWSS) and that the minimum payment in the SWSS will be adjusted consistent with the approach adopted in previous reviews.[517]

**Casual loadings under modern awards and the casual loading for award/agreement free employees**

**[465]** The Panel is required to review casual loadings in modern awards and to include a casual loading for award/agreement free employees in the NMW order. The casual loading for award/agreement free employees must be expressed as a percentage.[518]

**[466]** The ACTU,[519] Ai Group,[520] and ABI and NSWBC[521] submitted that the casual loading in modern awards and for award/agreement free employees should be maintained at 25 per cent and no other party contended otherwise.

**[467]** We have decided that the casual loading for award/agreement free employees should be maintained at 25 per cent. We have also decided that the casual loading in modern awards should remain at 25 per cent.

**[468]** In the 2014–15 Review decision, the Panel noted that the casual loading in the *Business Equipment Award 2010* (Business Equipment Award), at 20 per cent, was inconsistent with the standard 25 per cent casual loading across all other modern awards.[522]

**[469]** In proceedings before the 2015–16 Review, the Panel decided to increase the casual loading in the Business Equipment Award incrementally by 1 per cent from 1 July 2016 and each subsequent year until it reached 25 per cent.[523]

**[470]** In the current Review, the ACTU,[524] Ai Group,[525] and ABI and NSWBC[526] submitted that the casual loading in the Business Equipment Award should be adjusted to 23 per cent, in line with the Panel's phasing-in approach.

**[471]** Consistent with the phasing approach outlined by the Panel in its 2015–16 Review decision,[527] and with no submissions to the contrary, we have decided to increase the casual loading in the Business Equipment Award to 23 per cent.

**Special National Minimum Wages**

**[472]** In making a NMW order the Panel must set special NMWs for all award/agreement free employees in the following classes: junior employees, employees to whom training arrangements apply and employees with a disability.[528]

**[473]** Submissions specifically dealing with special NMWs for award/agreement free employees are set out below. We have also taken into account submissions by the ACTU[529] and ACOSS[530] regarding juniors, apprentices and trainees and employees with disability more generally on the basis that these submissions are relevant to (and are not expressed to exclude) award/agreement free employees in these categories.

**Award/agreement free junior employees**

**[474]** Ai Group[531] and ABI and NSWBC[532] supported the Panel's previous approach in using the junior wage percentage scale in the Miscellaneous Award to set the special NMW for award/agreement free junior employees.

**[475]** We have again decided that the special NMW for award/agreement free junior employees will be set by reference to the junior wage percentage scale in the Miscellaneous Award.

**Award/agreement free apprentices and trainees**

**[476]** Ai Group[533] and ABI and NSWBC[534] submitted that, consistent with the previous Review decision, the Panel should adopt the wage rates in the Miscellaneous Award for award/agreement free apprentices and trainees.

**[477]** We have decided to adopt the provisions of the Miscellaneous Award as the basis for the special NMWs for employees to whom training arrangements apply. The NMW order will incorporate, by reference, the apprentice and NTWS provisions of that award.

**Award/agreement free employees with disability**

**[478]** In its 2016–17 Review decision, and consistent with previous years' approaches, the Panel decided to set two special NMWs for award/agreement free employees with disability.[535] The first, for employees with disability whose productivity is not affected (special NMW1), was set at the rate of the NMW. The second, for employees with disability whose productivity is affected, was to be paid in accordance with an assessment under the Supported Wage System (SWS) Schedule attached to the NMW order (special NMW2), with the minimum payment fixed in accordance with the disability support pension income-free threshold.

**[479]** The ACTU,[536] Ai Group[537] and ABI and NSWBC[538] submitted that special NMW1 should continue to be set at the same level as the NMW. Ai Group[539] and ABI and NSWBC[540] submitted that special NMW2 should be adjusted in accordance with the same methodology as previous Reviews, and the ACTU supported this approach 'subject to any changes to the Supported Wage System Schedule.'[541]

**[480]** In its 2016–17 Review decision, the Panel noted that conferences concerning the *Supported Employment Services Award 2010*[542] (SES Award) were continuing and that special NMW2 would have to be considered after the issues in the SES Award have been finalised.[543]

**[481]** On 10 October 2017, the Full Bench of the Commission issued a decision[544] in relation to the SES Award as part of its 4 yearly review of modern awards. As a result of that decision, the SWS minimum wage assessment methodology set out in Schedule D to the SES Award was modified. This variation was consented to by the interested parties participating in the review.

**[482]** There was a hearing before the SES Award review Full Bench in relation to various claims to alter the wage assessment methodology in the SES Award conducted on 5-9 and 12-

16 February 2018. On 16 April 2018 the Full Bench issued a Statement[545] in which it expressed a number of provisional conclusions about the matters in contest. In respect of the use of the SWS under the SES Award in Australian Disability Enterprises (ADEs), the Full Bench said:

> '(3) The SWS does not, by itself and in its current form, represent an appropriate method of determining the wage rates for supported employees in ADEs because it:
>
> - does not take into account the proper range of work value considerations used to assess award wage rates, namely the nature of the work, the level of skill and responsibility involved in doing the work and the conditions under which the work is done (which, in the context of supported employment, would include the complexity of the task(s) performed, the range of tasks performed, and the level of support required in order for the task(s) to be performed);
>
> - may not adequately measure non-productive time at work on the part of supported employees; and
>
> - does not provide a sufficiently objective and relevant means of identifying the performance benchmark by which any SWS assessment is conducted.
>
> We emphasise that we express no conclusion about the operation of the SWS in the context of open employment.'[546]

**[483]** The Full Bench proposed that interested parties and the Commonwealth participate in a conferral process to develop a new classification structure and wage assessment mechanism in line with a number of identified principles. The process envisaged would necessarily involve the modification or replacement of the SWS in the SES Award.

**[484]** ACOSS's submission expressed interest in the recent SES Award matters, and submitted:

> 'Recent court decisions confirmed that some of the existing instruments used for this purpose were unreliable, and that people with disability employed in 'business services' were underpaid. The assessment tools should be reviewed and standardized as far as possible, rather than leaving it to individual enterprises to develop and use their own.'[547]

**[485]** ACOSS reiterated their two concerns submitted to previous Reviews,[548] namely that the system of disability wages was too complex and the minimum rate of pay for people whose productivity is affected by their disability was too low. [549]

**[486]** The Panel addressed this matter in the 2016–17 Review decision.[550] These issues may be further considered in a subsequent Review, after the issues in the SES award are finalised. Although the consideration of the SWS in the review of the SES Award is conducted in the specific context of its use in ADEs, the modification or replacement of the SWS in that award has potential implications for the use of the SWS in other awards.

**[487]** Consistent with previous years' approaches to these wages, we have decided to set 2 special NMWs for award/agreement free employees with disability. For award/agreement free

employees with disability whose productivity is not affected, the wage will be set at the rate of the NMW. For award/agreement free employees with disability whose productivity is affected, the wage will be paid in accordance with an assessment under the SWSS. The minimum payment will be fixed in accordance with the disability support pension income-free threshold.

## 6. Conclusion

**[488]** This Chapter sets out the outcome and other relevant matters to the Review.

**[489]** The national minimum wage order will contain:

(a) A national minimum wage of $719.20 per week or $18.93 per hour;

(b) Two special national minimum wages for award/agreement free employees with disability: for employees with disability whose productivity is not affected, a minimum wage of $719.20 per week or $18.93 per hour based on a 38-hour week, and for employees whose productivity is affected, an assessment under the supported wage system, subject to a minimum payment fixed under the SWSS;

(c) Wages provisions for award/agreement free junior employees based on the percentages for juniors in the Miscellaneous Award 2010 applied to the national minimum wage ;

(d) The apprentice wage provisions and the National Training Wage Schedule in the *Miscellaneous Award 2010* for award/agreement free employees to whom training arrangements apply, incorporated by reference, and a provision providing transitional arrangements for first year award/agreement free adult apprentices engaged before 1 July 2014; and

(e) A casual loading of 25 per cent for award/agreement free employees.

**[490]** The outcome of this Review in relation to modern award minimum wages is that from the first full pay period on or after 1 July 2018 minimum weekly wages are increased by 3.5 per cent, with commensurate increases in hourly rates on the basis of a 38-hour week.

**[491]** The increases to the NMW and modern award minimum wages are made to weekly wages. After the increase has been applied, the NMW or the modern award minimum weekly wage is rounded to the nearest 10 cents. To obtain an hourly wage, the weekly wage is divided by 38, on the basis of a 38-hour week for a full-time employee.

**[492]** The increase applies to modern award minimum wages for junior employees, employees to whom training arrangements apply and employees with disability, and to piece rates, through the operation of the methods applying to the calculation of those wages. Wages in the NTWS will be increased by 3.5 per cent.

**[493]** The casual loading in modern awards will remain at 25 per cent. The casual loading in the *Business Equipment Award 2010* will be increased to 23 per cent, consistent with the phasing approach. As a general proposition, we would expect that the casual loading in this award will be increased by 1 per cent in subsequent Reviews, until it reaches 25 per cent, in accordance with the phasing schedule proposed by Ai Group.

**[494]** The adjustment will flow through to employees with disabilities through the operation of the Supported Wage System Schedule and that the minimum payment in the SWSS will be adjusted consistent with the approach adopted in previous reviews.

**[495]** In relation to transitional instruments, from the first full pay period on or after 1 July 2018, wages in those instruments will be varied by 3.5 per cent per week, with commensurate increases in hourly rates based on a 38-hour week. Copied State awards will be varied on the basis discussed in Chapter 5 of this decision.

**[496]** The determinations necessary to give effect to the increase in modern awards will be made available in draft form shortly after this decision. Weekly wages in the NMW order and modern awards will be rounded to the nearest 10 cents and hourly wages will be calculated by dividing the weekly rate by 38, on the basis of the 38-hour week for a full-time employee. Determinations varying the modern awards will be made as soon as practicable and the modern awards including the varied wage rates will be published as required by the Act.

**[497]** We also intend to give consideration to a research program for the 2018–19 Review and invite interested parties to lodge research proposals by 27 July 2018. In doing so parties are encouraged to consider the research papers by Borland (February 2018), Borland (May 2018)[551] and Richardson[552] (May 2018) in the Research Reference list.

**[498]** The timetable for the 2018–19 Review will be announced in the third quarter of 2018.

**[499]** We wish to express our appreciation to the parties who participated in the Review for their contributions and to the staff of the Commission for their assistance.

PRESIDENT

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## Appendix 1—Research for Annual Wage Reviews

| Date | Title | Research report no. |
|---|---|---|
| February 2018 | Overview of research to inform the Annual Wage Review 2017–18 | |
| February 2018 | Employee and employer characteristics and collective agreement coverage | 1/2018 |
| February 2018 | The characteristics of the underemployed and unemployed | 2/2018 |
| February 2018 | Characteristics of workers earning the national minimum wage rate and of the low paid | 3/2018 |
| February 2018 | Part I: Methods and limitations to undertaking analysis of the employment effects of minimum wage increases | 4/2018 |
| March 2018 | Part II: Prospects for research on employment effects of minimum wages in Australia. | 4/2018 |
| March 2018 | The UK evaluation of the impacts of increases in their minimum wage | |
| February 2017 | Overview of research to inform the Annual Wage Review 2016–17 | |
| February 2017 | Explaining recent trends in collective bargaining | 4/2017 |
| February 2017 | Factors affecting apprentices and trainees | 3/2017 |
| February 2017 | The youth labour market | 2/2017 |
| | Award-reliant workers in the household income distribution | 1/2017 |
| February 2016 | An international comparison of minimum wages and labour market outcomes | 1/2016 |
| February 2015 | Award reliance and business size: a data profile using the Australian Workplace Relations Study | 1/2015 |
| December 2013 | Minimum wages and their role in the process and incentives to bargain | 7/2013 |
| December 2013 | Award reliance | 6/2013 |
| February 2013 | Accommodation and food services industry profile | 5/2013 |
| February 2013 | Retail trade industry profile | 4/2013 |
| February 2013 | Manufacturing industry profile | 3/2013 |
| February 2013 | Labour supply responses to an increase in minimum wages: An overview of the literature | 2/2013 |
| February 2013 | Higher classification/professional employee award reliance qualitative research: Consolidated report | 1/2013 |
| February 2012 | Higher classification/professional employee award reliance qualitative research: Interim report | 4/2012 |
| February 2012 | Award reliance and differences in earnings by gender | 3/2012 |
| February 2012 | Analysing modern award coverage using the Australian and New Zealand Standard Industrial Classification 2006: Phase 1 report | 2/2012 |
| January 2012 | Award-reliant small businesses | 1/2012 |

| Date | Title | Research report no. |
|---|---|---|
| February 2011 | Australian apprentice minimum wages in the national system | 6/2011 |
| February 2011 | Review of equal remuneration principles | 5/2011 |
| January 2011 | Research framework and data strategy | 4/2011 |
| January 2011 | Employees earning below the Federal Minimum Wage: Review of data, characteristics and potential explanatory factors | 3/2011 |
| January 2011 | Relative living standards and needs of low-paid employees: definition and measurement | 2/2011 |
| January 2011 | An overview of productivity, business competitiveness and viability | 1/2011 |
| June 2010 | Consolidated Social Research Report | 10/2010 |
| June 2010 | Administrative and Support Services Industry | 9/2010 |
| June 2010 | Other Services Industry | 8/2010 |
| February 2011 | Enterprise Case Studies: Effects of minimum wage-setting at an enterprise level | 7/2010 |
| June 2010 | Minimum wage transitional instruments under the *Fair Work Act 2009* and the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* | 6/2010 |
| February 2010 | Employees with disability: Open employment and the Supported Wage System | 5/2010 |
| February 2010 | Earnings of employees who are reliant on minimum rates of pay | 4/2010 |
| February 2010 | Social research—Phase one | 3/2010 |
| February 2010 | Literature review on social inclusion and its relationship to minimum wages and workforce participation | 2/2010 |
| February 2010 | An overview of compositional change in the Australian labour market and award reliance | 1/2010 |

## Appendix 2—Proposed Minimum Wages Adjustments

| Submission | Proposal | | |
|---|---|---|---|
| | **National minimum wage** | **Modern award minimum wages** | **Exemption/ deferral sought** |
| Australian Government | No quantum specified | | |
| New South Wales Government | No quantum specified | | |
| Queensland Government | $27.10 pw | No quantum specified | |
| Victorian Government | $27.10 pw | No quantum specified | |
| Government of South Australia | No quantum specified | | |
| Western Australian Government | No quantum specified | | |
| Federal opposition | No quantum specified, however proposes a real increase | | |
| Australian Council of Trade Unions | 7.2 per cent, applicable to all | | |
| Australian Industry Group | 1.8 per cent, applicable to all | | |
| Australian Chamber of Commerce and Industry | Not exceed 1.9 per cent, applicable to all | | |
| Australian Council of Social Service | No quantum specified | | |
| Australian Catholic Council for Employment Relations | $40.10 pw | C10 and below: $32.00 pw<br>Above C10: 3.9 per cent | |
| Australian Business Industrial and the New South Wales Business Chamber | Not more than 1.9 per cent | | |
| Australian Federation of Employers and Industries | No more than 1.9 per cent, applicable to all | | |
| Australian Hotels Association | Not more than 1.9 per cent, applicable to all | | |
| Australian Retailers Association | 1.9 per cent | No quantum specified | Requests increases to be considered on an award-by-award basis |
| Chamber of Commerce and Industry Queensland | Not more than 1.9 per cent | No quantum specified | Exemption for businesses subject to natural disasters |
| Chamber of Commerce and Industry of Western Australia | No quantum specified | | |
| Housing Industry Association | No quantum specified | | |
| Master Grocers of Australia | Not in excess of 1.1 per cent, applicable to all | | |
| National Retail Association | No increase | | |
| Restaurant & Catering Industrial | No increase | | |
| South Australian Wine Industry Association Incorporated | A flat dollar increase no higher than inflation | | |
| Lee, Walter | No quantum specified | | |

## Appendix 3—Index of Material

| Organisation | Document | Date |
|---|---|---|
| Australian Business Industrial and the NSW Business Chamber Ltd | Initial submission | 13 March 2018 |
| | Post-budget submission | |
| Australian Catholic Council for Employment Relations | Submission to preliminary hearing | 8 September 2017 |
| | Submission in reply to preliminary hearing | 15 September 2017 |
| | Initial submission | 13 March 2018 |
| | Submission in reply | 9 April 2018 |
| | Post-budget submission | 10 May 2018 |
| | Response to questions on notice | 10 May 2018 |
| | Response to questions for consultation | 10 May 2018 |
| Australian Chamber of Commerce and Industry | Submission to preliminary hearing | 11 September 2017 |
| | Initial submission | 13 March 2018 |
| | Submission in reply | 9 April 2018 |
| | Response to questions on notice | 9 April 2018 |
| | Response to questions for consultations | 14 May 2018 |
| Australian Council of Social Service | Initial submission | 16 March 2018 |
| Australian Council of Trade Unions | Submission to preliminary hearing | 8 September 2017 |
| | Submission in reply to preliminary hearing | 15 September 2017 |
| | Initial submission | 13 March 2018 |
| | Submission in reply | 9 April 2018 |
| | Response to questions on notice | 9 April 2018 |
| | Post-budget submission | 11 May 2018 |
| | Response to questions for consultations | 11 May 2018 |
| Australian Federation of Employers and Industries | Initial submission | 13 March 2018 |
| Australian Government | Initial submission | 13 March 2018 |
| | Response to questions on notice | 9 April 2018 |

| Organisation | Document | Date |
|---|---|---|
| | Post-budget submission | 11 May 2018 |
| | Response to questions for consultations | 11 May 2018 |
| Australian Hotels Association | Initial submission | 20 March 2018 |
| Australian Industry Group | Submission to preliminary hearing | 8 September 2017 |
| | Initial submission | 13 March 2018 |
| | Submission in reply | 9 April 2018 |
| | Response to questions on notice | 9 April 2018 |
| | Post-budget submission | 11 May 2018 |
| | Response to questions for consultations | 11 May 2018 |
| Australian Retailers Association | Initial submission | 13 March 2018 |
| Chamber of Commerce and Industry of Western Australia | Initial submission | 12 March 2018 |
| | Post-budget submission | 20 April 2018 |
| Chamber of Commerce and Industry Queensland | Initial submission | 13 March 2018 |
| Community and Public Sector Union | Initial submission | 24 April 2018 |
| Federal opposition | Initial submission | 13 March 2018 |
| Government of South Australia | Post-budget submission | 11 May 2018 |
| Government of Western Australia | Initial submission | 13 March 2018 |
| Housing Industry Association | Initial submission | 13 March 2018 |
| Master Grocers Australia | Initial submission | 13 March 2018 |
| National Retail Association | Initial submission | 12 March 2018 |
| New South Wales Government | Initial submission | 20 March 2018 |
| Queensland Government | Initial submission | 19 March 2018 |
| Restaurant and Catering Industrial | Initial submission | 13 March 2018 |
| | Response to questions on notice | 13 April 2018 |
| | Response to questions for consultation | 7 May 2018 |
| South Australian Wine Industry Association | Initial submission | 13 March 2018 |
| United Voice | Submission to preliminary hearing | 7 September 2018 |
| Victorian Government | Initial submission | 9 March 2018 |
| Lee, W | Initial submission | 14 March 2018 |

## Appendix 4—List of appearances

*Appearances*:

*A Durbin, L Wang, N Stoney, L Berger-Thompson* and *T Begbie* for the Australian Government

*A Matheson, S Barklamb* and *A Carr* and for the Australian Chamber of Commerce and Industry

*T Clarke, M McKenzie* and *D Kyloh* for the Australian Council of Trade Unions

*Hearing details*:

2018.

Melbourne, and Canberra (by video):

May 15.

*Appearances*:

*S Smith* and *J Toth* for the Australian Industry Group

*B Lawrence, M Savage* and *J Ferguson* for the Australian Catholic Council for Employment Relations

*S McIntosh* and *M Hill* for the Transport Workers' Union

*Hearing details*:

2018.

Sydney, and Melbourne (by video):

May 16.

[1] The NMW order sets both the NMW and special NMWs for employees who are juniors, to whom training arrangements apply, or who have disabilities; and applies to award/agreement free employees. An award/agreement free employee cannot be paid less than the rate of pay specified in the NMW order (see ss 294-299). Further, if an enterprise agreement applies to an employee and the employee is not covered by a modern award, then the employee's base rate of pay under the enterprise agreement must not be less than the rate specified in the NMW order (s.206(3)).

[2] Including classification rates, junior rates and casual loadings.

[3] ABS, *Employee Earnings and Hours, Australia, May 2016*, Catalogue No. 6306.0.

[4] *Fair Work Act 2009*, s.284(2)(a).

[5] *Fair Work Act 2009*, s.134(2).

[6] *Fair Work Act 2009*, s.134(2)(b).

[7] *Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited and Others* (1986) 162 CLR 24.

[8] *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at [329] per Mason J; *R v Toohey and Another: Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at [333] per Gibbs CJ; *Friends of Hinchinbrook Society Inc. v Minister for Environment (No. 3)* (1997) 77 FCR 153; *Australian Competition and Consumer Commission v Leelee Pty* Ltd [1999] FCA 1121; *Edwards v Giudice* [1999] FCA 1836; *National Retail Association v Fair Work Commission and Another* [2014] FCAFC 118 at [56].

[9] See [2015] FWCFB 3500 at [88]–[91].

[10] *Fair Work Act 2009*, s.284(1)(b) and s.134(1)(c).

[11] *Fair Work Act 2009*, s.284(1)(c) and s.134(1)(a).

[12] *Fair Work Act 2009*, s.284(1)(d) and s.134(1)(e).

[13] *Fair Work Act 2009*, s.284(1)(a) and s.134(1)(d), (f) and (h).

[14] For example, employment growth and inflation are mentioned as separate considerations under the modern awards objective (s.134(1)(h)), but in the minimum wages objective these factors appear to be subsidiary to the performance and competitiveness of the national economy (s.284(1)(a)) and the modern awards objective requires the Panel to take into account 'the likely impact of any exercise of modern award powers on ... the sustainability, performance and competitiveness of the national economy' (s.134(1)(h)), whereas the 'sustainability' of the national economy is not mentioned in the minimum wages objective: [2015] FWCFB 3500 at [88].

[15] *Fair Work Act 2009*, s.134(1)(b).

[16] [2015] FWCFB 3500 at [134]–[135].

[17] *Minister for Aboriginal Affairs and Another v Peko-Wallsend Limited and Others* (1986) 162 CLR 24 at [39]-[40]; *Penalty Rates Review Decision* [2017] FCAFC 161 at [48].

[18] Ibid at [109]; albeit the Court was considering a different statutory context, the observation at [109] is applicable to the Commission's task in the Review.

[19] *Fair Work Act 2009*, s.43(2)(a).

[20] [2017] FWCFB 3500 at [124]; [127].

[21] [2017] FWCFB 3500 at [141]–[142].

[22] See ACCER's submission dated 13 March 2018 at paras 214; 234–237; 240; 249; 253.

[23] See ACCER's submission dated 13 March 2018 at para. 249.

[24] See ACCER's submission dated 13 March 2018 at para. 42.

[25] See ACCER's submission dated 13 March 2018 at para. 215.

[26] See ACCER's submission dated 13 March 2018 at para. 231.

[27] *Penalty Rates* decision [2017] FWCFB 1001 at [128]–[132].

[28] *Penalty Rates Review* decision (2017) 350 ALR 592.

[29] *Penalty Rates Review* decision (2017) 350 ALR 592 at [49] and [53].

[30] *Penalty Rates Review* decision (2017) 350 ALR 592 at [33].

[31] [2010] FWAFB 4000 at [244]–[245]; [2011] FWAFB 3400 at [228]; [2012] FWAFB 5000 at [4], [14]–[15], [41], [149]; [2013] FWCFB 4000 at [9]; [2014] FWCFB 3500 at [8]; [2015] FWCFB 3500 at [10]–[11]; [2016] FWCFB at [151]–[152].

[32] [2013] FWCFB 4000 at [424].

[33] [2014] FWCFB 3500 at [396].

[34] [2016] FWCFB 3500 at [371].

[35] Ibid at [55].

[36] Ibid at [449]; [2015] FWCFB 3500 at [315]; [2014] FWCFB 3500 at [310].

[37] [2014] FWCFB 3500 at [323].

[38] *Allianz Australia Insurance Limited v GSF Australia Pty Ltd* (2005) 221 CLR 568, 574-575 [12]-[13] per McHugh J.

[39] [2015] FWCFB 8200.

[40] Ibid at [280].

[41] [2015] FWCFB 8200 at [290].

[42] [2017] FWCFB 3500 at [643].

[43] [2016] FWCFB 3500 at [545].

[44] [2016] FWCFB 3500 at [546].

[45] See [2015] FWCFB 3500 at [88]–[91]; [2016] FWCFB 3500 at [116]; [2017] FWCFB 3500 at [115]; [129].

[46] See *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [32].

[47] [2017] FWCFB 3500 at [129].

[48] *Fair Work Act 2009*, s.285(3).

[49] See [2015] FWCFB 3500 at [87]; [2016] FWCFB 3500 at [5]; [2017] FWCFB 3500 at [108].

[50] See [2013] FWCFB 4000 at [10].

[51] [2017] FWCFB 1931.

[52] [2017] FWCFB 3500 at [143]–[145].

[53] We note that actual indicators may themselves be subject to revision.

[54] [2013] FWCFB 4000 at [8].

[55] *Penalty Rates Review Decision* (2017) 350 ALR 592 at [95].

[56] RCI submission, 13 March 2018 at p. 11.

[57] Queensland Government submission, 19 March 2018 at p. 14; Victorian Government submission, 9 March 2018 at para. 28.

[58] ACOSS submission, 16 March 2018 at para. 7.

[59] Federal opposition, 13 March 2018 at para. 2.

[60] [2015] FWCFB 3500 at [7].

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[73] See *Penalty Rates* decision [2017] FWCFB 1001 and [2017] FWCFB 2955.

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[76] [2017] FWCFB 3500 at [182].

[77] [2017] FWCFB 3500 at [181].

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[83] [2017] FWCFB 3500 at [146]–[155].

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[87] The ARA submitted that '[t]he Panel should consider any increase on an award-by-award basis and provide an interim decision or statement prior to handing down a final decision…' and proposed a 1.9 per cent increase to the NMW; ARA submission, 13 March 2018 at pp. 12; 18.

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[125] Australian Government submission, 13 March 2018 at para. 162.

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[129] Statistical report, Chart 3.2.

[130] [2016] FWCFB 3500 at para. 298; [2017] FWCFB 3500 at [260].

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[192] Statistical report, Table 6.9.

[193] RBA (2018), *Statement on Monetary Policy*, May, p. 31.

[194] Ai Group submission, 13 March 2018 at p. 16.

[195] Statistical report, Tables 6.7; 6.8.

[196] Australian Government submission, 13 March 2018 at paras 39; 222.

[197] Australian Government submission, 13 March 2018 at para. 220.

[198] That is, the 77 per cent of the low paid who moved to higher paid multiplied by the 67 per cent who were in low-paid employment for less than one year: see Tables 2.7; 2.8.

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[329] The equivalence scale most commonly used is the 'OECD-modified scale' which assigns a value of 1 to the first adult member, 0.5 for each additional adult member and 0.3 for each child.

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[357] Saunders P & Bedford M (2017), *New minimum income for healthy living budget standards for low-paid and unemployed Australians*', SPRC Report 11/17, Social Policy Research Centre, UNSW Sydney, p. 29.

[358] Saunders P & Bedford M (2017), *New minimum income for healthy living budget standards for low-paid and unemployed Australians*', SPRC Report 11/17, Social Policy Research Centre, UNSW Sydney, p. 16.

[359] Saunders P & Bedford M (2017), *New minimum income for healthy living budget standards for low-paid and unemployed Australians*', SPRC Report 11/17, Social Policy Research Centre, UNSW Sydney, p. 103, Table 5.17.

[360] ACOSS submission, 13 March 2018 at p. 26.

[361] ACOSS submission, 13 March 2018 at p. 28.

[362] Such as ACCI submission, 13 March 2018 at paras 184; 187; 188; ACOSS submission, 13 March 2018 at p. 27.

[363] ACTU submission, 13 March 2018 at paras 286–287.

[364] ACTU submission, 13 March 2018 at para. 290.

[365] ACCI submission, 13 March 2018 at para. 167.

[366] ACCI submission, 13 March 2018 at paras 168; 179.

[367] ACCER submission, 13 March 2018 at para. 108; [2017] FWCFB 3500 at paras 53; 362.

[368] ACCER submission in reply, 9 April 2018 at para. 53.

[369] Saunders P & Bedford M (2017), *New budget standards for low-paid and unemployed Australians – project design, methods and key findings*, Social Policy Research Centre, UNSW, presentation to the Fair Work Commission, 27 November, Slide 16.

[370] ACCER submission, 13 March 2018 at para. 48.

[371] ACCI submission, 13 March 2018 at para. 170.

[372] [2013] FWCFB 4000 at [417].

[373] Statistical Report—*Annual Wage Review 2014–15*, at Table 10.1.

[374] Statistical Report—*Annual Wage Review 2014–15*, at Table 10.1.

[375] [2017] FWCFB 3500 at [471]; [2016] FWCFB 3500 at [443]; [2015] FWCFB 3500 at [398]; [2014] FWCFB 3500 at [379].

[376] Australian Government submission, 13 March 2018 at para. 224, Table 7.4.

[377] Fair Work Act 2009, s.3(f).

[378] ACTU submission, 13 March 2018 at para. 467.

[379] ACTU submission, 13 March 2018 at paras 468–469.

[380] [2017] FWCFB 3500 at [598].

[381] [2017] FWCFB 3500 at [593].

[382] [2017] FWCFB 3500 at [610].

[383] Peetz D & Yu S (2017), *Explaining recent trends in collective bargaining*, Fair Work Commission, Research Report 4/2017, February.

[384] [2017] FWCFB 3500 at [609]; Peetz D & Yu S (2017), *Explaining recent trends in collective bargaining*, Fair Work Commission, Research Report 4/2017, February.

[385] [2017] FWCFB 3500 at [606]–[607].

[386] Peetz D & Yu S (2018), *Employee and employer characteristics and collective agreement coverage*, Fair Work Commission, Research Report 1/2018, February.

[387] Peetz D & Yu S (2018), *Employee and employer characteristics and collective agreement coverage*, Fair Work Commission, Research Report 1/2018, February, p. 11.

[388] ACTU submission, 13 March 2018 at para. 466; O'Neill B (2015), *General Manager's report into developments in making enterprise agreements under the Fair Work Act 2009 (Cth), 2012–2015*, p. 9.

[389] ACTU submission, 13 March 2018 at para. 466.

[390] Australian Government submission, 13 March 2018 at paras 216–217.

[391] Australian Government submission, 13 March 2018 at para. 218.

[392] ACCI submission, 13 March 2018 at para. 227.

[393] ACCI submission, 13 March 2018 at para. 226.

[394] Small differences between the numbers in the ACCI submission and the December quarter may reflect minor revisions to the data.

[395] Department of Jobs and Small Business, *Workplace Agreements Database*, December quarter 2017. This estimate excludes pre-Fair Work Act agreements that had an expiry date before 1 July 2009, as it is likely that these agreements are not still operational.

[396] There may be other reasons why expired agreements have not been terminated or replaced other than those undergoing the bargaining process. For example, the business may have ceased to trade, or the company may not have any employees on these agreements.

[397] *Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited Retail Agreement 2011* (AG2011/10901); *Woolworths National Supermarket Agreement 2012* (AF2012/11791); *Big W Stores Certified Agreement 2012* (AG2012/13369); *The Kmart Australia Ltd Agreement 2012* (AG2012/5509); *Target Australia Retail Agreement 2012* (AG2012/12158).

[398] *Coles Supermarkets Enterprise Agreement* 2017 (AG2018/750). The 2018 Coles Agreement does not cover employees in Bi-Lo stores who were covered by the 2011 Agreement.

[399] Note that the collective agreements from the Employee Earnings and Hours survey include registered federal and state agreements, and non-registered agreements, while the WAD only contains registered federal agreements. That said, federal enterprise agreements account for around four in five collective agreements.

[400] Department of Jobs and Small Business, *Trends in Federal Enterprise Bargaining*, December quarter 2017, p. 22.

[401] Department of Jobs and Small Business, *Trends in Federal Enterprise Bargaining*, December quarter 2017.

[402] Fair Work Commission (2018), *Agreements in progress*, https://www.fwc.gov.au/awards-and-agreements/agreements/agreements-progress.

[403] Department of Jobs and Small Business, *Trends in Federal Enterprise Bargaining*, September quarter 2017, p. 51.

[404] ACTU submission, 13 March 2018 at para. 474.

[405] Australian Government submission, 13 March 2018 at p. 12.

[406] ACTU submission, 13 March 2018 at para. 61.

[407] ACTU submission, 13 March 2018 at para. 470.

[408] ACTU submission, 13 March 2018 at para. 463.

[409] ACTU submission, 13 March 2018 at paras 464–465.

[410] Federal opposition, submission 13 March 2018 at paras 77–87.

[411] Queensland Government submission, 19 March 2018 at p. 13.

[412] AFEI submission, 13 March 2018 at paras 72–73.

[413] Ai Group submission, 13 March 2018 at p. 43.

[414] Ai Group submission, 13 March 2018 at p. 43.

[415] [2017] FWCFB 3500 at [658].

[416] Ai Group submission, 13 March 2018 at pp. 44–45.

[417] ACCI submission, 13 March 2018 at paras 220; 222.

[418] [2017] FWCFB 3500 at [636].

[419] ACTU submission, 13 March 2018 at para. 481.

[420] ACTU submission, 13 March 2018 at para. 483.

[421] ACCER submission in-reply and response to questions on notice, 9 April 2018 at para. 67.

[422] ACCER submission in-reply and response to questions on notice, 9 April 2018 at para. 68.

[423] ACCI submission in-reply, 9 April 2018 at para. 111.

[424] ACCI submission in-reply, 9 April 2018 at para. 32.

[425] ACCI submission in-reply, 9 April 2018 at paras 111–112.

[426] *Allianz Insurance Limited v GSF Australia Ltd* (2005) 221 CLR 568 at [12]-[13] per McHugh J.

[427] [2015] FWCFB 8200.

[428] Ibid at [280].

[429] [2015] FWCFB 8200 at [290].

[430] *Penalty Rates* decision [2017] FWCFB 1001 at [216].

[431] [2016] FWCFB 3500 at [545].

[432] Statistical report, Table 11.1.

[433] Peetz D & Yu S (2018), *Employee and employer characteristics and collective agreement coverage*, Fair Work Commission, Research Report 1/2018, February, p. 10.

[434] Rozenbes D & Farmakis-Gamboni S (2015), *Earnings and characteristics of employees by gender and industrial arrangement*, report for the Pay Equity Unit of the Fair Work Commission, December; and Broadway B & Wilkins R (Melbourne Institute of Applied Economic and Social Research) (2015), *Low-paid women's workforce participation decisions and pay equity*, report for the Pay Equity Unit of the Fair Work Commission, December.

[435] Australian Government submission, 13 March 2018 at para 276.

[436] Australian Government submission, 13 March 2018 at para 276, Table 8.7.

[437] Broadway B & Wilkins R (2017), *Probing the effects of the Australian system of minimum wages on the gender wage gap*, Melbourne Institute of Applied Economics and Social Research, Working Paper No. 31/17, p. 12.

[438] Broadway B & Wilkins R (2017), *Probing the effects of the Australian system of minimum wages on the gender wage gap*, Melbourne Institute of Applied Economics and Social Research, Working Paper No. 31/17, p. 13.

[439] Broadway B & Wilkins R (2017), *Probing the effects of the Australian system of minimum wages on the gender wage gap*, Melbourne Institute of Applied Economics and Social Research, Working Paper No. 31/17, pp. 16–17.

[440] Broadway B & Wilkins R (2017), *Probing the effects of the Australian system of minimum wages on the gender wage gap*, Melbourne Institute of Applied Economics and Social Research, Working Paper No. 31/17, pp. 14–15.

[441] Broadway B & Wilkins R (2017), *Probing the effects of the Australian system of minimum wages on the gender wage gap*, Melbourne Institute of Applied Economics and Social Research, Working Paper No. 31/17, p. 22.

[442] Broadway B & Wilkins R (2017), *Probing the effects of the Australian system of minimum wages on the gender wage gap*, Melbourne Institute of Applied Economics and Social Research, Working Paper No. 31/17, p. 24.

[443] Broadway B & Wilkins R (2017), *Probing the effects of the Australian system of minimum wages on the gender wage gap*, Melbourne Institute of Applied Economics and Social Research, Working Paper No. 31/17, p. 24.

[444] Victorian Government submission, 13 March 2018 at para 103.

[445] Western Australian Government submission, 13 March 2018 at para 63.

[446] Victorian Government submission, 13 March 2018 at para. 103; Broadway B & Wilkins R (2017), *Probing the Effects of the Australian System of Minimum Wages on the Gender Wage Gap*, Melbourne Institute of Applied Economic & Social Research, Working Paper No. 31/17, December, p. 25.

[447] Queensland Government submission, 19 March 2018 at p. 13.

[448] Federal Opposition submission, 13 March 2018 at para. 69.

[449] ACTU submission, 13 March 2018 at para. 484.

[450] ACTU submission, 13 March 2018 at para. 487.

[451] ACTU submission in-reply, 13 April 2018 at p. 19.

[452] ACTU submission in-reply, 13 April 2018 at p. 19.

[453] ACCER submission, 13 March 2018 at para. 280.

[454] ACCER submission, 13 March 2018 at para. 276.

[455] ACCER submission, 13 March 2018 at para. 281.

[456] ACCER submission, 13 March 2018 at paras 278; 280.

[457] ACCI submission in-reply, 9 April at para. 28.

[458] ACCI submission in-reply, 9 April at paras 28–29.

[459] ACCI submission in-reply, 9 April at para. 33.

[460] [2016] FWCFB 3500 at [546].

[461] [2017] FWCFB 3500 at [654].

[462] Broadway B. and Wilkins R. (2007) Probing the Effects of the Australian System Minimum Wages on the Gender Wage Gap, Working Paper No. 31/17, p. 13.

[463] *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, s.22. Note 2012–13 decision [2013] FWAFB 4000 at [550]–[553] clarifies these are different categories of transitional instrument.

[464] Some Division 2A State reference transitional awards may still operate such as where they are related to awards that have not been terminated under the termination of instruments process.

[465] Some Division 2B State reference transitional awards may still operate such as where they are related to awards that have not been terminated under the termination of instruments process.

[466] Some Division 2B State awards may still operate such as where they cover: employees also covered by enterprise instruments; or State reference public sector awards.

[467] Two transitional pay equity orders currently operate, created under item 43 of Sch. 3, and item 30A of Sch. 3A, of the Transitional Act respectively. The Panel must review and may make a determination varying the transitional pay equity order created under sub item 30D(1) of Sch. 3A, to the extent that it is derived from the *Queensland Community Services and Crisis Assistance Award – State 2008* (Regs 3A.01B).

[468] See discussion further for whom these instruments apply [2013] FWCFB 4000 at [550]–[561].

[469] [2010] FWAFB 4000 at [370]–[396].

[470] Dunn A & Bray G (2010), *Minimum wage transitional instruments under the Fair Work Act 2009 and the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, Research Report 06/2010, Fair Work Australia, June 2010.

[471] Fair Work Commission (2017), *Background Paper: Annual Wage Review 2016–17 — Transitional Instruments*, 19 September.

[472] [2018] FWCFB 2 at [8]–[20].

[473] *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, items 5(1)–(5) and 9(4) of Sch. 6.

[474] *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, items 5(3), 6 and 10(1) of Sch. 6A.

[475] For example, certain instruments that covered employees who were also covered by the *Social, Community, Home Care and Disability Industry Award 2010* were preserved by the *Award Modernisation – Termination of Modernisable Instruments* decision [2010] FWAFB 9916 at [44]. As at the date of this decision, they have not been terminated.

[476] A more detailed outline of these instruments can be found at [2013] FWCFB 4000 at [553]–[559]; and [2017] FWCFB 1931 at [81].

[477] *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, items 10 and 20 of Sch. 9, items 7 and 12A(5)of Sch. 3.

[478] *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, items 7-8 of Sch. 9, and item 3(2) of Sch. 5.

[479] For example, *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, item 20(1) of Sch 3.

[480] [2017] FWCFB 3500 at [687]–[689].

[481] *All Trades Queensland Pty Limited* [2016] FWC 2832.

[482] *All Trades Queensland Pty Ltd v Construction, Forestry, Mining and Energy Union, Communications, Electrical, Energy, Information, Postal, Plumbing and Allied Services Union and Australian Manufacturing Workers' Union* [2017] FWCFB 132.

[483] [2017] FCAFC 189 at [58].

[484] *All Trades Queensland Pty Limited v Construction, Forestry, Mining and Energy Union* [2017] FCAFC 189 at [58].

[485] *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, item 2(5) of Sch. 3.

[486] NAPSAs were established by Sch. 8 of the *Workplace Relations Act 1996*, as amended by the *Workplace Relations Amendment (Work Choices) Act 2005*. They are transitional instruments applicable to employees who previously had their terms of employment determined by a State award, but who have been brought into the federal industrial relations system.

[487] [2017] FCAFC 189 at [40]; *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, item 20(1) of Sch. 3.

[488] [2017] FCAFC 189 at [26].

[489] [2010] FWAFB 9916 at [41]–[44].

[490] *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*, item 10(1) of Sch. 9 and item 12A of Sch. 3.

[491] [2017] FWCFB 1931.

[492] [2017] FWCFB 1931 at [142]–[155].

[493] The *Fair Work (Transfer of Business) Amendment Act 2012*, which commenced on 4-5 December 2012, introduced Part 6.3 into the Act. A copied State award continues to operate under the national system for a period of five years, unless terminated or extended by regulation. See s.768AO of the *Fair Work Act 2009*.

[494] The provisions of the *Fair Work (Transitional Provisions and Consequential Amendments) Regulations 2009* dealing with the variation of Division 2B State awards in annual wage reviews also apply to copied State awards. Sections 768BY and 768AW(b) of the *Fair Work Act 2009*.

[495] [2018] FWCFB 2.

[496] [2018] FWCFB 2 at [43].

[497] ACTU submission, 13 March 2018 at para 503.

[498] ACTU submission, 13 March 2018 at para 504; ACTU submission in reply, 9 April 2018 at p. 19.

[499] CPSU submission, 24 April 2018 at para 2.

[500] ABI and NSWBC submission, 13 March 2018 at p. 37.

[501] ACCI response to questions on notice, 9 April 2018 at para. 37; RCI made a similar submission in its response to questions on notice, 9 April 2018 at p. 5.

[502] *Fair Work Act 2009*, s.284(3).

[503] ACTU submission, 13 March 2018 at para 492.

[504] ACTU submission, 13 March 2018 at paras 493–494.

[505] Ai Group submission, 13 March 2018 at p. 48.

[506] ABI and NSWBC submission, 13 March 2018 at p. 36.

[507] ACTU submission, 13 March 2018 at paras 493–495.

[508] Ai Group submission, 13 March 2018 at p. 48.

[509] ABI and NSWBC submission, 13 March 2018 at p. 36.

[510] ACTU submission, 13 March 2018 at para. 496.

[511] ACTU submission, 13 March 2018 at para. 495.

[512] ACTU submission, 13 March 2018 at para. 495.

[513] ACTU submission, 13 March 2018 at para. 495.

[514] Ai Group submission, 13 March 2018 at p. 48.

[515] Australian Government submission, 13 March 2018 at para. 138.

[516] Victorian Government submission, 13 March 2018 at para. 136.

[517] [2016] FWCFB 3500 at paras 608; 650.

[518] *Fair Work Act 2009*, s.295(1)(b).

[519] ACTU submission, 13 March 2018 at para. 498.

[520] Ai Group submission, 13 March 2018 at p. 50.

[521] ABI and NSWBC submission, 13 March 2018 at p. 36.

[522] [2015] FWCFB 3500 at [560].

[523] [2016] FWCFB 3500 at [640].

[524] ACTU submission, 13 March 2018 at para. 499.

[525] Ai Group submission, 13 March 2018 at p. 50.

[526] ABI and NSWBC submission, 13 March 2018, at p. 36.

[527] [2018] FWCFB 3500 at [665].

[528] *Fair Work Act 2009*, s.294(1)(b).

[529] ACTU submission, 13 March 2018 at para. 493.

[530] ACOSS submission, 16 March 2018 at p. 18.

[531] Ai Group submission, 13 March 2018 at p. 50.

[532] ABI and NSWBC submission, 13 March 2018 at p. 35.

[533] Ai Group submission, 13 March 2018 at p.50.

[534] ABI and NSWBC submission, 13 March 2018 at pp. 35–36.

[535] [2017] FWCFB 3500 at [739].

[536] ACTU submission, 13 March 2018 at para. 497.

[537] Ai Group submission, 13 March 2018 at p. 48.

[538] ABI and NSWBC submission, 13 March 2018 at p. 35.

[539] Ai Group submission, 13 March 2018 at p. 48.

[540] ABI and NSWBC submission, 13 March 2018 at p. 35.

[541] ACTU submission, 13 March 2018 at para. 497.

[542] MA000103.

[543] [2017] FWCFB 3500 at [740].

[544] [2017] FWCFB 5073.

[545] [2018] FWCFB 2196.

[546] [2018] FWCFB 2196 at [15].

[547] ACOSS submission, 16 March 2018 at pp. 46–47.

[548] ACOSS submission to 2016–17 Review at p. 37; ACOSS submission to 2015–16 Review at pp. 38–39; ACOSS submission to 2014–15 Review at pp. 52–53; ACOSS submission to 2013–14 Review at pp. 59–60; ACOSS submission to 2012–13 Review at pp. 58–59; ACOSS submission to 2011–12 Review at p. 57; ACOSS submission to 2010–11 Review at pp. 45–46 and ACOSS submission to 2009–10 Review at p. 46.

[549] ACOSS submission, 16 March 2018 at p. 47.

[550] [2017] FWCFB 3500 at [737].

[551] Borland, J (2018), *Part II: Prospects for research on employment effects of minimum wages in Australia*, Outcomes from the Fair Work Commission research roundtable, Fair Work Commission, Research report 4/2018, March.

[552] Richardson, S (2018), *The UK evaluation of the impacts of increases in their minimum wage*, Discussion paper prepared for the Fair Work Commission research roundtable, Fair Work Commission, March.

WATERS AND OTHERS . . . . APPELLANTS;
COMPLAINANTS,

AND

PUBLIC TRANSPORT CORPORATION . . RESPONDENT.
RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1991.

*Feb.* 5, 6; *Dec.* 3.

Mason C.J., Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ.

*Discrimination Legislation — Discrimination on ground of status — Disabled persons — Direct and indirect discrimination — Whether intention or motive to discriminate necessary — Discrimination constituted by imposition of requirement or condition — No contravention where requirement or condition reasonable — Reasonableness — Onus of proof — No contravention where act done necessary to comply with provision of other legislation — Whether necessary that other legislation directly impose obligation to do discriminatory act — Equal Opportunity Act* 1984 (*Vict.*), *ss.* 17(1), (5), 29(2)(*b*), 39(*e*)(*ii*).

Section 29(1) of the *Equal Opportunity Act* 1984 (Vict.) made it unlawful "for a person who provides goods or services ... to discriminate against another person on the ground of status ... — (a) by refusing to supply the goods or perform the services; or (b) in the terms on which the person supplies the goods or performs the services". Sub-section (2) provided that the section did not apply to discrimination "on the ground of impairment in relation to the performance of a service where, in consequence of a person's impairment, the person requires the service to be performed in a special manner — (a) that cannot reasonably be provided by the person performing the service; or (b) that can on reasonable grounds only be provided by the person performing the service on more onerous terms than the terms on which the service could ... reasonably be provided to a person not having that impairment". Section 17(1) provided: "A person discriminates against another person ... if on the ground of the status ... of the other person the first-mentioned person treats the other person less favourably than the first-mentioned person treats or would treat a person of a different status ..." Sub-section (5) provided that "For the purposes of sub-section (1) a person discriminates against another person on the ground of the status ... of the other person if — (a) the first-mentioned person imposes on that other person a requirement or condition with which a substantially higher proportion of persons of a different status ... do or can comply; (b) the other person does not or cannot comply with the requirement or condition; and (c) the requirement or condition is not reasonable." Section 39 provided that the Act "does not render unlawful — ... (e) an act done by a person if it was necessary for the

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person to do it in order to comply with a provision of — ... (ii) any other Act ..."

*Held*, by Mason C.J., Brennan, Deane, Dawson, Toohey and Gaudron JJ., that s. 29(2)(b) was directed to terms that were more onerous to the person who required the goods and services and not to the provider of the goods and services.

*Per* McHugh J. Section 17(1) dealt only with direct discrimination and sub-s. (5) dealt only with indirect discrimination.

*Per* Mason C.J., Deane and Gaudron JJ. Section 17(5) was not a complete and exhaustive statement of what constituted indirect discrimination for the purposes of s. 17.

*Per* Mason C.J., Deane and Gaudron JJ., McHugh J. contra, that s. 17(1) did not require an intention or motive to discriminate.

*Reg. v. Birmingham City Council; Ex parte Equal Opportunities Commission*, [1989] A.C. 1155, at p. 1194, and *Australian Iron & Steel Pty. Ltd. v. Banovic* (1989), 168 C.L.R. 165, at pp. 176-177, applied.

*Per* Mason C.J., Deane, Dawson, Toohey, Gaudron and McHugh JJ. A "requirement or condition" in relation to a service must be separate from that service.

*Per* Dawson, Toohey and McHugh JJ. The words "requirement or condition" should be construed broadly to cover any form of qualification or prerequisite, although the actual requirement or condition should be formulated precisely.

*Per* McHugh J. In the context of providing goods or services, a person should be regarded as imposing a requirement or condition when he intimates, expressly or inferentially, that some stipulation or set of circumstances must be obeyed or endured if those goods or services are to be acquired, used or enjoyed.

*Held*, further, by Brennan, Deane, Dawson, Toohey and McHugh JJ., Mason C.J. and Gaudron J. contra, that "reasonable" in s. 17(5)(c) referred to what was reasonable in all the circumstances of the case.

*Per* McHugh J. The onus of proving that a requirement or condition was not reasonable within s. 17(5)(c) lay on the complainant.

*Vines v. Djordjevitch* (1955), 91 C.L.R. 512, at pp. 519-520 and *Roddy v. Perry* [No. 2] (1957), 58 S.R. (N.S.W.) 41, at p. 47, applied.

*Held*, further, by Mason C.J., Brennan, Deane, Gaudron and McHugh JJ., that s. 39(e)(ii) referred only to what it was necessary to do in order to comply with a specific requirement directly imposed by the relevant provision as distinct from a requirement imposed by some person in the exercise of a power conferred by the provision.

*Per* Dawson and Toohey JJ. Section 39(e)(ii) protected acts other than those expressly authorized by the other Act. Its protection extended to those necessary to carry out specific directions given under statutory authority, but not where a discretion as to the manner of carrying out the direction offered a choice between discrimination and no discrimination.

*Hampson v. Department of Education and Science*, [1991] 1 A.C. 171, applied.

Decision of the Supreme Court of Victoria (J. D. Phillips J.), reversed.

APPEAL from the Supreme Court of Victoria.

Peter Waters and nine other disabled persons lodged complaints under s. 44 of the *Equal Opportunity Act* 1984 (Vict.) alleging that

the Public Transport Corporation had discriminated against them in contravention of the Act. The acts of discrimination complained of were the removal of conductors from some trams and the introduction by the Corporation of "scratch tickets" for use on public transport. The tickets were to be bought from retail outlets and were to be validated by the traveller making a scratch mark in designated places to indicate the journey being undertaken. Some of the complainants could not travel on trams which did not have conductors. The disabilities of all complainants made it impossible or at least exceedingly difficult to use scratch tickets.

The complaints were referred to the Equal Opportunity Board which upheld them and made orders requiring the Corporation to "discontinue the scratch-ticket system as the main ticket system for the complainants" and to "refrain from implementing the driver-only tram proposal".

The Corporation appealed to the Supreme Court pursuant to s. 49(4) of the Act. After the time for appeal under that section had expired the Corporation instituted proceedings for judicial review by originating motion under Ch. 1, O. 56 of the Supreme Court Rules seeking to raise issues extending beyond those raised in its appeal. Phillips J. allowed the appeal and set aside the orders of the Board and in lieu thereof ordered that the complaints be dismissed. The originating motion was dismissed. The complainants appealed to the High Court, by special leave, from the dismissal of the appeal. The Corporation applied for special leave to cross-appeal from the dismissal of the motion in the event that the appeal succeeded.

*A. M. North* Q.C. (with him *H. Borenstein*), for the appellants. The Act is in the nature of a human rights code and calls for a broad interpretation to advance its purposes (1). Section 31(1) of the *Transport Act* 1983 (Vict.) is not a provision of any other Act for the purposes of s. 39(e)(ii). The other provision must expressly require an act of discrimination. Section 31(1) does not expressly require the Minister or Director-General to give directions which are discriminatory in effect nor does s. 31(1) require the Corporation to comply with such directions (2). [He referred to Pearce and Geddes, *Statutory Interpretation in Australia* (3); *Reg. v. Cain* (4).] It was

(1) *Re Ontario Human Rights Commission v. Simpsons-Sears Ltd.* (1958), 23 D.L.R. (4d) 321, at p. 329; *Street v. Queensland Bar Association* (1989), 168 C.L.R. 461, at pp. 487, 508, 566, 581; *Re Saskatchewan Human Rights Commission v. Canadian Odeon Theatres Ltd.* (1985), 18 D.L.R. (4d) 93; *Waugh v. Kippen* (1986), 160 C.L.R. 156.

(2) *Hampson v. Department of Education and Science*, [1991] 1 A.C. 171.

(3) 3rd ed. (1988), p. 105.

(4) [1985] 1 A.C. 46.

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open on the evidence and at law for the Board to find that the discriminatory acts were not necessary in order to comply with directions of the Minister or Director-General within s. 39(e)(ii). The characterization of the "requirement or condition" within s. 17(5)(a) was a question of fact for the Board, and the judge erred in interfering with it because there was evidence to support it. The judge's characterization was wrong in law in that it was too narrow. It failed to take account of the substance of the acts of the Corporation and the impact of its acts. [He referred to *Australian Iron & Steel Pty. Ltd. v. Banovic* (5); *Street v. Queensland Bar Association* (6); *Clarke v. Eley (I.M.I.) Kynoch Ltd.* (7); *Home Office v. Holmes* (8); *Styles v. Secretary of Department of Foreign Affairs and Trade* (9); and *Styles v. Secretary of Department of Foreign Affairs and Trade* (10).] "Reasonable" in s. 17(5)(c) is a reference to reasonableness in relation to the victim alone. This construction flows from the scheme of the Act which exempts the discriminator from liability in limited specific situations defined in other sections. These sections constitute an exclusive code for exemption for discriminators.

*F. X. Costigan* Q.C. (with him Mrs. *A. Richards*), for the respondent. The proper interpretation of s. 29(1)(b) requires that there be two separate sets of terms, one for one group of people, and one for the group of people discriminated against. The respondent does not contend that for the purposes of indirect discrimination under s. 17(5) it is necessary to identify any conscious and/or intentional element. There is nothing in the circumstances surrounding the complaints in relation to driver only trams which can be described as a "requirement or condition" to attract the operation of s. 17(5)(a). Moreover there was no imposition on any complainant of a requirement or condition. "Reasonable" in s. 17(5)(c) means reasonable in all the circumstances. The circumstances include economic, financial and public policy matters (11). The Act recognizes that in the case of indirect discrimination the burden of complying may be unreasonable (12). The corporation is entitled to

(5) (1989) 168 C.L.R. 165.
(6) (1989) 168 C.L.R. 461.
(7) [1983] I.C.R. 165.
(8) [1984] I.C.R. 678.
(9) (1988) 84 A.L.R. 408.
(10) (1989) 23 F.C.R. 251.
(11) *Styles v. Department of Foreign Affairs* (1988), 84 A.L.R., at pp. 426-431; (1989) 23 F.C.R., at pp. 263-264.
(12) *Ontario Human Rights Commission and O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 552; *Home Office v. Holmes*, [1985] 1 W.L.R. 71; [1984] 3 All E.R. 549.

the benefit of s. 39(e)(ii). It received a direct order pursuant to s. 31 of the *Transport Act* which it was required to obey. That direction required it to implement a driver only tram system. It could not decline to comply. Its action was necessary to carry out this direction. [He referred to *Hampson v. Department of Education and Science* (13).] The orders of the Board were null and void because they were vague, uncertain and unintelligible. By reference to ss. 49(4) and 88 of the *Magistrates' Court Act* 1971, the respondent was entitled to avail itself of the judicial review proceedings in circumstances where by reason of the narrow interpretation placed upon the power of amendment in s. 91 of the *Magistrates' Court Act* it was precluded from adding a ground of appeal in an order to review.

*Cur. adv. vult.*

Dec. 3.

The following written judgments were delivered:—

MASON C.J. AND GAUDRON J. The appellants are nine individuals ("the complainants") who lodged complaints under s. 44 of the *Equal Opportunity Act* 1984 (Vict.) ("the Act") and twenty-nine community organizations representing the interests of disabled persons, which organizations made allegations of discrimination that came to the attention of the Equal Opportunity Board ("the Board") established by s. 8(1) of the Act. The respondent, the Public Transport Corporation ("the Corporation"), is responsible for the provision of public transport in the State of Victoria in accordance with and subject to the *Transport Act* 1983 (Vict.).

The complaints and the allegations of discrimination arose out of a direction by the Minister for Transport to introduce a number of changes to the public transport system. This appeal is concerned with two of those changes, namely, a new ticketing system for public transport and the removal of conductors from some trams. The new tickets, known as "scratch tickets", were to be purchased from retail shops and were to be validated by the traveller making a scratch mark in designated places to indicate the journey being undertaken.

Each of the nine complainants suffers from a disability making it exceedingly difficult, if not impossible, to use scratch tickets. Some of the complainants, by reason of their particular disabilities, cannot travel on trams which do not have conductors. And, of course,

(13) [1991] 1 A.C. 171.

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other persons in the same general position as the complainants are similarly affected. It was by reason of these matters that it was complained and alleged, amongst other matters, that the introduction of scratch tickets and the removal of conductors constituted discrimination against the complainants in particular and against impaired persons generally.

*History of the proceedings*

The complaints were referred to the Board under s. 45 of the Act. Initially the Board took the view that it had no jurisdiction, but it was held otherwise on appeal to the Supreme Court of Victoria. The allegations of discrimination were referred to the Board under s. 42 of the Act after investigation by the Commissioner for Equal Opportunity under s. 41.

The complaints and allegations of discrimination were heard together and, after a lengthy hearing, they were upheld to the extent that they were based on the introduction of scratch tickets and the removal of conductors. Thereupon, the Board made orders requiring the Corporation to "discontinue the scratch-ticket system as the main ticket system for the [c]omplainants" and to "refrain from implementing the driver-only tram proposal". It is common ground that those orders were made by way of determination of the complaints lodged under s. 44 of the Act.

The Corporation appealed from the decision and orders of the Board to the Supreme Court pursuant to s. 49(4) of the Act. That sub-section provides for an appeal only on a question of law. The appeal is to be in accordance with the provisions of Pt XI of the *Magistrates' Courts Act* 1971 (Vict.) with such adaptations as are necessary. The appeal must be instituted within twenty-eight days. Within that period the Corporation obtained an order nisi as provided in Pt XI of the *Magistrates' Courts Act*. Later, and after the time for appeal had expired, the Corporation instituted proceedings for judicial review by originating motion under Ch.I, O. 56 of the Supreme Court Rules of Victoria ("the Rules") seeking to raise issues extending beyond those raised in its appeal.

The appeal and the originating motion were heard by Phillips J. The appeal was allowed. The order nisi which had been previously granted was made absolute and it was ordered that the orders of the Board be set aside and, in lieu thereof, that the complaints be dismissed. This appeal is brought from that order, there being no provision at that time for an appeal to the Full Court of the Supreme Court. The originating motion was dismissed, his Honour suggesting, in effect, that it was incompetent. In the event that the

appeal should succeed, the Corporation seeks special leave to cross-appeal from the dismissal of that motion.

*The provisions of the Act*

Section 29(1) of the Act provides:

> "It is unlawful for a person who provides goods or services (whether or not for payment) to discriminate against another person on the ground of status or by reason of the private life of the other person —
>
> (*a*) by refusing to supply the goods or perform the services; or
>
> (*b*) in the terms on which the person supplies the goods or performs the services."

"Status" is defined in s. 4(1) of the Act to mean, in par. (d) of the definition and in relation to a person, the impairment of that person. "Impairment" is relevantly defined in that sub-section to mean, in pars (b) and (c) of the definition, total or partial loss of a part of the body and malfunction of a part of the body. It is common ground that each of the complainants is impaired in one or other of those ways. It is also common ground that the Corporation provides services.

It is provided by s. 29(2) and (3) that certain discrimination is outside the operation of that section. It is necessary only to refer to sub-s. (2) which provides:

> "This section does not apply to discrimination on the ground of impairment in relation to the performance of a service where, in consequence of a person's impairment, the person requires the service to be performed in a special manner —
>
> (*a*) that cannot reasonably be provided by the person performing the service; or
>
> (*b*) that can on reasonable grounds only be provided by the person performing the service on more onerous terms than the terms on which the service could ... reasonably be provided to a person not having that impairment."

The concept of "discrimination" is dealt with in s. 17 of the Act which relevantly provides:

> "(1) A person discriminates against another person ... if on the ground of the status or by reason of the private life of the other person the first-mentioned person treats the other person less favourably than the first-mentioned person treats or would treat a person of a different status or with a different private life.
>
> ...
>
> (5) For the purposes of sub-section (1) a person discriminates against another person on the ground of the status or by reason of the private life of the other person if —
>
> (*a*) the first-mentioned person imposes on that other person

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a requirement or condition with which a substantially higher proportion of persons of a different status or with a different private life do or can comply;
(*b*) the other person does not or cannot comply with the requirement or condition; and
(*c*) the requirement or condition is not reasonable."

The Act, in Pt V, contains a number of general exceptions. One exception is to be found in s. 39 which relevantly provides:

"This Act does not render unlawful —

...

(*e*) an act done by a person if it was necessary for the person to do it in order to comply with a provision of —
(i) an order of the Board;
(ii) any other Act; or
(iii) an instrument made or approved by or under any other Act."

If conduct which is the subject of a complaint under s. 44 of the Act constitutes discrimination which is proscribed by the Act and is not excepted from its operation, whether specifically, as e.g. by s. 29(2), or generally, as e.g. by s. 39(e), the Board may make orders in accordance with s. 46. That section relevantly provides, in sub-s. (2)(a), that:

"[The Board] may order the person with respect to whom the complaint was made ... to refrain from committing any further act of discrimination against the complainant."

*The substantive issues in the appeal and in the application for special leave to cross-appeal*

The proceedings have at all times been conducted on the basis that, to the extent that discrimination is involved, it is because, in terms of s. 17(5) of the Act, the scratch tickets and driver-only trams involve the imposition of a requirement or condition with which a substantially higher proportion of unimpaired persons can or do comply than do impaired persons. Compliance is not in issue. Nor is it now in issue that scratch tickets involve the imposition of a requirement or condition. Accordingly, the specific issues which arise under the Act are —

(1) Whether, as found by Phillips J., there is no requirement or condition involved in the removal of conductors from trams.

(2) Whether the requirement or condition involved in the introduction of scratch tickets and that, if any, involved in the removal of conductors are, in terms of s. 17(5)(c), reasonable. More precisely, the question is whether, as held by Phillips J., the Board was wrong in refusing to have regard to the financial considerations which were said to justify those changes.

(3) Whether, if the changes constitute discrimination within s. 29(1) of the Act, they nonetheless fall within the special exception in s. 29(2). This question lies at the heart of the Corporation's application for special leave to cross-appeal.

(4) Whether, as was held by Phillips J., the Corporation's conduct in relation to the introduction of scratch tickets and the removal of conductors falls within the general exception set out in s. 39(e)(ii) of the Act in that, a direction having been given by the Minister, that conduct was necessary for the Corporation to comply with s. 31(1) of the *Transport Act*.

(5) Whether, as was held by Phillips J., the orders made by the Board, by reason of their vagueness, went beyond the power conferred by s. 46(2)(a) of the Act.

*The relationship between s.* 17(1) *and s.* 17(5) *of the Act*

The subject-matter of s. 17(5) of the Act is usually referred to as "indirect discrimination" (14) or as "adverse effect discrimination" (15), signifying that some criterion has been used or some matter taken into account which, although it does not, in terms, differentiate for an irrelevant or impermissible reason, has the same or substantially the same effect as if different treatment had been accorded precisely for a reason of that kind.

The notion of "indirect discrimination" or "adverse effect discrimination" derives from the decision of the Supreme Court of the United States in *Griggs v. Duke Power Co.* (16), which gave rise to the term "disparate impact discrimination". In that case a general anti-discrimination provision, much like that in s. 17(1) of the Act, which was directed to the elimination of racial discrimination, was interpreted as prohibiting the use of a selection test which, although not overtly differentiating on the basis of race, had a disparate impact on persons from different racial backgrounds.

Within the Australian legal system, it is usual for anti-discrimination legislation to ban discriminatory practices in terms which deal separately with treatment which differentiates by reason of some irrelevant or impermissible consideration and with practices which, although not overtly differentiating on that basis, have the same or substantially the same effect. That is the case with s. 17(1)

(14) See, e.g., *Australian Iron & Steel Pty. Ltd. v. Banovic* (1989), 168 C.L.R. 165, at pp. 175, 182-183, 202.
(15) See, e.g., *Street v. Queensland Bar Association* (1989), 168 C.L.R. 461, at p. 508, per Brennan J.
(16) (1971) 401 U.S. 424.

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and s. 17(5) of the Act. (17). That form of proscription appears to have been based on that in the *Sex Discrimination Act* 1975 (U.K.).

Sub-section (1) of s. 17 describes what constitutes discrimination by a person against another person in any circumstances relevant for the purposes of a provision of the Act. A person discriminates in the described sense "if on the ground of the status or by reason of the private life of the other person the first-mentioned person treats the other person less favourably than the first-mentioned person treats or would treat a person of a different status or with a different private life". The sub-section is expressed in general terms apt to apply to both direct and indirect ("adverse effect") discrimination. Conduct which is "facially neutral" may nevertheless amount to, or result in, "less favourable" treatment. In the United States and Canada anti-discrimination statutes expressed in general terms that do not draw any distinction between direct and indirect discrimination have been consistently construed as applying to both forms of discrimination (18). This Court has taken the same approach in construing s. 92 of the Constitution (19).

The remaining sub-sections in s. 17 give more precise content to the general concept of discrimination described in sub-s. (1). Instead of making separate and independent provision for indirect discrimination, the legislature has chosen by sub-s. (5) to make it clear that sub-s. (1) applies to indirect discrimination of the kind described in sub-s. (5), just as sub-s. (4) makes it clear that sub-s. (1) applies to direct discrimination of the kind to which it refers. Sub-sections (4) and (5) commence with the words "[f]or the purposes of sub-section (1)", as does sub-s. (2). Accordingly, sub-s. (5) is epexegetical to, or explanatory of, sub-s. (1), spelling out the reach, though not necessarily the whole of the reach, of that provision in its application to indirect discrimination (20).

It is implicit in what we have just said that we do not accept the proposition that s. 17(5) is a complete and exhaustive statement of

(17) See also *Sex Discrimination Act* 1984 (Cth), ss. 5, 6, 7; *Anti-Discrimination Act* 1977 (N.S.W.), ss. 7, 24, 39, 49A, 49P, 49ZG; *Equal Opportunity Act* 1984 (S.A.), s. 29; *Equal Opportunity Act* 1984 (W.A.), ss. 8, 9, 10, 36, 53.

(18) *Griggs* ("The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation" — see (1971), 401 U.S. 424, at p. 431); *Albemarle Paper Co. v. Moody* (1975), 422 U.S. 405; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536.

(19) *Cole v. Whitfield* (1988), 165 C.L.R. 360, at pp. 399, 407-408; *Castlemaine Tooheys Ltd. v. South Australia* (1990), 169 C.L.R. 436, at pp. 466-467, 478, 480.

(20) See the discussion of the relationship between s. 166 and s. 167 of the *Income Tax Assessment Act* 1936 (Cth) in *George v. Federal Commissioner of Taxation* (1952), 86 C.L.R. 183, at pp. 203-204.

what constitutes indirect discrimination for the purposes of s. 17. Indirect discrimination as described in s. 17(1) may occur otherwise than by means of the imposition of a "requirement or condition" within the meaning of s. 17(5). And the language of the section appears to be inconsistent with the notion that s. 17(5) is a complete and exhaustive prescription for the purposes of s. 17(1). The object of s. 17(5) was to ensure that s. 17(1) extended so far, not to confine its operation.

*Section* 17(1)*: does it require an intention or motive to discriminate?*

There is some force in the suggestion that the expressions "on the ground of the status" and "by reason of the private life" in s. 17(1) look to an intention or motive on the part of the alleged discriminator that is related to the status or private life of the other person (21). However, the principle that requires that the particular provisions of the Act must be read in the light of the statutory objects is of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation the courts have a special responsibility to take account of and give effect to the statutory purpose (22). In the present case, the statutory objects, which are stated in the long title to the Act, include, among other things, "to render unlawful certain Kinds of Discrimination, to promote Equality of Opportunity between persons of different status". It would, in our view, significantly impede or hinder the attainment of the objects of the Act if s. 17(1) were to be interpreted as requiring an intention or motive on the part of the alleged discriminator that is related to the status or private life of the person less favourably treated. It is enough that the material difference in treatment is based on the status or private life of that person, notwithstanding an absence of intention or motive on the part of the alleged discriminator relating to either of those considerations. A material difference in treatment that is so based sufficiently satisfies the notions of "on the ground of" and "by reason of". A similar view was adopted by the House of Lords in *Reg. v. Birmingham City Council; Ex parte Equal Opportunities Commission* (23) in relation to s. 1(1)(a) of the *Sex Discrimination Act* (U.K.) which proscribed less favourable treatment on the ground of sex. Lord Goff of Chieveley (with whom the other

(21) See *Department of Health v. Arumugam*, [1988] V.R. 319, at p. 327, per Fullagar J.
(22) *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R., at p. 547; see also *Street* (1989), 168 C.L.R., at pp. 487, 566.
(23) [1989] A.C. 1155.

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members of the House agreed) said (24): "The intention or motive of the defendant to discriminate ... is not a necessary condition of liability." His Lordship noted (24) that, if intention or motive were relevant "it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy. In the present case, whatever may have been the intention or motive of the council, nevertheless it is *because of* their sex that the girls in question receive less favourable treatment than the boys" (emphasis added). (See also the discussion by Deane and Gaudron JJ. in *Banovic* (25).)

*Requirement or condition in s.* 17(5) *of the Act*

It was found by the Board that the removal of conductors involved the imposition of a requirement or condition that "the [c]omplainants ... use trams without the assistance of conductors". On appeal, it was held by Phillips J. that "for the Corporation simply to remove conductors from some of its trams does not involve, in any ordinary use of language, the 'imposition' of some 'requirement or condition' on either the travelling public generally or the [c]omplainants in particular".

In *Banovic*, this Court considered s. 24(3) of the *Anti-Discrimination Act* (N.S.W.) which deals with the same subject-matter as s. 17(5) of the Act in terms of a person "requir[ing] the other person to comply with a requirement or condition". It is clear from that case that compliance may be required even if the requirement or condition is not made explicit: it is sufficient if a requirement or condition is implicit in the conduct which is said to constitute discrimination. There is nothing in the Act to suggest that, in this regard, s. 17(5) involves anything different from the provision considered in *Banovic*.

It was submitted on behalf of the Corporation that, when applying s. 17(5) in the context dictated by s. 29 of the Act, namely, the provision of goods and services, it is necessary to ensure that the nature of those goods or services is not treated as constituting a requirement or condition. Then it was submitted that the requirement or condition identified by the Board, namely, the use of "trams without the assistance of conductors", is merely a description of the nature of the service provided by the Corporation.

It is necessary to note that the Board identified the requirement or condition involved in the removal of conductors in a context in

(24) [1989] A.C., at p. 1194.
(25) (1989) 168 C.L.R., at pp. 176-177.

which it was clear that it knew and appreciated that conductors were being removed from only some of the Corporation's trams. In that context, the formulation of the requirement or condition is somewhat elliptical but meaning that the complainants could fully avail themselves of tram transport only if they could use trams without the assistance of conductors. It may be that the routes on which the complainants were likely to travel had only conductorless trams, with the practical consequence that the complainants were, in effect, required to "use trams without the assistance of conductors".

In the context of s. 29, the notion of "requirement or condition" would seem to involve something over and above that which is necessarily inherent in the goods or services provided. Thus, for example, it would not make sense to say that a manicure involves a requirement or condition that those availing themselves of that service have one or both of their hands. But, subject to that, there is nothing in s. 29 or in s. 17(5) to suggest that either the goods or services or the requirement or condition, if any, involved in their provision should be identified in any particular way. Thus, and subject to that qualification, the identification of the service involved is no more than a determination of fact (26). It is clear that, without making any express finding to that effect, the Board proceeded on the basis that the service provided by the Corporation was that of public transport as affected by the changes directed by the Minister for Transport.

It was open to the Board to identify the service provided by the Corporation with more or less particularity. For example, in the context of the complaints with respect to the removal of conductors, the Board might have identified the service as the provision of transport by trams, some of which had conductors and some of which did not. However, it was for the Board to identify the service, and the complaints and the evidence permitted it to proceed on the basis that it did.

Once the service provided by the Corporation was identified (albeit, not expressly) by the Board as public transport as affected by the changes directed, it was open to it to find, as in effect it did, that the removal of conductors from some trams involved the imposition of a condition that the complainants could fully avail themselves of the tram service only if they could use trams without the assistance of conductors. And a condition of that nature falls within the

(26) See *Re Saskatchewan Human Rights Commission and Canadian Odeon Theatres Ltd.* (1985), 18 D.L.R. (4th) 93; *James v. Eastleigh Council*, [1990] 1 Q.B. 61.

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ordinary conception of "requirement or condition" and, thus, falls within s. 17(5)(a). Indeed, it is apparent that it is within the intended operation of s. 17(5)(a), for, when stated in this way, what is revealed is the less favourable treatment of those who need the assistance of conductors as against those who do not. Of course, that does not answer the question whether that is less favourable treatment on the ground of status. That must be determined by reference to s. 17(5)(b) and (c).

When the finding as to the requirement or condition involved in the removal of conductors is understood, as it must be, in the manner that has been indicated, no error of law is disclosed in the Board's interpretation or its application of s. 17(5)(a) of the Act.

*The meaning of "reasonable" in s. 17(5)(c) of the Act*

The question raised by s. 17(5)(c) in this case is whether a requirement or condition is reasonable, notwithstanding that it is one with which a substantially higher proportion of unimpaired persons can or do comply than do impaired persons.

The Board approached the question raised by s. 17(5)(c) on the basis that it should determine whether the requirement or condition was reasonable by reference to, and only by reference to, the circumstances of the complainants. Accordingly, it held that it was precluded from considering "financial or economic considerations which [might] have motivated the [Corporation]" and from placing those considerations "in the balance against the facts presented by the [complainants]". On appeal, Phillips J. held that "reasonable" in s. 17(5)(c) meant "reasonable in all the circumstances of the case and it involves considering not only the position of the [c]omplainants but also the position of the Corporation".

Paragraph (c) of s. 17(5) does not remove discriminatory conduct from the operation of the Act. To the extent that discriminatory conduct is taken outside the Act's operation, that is done by other provisions, including s. 29(2) and s. 39(e). Instead, the effect of s. 17(5)(c) is to limit the concept of "discrimination". It is limited by the notion of "reasonableness". Given that that notion determines whether conduct otherwise falling within s. 17(5) constitutes discrimination, it would be surprising if "reasonable" were used in some general and imprecise sense, leaving that question to be answered as a matter of impression. However, that may be put to one side, for the meaning of "reasonable" in s. 17(5) must be ascertained by reference to the notion of "discrimination" and by reference to the scope and purpose of the Act.

The purpose of the Act is to eliminate discrimination on the

**Corrigendum:** after "to eliminate discrimination on the" insert "ground of status or by reason of personal life in those areas in which".

the Act operates. The discrimination with which the Act is concerned is discrimination against, rather than discrimination between, persons with different characteristics. The notion of "discrimination against" involves differentiating by reason of an irrelevant or impermissible consideration. Anti-discrimination legislation operates on the basis that certain characteristics or conditions are declared to be irrelevant or impermissible. Thus, subject to the exceptions set out in the Act, the effect of s. 17(1) is to declare that status and personal life are not to be taken into consideration in those areas in which the Act operates. The notion of "discrimination between" involves differentiating on the basis of a genuine distinction, which, in the context of anti-discrimination legislation, must be a characteristic that has not been declared an irrelevant or impermissible consideration. It is this consideration which suggests that the function of s. 17(5)(c) is to identify those cases in which a requirement or condition serves to effect a genuine distinction or, more precisely, a distinction which is not rendered impermissible by the Act.

The function of s. 17(5)(c) which is suggested by the purpose of the Act is borne out by *Griggs* which, as earlier indicated, held that certain practices which have the same effect as direct discrimination are comprehended within the general concept of "discrimination". That case concerned discrimination in employment and, in that context, it was said (27) of a practice having the same effect as direct discrimination that, if it "cannot be shown to be related to job performance, the practice is prohibited". Later, in *Albemarle Paper Co.*, the Supreme Court of the United States held (28), by reference to its earlier decision in *McDonnell Douglas Corp. v. Green* (29), that, even if "tests are 'job related', it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship'". And, in *Banovic*, a case also concerned with discrimination in employment, Deane and Gaudron JJ. said (30) that "reasonableness" in s. 24(3)(b) of the *Anti-Discrimination Act* (N.S.W.) was directed to the considerations identified in *Albemarle Paper Co.* but, perhaps, also embraced matters pertaining to the stability and harmony of the workforce.

The two-stage approach which emerged from *Griggs* and *Albemarle Paper Co.* was reaffirmed by the Supreme Court of the

(27) (1971) 401 U.S., at p. 431.
(28) (1975) 422 U.S., at p. 425.
(29) (1973) 411 U.S. 792.
(30) (1989) 168 C.L.R., at p. 181.

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United States in *Wards Cove Packing Co. Inc. v. Atonio* (31). That approach is not very different from the approach that has emerged in this Court in relation to the notion of discrimination involved in ss. 92 and 117 of the Constitution. In the case of different treatment, that approach involves ascertaining whether there is a difference which might justify different treatment and, if so, whether the different treatment in issue is reasonably capable of being seen as appropriate and adapted to that difference (32).

One very powerful reason for confining the meaning of the word "reasonable" in the context of s. 17(5)(c) in this way is that an extension of the concept to embrace all the circumstances of the case would open the way to justification of indirect discriminatory practices on grounds which are not available in the case of direct discrimination. Just why the legislature should intend to draw such a distinction between direct and indirect discrimination does not appear. And there is nothing to indicate that the consequences of direct discrimination are more objectionable and harmful to society than the consequences of indirect discrimination. In this situation a narrow reading of s. 17(5)(c) is more apt to secure the attainment of the statutory objects than a reading which permits the adoption of a discriminatory practice merely because it is "reasonable" having regard to economic and financial considerations. If the legislature had intended to provide for an exemption on that ground, it would have found a home in "Part V — General Exceptions".

The reason for the introduction of par. (c) in s. 17(5) is that the sub-section provides in effect that the imposition of a requirement or condition of the kind described in par. (a) amounts to discrimination against a person on the ground of status or private life if pars (b) and (c) are satisfied. Unless provision were made by par. (c) for the concept of reasonableness, the fact that the differentiating treatment is based on a non-proscribed distinction, and reasonably so based, would not avail the alleged discriminator. No such provision is required in connexion with s. 17(1) where conduct based on a relevant or non-proscribed distinction is not discrimination "on the ground of" or "by reason of" the status or private life of the person concerned.

Having regard to the purpose of the Act, the general context of s. 17(5)(c), the way in which "indirect discrimination" has been dealt

(31) (1989) 57 L.W. 4583.

(32) See the discussion by Brennan J. in *Gerhardy v. Brown* (1985), 159 C.L.R. 70, at p. 127; and see, in relation to s. 92, *Cole v. Whitfield* (1988), 165 C.L.R., at p. 408; *Bath v. Alston Holdings Pty. Ltd.* (1988), 165 C.L.R. 411, at pp. 427-428; *Castlemaine Tooheys Ltd.* (1990), 169 C.L.R., at p. 478; in relation to s. 117, *Street* (1989), 168 C.L.R., at pp. 487-489, 508-509, 510-511, 523-524, 555, 570-571, 582-583.

with in the United States following *Griggs*, and the notion of discrimination as revealed in the context of ss. 92 and 117 of the Constitution, "reasonable" in that paragraph is, in our view, to be read as directing an inquiry whether the requirement or condition reflects a distinction other than one based on status or personal life and, if so, whether the requirement or condition is appropriate or adapted to that distinction.

However, this view — which, for convenience, may be called "the strict view of s. 17(5)(c)" — is not a view which commends itself to a majority of the Court. Thus, it is necessary that this case be determined on a different basis.

Once the strict view of s. 17(5)(c) is rejected, "reasonable" in that paragraph must mean reasonable in all the circumstances. If "reasonable" is not limited by the concept of "discrimination", there is nothing else in the Act to limit the considerations to be taken into account in reaching a decision on that issue. In particular, and for the reasons given by Dawson and Toohey JJ., those considerations are not limited by s. 29(2) of the Act.

The strict view of s. 17(5)(c) of the Act would lead to the conclusion that Phillips J. was in error in upholding the Corporation's ground of appeal that the Board "erred in law in ruling that ... [i]t should not have regard to any financial or economic considerations which may have motivated the [Corporation] ... when determining the question of reasonableness". That view has not gained acceptance and the alternative view requires acceptance of the conclusion of Phillips J. that the Board erred in the manner stated.

*The operation of s.* 29(2) *of the Act*

As earlier indicated, s. 29(2) takes discriminatory conduct in the provision of goods and services outside the operation of s. 29 where, "in consequence of a person's impairment, [that] person requires the service to be performed in a special manner — (*a*) that cannot reasonably be provided by the person performing the service; or (*b*) that can on reasonable grounds only be provided by the person performing the service on more onerous terms than the terms on which the service could ... reasonably be provided to a person not having that impairment".

The Board proceeded, without any express finding to that effect, on the basis that the complainants required public transport to be provided in a special manner, namely, without scratch tickets and, so far as it was provided in trams, in trams with conductors. On this basis, it is hard to understand why the Corporation did not rely on

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s. 29(2)(a). However, it has at all times confined itself to a claim that its conduct is protected by par. (b).

The Board interpreted s. 29(2)(b) as concerned with terms which are more onerous to the provider of the services. It was argued in this Court on behalf of the Corporation that, to the contrary, it is concerned with terms which are more onerous to the impaired person. Then it was put that, the Board having proceeded on a wrong basis, there was, in effect, a failure to determine the question raised by s. 29(2)(b) and, unless the appeal should otherwise be resolved in the Corporation's favour, that question should be remitted for the Board's decision.

It was not necessary for Phillips J. to consider the meaning of s. 29(2)(b). And his Honour took the view that, in any event, it might not be open to the Corporation to rely on it as it was not raised in the grounds set out in the order nisi obtained pursuant to s. 49(4) of the Act, but only in the originating motion taken out pursuant to Ch. I, O. 56 of the Rules. His Honour indicated that he inclined to the view that the effect of s. 49(4) was to exclude the operation of Ch. I, O. 56. That latter question may, for the moment, be put to one side.

Section 29(2) operates only if an impaired person requires a service to be performed in a special manner which "cannot reasonably be provided" (par. (a)) or "can on reasonable grounds only be provided ... on more onerous terms" (par. (b)). The separate paragraphs of s. 29(2) are directed to the separate areas covered by s. 29(1)(a) and (b). It is convenient to repeat those paragraphs of s. 29(1) which make it unlawful for a person who provides goods or services to discriminate on the ground of status or by reason of private life:

> "(*a*) by refusing to supply the goods or perform the services; or
> (*b*) in the terms on which the person supplies the goods or performs the services."

Given that, by s. 17(1), the concept of discrimination is one which involves "less favourable" treatment, it is clear that "the terms" referred to in s. 29(1)(b) are the terms which are given to the person who requires the goods or services. And, because it operates in the same area as s. 29(1)(b), it follows that s. 29(2)(b) is also directed to terms that are more onerous to the person who requires the goods or services, namely, the impaired person.

There is no reason to treat "the terms" by reference to which s. 29(2)(b) operates in any narrow or technical sense. However, the composite expression "more onerous terms" in the context of s. 29(2)(b) indicates that the paragraph is concerned with terms which are more onerous to the person who seeks the performance of

the service in a special manner and which are necessarily different from those on which the service would be provided to others, as, for example, where a higher price is charged. It is not concerned with a term, such as that referred to in s. 17(5) as a "requirement or condition", which does not involve any overt differentiation but has a discriminatory effect.

This case is concerned with terms which are the same for everyone, regardless of their status or the nature of their personal life. More particularly, the terms are the same for all users of public transport, whether impaired or not. There is thus no possible foundation for an argument that the introduction of scratch tickets or the removal of conductors from trams falls within s. 29(2)(b).

*The requirement in s.* 31(1) *of the Transport Act and the general exception in s.* 39*(e)(ii) of the Act*

Section 39 of the Act contains a variety of exemptions from unlawfulness under the Act. Three of its seven paragraphs ((a), (b) and (f)) exempt the "exclusion" of persons from organizations, activities or programmes in certain defined areas or circumstances (i.e., community service organizations and social or other clubs; sporting activities; and benign discrimination under special measures programmes). Another three paragraphs ((c), (d) and (da)) exempt particular kinds of "discrimination" (i.e., on the ground of status or impairment in relation to an annuity or insurance; on the ground of impairment where necessary for protection of public health). In contrast, par. (e) of s. 39 is not confined by reference to the objective character of the conduct concerned. It extends to any act at all done by a person if the act "was necessary for the person to do it in order to comply with a provision of — (i) an order of the Board; (ii) any other Act; or (iii) an instrument made or approved by or under any other Act". It is submitted by the Corporation that the acts of which complaint is made in the present case fall within the exemption contained in s. 39(e)(ii) for the reason that they were necessary for it to do in order to comply with s. 31 of the *Transport Act*. That submission was rejected by the Board but upheld by Phillips J. in the Supreme Court.

Section 31 of the *Transport Act* does not directly impose an obligation upon anyone to do any specific thing. Sub-section (1) of s. 31 provides that a corporation to which it applies — and the Corporation is such a corporation — "must exercise its powers and discharge its duties subject to the general direction and control of the Minister [for Transport] or the Director-General [of Transport], and to any specific directions given by the Minister or the Director-

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General". Clearly enough, the section impliedly confers upon the Minister and the Director-General statutory power to give a direction to the Corporation. It also requires obedience by the Corporation to any direction given in the valid exercise of that statutory power.

The question involved in this aspect of the case is whether the exemption in s. 39(e)(ii) of anything which it was necessary to do in order to comply with a "provision" of any other Act extends to anything which was necessary in order to comply with a direction given by the Minister in the exercise of the statutory power conferred by s. 31 of the *Transport Act*. The effect of the construction of s. 39(e)(ii) for which the Corporation contends ("the wide construction") in supporting an affirmative answer to that question would be that any of the myriad of persons possessing statutory power or authority to give a direction to another person in relation to a subject-matter would be empowered to exempt the conduct of that other person in relation to that subject-matter from unlawfulness under the Act in any case where the provision of the particular Act conferring the power or authority expressly or impliedly required — as it ordinarily would — that such a direction be obeyed by the persons to whom it was given. It is argued for the appellants that s. 39(e)(ii) should be more narrowly construed as referring only to something which is done in order to comply with a specific obligation directly imposed by an actual provision of another Act ("the narrow construction").

As a matter of language, the words of s. 39(e)(ii) are capable of bearing the meaning attributed to them by either construction. Anything that it is necessary to do in order to comply with an exercise of statutory power can, as a matter of language, be said to be necessary "in order to comply with" the legislative "provision" conferring (and expressly or impliedly requiring obedience to) the statutory power. On the other hand, and depending upon context, a reference to what is necessary to comply with "a provision of ... any other Act" can be construed as referring only to what it is necessary to do in order to comply with a specific requirement directly imposed by the relevant provision as distinct from a requirement imposed by some person in the exercise of some power conferred by the provision (cf., e.g., the construction given by the House of Lords in *Hampson v. Department of Education and Science* (33) to the words "any act of discrimination done ... in pursuance of any instrument"). If the relevant words fell to be construed in isolation, we would favour the wide construction of

(33) [1991] 1 A.C. 171.

them. When par. (e)(ii) is construed in its context in the Act, however, it appears to us that the narrow construction is the preferable one.

For one thing, the express provision of s. 39(e)(iii) exempting any act which it was necessary to do in order to comply with a provision of "an instrument made or approved by or under any other Act" militates against the wide construction of s. 39(e)(ii). If s. 39(e)(ii) extended to exempt any act which was necessary to comply with the direct or indirect requirements of a provision of any other Act, s. 39(e)(iii) would be largely surplusage since a statutory instrument made or approved under another Act will ordinarily command obedience by reason of an express or implied provision of that other Act. Moreover, the fact that s. 39(e)(iii) requires "*an instrument*" made or approved under another Act — that is to say, a formal and written exercise of statutory power or authority which can be readily identified and examined — serves to confirm that it is unlikely that the exemption of s. 39(e)(ii) was intended to extend to less formal and less readily identifiable or examinable exercises of statutory power, such as the oral directive upon which the Corporation relies in the present case.

More importantly, the wide construction seems to us to be inconsistent with the general scheme of the Act. It is one thing to provide that the Act should give way to an express direction contained in an actual provision of another Act or in a statutory instrument. It is a quite different thing to provide, in effect, that the Act shall give way to any subordinate direction, no matter how informal, to which a provision of any other Act requires obedience. In that regard, it would seem inevitable that, if the wide construction is given to the words "necessary ... in order to comply with a provision of ... any other Act" for the purposes of s. 39(e)(ii), a correspondingly wide construction should be given to the words "necessary ... in order to comply with a provision of ... an instrument" for the purposes of s. 39(e)(iii). In a context where, prerogative aside, the Crown ordinarily acts through employees or agents exercising statutory powers, the result would be that the express provision in s. 5 that the Act binds the Crown would become almost illusory and the effect of the Act would be to confer an unfair advantage upon some Crown commercial instrumentalities, such as the Corporation, vis à vis any private competitor lacking comparable immunity.

Indeed, if the Corporation's argument be correct, it is difficult to see why the Director-General, an officer not directly responsible to the Victorian Parliament, could not validly give a direction to the Corporation and to the Roads Corporation requiring each of them

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to exercise its powers and discharge its duties without paying any regard at all to any of the provisions of the Act. Moreover, the undermining of the general scheme of the Act would not be confined to the case where a statutory provision authorizes the giving of directions to those in the service of the Crown. It would extend to any case where an Act or statutory instrument required that one person act in accordance with the directions of another. If, for example, a provision of an Act or of a "statute" or regulation of a university made or approved under an Act (34) required subordinate officers of the university to act in accordance with the directions of the university's council or vice-chancellor, anything necessary to comply with those directions would be exempt from the operation of the Act. If a general provision of a Companies Act happened to provide that the employees of a corporation must act in accordance with the directions of the company's board of directors, the board of any company could effectively remove the affairs of the company from the reach of the Act.

As has been said, s. 31 of the *Transport Act* did not require the Corporation to do any specific thing. It did not directly impose any obligation upon the Corporation to remove conductors from trams or to introduce scratch tickets. If such an obligation was imposed upon the Corporation, it was imposed by the oral directive of the Minister given pursuant to s. 31. It follows from what has been said above that s. 39(e)(ii) of the Act does not exempt from unlawfulness under the Act whatever it was necessary for the Corporation to do in order to comply with that oral directive. That being so, the provisions of s. 39(e)(ii) are inapplicable and it is unnecessary to consider whether the acts of the Corporation of which complaint is made were in fact "necessary ... in order to comply with" the Minister's oral directive.

*The orders made by the Board*

It is argued on behalf of the Corporation that the orders made by the Board are so vague as to be beyond the power conferred by s. 46(2)(a) of the Act. The orders operated by reference to the very acts which were found to constitute discrimination, namely, the introduction of scratch tickets and the removal of conductors from trams. No error of law attended those findings. The orders that the Corporation "discontinue the scratch-ticket system as the main ticket system for the [complainants]" and "refrain from implementing the driver-only tram proposal" clearly constitute orders authorized by s. 46(2)(a), being orders that the Corporation

(34) See, e.g., *Melbourne University Act* 1958 (Vict.), s. 17.

"refrain from committing any further act of discrimination against the complainant[s]".

*The Corporation's application for special leave to cross-appeal*

The application for special leave to cross-appeal raises an important question whether the avenue of review provided by Ch. I, O. 56 of the Rules is excluded, either by s. 49(4) of the Act or by s. 88 of the *Magistrates' Courts Act*. It is not strictly necessary to decide this question as there is no possible foundation for the argument that the Corporation would otherwise wish to make by reference to s. 29(2)(b) of the Act. However, it is appropriate that we indicate our general agreement with what is said on this issue by McHugh J.

*Conclusion*

For the reasons earlier given the matter must be determined on the basis that "reasonable" in s. 17(5)(c) of the Act means reasonable in all the circumstances.

The appeal should be allowed. The application for special leave to cross-appeal should be dismissed. The orders of the Supreme Court dismissing the complaints should be set aside and, in lieu thereof, it should be ordered that the matter be remitted to the Board to determine, in accordance with s. 17(5)(c) of the Act, whether the requirements or conditions involved in the introduction of scratch tickets and removal of conductors from trams are reasonable.

BRENNAN J. This case arose out of changes that were made to the Melbourne metropolitan transport system in order to reduce the expenditure of public funds. Conductors were withdrawn from the modern tramcars and a system of scratch tickets was introduced. The scratch ticket system required passengers to buy a ticket before boarding a tram and to validate it for their journey (by scratching it) or pay a penalty fare. The consequences of these changes were disastrous for many disabled people who were unable to buy or use a scratch ticket or who needed assistance in boarding or alighting from a tram, in acquiring a ticket on the tram, in finding a seat and in identifying their desired route and destination. They were denied the assistance which conductors had been accustomed to afford. In the result, many disabled people were effectively denied the use of public transport by trams, thereby restricting further the movement of people already confined by constraints imposed by nature, age or misfortune. This litigation was launched by nine individuals and was supported by a number of organizations in the interest of

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disabled people in an endeavour to restore the services which had been available before the changes. The ventilation of the problem has produced a partial solution: the scratch ticket system has been changed and some assistance has been made available to disabled people on trams without conductors. That is of no significance to the consideration of the legal issues which now fall for determination. This Court must decide those issues by reference to the circumstances as they were before these ameliorating steps were taken.

Disabilities — physical, functional and mental — are almost infinitely various and they create needs which vary according to the nature and extent of the disability. Services may be required to satisfy those needs and, in many cases, the services are provided by public authorities. Indeed, a measure of the civilization of a society is the extent to which it provides for the needs of the disabled (and of other minorities) and protects them from adverse and unjust discrimination which offends their human dignity. The provision of needed services and the protection against adverse and unjust discrimination are distinct but related means of securing the welfare and dignity of the disabled. This litigation seems to me to be largely misdirected, for it invokes the *Equal Opportunity Act* 1984 (Vict.) ("the Act") and alleges unlawful discrimination when the true remedy which is sought is an enhancement of the services available to the disabled. Anti-discrimination legislation cannot carry a traffic it was not designed to bear. The beneficial operation of such legislation is prejudiced by invoking its assistance to achieve remedies which can be achieved only by straining the legislative language. The provision of services for the disabled, a function properly and necessarily reposed in the Executive Government as the branch of Government with fiscal power and responsibility, might not receive due attention if the measure of the entitlements of the disabled is determined by litigation under anti-discrimination legislation. Anti-discrimination legislation should be liberally construed but not as though it were the only, or even the principal, means by which the disadvantages of the disabled or of other minority groups are to be alleviated.

The material facts and the relevant provisions of the Act are set out in other judgments and I need not repeat them. Section 29(1) of the Act proscribes two categories of discriminatory conduct relating to the provision of services for disabled people (by which term I mean persons suffering from an impairment as defined in s. 4(1) of the Act): discrimination *by refusing* to perform services (par. (a)) and discrimination *in the terms* on which services are performed (par. (b)). The ultimate question is whether either of these two provisions

covers the conduct of the Public Transport Corporation ("the Corporation") in withdrawing conductors from modern trams and introducing the scratch ticket system. It will be necessary to keep the distinction between these two categories of unlawful discrimination in mind in order to construe and apply the Act to the present case. The issues which, in my view, fall for determination appear under the headings following.

(i) *What is the relevant service for the purposes of s. 29(1)(a)?*

Conductors on modern trams had been accustomed to provide disabled people with the services earlier mentioned, as the Equal Opportunity Board ("the Board") found. Whether or not conductors were bound by the terms of their employment to provide the particular services needed by disabled people, the services which facilitated the use of the tram service by many disabled people were performed by the Corporation through its servants, the conductors. The services performed by the Corporation were the special services provided by conductors for the disabled and the general tram service available to the travelling public. By withdrawing conductors from modern trams, the Corporation refused to perform the special services theretofore available to the disabled, with the regrettable consequence that many more disabled people were unable to avail themselves of the latter service. Although the Corporation refused to perform the special services for the disabled, the refusal was not discriminatory as that concept is defined by s. 17(1) of the Act. The special services were not refused "on the ground of ... status"; conductors were simply withdrawn from modern trams, presumably on the ground of economy, though the adverse impact of the withdrawal fell more severely on the disabled than on the general public. But the Corporation treated the disabled and the general public alike, for the special services which had been provided by conductors had never been available to those who were not disabled except, perhaps, for the courtesies extended to all passengers and those courtesies were uniformly withdrawn from modern trams irrespective of the status of their passengers.

As the case did not fall within s. 17(1), the appellants placed reliance upon s. 17(5). But s. 17(5) has no application to a refusal of the special services which conductors had been accustomed to provide. Those services were not refused by the imposition of a "requirement or condition" on disabled people. They were refused simply because the conductors who had been accustomed to provide them were no longer employed on modern trams. The real impact on the disabled of the withdrawal of the special services consisted in

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on the disabled of the withdrawal of the special services consisted in their inability to avail themselves of the tram service available to the general public. The Corporation, of course, provided the ordinary tram service for all members of the travelling public: the Corporation did not refuse "to ... perform the services" of providing the ordinary tram service, though many disabled were no longer able to use it. Therefore the Corporation's conduct did not amount to a discriminatory refusal of service as proscribed by s. 29(1)(a). Indeed, before Phillips J. it was agreed that s. 29(1)(a) had no direct relevance to the case. The appellants founded their argument on s. 29(1)(b) and s. 17(5).

However, before leaving this aspect of the case, reference should be made to s. 29(2)(a), which suggests that the category of discriminatory conduct proscribed by s. 29(1)(a) includes a refusal to perform a service "in a special manner" required by another person "in consequence of [that other] person's impairment". Although this provision suggests that there may be a discriminatory refusal of service by a refusal to perform it in a "special manner", in terms it distinguishes between a service and the manner in which it is performed. It cannot be construed as importing a duty to provide impaired persons with services not available to non-impaired persons. Construing s. 29(1)(a) and s. 29(1)(b) together, it seems to me that, where the availability of the service to impaired persons depends on the manner in which it is performed (as distinct from the performance of an additional service) and the service can reasonably be performed in a manner which would make the service practically available to impaired persons who require a special manner of performance, it is unlawful to refuse to perform the service in that manner. Obviously, there may be fine distinctions to be made between an additional service performed only for a class which needs it and the manner in which a particular service can reasonably be performed in order to make that service available to that class. Thus, it may be unlawful discrimination falling within s. 29(1)(a) for the Corporation to refuse to permit trams to stop near a school for the blind (a special manner of "performing" the general tram service) because that would amount to a refusal of the service to blind children attending the school, though s. 29(1)(a) does not make it unlawful to withdraw the further service of escorting blind children to the footpath. Whatever the true distinction between a service and a special manner of performing it may be, it cannot be said that the provision of staff to assist the disabled to use the general tram service is merely a special manner of "performing" the general tram service: the provision of such assistance is an additional or enhanced service.

**Corrigendum:** delete line.

We were informed that, in the argument before Phillips J., the parties agreed that the needs of disabled people for the services provided by conductors amounted to a requirement that the Corporation's services be performed in a special manner. The agreement evidently arose in relation to the operation of s. 29(2)(b), a provision which confers immunity in respect of conduct otherwise falling within s. 29(1)(b). The agreement does not appear to have affected his Honour's decision in any material way and, in the context of s. 29(1)(a), it erroneously confuses the manner in which a service can be performed and an additional or enhanced service.

(ii) *What is the relevant service for the purposes of s.* 29(1)*(b)?*

The performance of a service and "the terms on which" the service is performed are concepts which are kept distinct in s. 29(1)(b) and (2)(b) of the Act. As s. 29(1)(b) speaks of discriminating "in" the terms on which services are performed, discrimination must be found, if at all, in the terms on which the service is performed not in the performance of the service. Because of the correlation between the terms on which a service is performed and the performance of the service, the existence of discrimination can be ascertained only by reference to the terms on which an actual service is performed by the putative discriminator. The service relevant to an alleged act of discrimination is the service which the putative discriminator performs, not a service which the putative discriminator has been accustomed to perform, nor a service of a higher standard which the putative discriminator could perform but is not performing. For the purposes of s. 29(1)(b), a service consists in what is performed, not in what is not performed. If there be any unlawful discrimination by non-performance, it must fall within s. 29(1)(a).

In this case, at the material time the relevant service being performed by the Corporation was the provision of tram transport for the general public. It was a feature of that service that the modern class of trams had no conductor. The withdrawal of conductors from modern trams in the Corporation's fleet is a fact relevant to the ascertainment of the "services" performed by the Corporation but, to bring the case within s. 29(1)(b), the appellants must characterize the withdrawal of conductors' services and the introduction of the scratch ticket system as the imposition of a requirement or condition within s. 17(5) on the users of tram transport.

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(iii) *What requirement or condition was imposed?*

Although s. 17 defines discrimination for the purposes of the Act as a whole, it is erroneous to commence the analysis of a situation which is said to reveal a contravention of s. 29(1)(b) by inquiring whether the situation as a whole reveals direct (s. 17(1)) or indirect (s. 17(5)) discrimination. Such an approach tends to conflate the relevant services and the terms on which the services are performed. If that mistake be made, indirect discrimination — the category relied on here — will be found not only in a requirement or condition imposed by the putative discriminator but in any change in the services performed by that person which impacts differentially on persons "of a different status or with a different private life". The appellants' argument seems to me to make that mistake. When that mistake is made, it is necessary to strain the language of the statute to bring the facts within the terms of s. 17(5). Thus, in the present case it is necessary to describe the Corporation's withdrawal of conductors from modern trams as the imposition of a requirement or condition having an adversely differential impact on persons suffering an impairment. In reality, the differential capacity to enjoy the tram service flowed from the restricted capacity of persons suffering an impairment to enjoy the tram service as it was, not from the imposition on them of a requirement or condition as a term of their enjoyment of the tram service.

It is only after the terms on which a service is performed have been identified that it is possible to determine whether the person performing the service discriminates "in" those terms. It is argued by the appellants that the ascertainment of what the service is and what are the terms on which the service is performed are questions of fact and that s. 49(4) of the Act precludes an appeal on questions of fact from the decisions of the Board. But if the Board misdirects itself in law in ascertaining what is the relevant service and what are the relevant terms on which that service is performed, it may make an error of law and erroneously treat the withdrawal of a service as a requirement or condition imposed on the enjoyment of a service which is not withdrawn. In my opinion, the Board did so misdirect itself in this case.

What are the terms on which the Corporation's service, such as it was, was available? In my respectful view, it is erroneous to give the description of an imposed requirement or condition to a situation in which the use of modern trams was practically unavailable to passengers who could not use them without assistance from conductors. Nor can the withdrawal of conductors from modern

trams be described as the imposition of a requirement or condition that passengers travel on trams without a conductor. Such descriptions strain the language of the statute: the Corporation did not require persons to travel on trams with or without conductors, nor did the Corporation restrict the use by the disabled of such service as it provided except by the scratch ticket requirement. The straining of language arises because the supposed requirement or condition is not in truth a term on which the service was performed but was a feature of the service as it was performed by the Corporation.

The difficulty encountered by disabled people who wished to use the modern trams arose simply because the services available fell short of their needs. If such shortfalls in a service can be transformed into a requirement or condition imposed by the person performing the service, the Act becomes a charter of the minimum standards of service which a person performing the service must provide or at least maintain to cater for the needs of the disabled. That is not the purpose of the Act. If a shortfall in a service or the withdrawal of a service is characterized as a requirement or condition imposed by the person performing the service, the Board must assume responsibility for determining whether the shortfall or withdrawal is "reasonable" (35). If "reasonable" in s. 17(5)(c) be held to import consideration of the cost of enhancing the service to eliminate the shortfall or to restore the service withdrawn, the responsibility for deciding the level of service to be provided would effectively pass from the performer of the service to the Board though the Board has no fiscal responsibility for providing the service. Whether that situation would be conducive to the interests of impaired persons is a matter of speculation. In the present case, the Board ordered the Corporation to "refrain from implementing the driver-only tram proposal". The form of the order is open to objection as failing to restrain specific conduct which might have been found to amount to the refusal of a service or the imposition of a requirement or condition but, more significantly, it purports to order the Corporation to maintain a level of staffing for its trams as the means of maintaining the services needed by disabled people. I find no basis in the Act for an order compelling the performer of a service to retain or employ staff to maintain the level of service previously provided.

In my opinion, the only relevant requirement or condition imposed by the Corporation in this case was that a person using the service should have acquired and should validate a scratch ticket or

(35) s. 17(5)(c).

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pay a penalty fare. That requirement or condition was one with which a substantially higher proportion of unimpaired persons than of impaired persons could comply (36) and with which many impaired persons could not comply (37). The imposition of that requirement or condition thus amounted to discrimination unless the requirement or condition was reasonable (38), the question next to be considered.

(iv) *Was the scratch ticket requirement reasonable?*

The imposition of a requirement or condition which satisfies pars (a) and (b) of s. 17(5) prima facie amounts to discrimination, but it falls into that classification only if the requirement or condition is not reasonable (38). It is not possible to determine reasonableness in the abstract; it must be determined by reference to the activity or transaction in which the putative discriminator is engaged. Provided the purpose of the activity or transaction is not to discriminate on impermissible grounds, the reasonableness of a requirement or condition depends on whether it is reasonable to impose the requirement or condition in order to perform the activity or complete the transaction. There are two aspects to this criterion of reasonableness: first, whether the imposition of the condition is appropriate and adapted to the performance of the activity or the completion of the transaction; second, whether the activity could be performed or the transaction completed without imposing a requirement or condition that is discriminatory (that is, one to which pars (a) and (b) of s. 17(5) would apply) or that is as discriminatory as the requirement or condition imposed. These are questions of fact and degree. Effectiveness, efficiency and convenience in performing the activity or completing the transaction and the cost of not imposing the discriminatory requirement or condition or of substituting another requirement or condition are relevant factors in considering what is reasonable.

As to the first aspect, I would agree generally with what Mason C.J. and Gaudron J. have written in emphasizing that, in considering reasonableness, the connexion between the requirement or condition and the activity to be performed or the transaction to be completed is an important factor. The reasons which may justify discrimination on the respective grounds specified in the Act — sex, marital status, race, impairment, parenthood, childlessness, being a de facto spouse, religious or political belief or activity — vary

(36) s. 17(5)(a).
(37) s. 17(5)(b).
(38) s. 17(5)(c).

according to the category of discrimination and the activity or transaction to which an alleged instance of discrimination relates. But even where the imposition of the particular requirement or condition is appropriate and adapted to the performance of the relevant activity or the completion of the relevant transaction, it is necessary to consider whether performance or completion might reasonably have been achieved without imposing so discriminatory a requirement or condition. To determine the latter question, in my view, reference to the general circumstances of the case is required. It follows that "reasonable" in s. 17(5)(c) cannot be narrowly confined. It must be remembered that the imposition of a requirement or condition falling within s. 17(5)(a) is not by itself an instance of discrimination; it becomes an instance of discrimination only by reason of its consequences on others. The only way in which a balance can fairly be struck between a putative discriminator's legal freedom to impose a requirement or condition in the several activities or transactions to which the Act relates and the interests of persons in a protected category is to consider all the circumstances of the case. Contrary to the view adopted by the Board, it may be necessary to consider the position of the putative discriminator.

It is submitted that, as the Act contains express provisions which remove particular discriminatory conduct by the putative discriminator from the net of proscription, these provisions exhaust the cases in which the position of the putative discriminator falls for consideration. Section 29(2) is such a provision and it is inappropriate — so the argument runs — to consider whether a discriminatory requirement or condition is reasonable from the viewpoint of the putative discriminator when s. 29(2)(b) states the occasions when conduct otherwise prohibited by s. 29(1)(b) is not unlawful. The occasions when s. 29(2)(b) might apply are limited to occasions when an impaired person "requires the service to be performed in a special manner" and the putative discriminator has imposed a requirement or condition more onerous than a requirement or condition that might reasonably be imposed on a non-impaired person. Section 29(2)(b) applies only when the conduct prohibited by s. 29(1) arises from the special manner in which the person complaining of the discrimination requires the relevant service to be performed; it does not apply when the discriminatory conduct consists simply in the refusal of a service or in the imposition of a discriminatory requirement or condition unrelated to the manner in which the service is performed. True it is that there is a considerable area of overlap between s. 17(5) in its application to s. 29(1)(b) and s. 29(2)(b), but it would give the Act an unreasonable operation if

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the specific provision of s. 29(2)(b) were read as excluding from consideration under s. 17(5)(c) the reasonableness of imposing the impugned requirement or condition in order to perform the relevant activity or to complete the relevant transaction.

Here, there was no occasion for the Board to consider the reasonableness of withdrawing conductors on the modern trams but the Board did have to determine whether it was reasonable to impose the scratch ticket arrangements to collect the fares of passengers or whether some alternative arrangements could reasonably have been implemented which would have eliminated or diminished the adverse effect of the scratch ticket arrangements on intending passengers suffering from impairment. As the Board construed s. 17(5)(c) to exclude consideration of factors other than the impact of the changes made by the Corporation on the availability of transport to persons suffering impairment, its decision on the question of reasonableness had to be set aside. Section 29(2)(b) had no application. The appellants' complaint as to the scratch ticket requirement did not reveal a requirement that the tram service be performed in a special manner and there was no suggestion that any discrimination in the terms on which that service was performed consisted in the imposition on disabled people of terms more onerous than the terms on which the service could be reasonably provided to others.

It was therefore necessary for Phillips J. to send the matter back to the Board for reconsideration unless the oral direction given by the Minister to the Corporation to implement the Cabinet resolution to introduce scratch tickets excluded the implementation from the operation of s. 29 of the Act.

(v) *Was the Minister's direction binding on the Corporation?*

Section 31(1) of the *Transport Act* 1983 (Vict.) reads as follows:

> "Each Corporation must exercise its powers and discharge its duties subject to the general direction and control of the Minister or the Director-General, and to any specific directions given by the Minister or the Director-General."

A controlling executive power of the kind conferred by s. 31(1) is not a power to direct a Government agency not to comply with its obligations under the general law. Section 31(1) does not authorize the Minister to give a direction to the Corporation to act in contravention of the *Equal Opportunity Act*. If the direction given by the Minister purported to require the Corporation to contravene the Act, the direction was pro tanto in excess of the Minister's power and therefore invalid. However, the direction given by the Minister would not require a contravention of the Act by the

Corporation if what is done in accordance with the direction is exempt from the prohibitions contained in the Act. Section 39 of the Act exempts certain categories of discriminatory conduct from proscription. Relevantly, s. 39 reads:

> "This Act does not render unlawful —
>
> ...
>
> (*e*) an act done by a person if it was necessary for the person to do it in order to comply with a provision of —
>
> (i) an order of the Board
>
> (ii) any other Act; or
>
> (iii) an instrument made or approved by or under any other Act."

An exemption created by s. 39(e) applies when the "provision" with which the putative discriminator is bound to comply is to be found in an order, an Act or an instrument. Unless the "provision" itself makes it necessary to do the relevant discriminatory act, s. 39(e) does not take the act outside the operation of the *Equal Opportunity Act*. Section 39(e)(ii) should not be construed as relating to a provision in an Act which does not itself require the doing of a discriminatory act but which requires obedience to a direction which is given under an authority conferred by that Act. If sub-par. (ii) so far extended, sub-par. (iii) would be otiose.

Sub-paragraph (iii), however, does not embrace all directions given under a statutory power. The term "instrument" generally imports a document of a formal legal kind; the term is so used in the definition of "Subordinate instrument" in s. 3 of the *Interpretation of Legislation Act* 1984 (Vict.). A verbal direction is not an instrument. Of course, it would make s. 39(e) adventitious in its operation if sub-par. (iii) applied when a Minister exercises a power in writing but not if he exercises a power by verbal direction. The instruments of which sub-par. (iii) speaks are, I think, written instruments which the "other Act" prescribes as the means by which a power conferred by the other Act is exercised. The scope of the exemptions created by s. 39(e)(ii) and (iii) of the Act is thus limited to discriminatory acts done in compliance with a statutory duty imposed by another Act or by an exercise of a statutory power which the other Act requires to be exercised by written instrument and which is so exercised.

No doubt directions given by the Minister under s. 31(1) of the *Transport Act* might be in writing, but the *Transport Act* does not require that directions shall be given by written instrument. Accordingly, s. 39(e) does not exempt from the prohibitions in the Act acts done to comply with directions given under s. 31(1) of the *Transport Act*. The corollary is that s. 31(1) does not authorize the

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giving of a direction which requires a Corporation to act in contravention of the *Equal Opportunity Act*. It follows that, although the direction to withdraw conductors involved no contravention of the Act, the direction to introduce the scratch ticket system would have done so — and would therefore have been unauthorized by the *Transport Act* — unless that system was "reasonable". The question whether that system was reasonable has not been determined by the Board according to law.

The matter must therefore go back to the Board to determine whether the requirement or condition that a passenger acquire and validate a scratch ticket or pay a penalty fare was a reasonable requirement or condition to impose on passengers travelling on the Corporation's trams including the modern trams without conductors.

It is unnecessary to consider in detail the form of the orders made by the Board with respect to scratch tickets except to say that there was no valid objection to an order in a form which required the Corporation to "discontinue the scratch-ticket system as the main ticket system".

The appeal should be allowed, the orders of Phillips J. set aside and in lieu thereof the matter should be remitted to the Equal Opportunity Board with a direction to determine whether the scratch ticket system was reasonable and, if so, to dismiss the complaints and allegations but, if the scratch ticket system was not reasonable, to order that the Corporation refrain from implementing the scratch ticket system as the main ticket system for Melbourne trams.

The Corporation's application for special leave to cross-appeal should be refused. Section 29(2)(b) has no application and the question of the jurisdiction of the Supreme Court under Ch. I, O. 56 of the Supreme Court Rules (Vict.) to review a decision by the Board should not now be decided.

DEANE J. Subject to one qualification, I agree with the judgment of Mason C.J. and Gaudron J. The qualification is that I do not share their Honours' views about the preferred meaning of the word "reasonable" in s. 17(5)(c) of the Act. In what follows, I deal with that aspect of the case.

An element of the Equal Opportunity Board's conclusion that the imposition of the requirements or conditions relating to scratch tickets and the absence of conductors constituted discrimination for the purposes of s. 17(5) was a finding that the requirements or conditions were "not reasonable" (s. 17(5)(c)). In making that finding, the Board acted on the basis that the question of

reasonableness for the purposes of s. 17(5)(c) was to be determined without regard to any financial or economic considerations which may have influenced the Public Transport Corporation in imposing the requirements or conditions. In the Board's view, all that was relevant for the purpose of determining whether a requirement or condition was not reasonable for the purposes of s. 17(5)(c) was its impact upon a complainant "in the context as presented by the evidence". It followed that the Board considered that it was not open to it "to place ... in the balance against the facts presented" by the complainants "any financial or economic considerations" which may have motivated the Corporation.

In the Supreme Court, Phillips J. was of the view that the question posed by s. 17(5)(c), namely, whether "the requirement or condition is not reasonable", was not to be answered by reference solely to the position of the person subjected to the discrimination. On his Honour's approach, the word "reasonable" in par. (c) should be read as meaning "reasonable in all the circumstances of the case" with the result that relevant circumstances affecting the alleged discriminator, including any financial cost of avoiding or removing a requirement or condition, are factors to be taken into account in determining whether the requirement or condition is "not reasonable". His Honour's approach in that regard corresponded with the views expressed by the members of the Federal Court in *Styles v. Secretary, Department of Foreign Affairs and Trade* (39).

The arguments supporting the Board's conclusion that circumstances affecting the alleged discriminator are not relevant for the purposes of s. 17(5)(c) are not without force. To give "reasonable" the wide meaning of "reasonable in all the circumstances of the case" effectively introduces an element of wide discretionary judgment into the identification of the "adverse effect discrimination" with which s. 17(5) is concerned. Moreover, the position of the alleged discriminator, including any financial cost of avoiding or removing discrimination, may also arise in the class of case which falls within s. 29(2) (i.e. where a person, by reason of impairment, requires a service to be performed in a special manner) and it is possible that the general policy of the Act would be better served if consideration of the position of the alleged discriminator was confined to that class of case. On balance, however, I agree with the reasons given by Dawson and Toohey JJ. for concluding that the context provided by s. 29(2) of the Act does not justify confining the ambit of the word "reasonable" in s. 17(5)(c) so as to

(39) (1989) 23 F.C.R. 251, at p. 263.

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render irrelevant any financial or other considerations affecting an alleged discriminator.

The fact that I do not share their Honours' views about the preferred meaning of the word "reasonable" in s. 17(5)(c) does not lead to any disagreement with the orders which Mason C.J. and Gaudron J. propose since, as their Honours point out, those orders are framed to reflect the conclusion reached by a majority of the Court, including myself, that the word should be understood as meaning "reasonable in all the circumstances of the case".

DAWSON AND TOOHEY JJ. In 1989 the Victorian Government decided to make changes to the public transport system in Melbourne. The changes included the introduction of scratch tickets and the removal of conductors from trams. A scratch ticket is one which a passenger is required to scratch in order to remove portions of the surface so as to reveal the date and time of travel. The scratch tickets were to be purchased before travel at shops such as milk bars or newsagencies, rather than on the trams, thus enabling the elimination of conductors on some trams. The changes were known as the "MetTicket concept" to which the Victorian Cabinet gave approval on 24 July 1989. The Cabinet record of that day records the approval as follows:

> "Agreed:
> That approval be given to the MetTicket concept which is characterised by:
> a. passenger responsibility to have a valid ticket at all times when travelling;
> b. sale of the full range of public transport tickets through commercial retail networks/outlets;
> c. introduction of Ticket Vending Machines on unstaffed/partially staffed stations and key off-station sites;
> d. introduction of scratch-tickets for daily or part-day trips purchased in bulk in advance from retail outlets;
> e. a new revenue protection system based on an upgraded passenger information/ticket examination service and on-the-spot fine for fare evaders; and
> f. a marketing emphasis to be given to increased periodical (weekly/monthly/annual) ticket usage.
> Noted:
> That the concept involves
> a. validation of scratch tickets by the passenger on day/time of travel;
> b. modification of modern trams to driver-only operation;
> c. retention of conductors on W Class (old green and yellow) trams;
> d. provision of additional tram services, subject to the Treasurer's approval and implementation of the staffing changes involved by 30 June 1993."

Following the decision by Cabinet, it appears that the Minister for Transport orally directed the respondent, the Public Transport Corporation, through the Director-General of Transport, to implement the resolution of Cabinet.

On 18 December 1989, nine persons, who are appellants in this appeal, lodged individual complaints with the Equal Opportunity Board pursuant to s. 44 of the *Equal Opportunity Act* 1984 (Vict.) ("the Act"). Certain community organizations representing the disabled also alleged discrimination and are appellants, but it is unnecessary to refer to them separately. The individual appellants suffer from a range of disabilities, including cerebral palsy and visual impairment. They alleged, amongst other things, that the decision to introduce scratch tickets and to remove conductors from some trams discriminated against them on the ground of their status. "Status" in relation to a person is defined in s. 4(1) of the Act as including the impairment of that person and "impairment" is defined by the same sub-section as including total or partial loss of a bodily function and the malfunction of a part of the body. "Malfunction of a part of the body" is defined by the same sub-section to include a mental or psychological disease or disorder and a condition or malfunction as a result of which a person learns more slowly than persons who do not have that condition or malfunction.

Section 29 of the Act provides that:

> "(1) It is unlawful for a person who provides goods or services (whether or not for payment) to discriminate against another person on the ground of status or by reason of the private life of the other person —
>
> (*a*) by refusing to supply the goods or perform the services; or
>
> (*b*) in the terms on which the person supplies the goods or performs the services.
>
> (2) This section does not apply to discrimination on the ground of impairment in relation to the performance of a service where, in consequence of a person's impairment, the person requires the service to be performed in a special manner —
>
> (*a*) that cannot reasonably be provided by the person performing the service; or
>
> (*b*) that can on reasonable grounds only be provided by the person performing the service on more onerous terms than the terms on which the service could be reasonably be provided to a person not having that impairment."

No point was taken before us that at the time the appellants lodged their complaints there may have been no more than a decision to implement the scratch ticket system. Nor was it contested that each of the appellants suffered from a form of

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impairment within the meaning of the Act. It was also common ground that the respondent provides services.

On 28 March 1990 the Board made findings that the respondent had unlawfully discriminated against the appellants in the terms on which it provided the scratch ticket system and in the terms on which it decided to provide a driver-only tram service. The Board did not then make any orders, giving the parties an opportunity to consider its reasons. On 30 April 1990 the Director-General of Transport gave written directions to the respondent, purporting to give them pursuant to s. 31 of the *Transport Act* 1983 (Vict.). These directions required the respondent to "ensure that its actions are in accordance with the requirements of appropriate legislation, and in particular taking into account the findings of the Equal Opportunity Board". Specifically the respondent was directed, amongst other things, "[t]o introduce a ticketing arrangement that removes the discriminatory impact on disabled persons of scratch tickets" and "[n]ot to extend beyond the current level the operation of driver-only/LRV [light rail vehicle] services" until further direction. The respondent was also directed to develop, in consultation with other persons and bodies, proposals for consideration by the Minister for Transport and the Director-General of Transport providing that "driver-only tram/LRV drivers' duties in respect of the disabled are to include all those duties previously required by [the respondent] to be performed by tram/LRV conductors, thereby directly addressing the [Equal Opportunity Board's] findings".

On 9 May 1990 the Board ordered the respondent within ninety days to "discontinue the scratch-ticket system as the main ticket system" for the appellants "using the public transport system" and ordered the respondent to "refrain from implementing the driver-only tram proposal". The respondent obtained an order nisi to review the decision of the Board pursuant to s. 49(4) of the Act, which allows an "appeal to the Supreme Court against [an order of the Board under Pt VI of the Act] on a question of law only as if the order were an order of a Magistrates' Court". Upon the return of the order nisi, Phillips J. made the order absolute dismissing the appellants' complaints. He held that the Board erred in a number of respects, but ultimately held that the respondent was bound to succeed upon the basis that its acts were necessary to comply with a provision of another Act, namely, the *Transport Act*. The relevant provision of the *Transport Act* was s. 31(1) which provides:

> "Each Corporation must exercise its powers and discharge its duties subject to the general direction and control of the

> Minister or the Director-General, and to any specific directions given by the Minister or the Director-General."

The respondent is a Corporation within the meaning of that sub-section.

Section 39(e)(ii) of the *Equal Opportunity Act* provides that the Act does not render unlawful:

> "an act done by a person if it was necessary for the person to do it in order to comply with a provision of —
>
> ...
>
> (ii) any other Act."

Phillips J. held that the respondent was required under s. 31(1) of the *Transport Act* to carry out the first direction given by the Minister for Transport through the Director-General of Transport to implement the resolution of Cabinet and that the Board was bound, on the evidence, to find that the acts complained of were necessary for that purpose.

The impairment suffered by the appellants falls into four categories, namely, visual impairment, physical disability, intellectual handicap and psychiatric disability, and the individual complaints lodged by each of the appellants with the Board were similar in form. For example, one appellant, who suffers from an inability to read or write, complained that he could not validate a scratch ticket and that he needed tram conductors to tell him when to get off a tram and which street to take to reach his destination. Another appellant, who suffers from cerebral palsy and is confined to a wheelchair, complained that he has difficulty controlling his movements and would be unable to use a scratch ticket. The type of discrimination of which each of the appellants complained was that of being treated less favourably than the rest of the community. Under s. 17 of the Act, that may amount to discrimination. Section 17 relevantly provides:

> "(1) A person discriminates against another person in any circumstances relevant for the purposes of a provision of this Act if on the ground of the status or by reason of the private life of the other person the first-mentioned person treats the other person less favourably than the first-mentioned person treats or would treat a person of a different status or with a different private life.
>
> ...
>
> (5) For the purposes of sub-section (1) a person discriminates against another person on the ground of the status or by reason of the private life of the other person if —
>
> (*a*) the first-mentioned person imposes on that other person a requirement or condition with which a substantially higher proportion of persons of a different status or with a different private life do or can comply;

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(*b*) the other person does not or cannot comply with the requirement or condition; and
(*c*) the requirement or condition is not reasonable."

Before turning to the question of discrimination, it is convenient to deal with the application of s. 39(e)(ii) of the Act because the respondent sought to uphold the decision of Phillips J. If that decision is correct upon that point, the appellants must fail in their appeal.

The appellants submitted that s. 39(e)(ii), being an exempting provision, should be strictly construed so as to apply only to acts done in order to comply with another Act which specifies acts which are discriminatory. In other words, they submitted that the "other Act" of which s. 39(e)(ii) speaks must contain a provision expressly authorizing discriminatory conduct. They gave as an example industrial safety legislation which fixes at different levels the maximum weight which males and females may be permitted to lift. By contrast, they said, s. 31(1) of the *Transport Act* does not refer to discriminatory conduct which it permits or compels; it is merely a general provision which is intended to ensure that each Corporation operates under the direction and control of the Minister for Transport or the Director-General of Transport.

In support of their submissions the appellants referred to the decision of the House of Lords in *Hampson v. Department of Education and Science* (40). In that case the Education (Teachers) Regulations (U.K.) required school teachers to be qualified teachers. The appellant, a Hong Kong Chinese woman, applied for the necessary qualification. The qualification had to be obtained from the Secretary of State and in the particular case the Regulations required the appellant, to be eligible for the qualification, to have completed a course approved by the Secretary of State as comparable to one or other of a number of United Kingdom courses. The course completed by the appellant in Hong Kong was not approved by the Secretary of State as comparable and he refused to provide the appellant with the qualification which she sought. The appellant alleged discrimination on racial grounds. One of the defences raised by the Department was under s. 41(1)(b) of the *Race Relations Act* 1976 (U.K.) which provided that the relevant parts of that Act did not render unlawful any act of discrimination done, amongst other things, in pursuance of any instrument made under any enactment by a Minister of the Crown. The relevant regulations were such an instrument.

The House of Lords rejected a wide construction of s. 41(1)(b)

(40) [1991] 1 A.C. 171.

which would have embraced any act of a person who derived his authority from an instrument as an act done in pursuance of the instrument. In rejecting the wide construction, Lord Lowry, with whom the other members of the House agreed, pointed to the fact that the *Race Relations Act* bound the Crown with the result that, upon the wide construction, a large number of bodies would achieve virtual immunity from its provisions. Accordingly, he adopted a narrower construction of s. 41(1)(b) and held that the Secretary of State did not act in pursuance of the Regulations and so did not attract the protection of s. 41(1)(b). In rejecting the wide construction he said (41):

> "In my view it disregards, and has to disregard, the fact that, in order to decide the application one way or the other, the Secretary of State had first to set up and apply a non-statutory criterion the setting up and application of which involved the exercise of his administrative discretion and led to the discriminatory act complained of."

In other words, the approval or non-approval as comparable of the course completed by the appellant in Hong Kong was something which was done in the exercise of a discretion and not in a manner required by the instrument and was, therefore, not done in pursuance of the instrument. Hence, the act was not immune from the legislation prohibiting discrimination.

But even if it were right to accept this distinction between an act done in pursuance of an instrument and a discretion exercised under the instrument — a distinction which is not without its difficulties — *Hampson v. Department of Education and Science* does not support a construction as narrow as that for which the appellants contend. And we do not think that such a narrow construction can be justified upon the wording of s. 39(e)(ii). The words "in order to comply with a provision of ... any other Act" bespeak something wider than express authorization of the conduct said to be discriminatory. In the case now before us s. 39(e)(ii) protects those acts of discrimination which it was *necessary* to do in order to carry out those directions and so comply with s. 31(1) of the *Transport Act*.

It would not be possible to apply the approach in *Hampson v. Department of Education and Science* here because s. 31(1) of the *Transport Act* does not confer any discretion upon the respondent to disregard specific directions given by the Minister or Director-General. If it were necessary for the respondent to commit acts of discrimination in order to carry out the specific directions of the Minister for Transport or the Director-General of Transport then,

(41) [1991] 1 A.C., at p. 186.

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by virtue of s. 39(e)(ii), those acts would not be unlawful, but if there were a discretion as to the manner in which the specific directions might be carried out which offered a choice between discrimination and no discrimination, the adoption of discriminatory means would be afforded no protection by s. 39(e)(ii).

The Board reached the conclusion that the acts of discrimination which it found to exist were not necessary in order to enable the respondent to comply with the direction given by the Minister through the Director-General. In its decision it said:

> "The evidence in relation to the oral direction made after 24th July, 1989 in no way satisfies the Board that it was necessary for the Respondent, in implementing the scratch-ticket and driver-only tram concepts that they should discriminate against the Complainants. ... Indeed, over the hearing of this case, it would seem that there were many ways in which the problems associated with the concepts could have been dealt with to cater for the needs of the disabled."

Phillips J. reached the opposite conclusion and held that, in the absence of evidence, the Board erred as a matter of law in finding as it did.

The view expressed by Phillips J. that there was no evidence to support the Board's conclusion cannot, we think, be sustained. And even if there were no evidence in any technical sense, that would not of itself necessarily convert any error on the part of the Board into an error of law. Under s. 51 of the Act the Board is required to "act fairly and according to the substantial merits of the case and, except insofar as it otherwise determines, is not bound by the rules of evidence or by practices and procedures applicable to courts of record". The Board was, therefore, free to reach its conclusions upon matters of fact as it saw fit so long as it acted within the constraints of s. 51. Whether it was necessary for the respondent to discriminate against the appellants in implementing the Cabinet resolution was a question of fact and there was no appeal from the Board's determination of that question. However, there was in fact ample evidence, as Phillips J. recognized, that the basic MetTicket system might have been modified in a number of ways to avoid disadvantaging the appellants. Phillips J. took the view that the relevant direction required the introduction of the basic system literally and without modification but that is, we think, to read too much into the terms of the Cabinet resolution. Clearly it provided only an outline of the MetTicket system, leaving the details of the system to be worked out by the respondent. There was evidence that those details, which were relevant to the introduction of the scratch tickets and to the removal of conductors from trams and not

just to the day-to-day operation of the MetTicket system, could have been resolved in such a way as to accommodate the appellants' disabilities. Moreover, it is proper to read the obligation imposed upon the respondent by s. 31 of the *Transport Act* as envisaging that degree of flexibility on the part of the respondent because, under s. 14(2)(v) of the same Act, the respondent is required, in the exercise of its functions, to have regard to the achievement of a number of objectives, including the object of identifying "the transport needs of disadvantaged groups, particularly people with disabilities" and of implementing "appropriate services within the level of funds specifically provided for this purpose by Government".

The Board concluded that the respondent discriminated against the appellants within the meaning of s. 17(5) in that it required the appellants, as requirements or conditions of using the public transport system, to validate scratch tickets and to use the tram system without the assistance of conductors. In doing so it held that these were requirements or conditions with which persons not suffering the impairments suffered by the appellants can comply and with which the appellants cannot comply and further that these requirements or conditions were not reasonable. Since the respondent provided services and the terms upon which it performed those services were the requirements or conditions which the Board found to be discriminatory, the Board held under s. 29(1) of the Act that the imposition of those terms was unlawful. The Board did not find that the services which, as a consequence of their impairment, the appellants required the respondent to perform in a special manner could not reasonably be provided by the respondent (42) or could on reasonable grounds only be provided by the respondent on more onerous terms than the terms on which the service could reasonably be provided to persons not suffering an impairment of the kind suffered by the appellants (43).

The respondent accepted that indirect discrimination under s. 17(5) of the Act might be unintentional, but it submitted that it was necessary to establish the application of s. 29 before resort might be had to s. 17(5). It submitted that for s. 29 to have any application the appellants had to establish that it provided services to the appellants upon terms which were different from the terms on which it provided its services to other members of the public. It argued that, since the requirements or conditions that scratch tickets be used and that trams be used without the assistance of a

(42) s. 29(2)(a).
(43) s. 29(2)(b).

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conductor applied equally to the appellants and to other members of the public, s. 29 had no application.

However, what amounts to discrimination for the purposes of s. 29 is to be derived in the first instance from s. 17. Section 17 does not make unlawful any discriminatory act but merely defines what will amount to discrimination. Section 29 makes unlawful (in the circumstances set out in that section) acts amounting to discrimination within the meaning of s. 17. Section 29 must, therefore, be applied in conjunction with s. 17.

A distinction is often drawn between two forms of discrimination, namely "direct" or "disparate treatment" discrimination and "indirect" or "adverse impact" discrimination. Broadly speaking, direct discrimination occurs where one person is treated in a different manner (in a less favourable sense) from the manner in which another is or would be treated in comparable circumstances on the ground of some unacceptable consideration (such as sex or race). On the other hand, indirect discrimination occurs where one person appears to be treated just as another is or would be treated but the impact of such "equal" treatment is that the former is in fact treated less favourably than the latter. The concept of indirect discrimination was first developed in the United States in relation to practices which had a disproportionate impact upon black workers as opposed to white workers (44). Both direct and indirect discrimination therefore entail one person being treated less favourably than another person. The major difference is that in the case of direct discrimination the treatment is on its face less favourable, whereas in the case of indirect discrimination the treatment is on its face neutral but the impact of the treatment on one person when compared with another is less favourable.

In *Australian Iron & Steel Pty. Ltd. v. Banovic* (45), Dawson J. expressed the view that ss. 24(1) and 24(3) of the *Anti-Discrimination Act* 1977 (N.S.W.), which are to some extent comparable with ss. 17(1) and 17(5) of the Act in this case, dealt with direct discrimination and indirect discrimination respectively in a mutually exclusive way. This was because if s. 24(1) (the equivalent of s. 17(1)) embraced indirect as well as direct discrimination, then s. 24(3) (the equivalent of s. 17(5)) would be superfluous. Thus Brennan J. in *Australian Iron & Steel Pty. Ltd. v. Banovic* (46) held that treatment which was facially neutral would not fall within s. 24(1) (the equivalent of s. 17(1)). Subject to the effect (if any) of the opening words of s. 17(5), which are referred to

(44) *Griggs v. Duke Power Co.* (1971), 401 U.S. 424.
(45) (1989) 168 C.L.R. 165, at p. 184.
(46) ibid., at p. 171.

below, this reasoning leads equally to the conclusion that discrimination within s. 17(5) cannot be discrimination within s. 17(1). Conversely, it is clear that discrimination within s. 17(1) cannot be discrimination within s. 17(5) because otherwise the anomalous situation would result whereby a requirement or condition which would not constitute discrimination under s. 17(5) unless it was unreasonable could constitute discrimination under s. 17(1) even if it was reasonable. In this case s. 17(5) is prefaced by the words "For the purposes of sub-section (1)". The precise effect of those words is far from clear, but there are strong reasons for nevertheless concluding that s. 17(1) and s. 17(5) deal separately with direct and indirect discrimination and do so in a manner which is mutually exclusive. However, no point based upon those words was taken and the discrimination alleged by the appellants was discrimination within s. 17(5).

For there to be discrimination within the meaning of s. 17(5), there must be a requirement or condition imposed upon the complainant with which the complainant does not or cannot comply but with which a substantially higher proportion of persons of a different status do or can comply. In *Australian Iron & Steel Pty. Ltd. v. Banovic* (47), Dawson J. observed that, upon principle and having regard to the objects of the Act, the words "requirement or condition" in the comparable provision in the *Anti-Discrimination Act* should be construed broadly so as to cover any form of qualification or prerequisite, although the actual requirement or condition in each instance should be formulated with some precision. In that case, the use of the "last on, first off" principle in putting off redundant employees was held to impose a requirement or condition that an employee should have commenced employment before a certain date in order to retain his or her employment.

We do not think that there can be any doubt that the introduction of the scratch ticket imposed a requirement or condition that it be used in order to travel on trams and indeed the contrary was not contended by the respondent before this Court. Nor do we think that it unduly strains the language of s. 17(5) to say that the withdrawal of conductors from trams imposed a requirement or condition that passengers travel on trams without the assistance of a conductor. The Board so found and we think it was open to it to make those findings.

The respondent, however, contended that the service provided by it was driver-only trams and that there was, therefore, no relevant

(47) (1989) 168 C.L.R., at p. 185.

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requirement or condition imposed with respect to the use of that service. It is true that for something to be a requirement or condition in relation to a matter it must be separate from that matter. However, whether such a requirement or condition is in fact separate from the matter to which it relates will clearly depend upon how the matter is described and how the requirement or condition is characterized. Given that the legislation should receive a generous construction, we do not think that the respondent can evade the implications of s. 17(5) by defining the service which it provides so as to incorporate as part of that service what would otherwise be a requirement or condition of the provision of that service. At all events the respondent ought not be allowed to do so where the service previously provided by it was continued, but with alterations which might be characterized as the imposition of different requirements. In any event the description of the service provided by the respondent and the characterization of the requirements or conditions on which the service is provided by the respondent are questions of fact to be determined by the Board and it was clearly open to the Board to define the service provided by the respondent as public transport and to characterize the removal of conductors from some trams as imposing on users of those trams a requirement or condition that they use them without the assistance of conductors.

The Board found that the requirements or conditions which it identified could not be complied with by the appellants but could be complied with by those who did not suffer the appellants' impairments, that is, they could be complied with by a substantially higher proportion of persons of a different status. The Board was entitled to so find.

The Board further found that the requirements or conditions which it identified were not reasonable. In so doing it disregarded the financial or economic considerations which may have motivated the respondent in imposing those requirements or conditions, taking the view that those considerations were involved instead in determining whether the test laid down by s. 29(2) was met and that to have regard to the same considerations in the context of s. 17(5) would be to render s. 29(2) superfluous.

In our view the Board was in error in failing to have regard to the financial or economic circumstances of the respondent when considering reasonableness for the purpose of s. 17(5). The fact that it was also required to consider the financial situation of the respondent when dealing with s. 29(2) provided no justification for its taking the course which it did. Apart from anything else, reasonableness is raised by each of those provisions in relation to a

different matter. Under s. 17(5)(c) the Board was required to consider whether the requirements or conditions which it found to exist were reasonable. Under s. 29(2) it was required to consider reasonableness in relation to the special manner in which the appellants required the respondent to perform the service provided by it. The two things are not necessarily the same. Even if this were not the case the test of reasonableness under s. 29(2) would not be rendered superfluous by construing reasonableness under s. 17(5)(c) as embracing factors also relevant for the purposes of s. 29(2). This is because discrimination under s. 17(1), which is unlawful by virtue of s. 29(1), may nevertheless be rendered not unlawful under s. 29(2) and the establishment of discrimination under s. 17(1), unlike that under s. 17(5), does not require proof of reasonableness. Further, while the discrimination which is rendered not unlawful by s. 29(2) is limited to discrimination on the ground of impairment, s. 17(5) (and s. 17(1)) is relevant not just to discrimination on the ground of impairment but also to discrimination on other grounds such as sex or race.

Reasonableness for the purposes of both s. 17(5)(c) and s. 29(2) is a question of fact for the Board to determine but it can only do so by weighing all the relevant factors. What is relevant will differ from case to case, but clearly in the present case the ability of the respondent to meet the cost, both in financial terms and in terms of efficiency, of accommodating the needs of impaired persons who use trams was relevant in relation to the reasonableness of the requirements or conditions which it imposed and in relation to the reasonableness of the special manner in which the appellants required the respondent to perform its service. Another relevant factor would be the availability of alternative methods which would achieve the objectives of the Cabinet resolution but in a less discriminatory way. Other factors which might be relevant are the maintenance of good industrial relations, the observance of health and safety requirements, the existence of competitors and the like. As was observed by Bowen C.J. and Gummow J. in *Secretary, Department of Foreign Affairs and Trade v. Styles* (48), in the context of s. 5(2)(b) of the *Sex Discrimination Act* 1984 (Cth), which is comparable to s. 17(5):

> "[T]he test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience. ... The criterion is an objective one, which requires the court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the

(48) (1989) 23 F.C.R. 251, at p. 263.

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requirement or condition on the other. All the circumstances of the case must be taken into account."

Clearly, in our view, the financial situation of the respondent was a circumstance to be taken into account when considering reasonableness both under s. 17(5) and under s. 29(2). Although the question of reasonableness is a question of fact rather than law, the failure of the Board to take into account a consideration which s. 17(5) requires to be taken into account constitutes an error of law.

In addition to the appeal instituted pursuant to s. 29(4) of the Act, the respondent sought, by way of originating motion, judicial review of the Board's decision under O. 56 of Ch. I of the Rules of the Supreme Court (Vict.). It is apparent that the respondent took this course in an attempt to raise grounds which it had been refused leave to raise by amendment of the grounds of appeal in the appeal under s. 49(4). The appellants by summons sought judgment on the originating motion or a stay upon the basis that the proceeding was frivolous or vexatious or an abuse of process. Section 49(4) of the Act prescribes a time limit of twenty-eight days to appeal to the Supreme Court on a question of law and it was said that the respondent was precluded from circumventing that time limit by recourse to the procedure under O. 56, which allows a more generous time limit of sixty days.

Phillips J. found it unnecessary to deal with the additional grounds which the respondent sought to raise and dismissed both the originating motion and the summons. The respondent sought to raise one of the additional grounds before us, although it conceded that it would require special leave to appeal from the decision of Phillips J. in order to do so.

The one ground which the respondent sought to raise concerned the proper construction of s. 29(2)(b) of the Act. The Board in its decision took the view that the "more onerous" terms of which that paragraph speaks are terms which are more onerous to the provider of the service. Clearly that is incorrect. Section 29(2) provides that s. 29 does not apply to discrimination where the special manner in which the impaired person requires a service to be performed cannot reasonably be provided by the person providing the service or where the person providing the service can only provide it on terms which are more onerous *to the impaired person* than to a person without the impairment. That is to say, s. 29(2) applies where a person with an impairment requires the provider of services to perform them in a special manner. In such a case, if the provider of the services cannot reasonably perform the service in that special manner or if he can on reasonable grounds only do so on terms more onerous to the impaired person than the terms on which he

could reasonably provide the service to an unimpaired person, he may lawfully refuse to provide the service or, it would seem, he may provide the service on those more onerous terms.

Furthermore, it is irrelevant, for the purposes of s. 29(2)(b), that the terms on which the service is performed are the same for all people because s. 29(2)(b) is involved, at least in some cases, with a hypothetical situation, i.e. it asks whether the service *can* reasonably be provided in a special manner only on more onerous terms to the complainant. If the service can only reasonably be provided in this special manner on more onerous terms to the complainant then there is no unlawful discrimination. But this is not to say that s. 29(2)(b) is only directed at such hypothetical cases because, as stated above, s. 29(2)(b) may also render otherwise unlawful discrimination lawful where the service is *actually* performed in the special manner on terms which are more onerous to the complainant. It may also be observed that s. 29(2)(b) is not confined to cases of direct discrimination but is equally applicable to indirect discrimination. The terms referred to in s. 29(2)(b) may therefore be more onerous, not only if they are or would be less favourable to the complainant on their face (i.e. if they result in direct discrimination), but also if they are or would be less favourable in their impact, albeit that they are neutral on their face (i.e. if they result in indirect discrimination).

However, the point raised by the appellants' summons concerning the propriety of proceeding by way of originating motion was not pursued before us and in the circumstances it would be inappropriate to grant special leave to appeal against Phillips J.'s decision dismissing the originating motion. We would therefore refuse special leave to appeal against that decision.

The only remaining matter is the respondent's submission that the orders made by the Board were null and void by reason of their being vague, uncertain and unintelligible. Under s. 46(2)(a) of the Act, the Board was entitled to order the respondent "to refrain from committing any further act of discrimination" against the appellants. No doubt it was incumbent upon the Board sufficiently to identify the nature of the discrimination which it ordered the respondent to refrain from committing. But in our view it did so by reference to the "scratch-ticket system" and the "driver-only tram proposal", for those were the aspects of the MetTicket system which imported the requirements or conditions which the Board found to constitute discrimination. In any event the orders of the Board reserved general liberty to the parties to apply and they could not therefore be said to involve any uncertainty of an incurable kind. We would reject the submission.

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The appeal should be allowed and the orders of Phillips J. set aside. Since the Board made an error of law in considering reasonableness under s. 17(5) without reference to the financial or economic situation of the respondent, the order which Phillips J. should have made was an order remitting the matter to the Board for rehearing on that point so far as the introduction of the scratch ticket system and the removal of conductors resulted in the imposition of a requirement or condition. That is the order which should now be made.

McHUGH J. The order under appeal, which was made by the Supreme Court of Victoria, set aside orders of the Equal Opportunity Board of Victoria ("the Board") requiring the Public Transport Corporation ("the Corporation") to discontinue "the scratch-ticket system as the main ticket system for the Complainants using the public transport system" and to refrain from implementing a "driver-only tram" proposal.

The appeal is brought by nine impaired individuals ("the complainants") and by twenty-nine organizations representing various groups of impaired people ("the organizations"), all of whom had lodged complaints with the Board alleging acts of discrimination by the Corporation which is the respondent to the appeal. The appellants contend that the Supreme Court erred in holding that the acts of the Corporation in introducing the scratch-ticket system and implementing the driver-only tram proposal were not unlawful acts of discrimination within the meaning of the *Equal Opportunity Act* 1984 (Vict.) ("the Act"). The Supreme Court found that the acts were not unlawful because they were done to comply with a direction given by the Minister for Transport pursuant to the provision of s. 31 of the *Transport Act* 1983 (Vict.). The appellants also contend that, contrary to the findings of the Supreme Court, the Board did not err in law in holding that the removal of conductors from trams constituted the imposition of a requirement or condition on the complainants within the meaning of s. 17(5)(a) of the Act, in holding that economic and financial considerations were not relevant in determining whether the imposition of a requirement or condition was reasonable for the purposes of s. 17(5)(c) of the Act, and in making orders in the form which it did.

*The factual background*

The appeal arises out of a decision made by the Corporation towards the end of 1989 to introduce certain changes to the public transport system. The Corporation is responsible for operating the

Victorian public transport system. In the latter half of 1989, the Corporation announced various changes to the operation of the public transport system which were to be brought into full effect on 1 January 1990. The most notable changes to be introduced were the removal of conductors from trams, the introduction of a ticketing system of "scratch" tickets and the reduction in the number of station assistants employed at railway stations. The "scratch" ticket system required the passenger to validate tickets, pre-purchased at retail outlets, by making a scratch mark in the relevant place on the day of travel to show the journey undertaken. The proposed changes had been approved by Cabinet in July 1989. Subsequently, directions were given by the Minister and the Director-General of Transport to the Corporation to implement the scheme.

In December 1989, the complainants each lodged complaints of discrimination with the Commissioner for Equal Opportunity, under s. 44 of the Act. Pursuant to s. 45 of the Act, the complaints were referred to the Board. Each of the complainants suffers from significant disability, in some cases physical and in others intellectual, in consequence of which he or she is either confined to a wheelchair, is unable to see properly, has difficulty controlling hand movements or is unable to read and write. Each complainant alleged that his or her use of the public transport system would be seriously disadvantaged if the proposed changes went ahead.

The complaints of the organizations made various allegations of discrimination by the Corporation against those who suffered from visual impairment or psychiatric, intellectual or physical disability. Those allegations were referred to the Board pursuant to s. 42 of the Act. The organizations concentrated on the same three aspects of the changes as had the nine complainants: the removal of tram conductors, the use of "scratch" tickets and the removal of assistants from railway stations.

The Board held that the appellants had succeeded in establishing their claims of unlawful discrimination in relation to the removal of tram conductors and the introduction of "scratch" tickets. The Board concluded that these two matters constituted discrimination under s. 17(5) of the Act which was unlawful by virtue of s. 29(1)(b). The Board held, however, that no case of discrimination had been made out in relation to the removal of station staff. The matter was re-listed to allow the Corporation to make submissions on the scope and operation of s. 39(e) of the Act which provides that an act is not unlawful under the Act if the doing of it was necessary in order to comply with a provision of an instrument made or approved by or under any other Act. The Board

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subsequently held that, notwithstanding that the acts of the Corporation were done as the result of a direction given by the Minister under s. 31 of the *Transport Act*, s. 39(e) did not prevent those acts being unlawful acts of discrimination.

*Equal Opportunity Act* 1984 *(Vict.)*

The Act, which is the successor to the *Equal Opportunity Act* 1977 (Vict.) and the *Equal Opportunity (Discrimination Against Disabled Persons) Act* 1982 (Vict.), renders unlawful certain kinds of discrimination against impaired persons. Section 17(1) of the Act deals with what can be described as "direct discrimination". Section 17(5) deals with what has been variously called "indirect discrimination", "disparate impact discrimination" and "adverse effect discrimination". Section 17(1) and (5) read as follows:

> "(1) A person discriminates against another person in any circumstances relevant for the purposes of a provision of this Act if on the ground of the status or by reason of the private life of the other person the first-mentioned person treats the other person less favourably than the first-mentioned person treats or would treat a person of a different status or with a different private life.
>
> ...
>
> (5) For the purposes of sub-section (1) a person discriminates against another person on the ground of the status or by reason of the private life of the other person if —
>
> (a) the first-mentioned person imposes on that other person a requirement or condition with which a substantially higher proportion of persons of a different status or with a different private life do or can comply;
>
> (b) the other person does not or cannot comply with the requirement or condition; and
>
> (c) the requirement or condition is not reasonable."

In *Australian Iron & Steel Pty. Ltd. v. Banovic* (49), Brennan J. and Dawson J. expressed the view, correctly in my opinion, that s. 24(1) and (3) of the *Anti-Discrimination Act* 1977 (N.S.W.), which are broadly comparable with s. 17(1) and (5) of the Victorian Act, were mutually exclusive provisions. Their Honours took the view that s. 24(1) dealt with direct discrimination and s. 24(3) with indirect discrimination. Consequently, what fell within one sub-section was outside the other sub-section. Likewise, in my opinion, s. 17(1) and (5) are mutually exclusive provisions.

The words "on the ground of the status or by reason of the private life of the other person" in s. 17(1) require that the act of the alleged discriminator be *actuated* by the status or private life of the

(49) (1989) 168 C.L.R. 165, at pp. 170-171, 184.

person alleged to be discriminated against. I am unable to accept the statement of Lord Goff of Chieveley in *Reg. v. Birmingham City Council; Ex parte Equal Opportunities Commission* (50), and the statements of Deane and Gaudron JJ. (51) in *Banovic* concerning intention or motive to discriminate if they are intended to suggest that it is not a necessary condition of liability that the conduct of the alleged discriminator ("the discriminator") be actuated by status or private life in a provision such as s. 17(1). With great respect to Deane and Gaudron JJ., I think that the examples given by them in *Banovic* as to intention or motive not being a necessary condition of liability are cases which are caught by the concept of indirect discrimination which fall within s. 17(5). The words "on the ground of" and "by reason of" require a causal connexion between the act of the discriminator which treats a person less favourably and the status or private life of the person the subject of that act ("the victim"). The status or private life of the victim must be at least one of the factors which moved the discriminator to act as he or she did. Of course, in determining whether a person has been treated differently "on the ground of" status or private life, the Board is not bound by the verbal formula which the discriminator has used. If the reason for the use of the formula was that it enabled a person to be treated differently on the ground of status or private life, then "the ground of" the act of the discriminator was the status or private life of the victim (52). But if the discriminator would have acted in the way in which he or she did, irrespective of the factor of status or private life, then the discriminator has not acted "on the ground of the status or by reason of the private life" of the victim. Likewise, if the discriminator genuinely acts on a non-discriminatory ground, then he or she does not act on the ground of status or private life even though the effect of the act may impact differently on those with a different status or private life. Thus, in *Director-General of Education v. Breen* (53), the Court of Appeal of New South Wales held that the Director-General had not acted "on the ground of sex" in selecting principals for non-secondary schools from a primary school promotions list rather than an infants school promotions list even though the use of the former list favoured male teachers. Only 1.5 per cent of teachers on the infants list were male but on the primary schools list 39 per cent of the teachers were male. Absent an intention to use the primary list to disadvantage

(50) [1989] A.C. 1155, at pp. 1193-1194.
(51) (1989) 168 C.L.R., at pp. 176-177.
(52) See *Umina Beach Bowling Club v. Ryan*, [1984] 2 N.S.W.L.R. 61, at p. 66, per Mahoney J.A.
(53) [1982] 2 I.R. 93.

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females, discrimination in a case such as *Breen* can be established only by relying on a provision similar to s. 17(5). At the relevant time, however, the *Anti-Discrimination Act* had no such equivalent.

The effect of the introductory words of s. 17(5), however, is that an act which falls within that sub-section is deemed for the purpose of s. 17(1) to constitute treating "the other person less favourably than the first-mentioned person treats or would treat a person of a different status or with a different private life". If the alleged discriminator has in fact treated the other person "less favourably", in the circumstances specified in s. 17(1), then discrimination is made out and s. 17(5) is irrelevant. Section 17(5), therefore, operates only in situations where s. 17(1) is inapplicable. The hypothesis upon which s. 17(5) is built is that the alleged discriminator has not in fact treated the other person "less favourably". Yet discrimination can arise just as readily from an act which treats as equals those who are different as it can from an act which treats differently persons whose circumstances are not materially different. Thus, both direct and indirect discrimination involve the notion of one person being treated "less favourably" than another.

How then can a case of indirect discrimination come within s. 17(5) and yet not come within s. 17(1)? The answer is that in s. 17(5) "discrimination" is defined in an artificial sense and is dealing with situations where a requirement or condition is imposed equally but has an adverse or more adverse effect on persons of a particular status or with a different private life. A person may be guilty of discrimination under s. 17(5) although he or she was not actuated in any way by status or private life. That is, s. 17(5) deals with the case of indirect discrimination. It is a special provision of the Act dealing with indirect discrimination. Moreover, the making of a finding of indirect discrimination under s. 17(5) is subject to the satisfaction of certain conditions. In accordance with accepted principles of statutory construction, it is not possible to make use of a general provision such as s. 17(1) to make findings of indirect discrimination in disregard of those conditions (54). Accordingly, in my opinion, s. 17(1) deals only with direct discrimination and s. 17(5) deals only with indirect discrimination. As will later appear, this conclusion has important consequences for the meaning of the term "reasonable" in s. 17(5)(c).

Both s. 17(1) and s. 17(5) refer to discrimination "on the ground of the status" of the person who is being discriminated against. The word "status" is defined in s. 4(1) of the Act to include impairment. "Impairment" in turn is widely defined so as to include the total or

(54) cf. *Saraswati v. The Queen* (1991), 172 C.L.R. 1, at pp. 23-24.

partial loss of a bodily function or of a part of the body, of the malfunction, malformation or disfigurement of a part of the body or the presence in the body of organisms causing disease. It is further defined to include an impairment which existed in the past but has now ceased to exist and an impairment which is imputed to a person.

In common with other anti-discrimination statutes, e.g., the *Sex Discrimination Act* 1975 (U.K.), the *Sex Discrimination Act* 1984 (Cth), the *Anti-Discrimination Act* (N.S.W.), the *Equal Opportunity Act* 1984 (S.A.) and the *Equal Opportunity Act* 1984 (W.A.), the Victorian Act in s. 17 describes what constitutes "discrimination". But s. 17 itself makes nothing unlawful. That is the task of later sections of the Act which make it unlawful for any person to discriminate in the circumstances specified in those sections. In this appeal, the relevant section is s. 29 which makes discrimination on the ground of impairment in the provision of or the terms on which goods or services are provided unlawful. The relevant parts of s. 29 are as follows:

> "(1) It is unlawful for a person who provides goods or services (whether or not for payment) to discriminate against another person on the ground of status or by reason of the private life of the other person —
>
> (*a*) by refusing to supply the goods or perform the services; or
>
> (*b*) in the terms on which the person supplies the goods or performs the services.
>
> (2) This section does not apply to discrimination on the ground of impairment in relation to the performance of a service where, in consequence of a person's impairment, the person requires the service to be performed in a special manner —
>
> (*a*) that cannot reasonably be provided by the person performing the service; or
>
> (*b*) that can on reasonable grounds only be provided by the person performing the service on more onerous terms than the terms on which the service could ... reasonably be provided to a person not having that impairment."

Section 29, however, has to be read with s. 39. The relevant parts of s. 39 are as follows:

> "This Act does not render unlawful —
>
> ...
>
> (*e*) an act done by a person if it was necessary for the person to do it in order to comply with a provision of —
>
> (i) an order of the Board;
>
> (ii) any other Act; or
>
> (iii) an instrument made or approved by or under any other Act."

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*The conclusions of the Victorian Supreme Court*

The Supreme Court (Phillips J.) allowed an appeal from the decision of the Board and set aside its orders. His Honour held that, while the introduction of "scratch" tickets imposed a relevant "requirement or condition" on the complainants, the removal of conductors from trams by the Corporation did not do so. The learned judge said that, by removing conductors, the Corporation was not imposing a requirement or condition on the travelling public generally nor on the complainants. His Honour also concluded that the Board erred in its consideration of what was "reasonable" within the meaning of s. 17(5)(c). He held that the Board was incorrect in holding that economic and financial considerations were not relevant matters to be considered under par. (c). Furthermore, Phillips J. held that s. 39 of the Act operated to exempt the relevant conduct of the Corporation from the provisions of the Act. Phillips J. was also of the opinion that the orders made by the Board were null and void for uncertainty.

*The services and terms on which they are performed*

The Corporation concedes that it is a provider of goods and services within the meaning of s. 29(1). The term "services" is defined in s. 4(1) to include services connected with transportation. The Board made no express finding as to what services were provided by the Corporation. The Board appears, however, to have acted on the basis that the services provided were that of "the public transport system". Phillips J. said that the identification of the "services" which were provided was essentially a question of fact for the Board. I cannot accept, however, that the Board's identification of the relevant services in this case was open to it as a matter of law. It is true that the identification of the relevant services is a question of fact. But the hypothesis upon which s. 29 operates is that there exists a person who provides goods or services and that that person has discriminated against the complainant in one of the ways set out in s. 29(1)(a) and (b). Accordingly, the goods or services which must be identified are those goods or services which are relevant to the complainant or any person or persons whom the complainant represents. Before there can be a finding of discrimination by a person in relation to the provision of goods or services, therefore, the relevant goods or services must be identified with sufficient precision to relate them to the facts of the case and the issues which arise for determination. If a person is alleged to have refused to perform services, e.g., the services in question must be identified in sufficiently concrete terms to enable the Board to

determine whether or not there has been a refusal to perform those services. What is a sufficiently precise identification of the service in one case may be too general in another. If the discrimination alleged was the refusal to allow impaired persons to travel on trams to St Kilda, it would be meaningless to identify the service provided as "the public transport system". If, however, the discrimination alleged was the refusal to allow impaired persons to travel on trams generally, "transportation of members of the public by trams" might identify the service with sufficient precision to enable the relevant issues to be resolved. On the other hand, if it was alleged that the physically impaired were discriminated against because they were not given sufficient time to become seated on trams, the relevant description of the service might not be sufficiently precise unless a description of the trams was incorporated into a description of the services. Likewise, if a person is alleged to have imposed on another person a "requirement or condition" in respect of using services, the services provided must be identified with sufficient precision to enable the Board to relate the requirement or condition to those services and to determine the issues raised by s. 17(5) of the Act. As will appear, the line between what is a "requirement or condition" of using services and the services themselves is often a fine one calling for an exact description of the services provided.

The generality of the Board's identification of the services provided in the present case went far beyond what was relevant to the facts and issues of the case and, moreover, assumed that there was only one service involved. The Board's identification of the services was wide enough to cover every means of transporting the public by road, sea, air and rail. Yet the relevant services were concerned only with railways and tramways and the nature of each service was different from the other. Consequently, the Board erred in law in assuming that the relevant services were "the public transport system". As will become apparent, this error has made it impossible to say whether or not the Board also erred in law in holding that the removal of the conductors from trams constituted the imposition of a "requirement or condition".

*Section* 29(1)

The appellants contend that the Corporation provides its services on the terms that the complainants use trams without conductors and buy "scratch" tickets before using the trams and that is a breach of s. 29(1) of the Act. The Corporation contends that s. 29(1) is inapplicable. It says that the discrimination must lie directly in the terms on which the goods or services are being

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provided; in other words, that the discrimination to which s. 29(1) refers can exist only where there are two situations, or sets of terms, to be compared. It was contended, therefore, that the introduction of "scratch" tickets, affecting all travellers alike, could not constitute discrimination under s. 29(1). However, the construction which the Corporation seeks to place on s. 29(1) is misconceived. As Phillips J. correctly stated:

> "All that s. 29(1)(b) requires is that there be some 'discrimination' in the terms on which the goods or services are provided; but what is 'discrimination' is described in s. 17. Section 17(1) describes the sort of direct discrimination mentioned by [the Corporation], where there are two sets of terms and one of which involves less favourable treatment by reference to a relevant criterion ... The other, indirect discrimination, involves no such difference in the terms on which the goods or services are being provided; it is enough that, although the terms be equal, they have unequal impact according to a relevant criterion."

In the present case, the terms on which the Corporation provided the relevant services was that users of those services must buy scratch tickets and "use trams without the assistance of conductors". Whether or not the terms on which the Corporation performs its services amount to discrimination depends on the application of s. 17(5) to the facts of the case.

*Requirement or condition — s. 17(5)(a)*

Section 17(5)(a) stipulates that a person who discriminates against another person must have imposed on that other person a "requirement or condition". For the purpose of determining the presence of "discrimination" within the meaning of s. 17(5), the requirement or condition that is allegedly imposed on a person must be identified with some precision (55).

The reported cases also require that the phrase "requirement or condition" in s. 17(5) be given a broad interpretation to enable the objectives of the Act to be fulfilled. The words "requirement or condition" are found not only in the Act but also, for example, in United Kingdom and New South Wales anti-discrimination statutes. In those jurisdictions, courts have given the words a wide interpretation (56). In *Banovic*, Dawson J., speaking of the equivalent New South Wales provision, said (55):

> "Upon principle and having regard to the objects of the Act, it is clear that the words 'requirement or condition' should be

(55) See *Banovic* (1989), 168 C.L.R., at p. 185, per Dawson J.
(56) See, particularly, *Clarke v. Eley (I.M.I.) Kynoch Ltd.*, [1983] I.C.R. 165.

> construed broadly so as to cover any form of qualification or prerequisite demanded by an employer of his employees."

See also my judgment in that case (57). In conformity with these pronouncements, s. 17(5) should be given a liberal interpretation in order to implement the objectives of the legislation. In the context of providing goods or services, a person should be regarded as imposing a requirement or condition when that person intimates, expressly or inferentially, that some stipulation or set of circumstances must be obeyed or endured if those goods or services are to be acquired, used or enjoyed.

The Corporation accepted that the introduction of "scratch" tickets involved the "imposition" of a "requirement or condition". As Phillips J. pointed out, for the Corporation to stipulate that a passenger purchase a ticket at a retail outlet before commencing his or her journey and then, at the commencement of the journey, validate the ticket in a certain way is to require something of a passenger. Such a stipulation is readily comprehended as one of the terms imposed upon passengers in the performance of the service. His Honour held, however, that the Corporation's act in removing conductors from trams was not the imposition of a "requirement or condition" within the meaning of s. 17(5)(a). He said that for the Corporation to remove conductors from some of its trams did not involve, in any ordinary use of language, the "imposition" of some "requirement or condition" on the travelling public or the complainants in particular.

However, a person could use the services provided by the Corporation's trams only if that person was prepared, inter alia, to endure using the trams without the assistance of conductors. That being so, it is no misuse of ordinary language to hold that the Corporation imposed a requirement or condition on persons using its trams if the services provided are characterized as the provision of trams. No doubt, as counsel for the Corporation stressed, it is important to distinguish between the services provided and the requirement or condition imposed. If, e.g., the Board found that the relevant services provided were conductorless trams, then it is difficult to see how the use of trams without a conductor was a requirement or condition of providing the service. Whether the services provided were trams or trams without conductors was a question of fact for the Board. Unfortunately, the Board defined the services provided at too high a level of generality to determine whether it was open as a matter of law to find that the use of trams without a conductor was a requirement or condition of the services

(57) (1989) 168 C.L.R., at pp. 195-197.

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provided. Nevertheless, in my opinion, Phillips J. erred in holding that as a matter of law the provision of trams without conductors was not imposing a requirement or condition on persons using those trams. Whether or not it was a requirement or condition is a question of fact for the Board after it defines the relevant services with greater precision.

McHugh J.

*Reasonableness of the requirement or condition — s. 17(5)(c)*

By reason of the provisions of par. (c), a person discriminates under s. 17(5) only if the requirement or condition imposed is "not reasonable". The Act gives no guidance as to the criteria to be applied in determining reasonableness.

The Board held that the financial and economic factors which grounded the Government's decision to make the changes to the public transport system were not relevant under par. (c), primarily for the reason that to hold otherwise would be to render s. 29(2) of the same Act superfluous. Phillips J. held that the Board had erred in law so holding. His Honour said that under par. (c) it was proper to consider the Corporation's economic and financial justifications in determining whether the requirements or conditions imposed by it were reasonable. In rejecting the appellants' contention that the reference to reasonableness is a reference to the point of view of those discriminated against, his Honour declared that:

> "On its face, par. (c) is not limited; it provides simply that there may be discrimination if the requirement or condition in question 'is not reasonable'. Surely that means reasonable in all the circumstances of the case and it involves considering not only the position of the Complainants but also the position of the Corporation."

This is a convenient place to deal with the contention that, contrary to the approach of Phillips J., the function of s. 17(5)(c) is to identify those cases in which a requirement or condition "serves to effect a distinction" which is not rendered impermissible by the Act. Consequently, the word "reasonable" in s. 17(5)(c) is said to be concerned only with whether the requirement or condition which has been imposed reflects a distinction other than one based on status or personal life and, if so, whether that requirement or condition is appropriate or adapted to that distinction.

In our joint judgment in *Castlemaine Tooheys Ltd. v. South Australia* (58), Gaudron J. and I sought to explain the general considerations which, *statute aside*, result in particular treatment being identified as discriminatory. We said:

(58) (1990) 169 C.L.R. 436, at pp. 478-479.

> "A law is discriminatory if it operates by reference to a distinction which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant to the object to be attained; a law is discriminatory if, although it operates by reference to a relevant distinction, the different treatment thereby assigned is not appropriate and adapted to the difference or differences which support that distinction. A law is also discriminatory if, although there is a relevant difference, it proceeds as though there is no such difference, or, in other words, if it treats equally things that are unequal — unless, perhaps, there is no practical basis for differentiation.
>
> ...
>
> To justify a distinction as relevant to an objective it is necessary to show that the distinction made is a real distinction. That involves the identification of a difference or differences explaining the distinction. It also involves showing a connexion between the distinction and the objective such that the object is reasonably capable of being seen as likely to be achieved — other than to an extent that is trifling or insignificant — by different treatment based on that distinction."

The contention that the function of s. 17(5)(c) is to identify those cases in which a requirement or condition "serves to effect a distinction" which is not rendered impermissible by the Act seems to depend on the proposition that the purpose of the Act is to deal with "discrimination" in the sense that that word would be understood in a context outside the Act. But in my opinion the Act seeks to eliminate "discrimination" only in situations which fall within the definitions of that term contained in the Act and, at least in the case of s. 17(5), the definition is highly artificial.

As I earlier pointed out, s. 17(1) and (5) deal with mutually exclusive subject matters — s. 17(1) with direct discrimination and s. 17(5) with indirect discrimination. What constitutes discrimination is to be found by applying the criteria specified in s. 17. Cases of indirect discrimination are to be determined by applying the criteria in s. 17(5) uninfluenced by the language of s. 17(1) or any general concept of discrimination. Whether "the requirement or condition is not reasonable" (s. 17(5)(c)) does not depend on the notion that the purpose of the term "reasonable" is to limit some general concept of discrimination which exists independently of s. 17(5). The reasonableness of the "requirement or condition" is itself part of the definition of discrimination in situations falling within s. 17(5). That sub-section deals with situations where a person has not directly treated the complainant less favourably than that person treats or would treat another person. In those situations, the act of a person will be held to be discrimination if the conditions specified in pars (a), (b) and (c) of

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s. 17(5) are satisfied. Section 17(5) is a deeming provision, and what falls within it is discrimination for the purposes of the Act even though it is not discrimination within the meaning of s. 17(1) or discrimination in the sense that that term would be understood in a context outside this Act. That being so, arguments based on any concept of discrimination existing outside the statutory definition contained in s. 17(5) are not legitimate aids to the construction of the term "reasonable" in s. 17(5)(c). What has been said in cases like *Castlemaine Tooheys*, therefore, has no application to s. 17 of the Act. Likewise, arguments based on *Griggs v. Duke Power Co.* (59) and similar authorities in the United States of America are not legitimate aids in interpreting s. 17(5) because those authorities do not deal with the term "discriminate" as it is defined in s. 17(5) or for that matter in s. 17(1).

In a legal instrument, subject to a contrary intention, the term "reasonable" is taken to mean reasonable in all the circumstances of the case (60). Nothing in the context of s. 17(5)(c) indicates that the term should not be given its ordinary meaning. The reasonableness of the imposition of the requirement or condition in that paragraph, therefore, must be examined by reference to the relevant circumstances, including in the case of a requirement or condition imposed by a government or statutory body any relevant policy objectives. In par. (c) the circumstances can include economic, financial and policy factors.

The Board held that a tribunal or court cannot examine economic and financial considerations in considering s. 17(5) because such an examination would make the provisions of s. 29(2) otiose. Section 17(5)(c) and s. 29(2), however, do not serve identical functions. Section 29(2) is confined to situations where the provider of the services is being asked by the complainants to provide them "in a special manner". Because it is so confined, s. 29(2) does not duplicate what falls for consideration under s. 17(5)(c). Further, s. 29(2) applies only in relation to discrimination on the ground of impairment; s. 17(5)(c) applies in a far wider range of situations. In considering the Corporation's argument that it acted reasonably for the purpose of s. 17(5)(c), therefore, the Board was not duplicating any inquiry which could arise under s. 29(2), even though it may have had to examine the same or similar evidence under both provisions.

In my opinion, therefore, Phillips J. was correct in holding that

(59) (1971) 401 U.S. 424.
(60) cf. *In re a Solicitor*, [1945] K.B. 368, at p. 371.

the Board had erred in law in determining the meaning of the term "reasonable" in s. 17(5)(c).

It follows that the Board must reconsider its findings in relation to the two requirements or conditions which it found existed in this case. In reconsidering whether the imposition of the requirements or conditions was reasonable, the Board must examine all the circumstances of the case. This inquiry will necessarily include a consideration of evidence viewed from the point of view of the appellants and of the Corporation. I should note that it was common ground between the parties that the onus was on the Corporation to produce evidence to show that the relevant requirements or conditions were reasonable. However, I cannot accept that the concession of the Corporation was correctly made. A finding that the requirement or condition imposed was not reasonable is an essential element in proving a breach of s. 17(5). A complainant has the onus of proving the element contained in par. (c) (61).

*Exemption from the provisions of the Equal Opportunity Act* 1984 *(Vict.)*

If, after reconsidering the evidence, the Board is satisfied that the acts of the Corporation constitute a breach of ss. 17 and 29(1) of the Act, the Board will have to determine whether the prima facie unlawfulness of the acts of the Corporation is neutralized by the provisions of s. 39(e)(ii) of the Act. The Board has already held that s. 39(e)(ii) did not prevent the acts of the Corporation from being unlawful acts of discrimination. But in the Supreme Court, Phillips J. reversed that finding. It, therefore, becomes necessary to examine the correctness of his Honour's finding.

Section 39(e)(ii) provides that the Act does not render unlawful an act done by a person if it was necessary for the person to do it in order to comply with a provision of any other Act. The *Transport Act* impliedly gives power to the Minister responsible for public transport in Victoria to give directions to the Corporation. Section 31(1) of the *Transport Act* provides:

> "Each Corporation must exercise its powers and discharge its duties subject to the general direction and control of the Minister or the Director-General, and to any specific directions given by the Minister or the Director-General."

The specific direction on which the Corporation relies in this appeal is the initial direction given to the Corporation, orally, following the

(61) See *Vines v. Djordjevitch* (1955), 91 C.L.R. 512, at pp. 519-520; *Roddy v. Perry* [No. 2] (1957), 58 S.R. (N.S.W.) 41, at p. 47.

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Cabinet meeting in July 1989. It was a direction given by the Minister, through the Director-General, for the implementation of the Cabinet decision to change various aspects of the public transport system. It was not contended by the appellants that the giving of an oral direction is outside the ambit of s. 31(1) of the *Transport Act*. The direction given was as follows: "the Minister directed the [Corporation] through the Director-General of Transport, Mr. J. King, to implement the Cabinet resolution approving the scratch ticket system and the driver-only trams."

The validity of the direction was not challenged by the appellants until the hearing in this Court on 5 February 1991. Consequently, the Minister was not a party to or intervener in the proceedings. Although it would have been desirable to have made the Minister a party to the proceedings, it was not strictly necessary. The Minister is not bound by the present proceedings. Furthermore, counsel for the Corporation did not suggest that the validity of the direction could not be examined in this appeal provided that the examination of that issue did not require the calling of evidence. To that important question I now turn.

While the Minister is not himself a person providing goods and services and does not fall within the ambit of s. 29(1), he is deemed to have committed an unlawful discriminatory act in directing the Corporation if the Corporation is guilty of a contravention of s. 29 of the Act. This conclusion is the result of s. 5 which provides that the Act is intended to bind the Crown and s. 35 which provides that, where one person counsels, requests, demands or procures another person to act and that person does act in contravention of the Act, both persons shall be jointly and severally liable under the Act in respect of the contravention. If the discriminatory act of the Corporation is unlawful, it is jointly and severally the unlawful act of the Minister.

The question then is whether s. 31(1) of the *Transport Act*, properly construed, and read in conjunction with the *Equal Opportunity Act*, authorizes the Minister to give a direction which overrides the protective provisions of the latter Act. It is clear enough that, for the purpose of s. 39(e)(ii), a direction of the Minister, made under s. 31(1), is not itself "an act done by a person" which "was necessary for the person to do ... in order to comply with a provision of" any other Act. In *Clinch v. Commissioner of Police* (62), the Commissioner of Police claimed that, in refusing to employ the complainant, he was acting in compliance with a requirement of "any other Act" and hence was exempted from

(62) [1984] E.O.C. 92-115.

complying with the *Anti-Discrimination Act* (N.S.W.) because of the provision of s. 54(1) of that Act which is the equivalent of s. 39(e)(ii) of the Victorian Act. The Equal Opportunity Tribunal of New South Wales held that, in order to fall within the exception in s. 54, the Commissioner had to demonstrate that his conduct occurred pursuant to an actual requirement of an Act and that it was necessary for him to pursue such a course of conduct. The Tribunal held that the requirement of the "other Act" must be mandatory and specific. The terms of s. 39(e)(ii) are different from s. 54(1) of the New South Wales legislation in that s. 39(e)(ii) refers to "an act done by a person if it was necessary for the person to do it in order to comply with a *provision* of ... any other Act" (emphasis added). Nevertheless, the reference to necessity appears in both Acts, and the principle of *Clinch* — which I think was correctly decided — means that a Minister when exercising a discretion conferred on him or her by "an Act" is not within the protective cloak of s. 39(e)(ii).

Nevertheless, if the direction in the present case was lawfully made under s. 31(1) of the *Transport Act*, neither the Corporation nor the Minister was guilty of any unlawful act of discrimination. Phillips J. held, correctly in my opinion, that s. 31(1) of the *Transport Act* is not merely an empowering provision, but a provision which obliges the Corporation to comply with specific directions given to it by the Minister. Moreover, I agree with his Honour that what the Corporation did was necessarily done in order to comply with the direction. Consequently, if the direction was valid, the Corporation's acts were not unlawful.

The power of the Minister to give directions under s. 31(1) is subject to the operation of the general law. By the general law, I mean the body of common law and equitable rules which are supplemented or amended by statutes and regulations and other instruments having the force of law. Section 31(1), therefore, would not authorize a direction that the Corporation commit a crime or tort or breach a contract or by-law. Nor would it authorize a direction that the Corporation commit a breach of a statute such as the Act. These propositions, though not directly expressed in the *Transport Act*, are self-evident. They are self-evident because, under a government of laws and not of men and women, it is axiomatic that, in the absence of express words or necessary intendment, Parliament does not intend the recipient of the power to authorize a Minister, statutory body or government official to break the general law of the land. The argument for the Corporation did not contest the truth of these propositions. But it contended that regard had to be given to s. 39(e)(ii) in determining whether the Minister could

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lawfully give a direction to the Corporation to do that which, because of the Act, the Corporation could not otherwise do of its own initiative. In other words, the Corporation contended that, since s. 39(e)(ii) took an act outside the operation of the Act if it was necessarily done in order to comply with a provision of another Act, nothing in the Act made the direction of the Minister unlawful. This argument is not without force. But in the end the question is whether, in enacting s. 31(1), Parliament intended that the Minister could give directions which had the effect of converting an otherwise unlawful act of the Corporation into a lawful act. Now, as I have said, it is axiomatic that, in conferring a power such as s. 31, Parliament does not intend to authorize the giving of directions to perform acts which are unlawful. It is but a short step to infer that, in the absence of a plain intention, Parliament, in conferring such a power, also does not intend the recipient of the power to authorize acts which, but for the direction, would be unlawful. And in the absence of a contrary legislative indication, it is an inference which should be drawn. Consequently, in my opinion, Parliament cannot be taken to have authorized the Minister to give directions to the Corporation to perform acts which but for the directions would be a breach of the Act. The present case is altogether different from one where the Minister has a statutory duty to give the direction.

The direction of the Minister, therefore, was not authorized by the *Transport Act*. No act done pursuant to it is exempted by s. 39(e)(ii). Consequently, Phillips J. was in error in holding that the Board had erred in law in not upholding the Corporation's claim for exemption from the operation of the Act pursuant to s. 39(e)(ii) of the Act.

*Order 56 of the Supreme Court Rules (Vict.)*

While in order to decide the present appeal it is not necessary to determine the availability to the Corporation of an appeal mechanism pursuant to the Victorian Supreme Court Rules, in my view the Corporation was not entitled to appeal from the decision of the Board on a point of law out of time by resort to originating motion under Ch. I, O. 56. The relevant facts are as follows: the Supreme Court granted an order nisi to the Corporation pursuant to s. 49(4) of the Act. That sub-section provided for a right of appeal within twenty-eight days of the Board's decision. After twenty-eight days had expired, the Corporation sought to challenge the Board's decision on the ground, inter alia, that it had misconstrued s. 29(2) of the Act and that it had erred in law in concluding that s. 29(2)(b)

was not available to the Corporation to render lawful the acts complained of. The Corporation then took out an originating motion pursuant to O. 56 of the Supreme Court Rules, which allows for judicial review within sixty days of a decision. As the Corporation had succeeded on other grounds, Phillips J. declined to determine whether s. 29(2)(b) was available to the Corporation. He dismissed the originating motion taken out by the Corporation without ruling upon its merits.

Before this Court, counsel for the Corporation argued that, while the Act does provide a right of appeal, there is an alternative appeal mechanism available under the Supreme Court Rules and that it was not out of time in seeking to raise the s. 29(2) defence. At the relevant time, s. 49(4) of the Act read as follows:

> "Any party to proceedings before the Board may, within 28 days after the day on which the Board makes an order under this Part and after having first served notice of that party's intention to do so on every other party to the proceedings and on the Registrar of the Board, appeal to the Supreme Court against that order on a question of law only as if the order were an order of a Magistrates' Court and the provisions of Part XI of the *Magistrates' Courts Act* 1971 shall, with such adaptations as are necessary, apply accordingly."

Section 88 of the *Magistrates' Courts Act* provided for appeal by way of order nisi within one month of the order complained of, but it did so without prejudice to such other right or remedy as may exist. The Corporation described O. 56 as another "right or remedy" within the meaning of s. 88. Consequently, the Corporation claimed that it was entitled to avail itself of O. 56 judicial review proceedings. It may be true that O. 56 is another "right or remedy" within the meaning of s. 88. But s. 49(4) does not convert an appeal under that sub-section into an order of a Magistrates Court so that the appeal is under Pt XI of the *Magistrates' Courts Act*. The appeal is one under s. 49(4) and must be lodged within twenty-eight days. The provisions of Pt XI of the *Magistrates' Courts Act* apply to that appeal "with such adaptations as are necessary". The effect of the "as if" clause in s. 49(4) was to apply the procedural machinery of Pt XI of the *Magistrates' Courts Act* 1971 (now repealed) to an appeal under s. 49(4) of the Act with such modifications as were necessary. The policy of s. 49(4) as discerned from its terms is that an order of the Board can be challenged only on a question of law by an appeal to the Supreme Court lodged "within 28 days after the day on which the Board makes an order under this Part and after having first served notice of that party's intention to do so on every other party". Any provision of Pt XI of the *Magistrates' Courts Act* which is inconsistent with the

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legislative intention revealed by that policy must necessarily be modified in its application to an order made by the Board. That means, inter alia, that those parts of s. 88 which give a right to appeal within one month of the making of an order and provide that an appeal is not without prejudice to any other "right or remedy" are not applicable to an order under the Act.

The Supreme Court, therefore, had no jurisdiction to hear the proceedings based on O. 56.

*Validity of the Board's Orders*

Before Phillips J., the Corporation argued that certain orders of the Board were null and void for vagueness and uncertainty. Since the orders of the Board must be set aside and the matter reconsidered in accordance with the reasons of the Court, any ruling on the orders which the Board made serves no useful purpose.

*Order*

The appeal is allowed.

*Appeal allowed.*

*Application for special leave to cross-appeal refused.*

*Set aside the order of the Supreme Court of Victoria allowing the appeal to that Court and dismissing the complaints. In lieu thereof, order that the matter be remitted to the Equal Opportunity Board to determine in accordance with s.* 17(5)*(c) of the Equal Opportunity Act* 1984 *(Vict.) whether the requirements or conditions involved in the introduction of scratch tickets and removal of conductors from trams are reasonable and to determine the complaints accordingly.*

Solicitors for the appellants, *Slater & Gordon.*

Solicitor for the respondent, *R. C. Beazley*, Victorian Government Solicitor.

R.A.S.

FEDERAL COURT OF AUSTRALIA

# Watts v Australian Postal Corporation

[2014] FCA 370

Mortimer J

14-17 October, 22 November 2013, 11 April 2014

*Human Rights — Discrimination law — Disability discrimination — Indirect discrimination — Failure to make reasonable adjustments — Meaning of "reasonable adjustments" — Where failure to make adjustments results in person being treated less favourably than person without disability — Characteristics of appropriate comparator — Where employee suffered psychological injury and placed on restricted duties — Where employer directed employee to not attend for work on basis that no reasonable adjustments could be made to allow her to return to pre-injury role — Whether employer discriminated against employee on basis of failure to make reasonable adjustments — Characteristics of employee comparator — Disability Discrimination Act 1992 (Cth), s 5(2).*

*Human Rights — Discrimination law — Disability discrimination — Whether discrimination unlawful — Where employee denied access to other benefits associated with employment or subjected to any other detriment — Meaning of — Whether ability to attend work, exercise skills and take leave at employee's choosing constitute "other benefits associated with employment" — Disability Discrimination Act 1992 (Cth), s 15(2)(b).*

This was two applications for relief in respect of alleged contraventions of the *Disability Discrimination Act 1992* (Cth) (the Act). The applicant, who was employed by the respondent as a bid manager, suffered a psychological injury as a result of not being selected for a leadership training program. Consequently, she spent a significant time away from the workplace, eventually returning on restricted duties under a return to work program. While the applicant was still on restricted duties, the respondent required her to provide evidence about whether she was fit to return to her pre-injury role as a bid manager and what adjustments might be required to allow her to do so. The applicant provided the respondent with a report on such matters from her psychologist, but the respondent was unsatisfied with the report and directed the applicant to take sick leave and not attend for work (on restricted duties or otherwise) on the basis that it was not satisfied she was fit to perform her role as a bid manager and there were no modifications or restrictions it considered were reasonably available to allow her to do so.

Section 15(2) of the Act relevantly provided that it was unlawful for an employer to discriminate against an employee on the ground of the employee's disability by denying the employee access to opportunities for promotion, transfer

or training or "any other benefits associated with employment" (s 15(2)(b)) or by subjecting the employee to "any other detriment" (s 15(2)(d)). Section 5(2) of the Act defined "discriminates" to include, relevantly, where an employer "does not make, or proposes not to make" reasonable adjustments for an employee (s 5(2)(a)) and the failure to make the reasonable adjustments had the effect that the employee was treated less favourably than a person without the disability in similar circumstances (s 5(2)(b)).

The applicant contended that the respondent had discriminated against her within the meaning of s 5(2) of the Act by not making reasonable adjustments to enable her to remain at work and transition back into her pre-injury role as a bid manager. The applicant submitted that s 5(2) imposed a positive obligation on an employer to make reasonable adjustments for an employee and the respondent had failed to discharge that obligation by requiring the applicant to identify whether reasonable adjustments could be made rather than undertaking its own enquiries. The applicant further submitted that the discrimination was unlawful because it was prohibited by either or both of s 15(2)(b) (in that it denied her access to certain non-pecuniary benefits associated with her employment, such as the ability to attend work, exercise her skills, and take leave at a time and for a purpose of her choosing) and s 15(2)(d) (in that it subjected her to detriment in her employment, where the alleged detriments mirrored the benefits relied upon for the purposes of s 15(2)(b), save that they were expressed in the negative). The respondent contended that, because it did all it reasonably could to obtain information from the applicant about whether or not reasonable adjustments could be made, it was at all relevant times proposing to make such adjustments within the meaning of s 5(2)(a), and that even if there were discrimination within the meaning of s 5(2), it was not unlawful because there was no loss of benefit to, or imposition of a detriment on, the applicant for the purposes of s 15(2)(b) or s 15(2)(d) of the Act.

*Held*, allowing the applications: (1) The respondent failed to make reasonable adjustments for the applicant for the purposes of s 5(2)(a) of the Act during the period when it directed her to remain away from the workplace. [10], [236], [238]-[240], [270]

*Discussion of* the meaning of "reasonable adjustments" and "does not make, or proposes not to make" in s 5(2)(a) of the Act. [23]-[34], [229]-[233], [239], [277]

(2) The effect of the respondent failing to make reasonable adjustments for the applicant was that the applicant was treated less favourably than another employee without her disability. [10], [247], [254]-[255], [264], [270]

*Discussion of* the characteristics of the relevant employee comparator for the purposes of s 5(2)(b) of the Act. [241]-[246], [250]-[252]

(3) The discrimination of the applicant was unlawful within the meaning of s 15(2)(b) of the Act, in that it denied the applicant access to benefits associated with her employment (being the ability to attend work, exercise her skills and use her leave as she chose). [10], [271]

*Discussion of* the meaning of "other benefits associated with employment" in s 15(2)(b) and "other detriment" in s 15(2)(d) of the Act. [60]-[68], [94]

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*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

*Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92.

*Qantas Airways Ltd v Gama* (2008) 167 FCR 537.

*Quinn v Overland* (2010) 199 IR 40.

*R v Inhabitants of Whitnash* (1827) 108 ER 845.

*Regents of University of California v Bakke* 438 US 265 (1978).

*Smith v Department of Education and Communities (NSW)* [2013] NSWADT 162.

*SZGIZ v Minister for Immigration and Citizenship* (2013) 212 FCR 235.

*Taxation, Deputy Commissioner of v Clark* (2003) 57 NSWLR 113.

*Waters v Public Transport Corporation* (1991) 173 CLR 349.

*X v Commonwealth* (1999) 200 CLR 177.

**Applications**

*S Keating*, for the applicant.

*R Nelson*, for the respondent.

*Cur adv vult*

11 April 2014

**Mortimer J.**

**Introduction and summary**

1 There are applications for relief under s 46PO of the *Australian Human Rights Commission Act 1986* (Cth), in respect of alleged contraventions of the *Disability Discrimination Act 1992* (Cth) (the DDA). There are two proceedings, covering different periods of time, which have been heard and determined together. The first proceeding concerns allegations against the Australian Postal Corporation (Australia Post), the respondent to both proceedings, in respect of conduct between June 2010 and 26 October 2010. The second proceeding concerns allegations against Australia Post in respect of conduct between February 2011 and 29 July 2012, as well as allegations of the continuation of the discrimination alleged in the first proceeding. In that sense, there are allegations of unlawful discrimination by Australia Post from the period of June 2010 through to 29 July 2012.

2 The following summary reflects the findings I have made on the evidence. The applicant, Ms Watts, is a bid manager for Australia Post. Throughout the events which have led to this proceeding, Ms Watts has remained employed by Australia Post. She is, on the evidence, a competent and conscientious employee. In April 2008, Ms Watts suffered a psychological injury as a result of an incident concerning her non-selection for a leadership training program offered by Australia Post. This led to her lodging a claim under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (the SRC Act) for compensation (Australia Post being regulated under the federal workers' compensation scheme). She had some significant time away from the workplace. In October 2008, she returned under a return to work program, although her workers' compensation claim remained unresolved. After her workers' compensation claim was resolved by consent in the Administrative Appeals Tribunal in December 2009, and while she was still occupying a position in Australia Post's workplace, as part of her return to work program, in February 2010 Australia Post moved to manage her return to her position as a bid manager under different arrangements. Australia Post had a policy described as a "Non-work related medical restrictions policy". How and why Australia Post decided to change the management of Ms Watts' working arrangements by reference to this policy is an important aspect of the facts in this case and is the subject of findings below at [210]-[225]. I shall refer to this policy of Australia Post as simply "the policy".

3 Ms Watts was not cooperative with Australia Post's decision to manage her under the policy, and did not agree with its imposition on her. Through its employees in its human resources area, Australia Post sought to have Ms Watts produce specific medical reports or advice about whether she was fit to return to her pre-injury role as a bid manager, and what medical restrictions or modifications might be required. It sought permission to speak to her treating doctor. It sought permission to speak to her treating psychologist. Ms Watts resisted these requests for various reasons, which I refer to in more detail later in these reasons for judgment. There was an effective impasse for several months, at least until mid-May 2010, but Ms Watts remained in the workplace under the arrangements in place since October 2008. In mid-May 2010,

Australia Post directed Ms Watts to take sick leave and not attend for work on the basis that it was not satisfied she was fit to perform her role as a bid manager, and there were no modifications or restrictions it considered were reasonably available to allow her to do so. It would not, apparently, permit her to continue in the position she had been occupying as part of her return to work program.

4 Australia Post engaged in much correspondence, by letter and email, with Ms Watts about its need for further and more detailed medical information. Initially, some events outside Ms Watt's control conspired to delay the provision of medical advice to Australia Post from Ms Selvi, Ms Watts' treating psychologist. When it was provided, those responsible in Australia Post management found Ms Selvi's advice unhelpful and unsatisfactory. Australia Post continued to pursue the matter, but not with any urgency. It did not seek to give Ms Watts any formal directions to attend for independent medical assessments, as it was clearly entitled to and could have done. It did not allow her to continue in the modified position she had been successfully performing until May 2010.

5 Delay, prevarication, lack of cooperation, stubborn adherence to process and some obstinacy on both sides all contributed to two years passing without Ms Watts returning to work. She used up her sick leave, her annual leave and from 4 August 2011 had to take leave without pay.

6 During this period, on 26 October 2010 Ms Watts lodged her first complaint under the DDA with the Australian Human Rights Commission. The principal allegation was that, after her treating psychologist gave Australia Post a report in June 2010, Ms Watts should have been able to return to work, and transition back into her position as a bid manager, because there were reasonable adjustments available for her to continue at work. That complaint was terminated on 28 September 2011, and on 21 November 2011 Ms Watts issued the first proceeding in this Court.

7 Eventually, on 13 October 2011 Australia Post gave Ms Watts a formal direction to attend for a psychiatric medical examination with an independent psychiatrist (Dr Hollander). This direction was given as a precursor to reliance on Australia Post's disciplinary processes if Ms Watts refused to comply with the direction. Ms Watts eventually complied with the direction and attended to see Dr Hollander. Dr Hollander produced a report stating Ms Watts was fit to return to her pre-injury duties in her role as bid manager, and could perform the inherent requirements of that position. He advised a graduated return to work program over four months. Australia Post accepted these recommendations, as did Ms Watts, and they were implemented. Her return to work was successful and she is back performing the role of bid manager. Her supervisor, Mr Psarologos, gave positive evidence about the way she performs her role.

8 Why this could not have happened two years ago remains, on the evidence, something of a mystery. The most likely explanation seems to be too much intransigence on both sides.

9 Then, on 24 October 2012 Ms Watts lodged a second complaint with the Commission, dealing with Australia Post's continuing refusal to allow her to return to work after she had been directed to take leave. The second complaint was terminated on 6 December 2012, and on 14 December 2012 Ms Watts issued the second proceeding in this Court.

10 For the reasons I set out below, I find that Australia Post contravened the

DDA by engaging in unlawful discrimination on the ground of Ms Watts' disability; namely, her disorder, illness or disease that affected her thought processes, perception of reality, emotions or judgment or that resulted in disturbed behaviour, within the meaning of s 4(1) of the DDA. The contraventions occurred between May 2010 and April 2011, on the basis of a failure by Australia Post to make reasonable adjustments for Ms Watts so she could remain at work. She was denied the ability to attend work, exercise her skills, be able to use her sick and recreation leave as she chose, all of which are benefits associated with her employment. She is entitled, with some qualifications, to compensation consisting of the re-crediting of her leave and other entitlements, with effect from June 2010 because that is consistent with her case at trial. She is not entitled to compensation for loss of income for the period after 21 April 2011, which includes the period she was on leave without pay, as I have found there was no unlawful discrimination by Australia Post during this time. She is also entitled to general damages, which I have fixed in the sum of $10,000.

## Jurisdiction

11 It is not contentious that this Court has jurisdiction under s 46PO of the *Australian Human Rights Commission Act* to deal with the two proceedings, arising out of two complaints made to the Commission by Ms Watts.

## Relevant aspects of the Disability Discrimination Act

12 The DDA, like other anti-discrimination legislation (whether State or federal), represents a compromise by the Parliament between the protection and advancement of the right to equality of treatment and opportunity enjoyed by people with disabilities, and the interests of other groups in the community who interact with people with disabilities and whose conduct, though it might be discriminatory, Parliament makes a legislative choice to exempt from compliance with prohibitions on discrimination.

13 The fact of this compromise was recognised in *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 362-363 per Mason CJ and Gaudron J, at 409-410 per McHugh J. Legislative compromises of this nature may be reflected in statutory language which is deliberately opaque. Writing extra-judicially, then Chief Justice Spigelman observed:

> The concept of attributing an intention to a legislature poses a number of problems. Indeed, there may not have been any actual intention at all. The words of a statute may represent a compromise between contending positions, where the actual working out of the application of the statute is, in practice, left to courts precisely because those responsible for the legislation are not able to agree on what the position should be. In a sense, each group is prepared to take its chances in court.

(Spigelman JJ, "The Poet's Rich Resource: Issues in Statutory Interpretation" (2001) 21 Aust Bar Rev 224 at 225-226.)

14 The statutory language of the DDA is an example. The facts of this case, and the parties' respective arguments, call for the resolution by interpretation of several aspects of that opaqueness. In doing so, the Court should remain faithful to the text, context and purpose of the legislative scheme, although application of this guidance in a scheme which is inherently a compromise requires reconciliations on which reasonable minds might differ. There are constructional

choices to be made. The Court must make them trying as best it can to remain close to the language Parliament chose to use, in the context it chose to use it, and applying the legislative purpose, objectively ascertained.

15 The applicant's claims concern amendments to the DDA made by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth), which introduced s 5(2) of the DDA, incorporating a new characterisation of what "discrimination" means for the purposes of the DDA.

16 The explanatory material stated that the amendments were designed to implement the recommendations of the Productivity Commission, themselves in part a consequence of the High Court's decision in *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92. The Commission's recommendations are found in its *Review of the Disability Discrimination Act 1992* (Report No 30, 30 April 2004) where it observed (at Overview, pp XL-XLI):

> A reasonable adjustment duty
>
> Until recently, it had been presumed that the DDA obliged affected organisations to make "reasonable adjustments" to accommodate the needs of people with disabilities. Although the term "reasonable adjustment" does not appear in the DDA, various features of the Act seemed to imply such an obligation. However, a recent High Court decision questioned this presumption and appears to have narrowed significantly the protection that the Act was previously thought to provide.
>
> The Commission considers that substantive equality is a sound basis for disability discrimination legislation. It therefore endorses the concept of reasonable adjustment as a means to this end, and recommends that it be included explicitly in the Act as a stand alone duty. This would mean that failure to provide reasonable adjustment could itself be unlawful discrimination and the subject of a complaint.
>
> The Commission makes this recommendation provided that the duty is always subject to the unjustifiable hardship defence. "Reasonable adjustment" should be defined to exclude adjustments that would cause unjustifiable hardship. This safeguard is necessary to ensure that adjustments are likely to produce net benefits for the community, and do not impose undue financial hardships on the organisations required to make them.
>
> Even in the absence of an explicit reasonable adjustment duty, there are strong grounds for ensuring that the unjustifiable hardship defence applies to all areas of the Act, including: education after enrolment; employment between hiring and firing; and administration of Commonwealth laws and programs. Some people are opposed to the Australian Government having recourse to this defence, presuming that it has greater resources at its disposal. But any government expenditure has an opportunity cost, and to devote resources to making adjustments that do not have net community benefits is just as wasteful as it is in any other area covered by the DDA.
>
> The DDA should also require that unjustifiable hardship be included in all disability standards introduced under the Act, including current draft standards.
>
> *Who pays?*
>
> Any obligation to make adjustments raises the vexed question of who should pay for those adjustments: the organisations concerned, or the community more broadly. There are good arguments for both to be involved (box 5). In some cases, the costs can be spread across different groups. For example, the costs of accessible public transport might be met partly by transport providers (through lower earnings), their customers (through higher fares) and by taxpayers (through subsidies). But in other cases organisations might not be able to pass on the costs.

> Two approaches could be adopted to help broaden the obligation to fund adjustments. The Commission is recommending that:
>
> • the unjustifiable hardship test also require that consideration be given to efforts taken by the organisation to access financial and other assistance. This would mean that the organisation could not use ignorance of existing programs as a defence.
> • the Australian Government review existing arrangements for funding adjustments and consider portable access grants to support participation in employment and education.

17 Section 5(2) of the DDA deals with the subject matter of the Commission's recommendations. It provides:

> (2) For the purposes of this Act, a person (the discriminator) also discriminates against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:
>
> (a) the discriminator does not make, or proposes not to make, reasonable adjustments for the person; and
>
> (b) the failure to make the reasonable adjustments has, or would have, the effect that the aggrieved person is, because of the disability, treated less favourably than a person without the disability would be treated in circumstances that are not materially different.

18 The definition of "reasonable adjustment" is critical to the disposition of the issues in this proceeding. The explanatory material (see Explanatory Memorandum, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (Cth) at [28]-[29], [35] (the 2008 Explanatory Memorandum)) acknowledges the concept of "reasonable adjustments" is drawn from the *Convention on the Rights of Persons with Disabilities 2007*, done at New York on 30 March 2007, although the term in the Convention is "reasonable accommodation". Article 2 of the Convention defines reasonable accommodation in the following terms:

> "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

19 Australia became a party to the Convention on 17 July 2008. It acceded to the *Optional Protocol* to the Convention on 21 August 2009, which became effective in Australia on that date. Article 5(3) of the Convention provides as follows:

> In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

20 Although the phrase chosen by the Parliament is slightly different, it is clear that these amendments were made in pursuance of Australia's international obligations under the Convention. If there is a constructional choice, a construction of s 5(2), and those provisions designed to interact with it, which is consistent with those obligations should be preferred, insofar as the text and context otherwise allow: *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at [97] per Gummow and Hayne JJ; *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [247] per Kiefel J; *SZGIZ v Minister for Immigration and Citizenship* (2013) 212 FCR 235 at [59].

21 This approach is important when the breadth of the statutory definition of "reasonable adjustment" is considered. Section 4 of the DDA defines "reasonable adjustment" in the following terms:

> an adjustment to be made by a person is a reasonable adjustment unless making the adjustment would impose an unjustifiable hardship on the person.

22 Thus, s 4 has effect as a deeming provision. The word "adjustment" is left undefined by the statute and is to be given its ordinary meaning as "an alteration or modification": *Oxford English Dictionary* (online edition). However, unlike other aspects of the DDA (see, for example, s 6) the statute does not leave it to the discriminator in the first instance and the Court in the second instance to determine whether an adjustment is "reasonable". Although the word "reasonable" is used, it has no qualitative character in its context. It is simply part of a term defined by legislative declaration of what is outside the term. All that Parliament declares to be outside the term is a modification or alteration which imposes unjustifiable hardship on a person, taking into account the considerations applicable to identifying hardship of that nature, which are set out in s 11 of the DDA.

23 To what does the adjustment relate? By s 5(2), it is made "for" the person with a disability. It is not made "to" the position the person occupies. It is not made "to" the equipment a person uses. In the context of discrimination at work in Div 1 of Pt 2 of the DDA, it is an alteration or modification "for" the person, which operates on the person's ability to do the work she or he is employed or appointed to do. The adjustment is to be enabling or facultative. There is, in my opinion, no reason in the text, context or purpose of s 5(2), read with s 4 and within the DDA as a whole, to construe the word "adjustment" in a way which might arbitrarily limit the kinds of modifications or alterations required to enable a disabled worker to perform his or her work. Technology changes and advances at an increasing pace and disabled people can be the beneficiaries of such changes and advances. The technological advance which enables Professor Stephen Hawking to compose text and communicate orally through cheek movements detected by an infrared switch mounted on his spectacles is but one well-publicised example of an "adjustment" that, a decade or two ago, may have been little more than a theory.

24 Similarly, the range of disabilities covered by the DDA, evident from the definition of "disability" in s 4 (some with clear physical manifestations and some without), means that the range of modifications for a particular person may be very specific to that person. Two individuals may have the same "disability" but how that "disability" manifests itself, and the impact it has on an individual's capacity to work or access services or education, may vary widely. Breadth and flexibility in the meaning of the word "adjustment" is to be expected in a statute which recognises and seeks to protect (within the legislative choices made by Parliament) the dignity and rights of disabled people as individuals. Where the disability is psychological, "adjustment" must be construed in a way which will ensure the same level of protection under the DDA to those with this kind of disability as to those with any other disability. Ultimately then, so long as it is a modification or alteration "for" a person with a disability, the DDA says nothing about how specific or non-specific the adjustment must be. An adjustment "for" a person may involve only technology, or it may involve only human interactions, or something in between. An adjustment "for" a person may change over time, and may need to be flexible

and adaptable. Much will depend on the particular disability and the particular individual, together with the circumstances in which the adjustment must operate. In order for s 5(2) of the DDA to provide, insofar as it is intended to, substantive equality for all individuals with disabilities, where those disabilities have different impacts on different people, it is important that there be no rigid categorisation or stereotyping of a concept such as an "adjustment".

25 There is one relevant qualification to the breadth of what can constitute an "adjustment" for the purposes of the DDA, as Australia Post submitted. Even taking into account the potential need for flexibility and adaptations, the adjustment must be sufficiently identifiable so as to enable the alleged discriminator (and the Court if need be) to determine whether making the adjustment will impose unjustifiable hardship on the discriminator. Otherwise, the exception in s 21B could be frustrated. For the reasons I express below at [45], this issue also arises under s 21A(1) in respect of the inherent requirements exception. The level of specificity required will be a factual question in each case.

26 It will be noticed that the definition of "reasonable adjustment" in s 4 uses the singular, and s 5(2) uses the plural. For the purposes of the operation of s 23 of the *Acts Interpretation Act 1901* (Cth), in my opinion the DDA exhibits a contrary intention. The use of the plural in the provision which imposes an enforceable obligation conveys an intention to capture the variety of circumstances, and the variety of disabilities, which may need to be accommodated. More than one adjustment may be necessary. More than one option may be available. The use of the plural is consistent with the imposition of an obligation that may require several steps, alternatives, processes or modifications for one person. The use of the plural allows for that possibility.

27 The somewhat absolute nature of the definition of reasonable adjustment has tangible consequences for potential discriminators. There is no room in the operation of s 5(2) for a discriminator, or a court, to assess conduct, or modifications, by reference to notions of reasonableness. The statute removes that capacity. Unless a modification involves unjustifiable hardship, it will by operation of s 4 be a reasonable adjustment and the discriminator must make it "for" the person, to avoid the consequences s 5(2) (read with other provisions in the DDA) might otherwise impose. The legislative choice about what is "unreasonable" for the purposes of this scheme is expressed in the inherent requirements exception, and in the concept of unjustifiable hardship. I deal with these provisions in more detail at [35] and [57] below. One consequence is that what constitutes "hardship" and the circumstances in which it might be "unjustifiable" may be broader than if the statute used reasonableness as a criterion of liability.

28 A further construction issue posed by s 5(2)(a), relevant to the current proceeding, is how the phrase "does not make, or proposes not to make" should be construed. The first part of the phrase is clear enough: it concerns the factual situation at the time a court assesses whether s 5(2) has been contravened. It directs attention to whether, as a matter of fact at that time, reasonable adjustments have been made. The second part directs attention to a (negative) position of the alleged discriminator, and also involves some speculation about the future. One construction question is whether the second part of the phrase is to be determined only by reference to the subjective intentions of the discriminator. Ordinarily, motive (that is, the reason a person has herself or

himself for achieving an object, or seeking to achieve an object) is not relevant in determining why a person acted as she or he did for the purposes of establishing discrimination: see *Purvis* at [148]-[166] per McHugh and Kirby JJ.

29 In *Nagarajan v London Regional Transport* [2000] 1 AC 501 at 511, Lord Nicholls of Birkenhead said:

> For the purposes of direct discrimination … the reason why the alleged discriminator acted on racial grounds is irrelevant. Racial discrimination is not negatived by the discriminator's motive or intention or reason or purpose (the words are interchangeable in this context) in treating another person less favourably on racial grounds. In particular, if the reason why the alleged discriminator rejected the complainant's job application was racial, it matters not that his intention may have been benign.

30 In my opinion, two points should be made about the construction of the phrase "proposes not to make" in s 5(2)(a). First, it is not directed to intention or motive. It requires an objective judgment about the position taken by the alleged discriminator. It should not be regarded as intending an assessment of the discriminator's subjective and ongoing state of mind. Consistently with the approach in *Purvis*, the statute requires a determination, as a matter of fact at the point in time when the discriminator's conduct is challenged, of what the discriminator's position in fact is.

31 Second, it is intended to identify a different factual situation from the phrase "does not make". The latter looks to what has or has not been done by the time of complaint, in circumstances where the complainant says something should have been done. If, in a given factual situation, the time for making reasonable adjustments has not yet been reached (for example, because the disabled worker has not started a job, has not returned to work, or there is an anticipatory refusal by the discriminator) then that is one circumstance in which the second part of the provision has work to do. It will also have work to do when there is continuing discrimination at the time a claim comes to be determined: in that situation both limbs may be engaged on the facts.

32 Further, s 5(2) as a whole must be construed in a way that allows it to operate in a practical way in the workplace, and in the educational and other settings with which the DDA deals. Adjustments may be simple, but also complex. Not only complex because of technical or technological requirements, but also perhaps because of personnel and workplace requirements. Time may be needed to implement them. Part of the work to be done by the second limb is to allow for the position of a discriminator who recognises her or his legal responsibilities, but the implementation of adjustments requires a period of time. In those circumstances, it cannot be said, consistently with the proper construction of the provision, that a discriminator "proposes not to make" reasonable adjustments. The period of time during which it might be said, in a given factual situation, that a discriminator has acknowledged her or his legal obligation and is pursuing implementation cannot be fixed in advance. Invariably it will be fact dependent. Delay may, after a period, indicate lack of genuine recognition of the legal obligation and make available the inference that the discriminator's position is that it "proposes not to make" the adjustment. On the other hand, delay may be accounted for by the unavailability, for example, of an adjustment where the adjustment is a practical, technological adjustment.

33 In other words, subject to circumstances of continuing discrimination, the two

parts of the phrase are intended to be able to address different factual situations. That is particularly apparent from the use of the conjunction "or" in s 5(2)(a), rather than "and". Each can and should be given different work to do in the statute: *Commonwealth v Baume* (1905) 2 CLR 405 at 414.

34 The tense used in para (a) of s 5(2) (extracted at [17] above) is in my opinion significant. Paragraph (a) is expressed in the present tense. It is suggestive of an ongoing or continuing obligation imposed by the statute on the discriminator. That is consistent with the subject matter of the provision which concerns (for example) the ability of disabled people to perform work, attend educational institutions, be provided with goods and services, and have access to accommodation on an ongoing basis.

35 The effect of the 2009 amendments on the two statutory exceptions to unlawful discrimination, described as "unjustifiable hardship" and "inherent requirements", is also important for the resolution of the issues in this proceeding.

36 Prior to the 2009 amendments, s 4(1) required "unjustifiable hardship" to be read by reference to s 11 of the DDA. Section 11 set out a series of mandatory considerations to be taken into account in determining what constituted unjustifiable hardship. The term was then picked up in the provisions dealing with prohibitions on discrimination in particular spheres, creating (where it was picked up) an exception to the prohibition. For example, s 15(4) of the DDA formerly provided:

> Neither paragraph (1)(b) nor (2)(c) renders unlawful discrimination by an employer against a person on the ground of the person's disability, if taking into account the person's past training, qualifications and experience relevant to the particular employment and, if the person is already employed by the employer, the person's performance as an employee, and all other relevant factors that it is reasonable to take into account, the person because of his or her disability:
>
> (a) would be unable to carry out the inherent requirements of the particular employment; or
>
> (b) would, in order to carry out those requirements, require services or facilities that are not required by persons without the disability and the provision of which would impose an unjustifiable hardship on the employer.

37 At that time, s 15(1)(b) dealt with the terms on which persons were offered employment and s 15(2)(c) dealt with dismissal. Those were the only circumstances in which the inherent requirements and unjustifiable hardship exceptions operated.

38 It can be seen from the former version of s 15 that the exception of "inherent requirements" was neither separately defined nor provided for. Instead, it was left undefined and a body of authority grew up around its content: see, eg, *X v Commonwealth* (1999) 200 CLR 177; *Cosma v Qantas Airways Ltd* (2002) 124 FCR 504.

39 The 2009 amendments not only introduced the concept of reasonable adjustments, but altered the way in which the exceptions for unjustifiable hardship and inherent requirements were to operate. Aside from the introduction of s 5(2), this was achieved in relation to discrimination in the area of work by repealing those parts of provisions such as s 15 which had dealt with these exceptions, and introducing freestanding provisions to deal with inherent requirements (s 21A) and unjustifiable hardship (s 21B). For other spheres of

activity (see, for example, Div 2 of Pt 2 of the DDA, which includes education and access to premises), a new provision creating an exception of unjustifiable hardship was introduced: see s 29A.

40 Section 21B provides:

> Exception — unjustifiable hardship
>
> This Division does not render it unlawful for a person (the discriminator) to discriminate against another person on the ground of a disability of the other person if avoiding the discrimination would impose an unjustifiable hardship on the discriminator.

41 Section 21B was not relied on by Australia Post in this proceeding and therefore is not directly in issue. However, its place and operation in the scheme assists in the construction, for example, of s 21A, which is in issue. The text of s 21B speaks of "avoiding the discrimination", thus picking up discrimination as defined by both s 5(1) and (2). For the purpose of s 5(2), "avoiding the discrimination" should be understood to mean making, or proposing to make, reasonable adjustments for a person with a disability.

42 The Productivity Commission dealt with the extension of the unjustifiable hardship defence (at pp 210-211):

> The Productivity Commission considers that there are good reasons to extend the unjustifiable hardship test to all areas of the DDA. As a duty to make adjustments might be implied from existing provisions, an across the board unjustifiable hardship defence is required as the Act stands now to provide the necessary balance. It would seem that the Australian Government intended it to apply it universally in the first place. According to HREOC:
>
> > The second reading speech introducing the Disability Discrimination Bill indicated an intention to apply the concept of unjustifiable hardship as a general limitation on the legislation, although the drafting of substantive provisions did not fully reflect this. (sub. 143, p. 28)
>
> If the Commission's proposal for a duty to make reasonable adjustments were adopted, an accompanying unjustifiable hardship defence would become even more important as an across the board safeguard to balance rights and obligations.

43 The Productivity Commission also recommended the extension of the exception of inherent requirements, from its 2009 operation in respect of hiring and dismissal, to all employment situations. The Report stated (at p 221):

> The Commission concludes that the inherent requirements provisions in the DDA are important from the perspectives of employers and employees (and prospective employees). From the employers' perspective, inherent requirements provide an important safeguard that underpins the merit principle in employment decisions. For employees, inherent requirements mean that employers cannot discriminate against them by using failure to meet non-essential requirements as a reason. Guidelines would help employers and employees to identify the inherent requirements for particular jobs.
>
> There is, however, one legislative amendment that should be made to address an apparent anomaly in the way inherent requirements apply to some employment situations and not others. Currently, like the unjustifiable hardship defence, the inherent requirements defence is not available between the hiring and dismissal stages of employment. It does not apply, for example, in relation to promotions. No good explanation has arisen for why this is so, nor to the Commission's knowledge is it a major issue with employers. The current lack of this defence would appear to have the unusual result, for example, that failure to meet the

inherent requirements of a more senior position could not be used by an employer to refuse to promote a person. Although not a seemingly urgent issue, this matter should be addressed.

44 Section 21A provides:

> Exception — inherent requirements
>
> *Inherent requirements*
>
> (1) This Division does not render it unlawful for a person (the discriminator) to discriminate against another person (the aggrieved person) on the ground of a disability of the aggrieved person if:
>
> (a) the discrimination relates to particular work (including promotion or transfer to particular work); and
>
> (b) because of the disability, the aggrieved person would be unable to carry out the inherent requirements of the particular work, even if the relevant employer, principal or partnership made reasonable adjustments for the aggrieved person.
>
> (2) For the purposes of paragraph (1)(b), the following factors are to be taken into account in determining whether the aggrieved person would be able to carry out the inherent requirements of the particular work:
>
> (a) the aggrieved person's past training, qualifications and experience relevant to the particular work;
>
> (b) if the aggrieved person already works for the discriminator — the aggrieved person's performance in working for the discriminator;
>
> (c) any other factor that it is reasonable to take into account.
>
> (3) For the purposes of this section, the aggrieved person works for another person if:
>
> (a) the other person employs the aggrieved person; or
>
> (b) the other person engages the aggrieved person as a commission agent; or
>
> (c) the aggrieved person works for the other person as a contract worker; or
>
> (d) the other person and the aggrieved person are members of a partnership; or
>
> (e) both of the following apply:
>
> (i) the other person is an authority or body that is empowered to confer, renew, extend, revoke or withdraw an authorisation or qualification that is needed for or facilitates the practice of a profession, the carrying on of a trade or the engaging in of an occupation;
>
> (ii) the aggrieved person is a member of that profession, carrying on that trade or engaged in that occupation.
>
> *Opportunities for promotion, transfer and training and registered organisations*
>
> (4) This section does not apply in relation to:
>
> (a) discrimination referred to in paragraph 15(2)(b) or (d), 16(2)(b) or (d), 17(1)(c) or (d) or 18(3)(c), other than discrimination in determining who should be offered promotion or transfer; or
>
> (b) discrimination referred to in section 20 (registered organisations under the Fair Work (Registered Organisations) Act 2009).

45 By the use of the conditional tense, the statute contemplates that the task required by s 21A(1)(b) can be carried out hypothetically. The provision also uses the term "particular work" in identifying the position to which the concept of inherent requirements attaches. The applicant submitted that this term was to be construed in light of whatever specific section of Div 1 of Pt 2 was relied

upon by a given applicant to establish that particular discriminatory conduct is unlawful. In my opinion the phrase is used in a more precise way than that. Although the word "work" is chosen so that it is capable of covering all the situations with which Div 1 deals, the use of the adjective "particular" suggests Parliament intended a further level of precision to be applied to identifying the "work" said to carry inherent requirements. In my opinion, s 21A requires a focus on the position, task, services or conduct the aggrieved person performs, or seeks to perform, in the workplace. For example, in s 18(3), which deals with partnerships, the relevant prohibition at para (b) (not excluded by s 21A(4)) relates to expulsion from the partnership. In order to assess the application of s 21A(1), it will be necessary to identify what "particular work" the disabled partner was performing, was asked to perform, or sought to perform. For example, was it to manage the human resources area of a partnership, or marketing, or client relations? That is the "particular work" whose inherent requirements must be identified.

46 The 2008 Explanatory Memorandum states at [72] that the newly introduced s 21A:

> substantially implements Productivity Commission Recommendation 8.4 to extend the defence of "inherent requirements" so that it is available to employers in all employment situations.

47 It goes on to state (at [74]-[78]):

> 74. New section 21A extends the defence to all areas of discrimination in employment, except in:
>
> - denying a person with disability access to opportunities for promotion, transfer or training
> - denying a person with disability access to any other benefits associated with employment, and
> - subjecting the person with disability to any other detriment.
>
> 75. The purpose of the first exclusion is to ensure people with disability retain an entitlement to have the opportunity to seek a promotion or transfer on an equal basis with others. Thus an employer could not, by denying access to the opportunity for promotion or transfer, deny an employee with disability the opportunity to demonstrate that he or she can in fact carry out the inherent requirements of the job sought.
>
> 76. The second and third areas exclusions relate to instances of discrimination by an employer against a person who is already employed. In those instances, as the employee is already carrying out the inherent requirements of the job, the defence of inherent requirements would bear no meaning. That is, if the employee is carrying out the inherent requirements of the job, but is then denied access to a benefit or is subjected to a detriment by his or her employer (other than dismissal or a change in terms or conditions), it cannot be a defence to claim that the reason for the discrimination was that the employee was unable to carry out the inherent requirements of the job.
>
> 77. However, if an existing employee became unable to meet the inherent requirements of the job, the defence of inherent requirements would remain available to the employer should he or she decide to dismiss the employee or to change the terms and conditions of the employment on that basis.
>
> 78. An employer who denies an employee access to any other employment benefit or subjects an employee to any other detriment would continue to

> have available the defence that avoidance of the discrimination would cause unjustifiable hardship (see the general defence of unjustifiable hardship inserted by Item 60 (new section 29A)).

48 The way these statements might be used to construe s 21A, and s 21A(4) in particular, was the subject of considerable argument in this proceeding. In particular, there was argument about the assumptions made in [76] of the Explanatory Memorandum concerning the circumstances in which the exclusion (in s 21A(4)) would be operating, when applied for example to provisions such as s 15(2)(b) and (d) of the DDA. The assumption is that an employee would be "carrying out the inherent requirements of the job" in all circumstances to which those provisions might apply.

49 The assumption in the extrinsic material is not borne out by the text of s 21A(4), read with a provision such as s 15(2) upon which it is intended to operate. Notwithstanding those passages in the Productivity Commission report about the desirability of extending the inherent requirements exception to the period between hiring and dismissal, it can be seen that the text of s 21A(4) precludes its extension other than to discrimination in the determination of who should be offered promotion or transfer, without any qualification that the employee must, at the time of discrimination, be performing the inherent requirements of her position. I return to the issue at [51] below in dealing with Australia Post's submission on the operation of s 21A, because Ms Watts' circumstances are an example of how an employee may not necessarily, at the time of the discrimination, be performing the inherent requirements of her position. Were it otherwise, the anti-discrimination provisions might substantially fail to achieve their objective. This is an example of where the words or asserted intention in extrinsic material should not be substituted for the text of the statute: see *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518 per Mason CJ, Wilson and Dawson JJ, at 532 per Deane J, at 547 per Gaudron J; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [47] per Hayne, Heydon, Crennan and Kiefel JJ; *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [44] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

50 The interaction between the prohibitions against unlawful discrimination (on either of the bases within s 5) and the two exceptions of inherent requirements and unjustifiable hardship can be summarised in the following way. In all circumstances in which Div 1 of Pt 2 would otherwise make discrimination at work unlawful, the "discriminator" (usually an employer but not necessarily) will have available the exception of unjustifiable hardship, but will bear the burden of proving the exception applies. In circumstances which do not involve the denial of a benefit, the limiting of access to opportunities for promotion and the like, or the imposition of any other detriment against an incumbent worker, the "discriminator" (usually an employer but not necessarily) will have available the exception of inherent requirements, but will bear the burden of proving its existence. The inherent requirements exception will apply to *selections* for promotion or transfer more generally. That is the purpose of the words in brackets in s 21A(1)(a), which are intended to cover the same field as the words at the end of s 21A(4). Broadly, in my opinion, the inherent requirements exception is intended to preserve for employers the entitlement to appoint, retain, promote or transfer employees who can fulfil core aspects of their employment contract.

51 The respondent submits the reason for the more limited application of s 21A, as compared to s 21B, is that given in the Explanatory Memorandum: namely, that incumbent workers with disabilities are assumed to be performing the inherent requirements of their job, and so s 21A could never have any application to denial of benefits associated with employment, or the imposition of a detriment. It draws a comparison with s 15(2)(a) (where the s 21A exception is available), contending that an employer can change the terms and conditions it affords a disabled employee if that person is, because of the disability, no longer capable of performing the inherent requirements of the position.

52 One problem with this construction is it does not recognise that, as they are expressed, provisions such as s 15(2)(a) are also capable of applying to incumbent workers who are performing the inherent requirements of a position.

53 Second, there is no such clear distinction between the circumstances in which s 21A applies and those where it does not. For example the reference in s 21A(1)(a) to "promotion or transfer to particular work", despite discrimination in respect of opportunities for promotion or transfer being at least partially excluded from the operation of s 21A by s 21A(4), does not reveal any clear intention to confine s 21A(4) to workers who are already carrying out the inherent requirements of a position. There is simply no textual support for that construction. Rather, it is aimed at preserving an employer's entitlement to secure a core set of capabilities and performance from employees. An employee temporarily out of the workforce, or on modified duties, may nevertheless be able to perform to such a standard.

54 The consequences of reconciling the operation of s 21A with the terms of s 5(2) and the statutory concept of reasonable adjustments emerge from the breadth of s 5(2), when it is read with the definition of reasonable adjustments in s 4. Section 21A(1)(b), when read with this definition, must be construed as meaning that, if the employer makes (or were to make) all adjustments for the person that do not cause the employer unjustifiable hardship, and the disabled person cannot perform the inherent requirements of the particular work, only then does the s 21A exception apply. That construction imposes substantial obligations on employers, and may as I have observed give the concept of "unjustifiable hardship" more work to do in the legislative scheme than previously conceived. Nevertheless, the text of s 5(2) is clear, especially read with the definition of "reasonable adjustment", and this construction is consistent with Australia's obligations under the Convention.

55 There is a further construction question about the temporal operation of the definition of "reasonable adjustment" in the context of s 21A(1)(b), assuming it applies. Where s 21A posits that a person would be "unable" to carry out the inherent requirements of the particular work, even with reasonable adjustments, does the statute allow for the adjustments to enable the person within a reasonable time to perform the inherent requirements of the particular work, or does s 21A operate to except an employer from liability unless the adjustments immediately enable the person to perform the inherent requirements of the particular work?

56 Take an example divorced from the present proceeding. An existing employee of a multinational computer software company whose "particular work" requires constant use of a computer has a skiing accident which means she loses the use of her arms and hands. Technology is available through which she could

learn to operate a computer with the use of a laser beam attached to her head. However, to have her trained in this, and able to use it effectively (including developing the necessary coordination), will take at least six months. It should be assumed for the purposes of the example that the use of the laser beam is a reasonable adjustment for the employee within the meaning of s 4 because the employer does not suggest it imposes unjustifiable hardship on the employer. Thus, it will be six months before she will be in a position to perform the inherent requirements of her pre-injury duties. Does s 21A(1) operate to except the woman's employer from a claim of unlawful discrimination if it dismisses her because she cannot perform the inherent requirements of her position immediately on her return to work?

57 The protections intended to be delivered by the 2009 amendments to require accommodation for disabled people by way of reasonable adjustments would seem to be almost entirely undermined by a construction of s 21A(1)(b) which does not allow some time for the adjustment to take effect. This is consistent with the objective of substantive equality s 5(2) is intended to pursue. The expression of s 21A(1)(b) in the conditional tense supports a construction of "unable" which allows some time for the adjustment to take effect. That is not to say that any outer temporal limit (of a number of weeks or months or years) is implied into s 21A(1)(b), nor that a gloss such as "within a reasonable time" is to be implied. Nor is there a need to limit the meaning of "unable". Rather, it is to recognise that, read in context, the prohibitions contained in Div 1 of Pt 2 of the DDA are intended to facilitate, in a variety of circumstances, disabled people performing, or continuing to perform, work for which they are qualified and of which they are capable, whether by training, experience or both. In this sense, allowing time for an employee to adapt, and gradually return to full capacity, itself forms part of the "reasonable adjustments" made, subject in any given case to the unjustifiable hardship exception.

58 Several construction issues about s 15 are also raised by Ms Watts' claims. Section 15 provides:

> Discrimination in employment
>
> (1) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against a person on the ground of the other person's disability:
>
> (a) in the arrangements made for the purpose of determining who should be offered employment; or
>
> (b) in determining who should be offered employment; or
>
> (c) in the terms or conditions on which employment is offered.
>
> (2) It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against an employee on the ground of the employee's disability:
>
> (a) in the terms or conditions of employment that the employer affords the employee; or
>
> (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment; or
>
> (c) by dismissing the employee; or
>
> (d) by subjecting the employee to any other detriment.
>
> (3) Neither paragraph (1)(a) nor (b) renders it unlawful for a person to

> discriminate against another person, on the ground of the other person's disability, in connection with employment to perform domestic duties on the premises on which the first-mentioned person resides.

59 Section 15(2) is the applicable provision in this proceeding. The parties made competing submissions about the construction and scope of the matters dealt with in paras (a) to (d) of subs (2). Subsection (2) takes as its premise an existing employer-employee relationship and deals with the treatment of employees in that context. That premise means there will be terms and conditions already attaching to the employment contract before any impugned conduct or treatment arises. The use of the verb "affords" in para (a), expressed in the present tense, indicates that the conduct said to constitute discrimination could relate either to those existing terms and conditions, or to any changes proposed or made to them by the employer. That construction ensures there is no gap between the protection given by subs (1) to prospective employees and that given to existing employees. The use of the word "in" at the start of this paragraph is important: it indicates that para (a) is directed to terms and conditions of employment (whether existing, proposed or changed) that are in and of themselves discriminatory. I agree with the submission of the applicant that para (a) does not deal with the *application* of a term or condition to a given factual situation between an employer and an employee. Rather it looks to the nature and operation of the term and condition itself.

60 Bearing in mind that each paragraph should be given real and separate work to do (*Baume* at 414; *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1 at [41] per French CJ, at [172] per Hayne J, at [450] per Kiefel J), when s 15(2)(b) speaks of "promotion, transfer or training", it is dealing with matters outside the terms and conditions of employment. In my opinion, they are three specifically identified "benefits associated with employment". They are not all benefits which necessarily have a pecuniary impact on an employee's income. They are not necessarily benefits which are permanent. They are all matters which enhance and develop a person's capacity and opportunity in her work. The use of the word "opportunities" in para (b) indicates that these "benefits" are not to be seen wholly from the perspective of the employer (that is, benefits which increase a person's value as an employee) nor are they to be seen wholly from the perspective of the employee (that is, benefits which bring personal achievement and satisfaction to the employee). Rather, they encompass both perspectives. Further, the use of the word "opportunities" distinguishes the breadth of this provision from the specific exception in s 21A(1)(a), which concerns *selection* for promotion or transfer.

61 There is a question as to how the phrase "other benefits associated with employment" in s 15(2)(b) should be construed, given that three specific benefits have been identified by Parliament. In an earlier time, the construction of a provision like s 15(2)(b) may have been immediately approached through the use of the *ejusdem generis* rule. I agree respectfully with the observations of Spigelman CJ in *Deputy Commissioner of Taxation v Clark* (2003) 57 NSWLR 113 at [124]-[127], that what is called the *ejusdem generis* rule is but one example of a process of interpretation sometimes described as "reading down" the ambit of a term or phrase in a statute, and that the question of whether a phrase should be read down and, if so, how, is not to be approached by any mechanical application of a "rule" such as *ejusdem generis*.

62 Contemporary approaches to statutory construction may have reduced the

role of these rules: cf *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [54] per Gummow and Hayne JJ. In any event, these rules are but methods by which apparent tensions, contradictions, or ambiguities in statutory language and purpose can be reconciled. The need to engage in such reconciliation as part of statutory interpretation has been emphasised as a core part of contemporary approaches to statutory construction (see *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69]-[71]), but the language of reconciliation has been employed by courts for a long time to describe the process of interpretation: see *R v Inhabitants of Whitnash* (1827) 7 B & C 596 at 599; 108 ER 845 at 846 per Bayley J.

63 Similarly, contemporary approaches to statutory construction may reduce resort to descriptions such as "reading down". Often "reading down" is no more than a convenient way to express a view that text, context and purpose suggest a word or phrase in a statute has particular limits around its construction. It is not that there is a broad meaning, which is then "read down". The interpretation of statutory language does not involve arriving at a preliminary or likely construction, and then revising or revisiting that construction to fit with Parliament's purpose, or the context of the provision and the statute. The choice as to construction is a single choice, arrived at by a variety of legitimate approaches. A circumstance where a construction is chosen which one might describe as a "reading down" is in reality the construction that the court has decided is the one the text, context and purpose of the statute, and its parts and provisions, requires. In that sense, there is no "reading down": there is simply a conclusion as to construction.

64 That is, in my opinion, part of what Mahoney JA was identifying in *Mattinson v Multiplo Incubators Pty Ltd* [1977] 1 NSWLR 368 at 373-376. His Honour's emphasis on text and context in preference to "rules" was prescient of the approach endorsed repeatedly by the High Court in the last decade: *Project Blue Sky* at [69]-[71]; *Alcan* at [47]; *Lacey* at [43]-[44]; *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at [24]-[25]. His Honour observed (at 376) that the application of a "rule" such as *ejusdem generis* to conclude that a statutory phrase using general words should be given a limited or restricted construction is "not because, e.g. a genus has been found, but only because the legislative intention has already been seen to be that the general words are to be so restricted".

65 In the context of s 15(2) of the DDA, whose function is to express prohibitions on certain conduct, with the purpose of protecting employees with a disability from discrimination during the course of their employment, in my opinion the identification of "promotion, transfer or training" is intended to do no more than provide specific examples of "benefits associated with employment" and is not intended to restrict or limit what might otherwise fall within the concept of "benefits associated with employment". The language and context suggest, as I have observed above, a broad range of matters which could be "benefits", including matters that employees may regard as benefits (such as new challenges or greater interaction with fellow employees) and those that employers might regard as benefits (such as temporary promotions to fill a gap) and those that both employers and employees might regard as benefits (such as training).

66 Accordingly, there is no reason to exclude from the concept of "benefits

associated with employment" matters such as those identified by the applicant in this case: attending for work, performing work and exercising skills, using accrued entitlements at a time and for a purpose of the employee's choosing (as would usually be the case with entitlements, within reasonable limits) and earning ordinary income. A similar approach in a different statutory context was taken in *Quinn v Overland* (2010) 199 IR 40 at [110] per Bromberg J. In another context, see also *Blackadder v Ramsey Butchering Services Pty Ltd* (2005) 221 CLR 539 at [80] where Callinan and Heydon JJ stated:

> It may be that in modern times, a desire for what has been called "job satisfaction", and a need for employees of various kinds, to keep and to be seen to have kept their hands in by actual work have a role to play in determining whether work in fact should be provided.

67 The construction of s 15(2)(c) was not in issue in this proceeding, but the construction of para (d) is important. The use of the word "detriment" within the same subsection as the word "benefit" indicates those terms should be taken as encompassing different kinds of conduct or treatment. The use of the word "other" in para (d) makes clear that the three matters with which paras (a) to (c) deal are regarded by Parliament in their effect on employees as forms of detriments. The purpose of para (d) is to pick up matters not otherwise covered already in that subsection. In that sense, it is surplusage to construe para (d) as a negative mirror of para (b): the better approach is to see each paragraph as directed at different kinds of conduct or treatment.

68 Aside from a nexus between the identified "detriment" and the employment of the person concerned, the context otherwise suggests no particular limits on the meaning which should be given to that word. For example, it may be a loss or disadvantage which is temporary but real (such as moving an employee away from her established workplace and colleagues); it may be a prejudice to the earning of additional income (such as a facially neutral requirement about eligibility for overtime which disproportionately affects employees with a particular disability); or it may be damage done by the tolerance (or encouragement) of teasing or harassment of a disabled employee in a workplace. Essentially (and perhaps obviously), a "detriment" within para (d) will have an immediate negative connotation: a "benefit" within para (b) will have an immediate positive connotation. A "detriment" should not be identified solely by the negative expression of what is in reality a benefit.

69 Before applying these provisions to the facts, it is appropriate to now turn to Ms Watts' claims, and Australia Post's responses to them.

## Ms Watts' claims

### *Ms Watts' disability*

70 It is common ground that, at all relevant times, Ms Watts suffered from a "disorder, illness or disease that affected her thought processes, perception of reality, emotions or judgment or that resulted in disturbed behaviour", within the meaning of s 4(1) of the DDA. The evidence showed there had been several diagnoses made of Ms Watts since October 2008. The different diagnoses were the subject of evidence from Ms Selvi and Dr Hollander. The former diagnosed Ms Watts as suffering from generalised anxiety disorder, acute stress disorder and insomnia, and Australia Post appeared on the evidence prepared to act on this diagnosis throughout the period Ms Watts complains about. After he saw

Ms Watts, Dr Hollander's opinion was that she suffered from adjustment disorder with mixed anxiety and depressed mood, and that by April 2012 her symptoms were in partial remission.

71 The applicant's contention is that it is sufficient for the application of the provisions of the DDA for the Court to be satisfied that Ms Watts suffered at all relevant times from a psychological condition, which is a disability for the purposes of the DDA. Australia Post did not contend that the precise diagnosis of Ms Watts' psychological condition affected the adjustments required or the resolution of the issues in this proceeding. It is sufficient to proceed on the basis that Ms Watts' psychological condition involved elements of anxiety and emotional distress.

*Ms Watt's three contentions*

72 The applicant has consistently characterised her case as having three contentions. They are put in the alternative to each other.

*First contention*

73 The applicant contends s 5(2) imposes a positive obligation on an employer to make reasonable adjustments for an employee. She submits that, between June 2010 and October 2011, Australia Post failed to discharge that obligation because in substance it relied on, and waited for, Ms Watts to provide evidence satisfactory to Australia Post of what she could or could not do, and until the evidence was satisfactory from Australia Post's point of view, it did nothing proactive or positive in terms of making adjustments. It is inherent in this aspect of the claim being limited to a period up to October 2011 that the applicant accepts Australia Post did take some positive steps when, in mid-October 2011, it formally directed Ms Watts to attend for a medical appointment with Dr Hollander, and made arrangements for that appointment, so that Dr Hollander could assess whether she was fit to return to her role as a bid manager, and how that might be achieved.

74 The applicant submitted:

> An employer cannot discharge its obligation under section 5(2) by shifting responsibility for determining whether reasonable adjustments can be made to the employee. Further, that the employee cannot identify a reasonable adjustment, or that an adjustment identified is not reasonable, does not alter the positive obligation on the employer to make reasonable adjustments. An employer is obliged to undertake its own enquiries and to make its own assessment as to whether reasonable adjustments can be made. An employer is not entitled to place responsibility for identifying reasonable adjustments on the worker.

75 Notwithstanding this submission, the applicant identified at least two reasonable adjustments which could have been made. First, to implement a return to work program. Second, to provide restricted duties in accordance with the terms of Australia Post's non-work related medical restrictions policy.

76 Between June 2010 and October 2011, all Australia Post did, according to the applicant, was rigidly adhere to the terms of the policy, and attempt to force the applicant to provide information to the employer about how and when she could return to her role as bid manager. That is, Australia Post's entire focus was on insisting Ms Watts comply with the policy. Although the applicant conceded that, during this period, Australia Post did take some steps (such as in November 2010 making an appointment for Ms Watts with Dr Hollander on 4 February 2011, and conducting what Australia Post described as an internal

"reasonable adjustments assessment" in March 2011), the applicant submitted Australia Post "simply let the matter drift", placing primary responsibility on Ms Watts herself to identify whether reasonable adjustments could be made and what they were.

*Second contention*

77 This aspect is based on a less robust construction of an employer's obligation in s 5(2). Ms Watts contends that, in each of June 2010 and February 2011, Ms Watts identified reasonable adjustments which could be made by Australia Post to allow her to return to work, and to return to her role as a bid manager. Australia Post, it is contended, failed to make the reasonable adjustments identified.

78 On approximately 22 June 2010, Ms Watts provided Australia Post with a report from Ms Selvi, her treating psychologist. The report was quite general, but the applicant submitted it was sufficiently clear in its terms to indicate to Australia Post how Ms Watts' return to work could be managed, and she submitted it indicated she could be back in her full role as bid manager after two to three months of working under some restrictions.

79 Then, Australia Post having asked for further clarification from Ms Selvi, in February 2011 Ms Selvi provided a second report. It was delayed because of injuries suffered by Ms Selvi in a car accident, and Ms Watts' insistence that no-one but Ms Selvi could provide such a report to Australia Post. Australia Post at this stage did not seek to compel Ms Watts to see another medical practitioner. Ms Selvi's second report contained more information, but still not enough to satisfy Australia Post. Australia Post's "reasonable adjustments assessment" undertaken by employees at Australia Post in March 2011, after receipt of Ms Selvi's second report, concluded that the adjustments recommended by Ms Selvi could not be accommodated. Ms Watts submits that, in respect of both Ms Selvi's reports, their non-implementation by Australia Post constituted a failure to make reasonable adjustments for the purposes of s 5(2) of the DDA.

*Third contention*

80 The third aspect of the applicant's case is a confined contention, essentially about the delay she alleges occurred in Australia Post implementing the recommendations of its own independent medical specialist, Dr Hollander. This aspect covers the period between 23 April 2012 (the date of Dr Hollander's report) and 30 July 2012, when Ms Watts returned to work for Australia Post. The applicant accepts that, by allowing Ms Watts to return to work in accordance with the recommendations made by Dr Hollander, Australia Post discharged its obligation under the DDA to make reasonable adjustments for her disability in her employment with Australia Post. However, she contends the three-month time gap between when Australia Post was informed of the reasonable adjustments which should be made, and when Australia Post made them (by allowing Ms Watts to return to working in accordance with Dr Hollander's recommendations) should be characterised as a failure to make reasonable adjustments for the purposes of s 5(2) of the DDA.

*Less favourable treatment*

81 Whichever of the three contentions is considered, Ms Watts submits the treatment she experienced was less favourable than another employee of Australia Post in similar circumstances. The applicant put forward two

comparators. First, an employee of Australia Post in a role such as bid manager, without a disability, who has been away from work for some time but is ready, willing and able to work. Second, an employee of Australia Post in a role such as bid manager, with a different disability, who is off work because of that disability, but is ready, willing and able to return to work with reasonable adjustments.

82 As to the first comparator, the applicant submits Australia Post would have allowed such an employee back to work.

83 As to the second comparator, the applicant submits the policy would have been applied to another employee differently, by allowing that employee to return to work on restricted duties until the employee could return to their full and usual role.

84 In neither case, the applicant submits, did Australia Post treat Ms Watts in these ways. Instead it directed her to remain away from work.

85 The only reason for Australia Post's direction that Ms Watts remain away from work was, she submits, her disability (namely her psychological condition).

*Contravention of section 15(2)*

86 The discrimination identified by the applicant was contended to be unlawful because it was prohibited by either or both of s 15(2)(b) and (d) of the DDA.

87 The applicant's case was that Australia Post had contravened s 15(2) of the DDA, by failing to make reasonable adjustments for her disability in the way it required her to return to her position as bid manager. Given how both parties' arguments developed by the time of final submissions, it is necessary to rehearse the way the parties' arguments about the contravention of s 15(2) were put. The applicant's case was put in her written outline of submissions before trial by reference to s 15(2)(b) and (d). This reflected the way the matter was pleaded in the amended statement of claim filed on 18 February 2013. The respondent's outline of submissions before trial did not cavil with those references. In opening at trial, the applicant's counsel also relied on s 15(2)(b) and (d). In her opening, the respondent's counsel did not dispute that the respondent's actions in preventing Ms Watts from attending work, earning income and exercising her skills could be characterised as a detriment, although she submitted Australia Post did not accept that there was a benefit to be derived from attending for work, in and of itself. Instead, the respondent relied upon the inherent requirements exception in s 21A, in particular, that the adjustments identified by Ms Watts as "reasonable adjustments", even if they could properly be identified and implemented, would not have enabled Ms Watts to perform the inherent requirements of the bid manager role. For present purposes it is important that neither in its defence nor in submissions before trial, nor in opening the respondent's case at trial, was it suggested by Australia Post that Ms Watts claims were to be assessed other than by reference to s 15(2)(b) and (d).

88 It is fair to say that before trial, during opening and during the trial, the focus of both parties in terms of the relevant and critical aspects of the legislative scheme was on the construction and application of s 5(2), and parts of s 21A. By the time final written submissions were filed, it was clear both parties, and especially the respondent, had realised the importance of s 21A(4) and the fact that it excluded from the terms of the exception created by s 21A any

discrimination referred to in s 15(2)(b) and (d). In other words, on the applicant's case as it was pleaded and argued, s 21A could not assist the respondent.

89 This led the respondent, in final submissions, to submit that Australia Post's conduct should be characterised as, if anything, a contravention of s 15(2)(a). This then would make the exception in s 21A available to Australia Post. The applicant objected to the respondent's introduction of s 15(2)(a) at the stage of final submissions. She submitted there was prejudice to the applicant in the Court accepting the respondent's invitation to find that, if there was a contravention of s 15(2) by Australia Post, it was a contravention of s 15(2)(a). The prejudice was fourfold. First, the applicant had made no submission to the Court on relevant authorities dealing with the construction of the phrase "terms or conditions of employment". The applicant submitted that construction of the same phrase, as it appears in other legislative schemes, may assist the Court in interpreting s 15(2)(a) of the DDA. Second, the applicant submitted she did not have the opportunity to call evidence with respect to the terms and conditions of her employment, including evidence about any oral terms of her employment contract, nor about whether any of the many workplace policies of Australia Post, or any relevant enterprise agreement that may have been in existence, were incorporated into her contract of employment. Third, the applicant objected to the respondent's reliance on the new argument on the basis that the respondent had not properly identified the relevant terms or conditions of employment it said brought the respondent's conduct within s 15(2)(a). If the respondent was allowed to proceed with this argument, the applicant submitted, it must be required to clearly articulate the relevant terms or conditions, so that the applicant could properly meet the arguments put against her. Finally, the applicant submitted that the respondent had conceded in its opening that the particular conduct in question, preventing the applicant from attending work, earning income and exercising her skill, constituted a detriment. She says now that the respondent should not be able to, after that concession, put its case differently in final submissions.

90 I accept those submissions. A party should be held to the case it has pleaded and run throughout a trial, unless all parties agree, or the interests of the administration of justice require otherwise: *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286-287 per Mason CJ and Gaudron J; *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* (2011) 192 FCR 445 at [305] per Keane CJ, Lander and Besanko JJ. This has been a proceeding conducted over two years, no doubt at considerable cost to both parties, who have each been legally represented on both sides. The case as substantively pleaded by the applicant is the case she put to the Court for determination, and the case the respondent sought to meet. There was little or no evidence about the contractual and employment arrangements between Ms Watts and Australia Post so as to provide an evidentiary foundation for s 15(2)(a) to be considered. That is not surprising, so far as the applicant is concerned, since her case has always been restricted to a contention that Australia Post's conduct contravened s 15(2)(b) and (d). That is the case she has consistently advanced and the proceeding stands or falls on the success of those contentions.

91 It is not for the respondent, in final submissions, to invite the Court to embark for itself on a different characterisation of Australia Post's conduct, so as to

avoid for Australia Post the consequences of s 21A(4). It may well be the case that the applicant appreciated all along the import of s 21A(4) and pleaded the case as she did accordingly. It is not for the Court to speculate on such matters, but rather to consider the case as put by the applicant and determine whether she has discharged her burden of proof and, if the statute requires it, the respondent has discharged its burden of proof on the case made by the applicant. Accordingly, the applicant's case will be considered on the basis that her pleadings and submissions contend that Australia Post contravened one or both of s 15(2)(b) and (d) of the DDA. It is not appropriate to permit Australia Post to recast its conduct as, if anything, a contravention of s 15(2)(a). Even if it were otherwise appropriate, there is insufficient evidence before the Court to make any findings in favour of the contentions now sought to be put by Australia Post.

92 As to the application of s 15(2)(b), the applicant submits Australia Post, in the conduct comprehended by her three alternative contentions, denied Ms Watts access to benefits associated with her employment. She submits these benefits need not be pecuniary benefits. She was denied, she contends, the benefits of attending for work, of exercising her skills and performing her work, of using her accrued entitlements at a time and for a purpose or purposes of her choosing, and of earning her ordinary income in addition to her accrued entitlements.

93 As to the application of s 15(2)(d), the applicant submits Australia Post, in the conduct comprehended by her three alterative contentions, subjected Ms Watts to detriment in her employment. She contends she was subjected to the detriment of not being able to attend for work, not being permitted to exercise her skills and perform her work, being forced to use her accrued entitlements at a time and for a purpose or purposes not of her choosing, and being deprived of earning her ordinary income in addition to her accrued entitlements.

94 The detriments relied upon by the applicant for the purposes of s 15(2)(d) thus mirror the benefits relied upon for the purposes of s 15(2)(b), save that they are expressed in the negative. At [67]-[68] above I have given reasons why I do not consider this approach to the construction and operation of s 15(2) to be correct.

95 In terms of loss and damage, the applicant identifies four categories of loss and damage. First, there is a loss of earnings claim, for the period during which she was required to take leave without pay (namely 219 days), amounting to $76,619, to this figure to be added her superannuation and leave entitlements for that period. Second, there is the loss of accrued leave entitlements (namely 321.1702 days of annual leave, long service leave and sick leave), for which she seeks orders requiring Australia Post to reinstate and re-credit that leave. Third, she seeks compensation for annual bonuses lost during the time she was away from work, which she claims to amount to $14,457. Fourth, she claims for loss of superannuation entitlements which accrued during the period she was forced to use her paid leave, although this figure was not quantified.

96 The applicant also seeks declarations in respect of Australia Post's unlawful discrimination, and general damages in the sum of $40,000.

**Australia Post's response**

97 The respondent met Ms Watts' case on several fronts. It raised few challenges to the material facts relied on by Ms Watts, although it submitted generally that Ms Watts' case understated or ignored the lengths to which Australia Post went

to try and obtain the necessary medical information from Ms Watts so that it could assess whether she was able to return to her role as bid manager, and what reasonable accommodations might be able to be put in place for her.

*No discrimination*

98 Australia Post submitted there was no discrimination within the meaning of s 5 of the DDA, and the Court should dismiss Ms Watts' application. Australia Post made this submission on at least two bases: there was no less favourable treatment of Ms Watts because of her disability, and there was no failure to make reasonable adjustments under s 5(2).

No "adjustments" identified by the applicant

99 Australia Post contends that the applicant failed, both at the time of the alleged discrimination, and during this proceeding, to identify the content of the return to work plan said to constitute reasonable adjustments for the purposes of s 5(2).

100 Further, it contends the applicant cannot rely on the content of Ms Selvi's first or second reports as constituting the reasonable adjustments which Australia Post should have made, because the content of both of those reports is too vague and uncertain. The respondent relies in part on Ms Selvi's own evidence, where it submits she conceded in cross-examination that she was not provided with all the information she needed for the report, that she did not have clarity of what was required of her and that she sincerely appreciated that Australia Post did not understand what was meant by the recommendations she had made.

Australia Post proposed to make reasonable adjustments at all relevant times

101 For the period 28 April 2012 (the date of Dr Hollander's report) to 30 July 2012 (when Ms Watts returned to work) Australia Post contended it was always proposing to make reasonable adjustments within the meaning of s 5(2) of the DDA.

102 Australia Post further contended in final submissions that, because at all relevant times from February 2010 it was taking steps to determine whether or not reasonable adjustments could be made for Ms Watts, it was at all relevant times proposing to make such adjustments within the meaning of s 5(2) of the DDA. In other words, the contention made separately and expressly in relation to the period after Dr Hollander's report was prepared was ultimately relied upon by Australia Post in relation to the whole period of alleged unlawful discrimination.

103 As to the entire period, Australia Post contends that its policy complied with the DDA, and that its witnesses were unchallenged in their evidence that Australia Post at all relevant times sought to apply the policy to Ms Watts' circumstances. In the absence of any attack by the applicant on the lawfulness of the policy (or the policy's compliance with the DDA), Australia Post contended that Australia Post did all it reasonably could to obtain the requisite information from Ms Watts, so as to follow the policy it had promulgated for dealing with employees in these circumstances. There was ample evidence, Australia Post contended, to demonstrate that at all relevant times it proposed to make reasonable adjustments for Ms Watts.

No less favourable treatment: comparator

104 Australia Post contended that whichever comparator is used (and Australia

Post contended for a different comparator to the ones identified by the applicant), and for all three periods identified by the applicant, Ms Watts was not treated less favourably by Australia Post. In other words, Australia Post would have treated an appropriate comparator employee in the same way.

105 Australia Post contended (and the applicant agreed) that there was no actual comparator available, so that the comparator must be hypothetical. One of the respondent's principal contentions was that the comparator must be a person without a disability: it could not be, as the applicant submitted, a person with a different disability. The respondent relied on *Purvis* at [222] per Gummow, Hayne and Heydon JJ and *Gaffney v RSM Bird Cameron (a firm)* [2013] FCA 661 at [137] per Gilmour J for this proposition.

106 Australia Post contended that the attribute of the applicant's hypothetical comparator — that she was "ready, willing and able" at all relevant times to work — was not an attribute that Ms Watts shared. From October 2008 to 30 July 2012, Ms Watts continued to provide medical certificates to the effect she was not fit for her usual duties; her GP never certified her as fit to return to her duties as bid manager. Further, Australia Post contended that Ms Watts' hypothetical comparator (especially the "willing" aspect), ignored the evidence about her continued lack of cooperation with Australia Post's requests and with its attempts to apply the policy to her. Though unhelpful to her this attribute must, Australia Post contended, be given to the hypothetical comparator.

107 Therefore, Australia Post contended, the appropriate comparator in the present case is a person without Ms Watts' disability who is certified as unfit to perform his or her original role (or certified as fit only to perform restricted duties), a person who has refused to attend medical examinations, refused to provide the required medical information and refused to allow his or her employer directly to contact any medical practitioners to obtain that information. Australia Post contended such a person would have been treated as Ms Watts was — that is, not allowed to return to work until Australia Post had the medical information it required to determine what duties could be performed and whether the employee could return to their appointed role.

108 As to an employee with a different disability, in the alternative to its submission that such a person cannot be an appropriate comparator, Australia Post contended there was no evidence that it would have treated any other employee differently to the way it treated Ms Watts. Restricted duties were given, on the evidence, to employees within the terms of the policy and not outside them. Ms Watts' circumstances — and the length of time she had been on restricted duties (19 months according to Australia Post, this period being counted from her initial return to work in October 2008) — were far outside the policy. It was clear, Australia Post contended, that any other employee would have been treated in the same way as Ms Watts. Further, Australia Post submitted that, in the absence of any cross-examination of Ms Scott-Brown and Ms Garrad to the effect that an employee with a different disability would have been provided with restricted duties and not directed to go on sick leave, the applicant should not be permitted to put this argument. Australia Post contended the applicant was precluded from the argument by the rule in *Browne v Dunn* (1893) 6 R 67.

No less favourable treatment: no causal nexus

109 Even if, contrary to its submissions, there was less favourable treatment, the respondent also contended there was no causal nexus between the way Ms Watts was treated and Ms Watts' disability.

110 The respondent submitted the real reason for Ms Watts' treatment (in being directed to take sick leave and not being permitted to return until after Dr Hollander's report had been implemented by Australia Post) was that the policy was applied in its terms to her. In other words, the real reason was Ms Watts' own failure (over the entire period, including 18 months during which she refused to be medically examined by Dr Hollander) to provide Australia Post with the medical information it required in order properly to assess her work restrictions and any adjustments that could be made. This position was, Australia Post contended, only broken by the direction it gave Ms Watts in October 2011 under threat of the commencement of disciplinary proceedings, and even then Ms Watts did not comply with that direction until February 2012.

*No contravention of section 15(2)(b) or section 15(2)(d)*

111 Australia Post also submitted that there was no loss of a benefit to, or imposition of a detriment on, Ms Watts for the purposes of s 15(b) or s 15(d) of the DDA and so, even if there was discrimination, it was not unlawful.

112 Australia Post contended that subss (2)(b) and (d) did not apply because those provisions only apply, it was submitted, to an employee performing the inherent requirements of her or his role, where an employee's terms and conditions of employment remain unchanged. That was not Ms Watts' circumstances, Australia Post submitted.

113 Rather, Ms Watts had her terms and conditions of employment changed in February 2010 by the application of the policy to her. The decision by Australia Post not to provide Ms Watts any further with restricted duties from May 2010, and to direct her to go on sick leave, amounted to a change in her terms and conditions of employment by Australia Post. This, it was said, brings Australia Post's conduct within subs (2)(a), rather than subs (2)(b) or subs (2)(d). I have rejected Australia Post's late reliance on s 15(2)(a), for reasons given at [89]-[91] above, and do not consider it further.

114 If s 15(2)(b) and (d) did apply, then Australia Post contended Ms Watts had not been denied any "benefits" (emphasising the plural) associated with her employment. As a matter of construction, this term is limited to non-salary employment benefits such as salary packaging, bonuses and the like.

115 Nor, Australia post submitted, was any "other detriment" imposed on Ms Watts. There was a change to the terms and conditions of her employment, but nothing more, and any "detriment" to Ms Watts was consequential to a change in her terms and conditions of employment. The word "other" means something outside paras (a) to (c) inclusive.

*If otherwise a contravention of section 15(2)(b) or section 15(2)(d), the exception in section 21A applies*

116 Counsel for Australia Post conceded during final submissions that s 21A can only assist Australia Post if a contravention of s 15(2)(a) or s 15(2)(c) is involved. For the reasons I have set out earlier, in my opinion the applicant's

case is and has always been limited to s 15(2)(b) or s 15(2)(d) and should be determined on that basis. Accordingly, there is no occasion to consider further the application of s 21A.

**General findings in relation to witnesses and their evidence**

117 In this part of my reasons, I set out my findings about the reliability of each witness' evidence. Aside from Ms Watts' evidence (which I deal with in other parts of these reasons where necessary), I also set out those parts of the witness' evidence which I consider to be particularly material to the issues the Court must determine.

*Ms Watts*

118 Ms Watts is a longstanding employee of Australia Post. It was not contested by Australia Post that she has been an experienced and valuable employee who exhibits high levels of diligence in her work.

119 Although there are not many contested issues of material fact in this proceeding, Australia Post put the attitude of Ms Watts to her return to work, and to Australia Post's implementation of the policy, as an important feature of its case. Its submissions rested on showing Ms Watts as uncooperative, unreasonable and often hostile to Australia Post's attempt to have her return to work through an application of the policy. It sought to lay blame for the delays squarely at Ms Watts' feet. Ms Watts was a difficult witness to assess. When pressed in cross-examination about particular events, she tended to deny propositions put to her in circumstances where it was difficult to understand what was being denied, and why. For example, she was cross-examined about a conversation with Ms Scott-Brown, where Australia Post alleged she accepted she had had some "setbacks" in her return to work and her recovery from the incident with Ms Marshall in 2008. Ms Watts' answers often appeared evasive and unnecessarily argumentative — whether she had difficulty with the word "setback" and, if so, why, was not clear. One inference might be that she saw something disadvantageous to her case in admitting she had recognised in conversation she had had setbacks. Another might be that she was overly concerned about the exactness of particular propositions, where they concerned her. Another might be that she was stubbornly refusing to agree to anything put to her on behalf of Australia Post.

120 Another example was the cross-examination about the medical information release Australia Post had tried to get Ms Watts to sign, from about February 2010 right through until April 2012. Ms Watts agreed in cross-examination that she refused to sign the release, but asserted that she did not understand the plain information on the release form to the effect that, by signing the release form, Australia Post could obtain medical information from, and talk to, her treating doctor. Her answers in cross-examination seemed disingenuous for a person of her obvious capabilities. Similar alternative inferences to those set out in the preceding paragraph might be drawn.

121 As the evidence progressed and after the evidence of Mr Psarologos, to which I refer below, a fuller picture of Ms Watts appeared. Ultimately I formed the view Ms Watts was neither deliberately evasive, nor disingenuous in her evidence. I find Ms Watts to be an intelligent person, with a great command over and interest in matters of detail. She is very process driven, which is no doubt a considerable asset in her approach to her work at Australia Post, but when she is personally involved in a process, this personality trait can mean that

she appears and can become uncooperative and obsessive. The more difficult or confronting the situation, the more Ms Watts seems to resort to, and find some comfort in, absolute precision — whether it is which word is chosen in a statement, the meaning of a document, the characterisation of her reaction to an event. Her insistence on precision then overwhelms her response, to an extent that is no doubt frustrating and confusing to those who must deal with her. This tendency was evident in the way she answered questions both in cross-examination and in re-examination.

122 I find she gave her evidence honestly, although at times with a tendency not to recall matters which she may have perceived to be to her disadvantage to recall. That feature is, I find, an unfortunate legacy of the very confrontational approaches taken by both parties to the situation which gave rise to these proceedings. Consistently with the findings I have made above, she had a good command over the detail of her dealings with Australia Post and, where there is a conflict between the evidence of what she was told, or what was said, during a conversation where there were otherwise no contemporaneous records, I find her evidence to be preferable on the basis that she was highly motivated to retain the details, and to do so with precision.

*Ms Selvi*

123 I found Ms Selvi's evidence reliable, although it was clear she had a particular perspective as a treating psychologist who deals with many injured workers. I accept her evidence that she was willing to cooperate with Australia Post in exploring ways to return Ms Watts to work in her role as bid manager, even before the events of February 2010. It is clear there was a period during which she was substantially unavailable to provide medical information to Australia Post due to having had a serious car accident. Her unavailability did cause some delays in Australia Post receiving her second report. No blame attaches to Ms Selvi for this. In any event, Australia Post were dissatisfied with her second report and refused to act on it, so the timing of the report in that sense did not affect Australia Post's course of action. Since she was not an independent psychologist, but rather Ms Watts' treating psychologist, it is unsurprising that both her evidence and the tone of her reports tended to be supportive of Ms Watts. This does not diminish the reliability of her evidence, nor does it suggest it should not be afforded due weight.

124 That said, I find that her explanation for her diagnosis of acute stress disorder in Ms Watts in 2008 did have the objective weaknesses identified by Dr Hollander and to which I refer below. Any debate about that diagnosis is of marginal relevance to the issues in this proceeding.

125 On issues such as how Ms Watts presented to her, and the negative impact that Australia Post's conduct in dealing with Ms Watts' return to work had on Ms Watts, I accept her evidence, especially in her second report, which I deal with in more detail at [297]-[300] below.

126 On the key question about the content of the recommendations in her report, and the restrictions to which Ms Watts should be subject for the first few months, it is appropriate to deal with that question in the context of the findings I make about contravention of the DDA below at [227]-[271].

*Ms Scott-Brown*

127 When Ms Scott-Brown came into her role as the Human Resources Manager for the Commercial area of Australia Post in Victoria and Tasmania in

August 2009, the workers' compensation claims made by Ms Watts remained unresolved. Ms Scott-Brown occupied this position during the agreed resolution of the AAT proceedings in relation to the SRC Act. It was she who decided, apparently somewhat abruptly in early 2010, that the policy should be applied to Ms Watts and that Ms Watts could not continue to work for Mr Schell in the role and in the manner she had been working.

128 Ms Scott-Brown expressed firm views in her evidence about Ms Watts' attitude, and also that of her union representatives. For example, her evidence was that:

> I formed the view that Ms Watts and Ms Paliouras would bulldoze Ms Dillon in meetings, leaving her very brow-beaten. However I was an executive, and had been at Australia Post for a long time. I believe Ms Watts knew that there would not be any scope for her to play games with me.

At another point, Ms Scott-Brown sent an email to Ms Watts, alleging that she treated her staff (and Ms Dillon in particular) in a "disrespectful manner". Ms Scott-Brown agreed in cross-examination that she had never spoken to Ms Watts about these allegations, but rather put them in an email to her. The details of the interactions between Ms Watts and Ms Dillon were not explored in cross-examination by either party. Ms Dillon was not called as a witness. Ms Scott-Brown clearly disapproved of the way Ms Watts behaved, and could not understand it. Certainly Ms Watts is persistent and perhaps obsessive in her attention to detail and her insistence on precision. Her tone and style in emails before the Court can be brusque. However the picture of Ms Watts which Ms Scott-Brown sought to paint in her evidence (of Ms Watts deliberately obfuscating for no good reason, and being unacceptably confrontational) is not one I entirely accept.

129 At another point in her evidence, Ms Scott-Brown expressed the view that, after Ms Selvi's second report in February 2011, "the only impediment to a satisfactory return to work seemed to be Ms Watts' unwillingness to genuinely co-operate and accept the assistance she was being offered".

130 In contrast to this obvious scepticism about Ms Watts, Ms Scott-Brown's evidence was also replete with references to Australia Post's "duty of care" to Ms Watts, and to her own concern about how Ms Watts would deal with a return to work. For example, she made statements in her evidence to the effect that "I was particularly concerned about the prospect of Ms Watts having a significant relapse and that Australia Post would, as a result, not fulfil its duty of care to her". I do not accept that Ms Scott-Brown was as motivated by her concern about Ms Watts' wellbeing as her evidence tried to suggest. I find her principal motivation was to insist, from her employer's perspective, that Ms Watts adhere to and act in accordance with the policy, and essentially do what Ms Scott-Brown on behalf of Australia Post required her to do. The interactions between Ms Scott-Brown and Ms Watts, and their respective attitudes as they emerge from the evidence, are good examples of the entrenched positions on each side, which substantially contributed to the inordinate amount of time it took to arrange for Ms Watts to return to work after being directed on sick leave.

131 I find Ms Scott-Brown displayed very little independent recollection and, when challenged, pulled back from asserting any independent recollection. That is to be expected given the passage of time and her position in Australia Post where she was dealing with a range of employees and a range of workplace

issues. Ms Scott-Brown appears to have made up her mind about Ms Watts as an unreasonable and difficult employee who "played games" at the time she decided to insist the policy be applied to Ms Watts in 2010. I found her evidence at times to be unduly defensive. The scepticism about Ms Watts and her motivations contained in her affidavit evidence and to which I have referred was also apparent in her oral evidence.

132 I do not accept Ms Scott-Brown's characterisations of Ms Watts and her motivations, nor do I accept her evidence that her own decision-making was principally motivated by her concerns to discharge a duty of care to Ms Watts. I find Ms Scott-Brown sought to ensure the policy was implemented and applied in its terms, and that was her principal motivation in her interactions with both Ms Watts and Ms Selvi.

133 Notwithstanding my concerns about Ms Scott-Brown's evidence, the contemporaneous documentation exhibited to her affidavit reliably discloses much of the relevant course of conduct by Australia Post, and by Ms Watts. That documentation, together with the documentation attached to Ms Garrad's affidavit, forms the basis for many of my findings of fact. Further, I do accept that eventually Ms Watts' approach to her return to work did become uncooperative, but her approach does not warrant that characterisation for the whole period under consideration.

*Mr Schell*

134 During 2009 and 2010 Mr Schell was the Product Manager of the Cross Business Solutions service within Australia Post. After she worked for a short period of time on a part-time basis in the marketing area, Ms Watts returned to work after her 2008 injury to a position subject to Mr Schell's supervision. Mr Schell's evidence was that when he was approached by Australia Post's human resources team to see if he had any part-time work for Ms Watts he saw an opportunity for her to work in his team. He described himself as "an informal mentor and a confidante for Ms Watts during the time she worked with me". Making allowances for the reduced scope and complexity of her tasks while she worked in his team, Mr Schell described the quality of Ms Watts' work for him as "very good". In his evidence he described how, because of the nature of her role in his team, he was able to be generous and flexible with timelines, working hours and tasks. He accepted in cross-examination this was appropriate for a person returning to work with medical restrictions. His opinion was that Ms Watts was "honest and upfront" about what she could and could not manage, and his conversations with Ms Watts were always very "upfront". He said that he never had cause to speak to Ms Watts or raise issues with her about her behaviour in the workplace, characterising her as polite, respectful, and diligent with a high standard of work. In relation to tasks he set out in his evidence in more detail he described Ms Watts as providing "valuable assistance". He said he would have been willing to provide her with work for as long as an arrangement was required, although his understanding was that, if there were ongoing medical restrictions, he would "have to make a business case" and the outcome of that could not be predicted.

135 I found Mr Schell to be a forthright and honest witness, who took a measured and fair approach to the evidence he gave. I accept his evidence as I have outlined it above. It was not attended by the kind of scepticism about Ms Watts which was displayed by Ms Scott-Brown.

*Ms Marshall*

136 Ms Marshall was the Australia Post employee most closely involved in the incident which resulted in Ms Watts' psychological injury in 2008. That incident involved an application by Ms Watts for a leadership program within Australia Post called "Tomorrow's Leaders Program". Ms Marshall's evidence was that acceptance into the program was a "valuable opportunity" for employees. Ms Watts was unsuccessful in her application and there appears to be some debate over how positive Ms Marshall was in her assessment of Ms Watts during the selection process for the program. Ms Marshall participated in giving Ms Watts feedback about why she was unsuccessful, although another Australia Post employee (Ms Goulas) led the feedback session because she had been on the selection panel. One of the points of feedback given to Ms Watts was that she needed further development in her communication skills. This feedback session seems to have been the trigger for Ms Watts' psychological injury.

137 Ms Marshall's evidence described in some detail the course taken by Ms Watts' complaint about this event, and her injuries, including a rebuttal by Ms Marshall of many aspects of Ms Watts' complaint. None of these matters are material to the issues the Court must decide in this proceeding. Ms Marshall's evidence also dealt in some detail with ongoing proposals for a mediation between her and Ms Watts, which Ms Watts' treating GP and Ms Selvi both saw as important for Ms Watts' recovery. This was a prospect Ms Marshall, for a variety of reasons, was uncomfortable with and ultimately would not agree to.

138 Ms Marshall's evidence was that, since Ms Watts has returned to work under Dr Hollander's recommendation in July 2012, and after the first two weeks of her return, "whilst I interact with Ms Watts professionally, I am not required to supervise her in any way". This is the most material aspect of Ms Marshall's evidence to the issues in this proceeding. In terms of their working relationship (which over the three or four years before Ms Watts' return to work in July 2012 seemed to be the most potentially fraught of Ms Watts' working relationships), an "adjustment" in respect of face to face interaction between Ms Watts and Ms Marshall was in fact only necessary for two weeks, and an "adjustment" as to supervision arrangements appears to have readily been implemented.

*Ms Garrad*

139 Ms Garrad took over human resources management responsibilities from Ms Scott-Brown for Ms Watts in approximately September 2011. Like Ms Scott-Brown, it was through her evidence that much of the contemporaneous documentation flowing between Australia Post, Ms Watts and the union was adduced.

140 Like Ms Scott-Brown, Ms Garrad had a sceptical opinion of Ms Watts. Her affidavit evidence included the following statement: "I believed that Ms Watts was attempting to frustrate the process [of arranging an independent medical examination by Dr Hollander]". I accept there is basis for her scepticism about Ms Watts' attitude in respect of continuing failed arrangements to attend Dr Hollander. As I have found at [121] above, Ms Watts' obsession with process and precision made her uncooperative and at times confrontational with Australia Post. By April 2011, I accept these tendencies seem to have become extreme enough as to replace her readiness and willingness to return to work.

*Mr Psarologos*

141 Mr Psarologos has been the head of the bid management team at Australia Post since October 2010. He gave evidence about the bid management team structure within Australia Post, including a restructure which was completed in May 2011 and resulted in the formation of one national bid management team. He also gave evidence about the function of the bid consultant position which Ms Watts occupied, which was renamed "bid manager" after the 2011 restructure.

142 Mr Psarologos was involved in the "reasonable adjustments assessment" carried out internally by Australia Post in March 2011. His evidence was that:

> On 16 March 2011, Ms Marshall and I provided a further draft of the reasonable adjustment assessment to Ms Blackman. On 16 March 2013, Ms Blackman reviewed that assessment and provided advice as to what was legally required by Australia Post. I understood from that advice that Australia Post was required to make adjustments to work methods but Australia Post was not required to:
>
> (a) change the inherent requirements of the job;
> (b) maintain a job which could otherwise be altered or abolished;
> (c) assign performance of some inherent requirements to another employee;
> (d) create a different job; and/or
> (e) promote or transfer to a different job.

143 He went on in his affidavit evidence to explain why he believed that some of the proposed restrictions in the second report by Ms Selvi could not be accommodated from the perspective of the bid management team. His evidence was that the difference between Ms Selvi's suggested restrictions and those of Dr Hollander was that the latter did not recommend restrictions on multi-tasking, avoiding stress and avoiding deadlines.

144 His evidence was that, after the May 2011 restructure and together with some other staffing and structural changes, the team has "far more resources and flexibility than we once had in terms of how we can arrange work matters". His affidavit continued:

> In my view, we are now a far more mature team, organisationally speaking, than we were previously, and we have significantly improved our processes and systems. This, along with the increased resourcing, has meant that it is easier than it was (in early 2011 and earlier) for Bid Managers to do their job.

145 His evidence was that he still provides Ms Watts with more support than he does other bid managers and that she is still working towards managing multiple bid opportunities. He gave evidence about the development plan he has for Ms Watts in terms of assisting her to manage more complex bid opportunities.

146 Like Mr Schell, Mr Psarologos was a frank and honest witness who impressed me as a person with no particular stake or agenda in the subject matter of this proceeding. He was complimentary about Ms Watts' performance and gave a frank account of her positive performance in her role, characterising her as polite, cooperative, and methodical. He stated that he had never had to counsel her "in a bad way". His evidence made it clear that Ms Watts is very process driven, and that was why she was so methodical. He gave the impression he understood the way those characteristics could be manifest unhelpfully in a workplace environment, without careful management. It was clear from his evidence that Mr Psarologos has a good working relationship

with Ms Watts, and (as any competent manager should) he understands her personality and approach to her work sufficiently well that he assists her to perform to her strengths and improve in areas where she needs further development. I found his evidence reliable and of assistance in determining, to the extent it is relevant to the material issues in this proceeding, how Ms Watts performs in the Australia Post workplace.

*Dr Hollander*

147 Despite the somewhat tortured history of how Ms Watts eventually came to be examined and assessed by him, Dr Hollander's evidence was clear and reliable. Dr Hollander agreed, fairly, in cross-examination that the difference between the reported symptomatology of Ms Watts in Ms Selvi's reports of June 2010 and February 2011, and also between Ms Selvi's reports and his own reports in August 2013, could be consistent with changes in Ms Watts symptomatology over that period.

148 He accepted that Ms Watts' condition had caused her a significant degree of distress, which had improved by the time he saw her for examination in 2012, but also agreed the nature of the symptoms she had reported had a significant impact on her personal life. He saw the continuation of legal proceedings, in particular the AAT proceedings, as a contributing factor to her symptomatology.

149 He disagreed with Ms Selvi's diagnosis, in 2008, of Ms Watts as having an acute stress disorder, because the diagnostic criteria in the *Diagnostic and Statistic Manual of Mental Disorders* Fourth Edition, Text Revision, of the American Psychiatric Association (DSM-IV-TR) (being the relevant edition of the accepted diagnostic manual at the time both his and Mr Selvi's reports were produced) require identification of an event a person experienced, witnessed or was confronted with which involved actual or threatened death or serious injury. It is unnecessary to make any findings about whether, at the time she made the diagnosis of acute stress disorder, such a diagnosis was open to Ms Selvi. That diagnosis did not, on the evidence, have any material or different impact on the adjustments which were said to be necessary for Ms Watts in her workplace at Australia Post.

150 As to Ms Watts' attitudes as he experienced them during his examination of her, his evidence was that she was cooperative and genuinely reporting her symptoms. However, when asked if he found her motivated to return to work, he replied that when he attempted to explore specific return to work issues with her, Ms Watts had a "pattern of response whereby she deferred all those decisions to Ms Selvi's recommendations, rather than [sic] willing to openly engage in an exploration of specifically what residual symptoms were contributing to limitations to working at the time". The matter was not explored further in evidence with Dr Hollander by either party, so there is no clear evidence or inference about why that might have been how Ms Watts responded. However, these reservations are consistent with the findings I have made that, from April 2011, Ms Watts was not cooperative about returning to work.

151 Dr Hollander's report contained some observations about Ms Selvi's recommendations on Ms Watts' return to work. Quite properly in his evidence he clarified that his observations were intended to imply that these were not medical issues, but rather his summary of the employer's perspective. He also gave evidence that the process by which another psychiatrist — Dr Congiu — had come to sign off on a report to Australia Post, about the circumstances

under which Ms Watts could return to the bid manager role, was not a process he thought appropriate. Dr Hollander did not consider it appropriate for Dr Congiu to have signed off on a report by cross-referencing to Ms Selvi's detailed recommendations, when he had not seen them. I deal with Dr Congiu's report at [171]-[174] below.

## Findings

*The course of events as disclosed by the evidence*

152 Ms Watts was first employed by Australia Post in November 1987, as a trainee postal services officer. She worked her way up to the position of bid consultant in the bid management team of Australia Post.

153 The bid management team is responsible for the coordination and preparation of bids, tenders and proposals for which Australia Post competes. Bid consultants (or managers) within the team provide pre-sales support and research prior to bids or tenders, assess and evaluate the bid opportunities for Australia Post, ensure consistent national processes are adhered to in preparing and presenting the bid, manage cross-functional teams involved in preparing the bid and conduct analysis after the bid outcome is known.

154 In April 2008, Ms Watts applied for, but did not receive, a place in a leadership training program offered by Australia Post. She received feedback from her then manager, Ms Marshall, about why she missed out. Ms Watts suffered a severe psychological reaction. The effect of this event on Ms Watts was significant. Aside from emotional reactions, her sense of demoralisation was such that she reported experiencing headaches, dizziness, difficulty breathing, tiredness and great difficulty sleeping. It might be thought that Ms Watts' reaction was extreme and unusual. However, there was no suggestion her reaction, and the psychological condition she sustained, were anything other than genuine and significant. Ms Selvi's evidence was to that effect and I accept her evidence on this issue. The evidence before me discloses that Australia Post acted at all times on the basis that Ms Watts' reaction was genuinely experienced. I accept that to be the case.

155 Although the evidence was not clear, it appears Ms Watts was away from the workplace because of this incident from approximately May 2008 to October 2008. She did not return to her position in the bid management team. Instead, she returned to work on a part-time basis undertaking data entry in the marketing area. Then, in early 2009 as part of a return to work plan, she commenced work for Mr Schell in the Cross Business Solutions service. Ms Watts' return to work plan is not in evidence. Indeed, there was little evidence about how Australia Post was discharging its obligations under ss 37 and 40 of the SRC Act to assist Ms Watts to return to work. The evidence is that the work Ms Watts was undertaking when working for Mr Schell was at an AO4 level. There is some evidence to the effect that the work she was performing for Mr Schell was increasing in complexity, but it was clearly still some way from an AO6 level, and it was outside the bid management team. Nevertheless, and paricularly taking into account Australia Post's obligations under the SRC Act, I am prepared to infer that, while she was working for Mr Schell, both she and those responsible for her management at Australia Post were intending that she would return to her AO6 role within the bid management team.

156 On the evidence, it seems all was progressing well in the workplace.

However, Ms Watts had an outstanding workers' compensation claim that had not resolved. Australia Post is a self-insurer pursuant to Pt VIII of the SRC Act. The dispute had reached the stage of the AAT.

157 On 7 December 2009, Ms Watts' workers' compensation claim was settled under s 42C of the *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act). The orders of the AAT are important to an assessment of Australia Post's arguments and I refer to them in more detail at [211]-[213] below.

158 Shortly before the AAT settlement, Ms Toni Scott-Brown commenced in the role of Manager, Human Resources – Commercial Vic/Tas. She had been employed by Australia Post since 1994. She was responsible for the management of the return to work programs for, amongst other employees, Ms Watts. In her evidence she described how, in early 2010, she looked through Ms Watts' file and could not understand why Ms Watts was still being managed as if her workers' compensation claim had not resolved. Ms Scott-Brown decided it was appropriate to manage Ms Watts under Australia Post's non-work related medical restrictions policy. She made this decision, on her evidence, in about February 2010.

159 It appears to have been quite a sudden decision, not taken after any consultation with Ms Watts or the union, nor with those responsible for supervising and managing her. It is unclear why such a sudden change to her return to work arrangements, which seemed to be going relatively smoothly, needed to be made, but the fact is that it was.

160 The applicant was told in a meeting with Ms Dillon on 8 February 2010 that the policy would henceforth be applied to her. This was followed up with advice in a letter from Ms Scott-Brown dated 15 February 2010. Ms Watts disputed this decision and some communications, mostly by email, between her and Ms Scott-Brown ensued.

161 Australia Post requested Ms Watts provide it with the medical information the policy stated an employee should provide. For example, in a letter dated 29 April 2010, Ms Scott-Brown told the applicant:

> In order to assist with the progression of mediation [this is a reference to proposed mediation between Ms Marshall and Ms Watts] and your return to work, Australia Post (correspondence dated 26 March 2010) requested that you provide further medical advice to determine whether your medical restrictions can be accommodated at work. This information was to be provided within the one-month "fair opportunity" period which was to end on Monday 12 April 2010.
>
> Subsequently you submitted a letter dated 8 April 2010 from Dr Prem Saranathan seeking an extension to the specified date of 12 April 2010 to enable you to obtain further feedback from a consulting psychiatrist. Australia Post accepted this request on the basis that we had been advised that you were in the process of making an appointment to see a psychiatrist. Since 8 April 2010 we have not received any further advice from you regarding your request.
>
> We require this information from your medical adviser as soon as possible to enable Australia Post to meet its duty of care in relation to your situation. We wish to ensure that we have made all reasonable efforts to accommodate your medical circumstances. Without this advice we are unable to progress your return to work and we are unable to ensure that the temporary duties that you are currently being provided can continue to meet your restrictions and business needs.
>
> You will continue to be managed under the *Non-Work Related Medical Restrictions Policy* (please read the enclosed Employee Information Sheet). In light of your inability to provide information in a timely manner, your one-month "fair opportunity" period ends next Friday 7 May 2010. Without this information

> Australia Post is unable to make any determinations in regards to the limitations we would need to consider in your work situation. You may be directed onto sick leave if your workplace is unable to continue to accommodate your medical restrictions after the one-month "fair opportunity" period. However, before this occurs, you would be offered the opportunity to discuss this and your manager would consider any suggestions you may have in this regard.
>
> As previously advised, if you decide to obtain the information required by Australia Post, you must organise this with your own doctor at your own expense.

162 More correspondence ensued, this time including Dr Saranathan, Ms Watts' treating general practitioner. Dr Saranathan is the medical practitioner who, since October 2008, had been giving Ms Watts medical certificates stating that she was not fit to resume her pre-injury role of bid manager, without restrictions. The certificates issued by Dr Saranathan contained, on Ms Scott-Brown's evidence, the same formulation over the relevant period of time: namely a diagnosis, specification of restricted hours and restrictions on work. However, after her decision to apply the policy to Ms Watts, Ms Scott-Brown considered these certificates contained insufficient information for any decision-making by Australia Post.

163 By early May 2010, Ms Watts had not supplied the medical information Australia Post has been asserting its policy required her to provide. Ms Scott-Brown expressed her concern to Ms Watts that she was taking "unreasonable and arguably unrealistic lengths of time" in securing appointments with her medical practitioner to obtain the reports Australia Post was insisting on. Ms Scott-Brown asked for a meeting with Ms Watts. For her part, Ms Watts was insistent on having a particular union representative at the meeting who had been dealing with the issue, which seems to have delayed the meeting process.

164 Eventually, at a meeting on 11 May 2010, Ms Watts provided a certificate from Dr Saranathan, which certified her as fit to return to work on modified duties for between 5 and 7.35 hours per day. The certificate also stated that Ms Watts' return to work "must take into consideration Andrea's medical and psychological needs as specified in the letter by Muradiye Selvi". After their meeting, Australia Post then corresponded with Ms Watts on the same day to inform her that the information in the certificate was insufficient. There is a debate, which need not be resolved, whether Ms Watts was told at the meeting that the information was insufficient. Clearly Australia Post's letter said as much. It also insisted, again, that Ms Watts arrange for Dr Saranathan to complete the form issued under the policy, and write a letter including the matters Australia Post asked for information about in its proforma letter issued under the policy. The letter sent to Ms Watts warned her she could be directed onto sick leave if she did not obtain the medical information.

165 Further emails, correspondence and meetings occurred, the substance of which was that Australia Post continued to insist on Ms Watts providing, at her own expense and by her own arrangements, medical information which in form and substance reflected what the policy required. Ms Watts continued to protest that either she did not understand what information she was required to provide, that she was not in a position to provide the information, or asked again what information was required. It appears both she and her union representatives also alternatively asserted Australia Post had all the medical information it required. Australia Post for its part continued to assert it did not have enough information and Ms Watts knew what she had to provide.

166 Although the sequence of events in the evidence is not wholly clear, it appears that, at a further meeting on 18 May 2010, Ms Scott-Brown told Ms Watts that, since she had not provided the further medical information Australia Post said it needed, Ms Watts would be directed to take sick leave. This was confirmed in a letter of the same date. After some negotiation, Australia Post agreed Ms Watts could access her recreation leave instead of sick leave until the medical information was received. Ms Watts went on leave, in accordance with Australia Post's direction, from 18 May 2010.

167 On 7 June 2010, Ms Watts acknowledged she could not yet provide the medical information Australia Post required to revoke the direction and permit her to return to work.

168 I set out below examples of the tenor and content of the exchanges between Ms Watts and Ms Scott-Brown. On 7 June 2010, Ms Watts sent an email in the following terms:

> Hello Toni.
>
> I trust you have received my voicemail to you this morning advising you that I will not be coming into work today. I have briefly liaised with Ray Gorman of the CEPU regarding the current situation.
>
> It appears that it may be some time before the NWRMR proforma will be completed. We wish to clarify a few issues with you as these matters were not discussed at our last meeting on Tuesday 18 June 2010 [sic] and will assist us in deciding a suitable course of action. The issues are as follows:
>
> - If an employee is directed onto sick leave under the NWRMR Policy for not providing the required medical evidence to Australia Post within the specified timeframes, what does the employee need to provide to Australia Post in order to return to work? Are there any other terms or conditions that apply to this employee in this situation?
> - If an employee opts to use their own leave (e.g. RL or LSL) rather than being directed onto sick leave, for not providing the required medical evidence to Australia Post within the specified timeframes, what does the employee need to provide to Australia Post upon returning to work? Are there any other terms or conditions that apply to this employee in this situation?
> - Upon supplying the required medical evidence to Australia Post, if restricted duties are not available or the employee can not be accommodated by Australia Post, what is the outcome for the employee?
>
> I will discuss the information that you provide with Ray Gorman and advise you further on the situation. I will complete leave forms, as required, once these issues are addressed.
>
> Thank you for your assistance.
>
> Regards,
>
> Andrea Watts

169 That email produced a series of exchanges between the two women, culminating in the following email from Ms Scott-Brown on 8 June 2010:

> Good Afternoon Andrea,
>
> Please refer to the documentation provided to you on three separate occasions since February of this year. If you require more specific information in relation to matters you are considering but which are not apparent to me, perhaps you could provide more specific questions.
>
> I reiterate that you are required by Australia Post to provide a medical report from your doctor outlining the likely duration of your medical condition, the precise extent of your incapacity and any restrictions they believer [sic] would

> apply in relation to your nominal position. I have attempted to make this request clear on at least eight separate occasions in writing and in direct conversation in the presence of your union representatives.
>
> If you do not provide this information for us to consider how we might assist your return to work, I have no further advice to provide at this time. In the meantime you are directed by close of business today to provide a leave request application form to cover the leave you are currently seeking. We will consider whether or not this can be approved for continuation depending on business requirements. On reflection of your questioning, perhaps you can advise me what it will take for you comply with this routine requirement?
>
> Toni Scott-Brown
>
> HR Manager, Commercial Vic/Tas

170 There is a sense in which the content of this correspondence passes the other party by like a ship in the night, and each continued simply to adhere to their respective and somewhat intransigent positions.

171 On 22 June 2010, Ms Watts returned to work in Mr Schell's team. On the same day, or the day before, she delivered to Australia Post a copy of the policy's proforma certificate, filled in by one Dr Congiu, a psychiatrist, and dated 8 June 2010. In the report, Dr Congiu referred to and relied upon a report from Ms Selvi as the document which set out the restrictions to apply to Ms Watts' return to work. This report was dated 18 June 2010 and accompanied the proforma. It appears that Ms Watts considered she had met Australia Post's requirements, and so she decided to come back to the workplace.

172 Dr Congiu's certificate stated that the nature of Ms Watts' medical condition was "Generalised Anxiety Disorder". It stated the restrictions were effective "from today" (ie 8 June 2010) and, in answer to whether the employee could work her full rostered hours, he ticked "No" and stated "See enclosed psychologist's report". The proforma then listed a number of restrictions, most of which could never have any application to an employee in Ms Watts' role and with Ms Watts' kind of medical condition. They concerned things such as lifting, forceful pushing and pulling, standing tolerance and the operation of power equipment. There was a box for "Other restrictions" which was ticked, and after the request "please specify", Dr Congiu had written "To be specified by treating psychologist (see report)".

173 The form then asked if the restrictions were permanent or temporary, and the box "Temporary" was ticked. The next question asked was "when is it likely the employee will be able to perform the inherent requirements of the actual position they occupy (in terms of number of days, or weeks, or months)?". To that question Dr Congiu answered "2-3 months". The form itself stated that the "maximum allowable period of non-work related restrictions in the workplace is 3 months". This seems to be an arbitrary period chosen by Australia Post, and there was no evidence about how or why the period of three months was chosen, aside from an assertion by Ms Scott-Brown it was a "reasonable period of time".

174 Dr Congiu had then signed, dated and completed his professional details at the bottom of the form.

175 The accompanying report by Ms Selvi was in the form of a letter addressed to Ms Scott-Brown. It commenced with the following statement: "Please read the following information in conjunction with the 'Australia Post Non-Work Related Medical Restrictions Medical Certificate' completed by Psychiatrist Dr D.L.Congiu dated 8/6/2010".

176 The report then set out the number of hours per day Ms Watts could work for each of the three months, starting with six hours, increasing to seven and finally to 7.35 by mid-August 2010.

177 The report then continued:

> Restrictions
>
> *Restrictions for Duties*
>
> Tasks and roles allocated to be less complex than AO6 Bid Consultant position
>
> Avoid tight deadlines
>
> Avoid tasks assigned simultaneously
>
> Avoid one on one meetings with middle management (AO6 – AO8)
>
> Avoid supervisory tasks and leading teams
>
> Avoid tasks or situations where conflict would arise
>
> Avoid working on the same floor as Ms Marshall and avoid communication or interaction with Ms Marshall (at least until mediation)
>
> Duties to be performed at usual work location: 111 Bourke St Melbourne.
>
> • *ALLOW BREAKS TO PRACTICE RELAXATION STRATEGIES WHEN ANXIETY LEVELS ARE HIGH*
>
> *3.0 The Period For Which these Restrictions are required*
>
> Please note that the above restrictions are temporary.
>
> *4.0 Prognosis*
>
> It is anticipated that the [sic] Ms Watts will be able to perform the inherent requirements of her actual position after three months. If she is to return to position of "BID CONSULTANT" and if she is to work with Ms Marshall than [sic] a mediation must take place before Ms Watts could return to her pre-injury position.
>
> *5.0 Upgrading*

| *Period* | *Upgrade of Duties* |
|---|---|
| First and second month | AO5 |
| Third month | AO6 |

> I am unsure of the level of tasks that Ms Watts has been performing over the past year or so since her return to work program but assume that it has been more of an AO5 level. Hence, I am confident that she can be upgraded gradually back to A06 after two months.
>
> *Recommendations on Mediation.*
>
> During my communications with Australia post and in our mutual efforts to assist Ms Watts with a viable return to work program, I have always advocated that mediation would be necessary to successfully return her back to the inherent requirements of her actual pre-injury position if she was to work with co worker Ms Marshall.
>
> Due to the nature and the cause of the injury sustained by Ms Watts, it is important that there is a psychological resolution between Ms Watts and Ms Marshall if they are to work alongside each other without there being any risk of further injury or an exacerbation of any residual symptoms.
>
> Hence, I would like to report that there has been no intentions on the part of Ms Watts to avoid mediation sessions or to intentionally halt her rehabilitation towards a return to full duties in her nominal role at Australia Post.

> Based on Ms Watts current psychological functioning and her emotional status, there is no reason why Ms Watts can not proceed with the Mediation sessions, keeping in mind that such mediation will be important when she is ready to move to her pre-injury duties if she is to work with Ms Marshall.
>
> I am further confident that given that Ms Watts has had ongoing supportive therapy to overcome the psychological impact of the primary injury, that she will function in her pre injury role without Mediation if she was not working with her co fellow worker Ms Marshall.
>
> Thank you for giving me the opportunity to add to the medical certificate provided by psychiatrist Dr Congiu. Please do not hesitate to contact me if I could be of further assistance in this matter.
>
> Yours sincerely
>
> Muradiye M. Selvi
>
> CONSULTANT PSYCHOLOGIST

178 Ms Scott-Brown did not read the documents until 23 June 2010 and was not aware until that date that Ms Watts had in fact returned to work with Mr Schell the previous day. Ms Scott-Brown was concerned Ms Watts had returned to work in the way she had, without Ms Scott-Brown having considered the medical information or having had a chance to implement any work restrictions. The fact that Ms Watts returned herself to work in this fashion is consistent with the uncooperative way each party had dealt with the other to that point. Ms Scott-Brown's reaction further demonstrated the spirit of non-cooperation was to continue. Her emails to Ms Watts, although couched politely and with somewhat profuse gratitude for the provision of the information, made it clear that Ms Watts should go back on leave until Australia Post had made a decision about the information provided, or she would be directed onto sick leave again. Ms Scott-Brown stated:

> You are to take leave as previously agreed in discussion with your union representative Mr Ray Gorman, until otherwise advised by me that I have considered your medical details and been able to make suitable arrangements to adjust work to suit your circumstances while also meeting business requirements. This step has not been completed and may take a week or so to expedite.

179 Another meeting was held on 29 June 2010 between Ms Scott-Brown, Ms Watts, Ms Dillon and Mr Gorman. During this meeting and in subsequent correspondence, Ms Scott-Brown told Ms Watts that the information provided by Dr Congiu and Ms Selvi was insufficient, in that it did not "detail the extent and duration of your restrictions, [sic] sufficient detail to enable us to establish a planned approach to your return to work". Ms Scott-Brown directed Ms Watts to take sick leave "until further notice".

180 Thus, it is at this point — through the direction given on 29 June 2010 — that Ms Watts is again involuntarily placed on leave and compelled to start again using up her leave entitlements, in circumstances where she believed she had complied with Australia Post's requirements under the policy. After this meeting and correspondence, Ms Scott-Brown had some communications with Mr Schell. Ms Watts had been in touch with Mr Schell by email on 25 June 2010 inquiring about the tasks Ms Watts said were outstanding for him and about which she asked him to inform Ms Scott-Brown. Ultimately, the emails reveal Mr Schell was not going to take Ms Watts back into his team unless Human Resources authorised him to do so. Ms Scott-Brown was not going to authorise that until she had more information. And so the stalemate continued.

181 Ms Scott-Brown also sent an email around to other Australia Post divisions, inquiring if they had any "vacancies", full or part time, at an AO6 level or below, and informing the recipients of the restrictions set out in Ms Selvi's report, and the recommended restricted working hours. All divisions came back with answers to the effect that they had no vacancies, or could not accommodate the restrictions. The email itself and Ms Scott-Brown's evidence suggest that the policy required such inquiries prior to directing an employee on sick leave. What then follows is a period of some months during which Ms Scott-Brown attempts to obtain further information from Ms Selvi, either directly or through Ms Watts. During this period, Ms Scott-Brown also confirms with Ms Watts that she, not Australia Post, is responsible for all costs associated with procuring Ms Selvi's report, and her professional assistance. One of the main contributing factors to there being no further information forthcoming from Ms Selvi is the fact that she was involved in a serious car accident and was off work for a considerable period of time.

182 By the end of October 2010, Ms Scott-Brown had decided to "require" Ms Watts to attend a medical assessment by a practitioner nominated by Australia Post. This was Dr Hollander. Ms Scott-Brown informed Ms Watts of this requirement by email on 28 October 2010, noting that the matter of Ms Watts' return to work had remained unresolved for more than a year.

183 Ms Scott-Brown made an appointment for Ms Watts with Dr Hollander on 4 February 2011. Ms A Rohowskyj, Senior Medical Consultant with Australia Post, sent Ms Watts a letter about the appointment — entitled "Fitness for duty assessment (initial)" — on 24 January 2011. Why there was a gap of some three months between Australia Post raising this independent medical avenue, the making of the appointment, and informing Ms Watts of it, is unexplained in the evidence.

184 The response from Ms Watts to this letter typifies the lack of trust and cooperation between her and Australia Post. Her response listed 25 questions and concerns she asserted she had. The answers to some of them would seem obvious to a person of Ms Watts' seniority, intelligence and experience. Others display a preoccupation with issues of privacy and record keeping which seems inconsistent with Ms Watts' recent experiences of having been through a workers' compensation claim. One question asserted Australia Post already had "ample medical information about me". The letter ended with the statements "In the interests of minimizing any inconvenience to Dr Hollander, I suggest that you postpone the scheduled appointment". That statement could be taken in several ways: as a refusal to attend the appointment, or (at the other end of the spectrum) as a recognition that, with such short notice and so many concerns to be resolved, the scheduled appointment could not reasonably be met. The tone of Ms Watts' questions is very direct, and could be construed by a reader as confrontational. That said, most of the 25 questions could also be described as legitimate, if somewhat obsessive. They are consistent with the evidence given by Mr Psarologos about his observations of Ms Watts' personality — which I accept — and with my own observations and findings about Ms Watts. She was not an acquiescent and unquestioning employee where her own interests were concerned. Nor was she obliged to be.

185 In correspondence, which is somewhat repetitive in content, Australia Post answered Ms Watts' questions. It asked for confirmation that she would attend the appointment. Ms Watts did not respond, but did not attend the appointment.

186 Once informed of Ms Watts' non-attendance, Ms Scott-Brown told Ms Watts by email on 10 February 2011 that a further appointment would be made and Australia Post "expected" Ms Watts would attend. She also inquired again whether Ms Watts had any further medical information to supply Australia Post to assist with her return to work in her nominal position.

187 Subsequently, the appointment with Dr Hollander was fixed for 29 April 2011.

188 On 21 February 2011, Ms Scott-Brown met with Ms Watts and Mr Gorman, at their request. At this meeting, Ms Scott-Brown was given a second report by Ms Selvi. As she did with the first report by Ms Selvi, Ms Scott-Brown told Ms Watts and Mr Gorman that she would review it to see if it had sufficient information.

189 The second report by Ms Selvi again referred to the certificate given by Dr Congiu on 8 June 2010, and to the first report written by Ms Selvi on 18 June 2010. It was otherwise expressly said to be in response to Ms Scott-Brown's letter of 20 August 2010: in other words, it was Ms Selvi's attempt to provide the further information Australia Post sought. This second report was structured around the questions Ms Scott-Brown had asked in that letter.

190 Ms Scott-Brown formed the view that Ms Selvi's second report still did not provide her with the information she needed. Her evidence was that she saw much of Ms Selvi's report as advocacy for Ms Watts. Her evidence also was that, in substance, she thought Ms Selvi was being too optimistic, the work restrictions were not indicative of the reported treatment history and could not be relied upon.

191 At [127]-[133] I make findings about Ms Scott-Brown's attitude to Ms Watts. Those attitudes seem to have affected Ms Scott-Brown's approach to Ms Selvi as well. I find that Ms Scott-Brown's attitude was unreasonably skewed because of Ms Watts' somewhat confrontational style, and her insistence on process and questioning. This led Ms Scott-Brown to form a view Ms Watts was not genuinely cooperating with Australia Post, and was, in effect, malingering. A person in Ms Scott-Brown's position who was less sceptical and was acting more dispassionately would, in my opinion, have been able to work with what was in Ms Selvi's two reports and, with Ms Selvi if need be, to accommodate Ms Watts returning from leave to her position at Australia Post.

192 The evidence reveals that, initially unbeknown to Ms Watts and Mr Gorman, in early 2011 Australia Post itself decided to undertake what it called a "reasonable adjustments assessment". The purpose of this assessment, in Ms Scott-Brown's words, was to "ascertain whether it could accommodate the restrictions Ms Selvi prescribed".

193 The assessment consisted of a table setting out the "work practice requirement" for the position of bid consultant AO6, parts of Ms Selvi's report identified in the Australia Post document as "restrictions", what kind of adjustment the author of the document considered might be required because of the restriction and, finally, a column headed "impact". The document contained conclusions about whether each restriction could be accommodated. Relevant employees within Australia Post met to discuss the restrictions, and the ultimate conclusion was that the restrictions could not be accommodated. In substance, Australia Post's view was that the restrictions were not compatible with the requirements of a bid consultant, which was a high-pressure position working to

deadlines in a team environment. The clear import from Ms Selvi's report that the restrictions were likely to be needed only for three months did not feature strongly in the evidence or the document, although Mr Psarologos made some concessions in his evidence that "in hindsight" some of the restrictions which Australia Post concluded at the time could not be accommodated could have been accommodated for the limited period of time required.

194 Ms Watts' evidence, which was uncontradicted, was that she was not given any opportunity to comment on the assessment, to make suggestions to Mr Psarologos about how the restrictions might be accommodated, or otherwise to have any input into that assessment. Nor, it seems, was Ms Selvi herself consulted.

195 As Mr Psarologos' own evidence recognises, the consideration by Australia Post of this assessment was being undertaken in the context of Ms Watts having lodged a complaint about her treatment with the Australian Human Rights Commission.

196 It appears that Australia Post considered this assessment concluded by approximately 17 March 2011, adversely to Ms Watts returning to work on the basis of Ms Selvi's reports and Dr Congiu's opinion. Ms Scott-Brown's effective responsibility for managing Ms Watts' absences and return to work ceased around the end of April 2011 and, in September 2011, Ms Garrad took over.

197 Considering that it needed further medical advice in order to manage Ms Watts' return to work, Australia Post persisted in attempting to persuade Ms Watts to see Dr Hollander. However, on 21 April 2011 Ms Watts refused, in writing, to see him. She gave her reasons as "I have already provided ample medical information to Australia Post to allow for the development of a return to work program that will accommodate my medical restrictions".

198 Ms Garrad's evidence was that, having taken over responsibility for managing Ms Watts' return to work process in September 2011, she saw this as an impasse, and that the "situation clearly could not indefinitely continue as it was". She decided it was necessary for Ms Watts to be independently assessed and, on 13 October 2011, Australia Post sent Ms Watts a letter containing a formal direction that she attend for an examination with Dr Hollander. The evidence does not satisfactorily explain what had occurred between April and October 2011. It is unclear who, if anyone, with Australia Post's Human Resources team was managing Ms Watts' situation. Regardless, an obvious inference, which I draw, is that Ms Watts adhered to her refusal to see Dr Hollander throughout this period. Australia Post's letter made it clear to Ms Watts that non-compliance would result in action under Australia Post's disciplinary procedures, and could ultimately lead to her dismissal. Ms Watts was given until 26 October 2011 to confirm she would abide by the direction and attend for examination. Shortly before that deadline, Australia Post wrote to Ms Watts confirming the earliest appointment with Dr Hollander was 12 December 2011 and, given that was some time away, proposing two other alternatives (both involving an Australia Post-nominated doctor and contact with Ms Selvi) as ways Australia Post might obtain what it considered was better information about how Ms Watts might return to work with restrictions. The evidence does not disclose any response by Ms Watts to this alternative

proposal, although there was a response on her behalf by the union, disputing the lawfulness of Australia Post's direction. This exchange is another example of Ms Watts' lack of cooperation by this stage.

199 Debate between Australia Post and the union on Ms Watts' behalf continued, the latter maintaining the direction Australia Post had given was unlawful. The deadline for Ms Watts' confirmation passed without compliance from her. It must be recalled all this was now occurring in the context of an existing complaint by Ms Watts to the Commission. In writing, and formally, Australia Post gave Ms Watts one more opportunity to comply with the direction it had given her, extending the deadline to 4 November 2011.

200 Trenchant positions, which it is not necessary to recite in detail, continued through correspondence. However, an example of the level of both resistance, and insistence, coming from Ms Watts can be gleaned from this piece of correspondence, dated 29 November 2011, from Ms Watts to Australia Post over whether, having extended the deadline for confirming she would agree to be examined by Dr Hollander on 12 December 2011, Ms Watts would meet the new deadline:

> Unfortunately, I am unable to provide a response by the date you have proposed, as I need to consult with Ms Khatab, Legal Officer at the CWU, regarding Australia Post's most recent response on this matter.
>
> I was advised by Mr Gorman today that Ms Khatab is interstate on a business matter for the entire week. Mr Gorman will be contacting you via phone to explain the situation and also request an extension to your imposed deadline.
>
> As Ms Khatab will most likely be responding on my behalf, I am requesting an extension to your proposed deadline until Friday 9 December 2011 to allow sufficient time for Ms Khatab to meet with me, discuss the situation and formulate a response to Australia Post.
>
> As you will appreciate, the situation is beyond my control. Any inconvenience caused is regrettable. If the scheduled appointment with Dr Hollander needs to be rescheduled to avoid any inconvenience, please do so and advise of new details.

201 By this stage, proceedings had been issued in this Court. Correspondence continued over the last part of 2011 about whether Ms Watts would consent to being examined by Dr Hollander, whether Australia Post's direction was lawful, whether Ms Watts was fit to return to work, and so on. The correspondence was now between the parties' legal representatives in the first Federal Court proceeding, and in the context of Australia Post initiating a disciplinary inquiry because of what it said was Ms Watts' non-compliance with a lawful direction. Then, after more correspondence, on 8 February 2012 Ms Watts' legal representative informed Australia Post's legal representative that Ms Watts would attend an assessment with Dr Hollander, and on 14 February 2012 Ms Watts consented in writing to attend this assessment. That was one year and four months after Australia Post first asked Ms Watts to attend such an assessment.

202 On 23 April 2012, Ms Watts finally attended an examination with Dr Hollander. Within a few days of the examination, Dr Hollander finalised his report and sent it to Australia Post. He found her to be suffering from a psychiatric illness of an adjustment disorder with mixed anxiety and depressed mood that was in partial remission at the date of his report. His report accepted Ms Watts' account of her previous symptoms and their severity, but his opinion was that Ms Watts' symptoms had resolved to a degree such that they were no

longer impacting upon her work capacity in the way they previously had. He emphasised that, for her symptoms to remain in remission, her return to work needed to be organised in a graduated manner, optimally with the restrictions he then recommended.

203 Those restrictions as set out in his report were:

1. A graduated return to work is implemented,
   (a) According to the following schedule:
      - two months working at 0.5 of fulltime hours, distributed over five days per week
      - followed by a further two months of working at 0.75 normal fulltime hours
      - then resuming fulltime hours
   (b) And with the following restrictions:
      - That Ms Watts receive the relevant and appropriate degree of retraining/upskilling for her role, given the now extended period of time off work.
      - That during this period of gradual return to work, Ms Watts be granted a reduced volume of work proportional to the degree of her reduced hours.
      - That during the graduated return to work program, she be provided with some level of increased support for her to consult with an advisor or supervisor should she run into difficulties regaining some of the necessary knowledge or skills required for her role.
      - Providing Ms Watts extra breaks as needed to practice anxiety management strategies should she experience re-emerging symptoms of anxiety in the workplace. The need for such breaks is estimated to be of 10 to 15 minutes of duration up to two to three times per day (if increased frequency or duration of breaks is needed, then this would be an indication that further reassessment of her Fitness for Duty is indicated at that time).
      - That during this graduated return to work, that Ms Watts is not to report directly to her previous manager, Ms Marshall, as her supervisor or manager (although other forms of contact with Ms Marshall are not necessarily contraindicated).
      - If Ms Watts is required to eventually resume a direct reporting relationship to Ms Marshall in the future, that a mediation process between Ms Watts and Ms Marshall be undertaken either prior to Ms Watts' return to work or during this graduated return to work process.

204 Dr Hollander's ultimate conclusion was that Ms Watts was capable of performing the inherent requirements of her position, AO6 bid consultant, with the restriction of a graduated return to work as he had described in his report, and the specific restrictions he had identified. His opinion was that the restrictions would be required for four months. His psychiatric prognosis for Ms Watts was positive, however his prognosis about her occupational functioning was more moderate: his opinion was that prognosis depended on motivational factors, negotiation of outstanding issues between her and

Australia Post and whether the contrasting views of what restrictions were necessary (and how they might be accommodated) could be resolved between Australia Post and Ms Watts.

205 On 21 May 2012, Australia Post informed Ms Watts' legal representatives of the receipt of Dr Hollander's report and provided a summary of his conclusions and recommendations. It told her legal representatives that Australia Post agreed to the restrictions, save for two matters, which it described in the following terms:

> 1. Ms Watts will be required to report to Madeleine Marshall at the conclusion of the four month graduated return to work period given Ms Marshall is the Bid Manager for the Victorian and Tasmanian Bid Management team. We note that Dr Hollander has concluded that providing the graduated return to work plan is implemented, Ms Watts' condition is not of a severity that would preclude this reporting relationship.
> 2. Given Ms Watts and Ms Marshall will be working within the same team when Ms Watts returns to work, we propose that the mediation between Ms Marshall and Ms Watts occur prior to Ms Watts' return to work.

206 Continuing the pattern that had been set to that point, further correspondence ensued after the 21 May letter about Ms Watts' return to work date, and there was a focus by Australia Post on whether or not a mediation between her and Ms Marshall should or could be scheduled and, if so, when. Ultimately, Ms Marshall expressed a strong desire not to attend such a mediation. Mr Mark LeBusque, Australia Post's Director of Solution Sales to whom the Bid Management team ultimately reported, did not wish to insist and, therefore, no mediation between them occurred. Ultimately, Ms Watts did not in fact report to Ms Marshall on her return to work.

207 The last important piece of correspondence, for the purpose of determining the legal issues in this proceeding, is Australia Post's letter to Ms Watts' legal representatives, dated 18 June 2012. In this letter, Australia Post sets out the adjustments it proposes to make to allow Ms Watts to return to work in her position as a bid consultant. They were stated to be:

> a) A graduated return to work, as follows:
>  i. Two months of working 0.5 of full time hours, distributed over five days per week;
>  ii. A further period of two months of working 0.75 of full time hours, distributed over five days per week; and
>  iii. Returning to full time hours at the conclusion of the four month period.
> b) Ms Watts will be granted a reduced volume of work to match her reduced hours.
> c) Increased support will be provided to Ms Watts to allow her to consult with an advisor or supervisor should she run into difficulties regaining some of the necessary knowledge or skills required for her role. Mr LeBusque, Mr Psarologos and Ms Garrad will be available to provide this support during Ms Watts' graduated return to work.
> d) Australia Post will provide Ms Watts with the opportunity to take breaks of between 10 to 15 minutes up to two to three times a day, to practice anxiety management strategies should she experience re-emerging

> symptoms of anxiety. Consistent with Dr Hollander's recommendation, if the frequency or duration of these breaks increases, we may require a further medical advice, including a Fitness for Duty assessment.
>
> e) During the four month graduated return to work period, Ms Watts will not report to Ms Marshall, and instead will report directly to Mr Psarologos, with support available from Mr Le Busque. At the conclusion of the graduated return to work period, Ms Watts will be required to report directly to Ms Marshall. During the graduated return to work period, Ms Watts will be required to work with Ms Marshall and will have regular interactions with Ms Madeleine [sic] on a day to day basis.
>
> Australia Post encourages Ms Watts to implement the other recommendations reached by Dr Hollander, as follows:
>
> a) Continue to attend her GP on a regular basis for ongoing monitoring;
> b) Participate in ongoing monitoring of clinical risk assessment by all her treating doctors;
> c) Continue with ongoing psychological therapy; and
> d) Ms Watts and her doctor and psychologist consider developing a written and specific relapse prevention plan.
>
> Consistent with Dr Hollander's recommendations, Australia Post will monitor Ms Watts return to work and will complete a three month review to assess Ms Watts graduated return to work progress. Should Australia Post have concerns regarding a potential re-emergence of Ms Watts' depressive/anxiety symptoms, Australia Post will seek further medical advice, which may include a further Fitness for Duty assessment.

208 These adjustments have the same characteristics as the ones Ms Watts was working under with Mr Schell — reduced hours, smaller volume of work, increased support, breaks as she needed them. The time frame for her full assumption of the duties of bid consultant was four months, with a three-month review. That is longer than the time frame set by Ms Selvi. The adjustments also have the same characteristics as those Ms Selvi recommended. As it turned out, Ms Watts did not report to Ms Marshall as this letter contemplated. That seems to have been as much a preference of Ms Marshall as Ms Watts and it is a good example of how adjustments to deal with psychiatric, psychological and attending interpersonal difficulties cannot be set in stone.

209 Ms Watts returned to work at Australia Post on 30 July 2012.

*The AAT decision and Australia Post's non-work related medical restrictions policy*

210 Before leaving my findings on the course of events as disclosed by the evidence, it is necessary to address what I identify elsewhere as an error by Ms Scott-Brown, and Australia Post generally, which in my opinion has contributed to the tortured circumstances that evolved from 2010 to 2012. That error concerns the effect of the AAT decision and the (non) applicability of Australia Post's non-work related medical restrictions policy to Ms Watts' circumstances.

211 In evidence in this proceeding was the decision made by consent by the AAT under s 42C of the AAT Act, effecting the settlement between Ms Watts and Australia Post of her claims under the SRC Act.

212 The relevant parts of the AAT decision are as follows:

> In accordance with s 42C(2) of the AAT Act, the Tribunal sets aside the reviewable decision of 10 October 2008 and in substitution decides that:

1. The Applicant sustained an injury, identified as an adjustment disorder to which employment with Australia Post contributed to a significant degree and which entitles her to compensation pursuant to s 14 of the *Safety, Rehabilitation and Compensation Act 1988* (the SRC Act);
2. The Respondent shall pay:
    a) weekly payments of compensation in respect of incapacity for work from 11 April 2008 to 31 March 2009 (both dates inclusive) pursuant to s 19 of the SRC Act. The Applicant is not entitled to s 19 payments after 31 March 2009 on the basis that the compensable condition did not result in incapacity for work; and
    b) reimbursement of medical and related expenses incurred in the period of 11 April 2008 to 1 December 2009 pursuant to s 16 of the SRC Act subject to the production of a valid Medicare Australia Notice of Charge, accounts and receipts in respect of the condition not to exceed $758.68 over and above the Medicare Charge; and
3. at 2 December 2009 all pathophysiological effects of the adjustment disorder ceased and the Applicant is not entitled to compensation pursuant to ss 16 or 19 of the SRC Act.

213 The effect of this decision is that Australia Post recognised its liability generally under s 14 of the SRC Act, but the parties then agreed to limits on Australia Post's liability to pay various kinds of compensation for that injury. Section 16 of the SRC Act deals with compensation in relation to medical expenses, and s 19 deals with compensation for loss of income. Accordingly, the effect of paragraph 3 of the AAT decision is to fix an end point — 2 December 2009 — for the payment by Australia Post of compensation for Ms Watts' medical expenses and any loss of income under the SRC Act. Contrary to the impression Ms Scott-Brown seemed to have had, and Australia Post's submissions sometimes contended for, the effect of this decision was not to transform Ms Watts' psychological condition from a work-related one to a non-work related one. The decision could not have had that effect: the nature and cause of Ms Watts' injury was, and is, a question of fact. Obviously, nor could the orders rid Ms Watts, in fact, of her illness. The highest the rather too broadly expressed statement in paragraph 3 can be read is that the explanation for the agreement to cease s 19 loss of income payments is that Ms Watts was fit to return to work. Indeed, as the evidence in this case demonstrates, she was already back at work. If Australia Post agreed, by these orders, that Ms Watts was fit to return to work and no longer needed compensation under s 19, then it is even more curious that less than two months later it was asserting that she could not be in the workplace without new and significantly detailed medical information.

214 Nevertheless, somehow Ms Scott-Brown reached the view that the non-work related medical restrictions policy should be applied to Ms Watts. It is therefore necessary to examine the terms of that policy.

215 The "Management Overview" of Australia Post's non-work related medical restrictions policy relevantly stated:

> Where an illness or injury is non-work related, management has the responsibility to ensure the employee is given the opportunity to upgrade to full duties, wherever possible, within a "reasonable" time. Australia Post therefore allows such employees to perform restricted duties for a maximum period of three (3) months where medical information supports the appropriateness of such duties and the employee's restrictions can be accommodated at his or her workplace.

> If the employee's inability to perform his or her job because of his or her disability can be overcome through the provision of assistance in the form of "services" or some form of physical adjustment to workplace equipment or facilities and the provision of that assistance is "reasonable", Australia Post has an obligation to make that adjustment(s). This is known as "reasonable adjustment".
>
> *If, the employee is unable to perform the "inherent requirements" of his or her nominal position within the time-frame allowed under the policy, even with "reasonable adjustment", management will consider redeployment options and if unsuccessful, retire the employee after a continuous absence on sick leave of up to 78 weeks including up to 52 weeks of continuous paid sick leave, depending on the employee's credit.*

(Emphasis in original.)

216 It can be seen that there is significant disconformity between the summary of how the policy is intended to operate and the operation of the DDA, as I have described it at [12]-[68] above. Most critically, the policy assumes the concept of reasonable adjustments in the DDA operates on the basis of reasonableness, when it does not. The policy also assumes limits on an employer's obligation to make reasonable adjustments which are not confined to unjustifiable hardship, nor to the more limited operation of the s 21A inherent requirements exception.

217 The policy is divided into two parts: one dealing with "provision of restricted duties" and another dealing with "reasonable adjustments". The first part concentrates on a situation where a worker's duties need to be altered for a temporary period, and during that period the worker may not be performing what the policy identifies as the "inherent requirements" of the worker's position. The policy sets out criteria to be considered before restricted duties can be provided. Two of those criteria clearly became uppermost in the attitude of Australia Post, and Ms Scott-Brown and Ms Garrad in particular:

> a. The nature of the condition and medical prognosis indicates a *high potential* the employee will be able to perform the "*inherent requirements*" of his or her nominal position, within a "*reasonable timeframe*";
> b. A "reasonable" duration for the provision of restricted duties, is to be established by the workplace manager based on the nature and prognosis of the employe's medical condition. However, the maximum duration for the provision of restricted *duties* is *three (3) months*;

(Emphasis in original.)

218 The next part of the policy — "reasonable adjustment" — is expressed to apply only where a "manager is still unable to provide restricted duties after taking into consideration the employee's suggestions". The policy states:

> 5.1 Employee involvement in the consideration of "reasonable adjustment"
>
> If a manager is still unable to provide restricted duties after taking into consideration the employee's suggestions, consideration must at that same meeting with the employee be given to assessing the employee's restrictions against the principles of "reasonable adjustment". The employee is to be requested to suggest the "reasonable adjustment"(s) he or she believes would assist him or her in being able to perform the "inherent requirements" of his or her position. The employee must be advised that he or she may have a representative, who may be a union representative, present as a support during the discussion.
>
> 5.2 What is "reasonable adjustment"?
>
> "Reasonable adjustment" does not require an employer to alter the nature or the "inherent requirements" of the employee's job, to assign the performance of some inherent requirements of an employee's job to another employee or to create a

> different job. Rather it is a question of overcoming an employee's inability, by reason of disability, to perform his or her job through the provision of assistance in the form of "services" or some form of physical adjustment to workplace equipment or facilities which provision is considered to be reasonable.

219 The policy then goes on to set out what should happen if neither restricted duties nor reasonable adjustments are available: namely, a direction onto sick leave. The policy also contemplates such a direction if the medical information provided by the employee is "unclear or does not contain all the required information". There is no doubt that Australia Post took steps it believed were consistent with this policy; that, however, says nothing about its compliance or non-compliance with the DDA.

220 The language of the policy indicates it is intended to apply across Australia Post's workforce. There is a great variation in the nature of employment across Australia Post's workforce. A "one size fits all" policy, while providing some guidance in a general way, could never seek to replace consideration of individual circumstances and needs. As this case so amply demonstrates, inflexible insistence on compliance with a policy, rather than an individualised consideration of circumstances, can be counterproductive in terms of meeting the requirements of the DDA.

221 When Ms Scott-Brown wrote to Ms Watts to inform her that she had decided to apply this policy to Ms Watts, she asserted that "your restrictions are no longer regarded as work related (statutory)". Again, that misrepresents the terms of the AAT decision, which says nothing about restricted duties, but only about liability to pay compensation for loss of income and for medical expenses. Having then stated that Australia Post required further information "as to exactly what restrictions apply and how long these will be needed", Ms Scott-Brown made the following rather negative conclusion to the letter:

> Under the terms of the policy, if your medical evidence is not satisfactory and/or your workplace cannot accommodate your restrictions, you may be directed to remain on sick leave and asked to provide ongoing medical advice. However, before this occurs, you would be offered the opportunity to discuss the inability to readily provide restricted duties and your manager will consider any reasonable suggestions you may have in this regard.

Again, the disconformities with the operation of the DDA are obvious.

222 There was no basis in fact to consider that the policy should have been applied to Ms Watts. As she responded to Ms Scott-Brown shortly after this letter:

> My injury is not a new injury. It is the same injury that relates to my worker's compensation claim and the decision made at the Administrative Appeals Tribunal. The circumstances of my injury and any restrictions that apply have not changed in any way. Subsequently, Australia Post is fully aware of all the details of my injury, including prognosis and restrictions. Furthermore, Australia Post is [sic] possession of all related documents from my General Practitioner and Psychologist. …
>
> As suitable employment tasks have been found by Australia Post to currently accommodate and assist in the gradual recovery and rehabilitation, there is no requirement to repeat this task. There is a clear understanding between Cathy Dillon, Chris Schell and myself that there is sufficient work and suitable tasks to meet the restrictions that apply to my injury currently and in the future.

223 Ms Watts was correct. In terms of the language of the DDA, Australia Post was making reasonable adjustments for Ms Watts in the period leading up to the direction of Ms Watts onto leave.

224 Ms Scott-Brown replied to this in the following terms:

> I understand your assertion that your injury is not new and that it is a continuing injury resulting from events that occurred at your workplace some time ago. However, I also understand that at your recent Tribunal Hearing, you were denied further compensation on the basis that the cause of your medical issues are no longer be [sic] attributed to the initial work injury. While you have described an ongoing health issue, this was not considered by the Tribunal to be a direct result of the previous compensation claim. This was the decision of the Tribunal member as a result of their deliberations.
>
> The result of this is that Australia Post has no further obligation to treat your matter as a compensable injury and we are required to address your inability to return to full work capacity under the non work related medical condition policy.

225 In my opinion, this sequence of events reveals a fundamental misunderstanding by Ms Scott-Brown, perpetuated by Ms Garrad and by Australia Post generally, as to the nature of the AAT decision, and the position of Ms Watts after that decision. It led to the entirely artificial characterisation by Ms Scott-Brown of Ms Watts as having a new and different "injury", with a new and different cause. It was that psychological condition which Ms Scott-Brown then relied on as the reason that Ms Watts had to be managed under the policy and, applying the policy, had to be directed onto sick leave when she did not provide medical information satisfactory to Australia Post.

**Conclusions on applicant's first contentions**

226 In this part of my reasons, I set out my conclusions on Ms Watts' first contention, and on issues which are common to all her contentions.

*Ms Watts had a "disability" for the purposes of the Disability Discrimination Act*

227 I find Ms Watts had a disability: namely, her disorder, illness or disease that affected her thought processes, perception of reality, emotions or judgment or that resulted in disturbed behaviour, within the meaning of s 4(1) of the DDA. At all material times, Ms Watts suffered from such an illness, although it was diagnosed differently at different times. In 2008, Ms Selvi diagnosed her with three separate conditions:

> 1. Acute Stress Disorder, (Code: 308.3) as described in the Diagnostic and Statistical Manual of Mental Disorders — Fourth Edition (DSM-IV).
> 2. Generalized Anxiety Disorder, (Code: 300.02)) as described in the Diagnostic and Statistical Manual of Mental Disorders — Fourth Edition (DSM-IV). and
> 3. Insomnia – Related to Anxiety Disorder, (Code: 307.42)) as described in the Diagnostic and Statistical Manual of Mental Disorders — Fourth Edition (DSM-IV).

228 By the time Dr Hollander examined her in April 2012, he diagnosed only one condition: adjustment disorder with mixed anxiety and depressed mood that was in partial remission. However, I am satisfied that at all material times Ms Watts had a psychological condition which was a disability within the meaning of s 4(1) of the DDA. Australia Post did not contend otherwise. Contrary to the way in which Ms Scott-Brown seems to have approached Ms Watts' situation,

there was no change in the nature of Ms Watts' illness before, during or after the resolution of the AAT proceedings. At all relevant times covered by the allegations in this proceeding, a key component was Ms Watts suffered from adjustment and anxiety disorders. Her injury or illness remained one which had been caused by the events in her workplace involving Ms Marshall and the Tomorrow's Leaders Program selection and feedback process in 2008. Her illness had resolved to a significant extent by the end of 2009 such that she was back at work, with restrictions. There was, therefore, no change in the nature of her disability for the purposes of the DDA either.

*There were reasonable adjustments available for Ms Watts*

229 This conclusion applies to all three of the applicant's contentions. In my opinion, matters such as limited working hours which gradually increased, alterations to supervision arrangements, modifications to face-to-face meeting requirements, amelioration of deadlines being too tight, changes in the kind of work being performed, minimising conflict situations, avoiding the need to lead teams, where all those matters are envisaged as necessary for a limited period of time of approximately three months, are adjustments which could have been made for Ms Watts without imposing unjustifiable hardship on Australia Post.

230 The adjustments in issue in this case were never of the kind or quality that imposed an unjustifiable hardship on Australia Post: not only was that argument disavowed by Australia Post in this proceeding, but there also was no evidence to support such an argument in any event. Thus, for the purposes of s 5(2), the kinds of restrictions under which Ms Watts was working in January 2010 with Mr Schell were reasonable adjustments for Ms Watts. The kinds of restrictions proposed by Dr Congiu and Ms Selvi were reasonable adjustments for Ms Watts. The kinds of restrictions proposed by Dr Hollander were reasonable adjustments for Ms Watts. I do not consider there to be any disqualifying vagueness about the nature of the adjustments proposed for Ms Watts by Dr Congiu and Ms Selvi, as Australia Post sought to contend. Nor was there any apparent disqualifying vagueness or uncertainty about the modification Ms Watts was working with during her time with Mr Schell. It is likely to frustrate the operation and purpose of s 5(2) in circumstances of people with psychological conditions if the word "adjustment" in the term "reasonable adjustment" was found to require too much precision. In any event, I find no material difference in terms of the level of precision between a restriction expressed by Ms Selvi as "avoid tasks assigned simultaneously" and a restriction expressed by Dr Hollander as "a reduced volume of work proportional to her reduced working hours". Of their nature, adjustments in the workplace for employees with psychological conditions or other disorders within the definition set out in s 4(1) of the DDA will need to be flexibly and generally expressed.

231 However, I do not accept the applicant's contention that a return to work plan, of itself, falls within the concept of a reasonable adjustment for the purposes of s 5(2). The respondent is correct to submit it is too removed from the work to be performed. The adjustment must be "for" the person, so the person can perform work. While an adjustment can be generally described (perhaps more so when dealing with a psychological injury), it must in my opinion be a nominated alteration or modification to a matter related to the work the person is employed or contracted to perform.

*Whether section 5(2) imposes a duty*

232 I accept that as a matter of construction the language of s 5(2) suggests a positive obligation on a discriminator. That is what language of a failure or an omission would ordinarily suggest. Section 5(2) is concerned with a state of fact: namely, whether certain things were not done, why they were not done and what the result was. Inquiring whether a discriminator did not make reasonable adjustments fastens on an omission by the discriminator to do something, or a proposal not to do something. Using the concept of omission does suggest a positive duty to do something.

233 Thus, if the circumstances concern events in the past, s 5(2) requires the Court to determine, as a matter of fact, whether the discriminator did not make reasonable adjustments for the person. Alternatively, if the circumstances concern events yet to take place or an ongoing situation, s 5(2) requires the Court to determine whether the discriminator proposes not to make reasonable adjustments for the person. Sitting behind each of those may be the premise that the discriminator was obliged to make adjustments unless they imposed unjustifiable hardship. However, the assessment of whether there is discrimination will focus on what was, in fact, done or not done, rather than on any "duty".

*Australia Post failed to make reasonable adjustments for Ms Watts*

234 The facts in this proceeding concern an ongoing employment situation and conceivably could involve both limbs of s 5(2)(a). Ms Watts' evidence, which was not contradicted, was that by the time she took annual leave at the end of the year in December 2009 she was working successfully with Mr Schell and had almost achieved a return to full-time hours of 7.35 hours per day, in that she was working six hours per day, was working autonomously and with limited direction. It appears to be common ground she was performing this work at a level of AO4 or thereabouts.

235 She returned to work on 18 January 2010, reporting again to Mr Schell. It appears that during the early part of 2010 Ms Watts continued to work for Mr Schell, under the same kind of restrictions she had in late 2009. It was in early 2010 that Ms Scott-Brown decided to apply the policy to Ms Watts, but the evidence is that she remained at work until 18 May 2010, when Ms Scott-Brown first directed her to take leave. It appears on the evidence that, from 18 May 2010, Ms Watts was absent from the workplace, until her unscheduled and uninvited return on 22 June 2010 for a week or so. Another direction to take leave was made on 29 June 2010 and from this point Ms Watts remained away from her workplace until 31 July 2012.

236 Given that Ms Watts' own evidence was that she was working successfully and well with Mr Schell, I find there was no failure by Australia Post to make reasonable adjustments for her until she was directed to take sick leave. Although from early February there was debate about the application of the policy to her, the evidence is or suggests that Ms Watts continued to work for Mr Schell under existing restrictions until she was directed on to sick leave. From 18 May, Ms Watts was absent from the workplace involuntarily. Initially she was absent using her own annual leave entitlements. From 29 June 2010 she was directed onto sick leave. Her return to work for one week in late June was without agreement from Australia Post. I find on and from 18 May 2010 when Australia Post directed Ms Watts to remain away from her workplace, Australia Post did not make reasonable adjustments for Ms Watts.

237 Ms Watts remained on a variety of forms of leave, and subsequently when her leave ran out, took leave without pay, until her return to work on 30 July 2012. By a letter dated 21 May 2012, Australia Post effectively accepted Dr Hollander's recommendations and proposed that Ms Watts return to her position as a bid consultant under the arrangements Dr Hollander had identified. In substance, as I find at [208], there was no real difference between what Dr Hollander was recommending, the arrangements which had been in place for Ms Watts while she was working with Mr Schell under restrictions Australia Post identified at least to some extent through information from Dr Saranathan and Ms Selvi, and the arrangements proposed by Ms Selvi in her first and second reports. Throughout this whole period the modifications for Ms Watts were reduced working hours, less complex work, greater supervision and support and reduced volume of work. The content and progression of these modifications would inevitably vary; however, their character did not change.

238 Accordingly, I find for that period between 18 May 2010 when she was directed by Ms Scott-Brown to go on sick leave, and 21 May 2012 when Australia Post accepted she could return to work under arrangements identified by Dr Hollander, Australia Post did not make reasonable adjustments for Ms Watts.

239 I reject the respondent's submission that, because during this entire period there was evidence of Australia Post seeking medical information, and seeking to apply the terms of the policy to Ms Watts, this constituted Australia Post "proposing to make reasonable adjustments" for Ms Watts throughout the entire period. First, as a matter of construction as I have outlined at [28]-[34] above, that is not in my opinion the operation of this limb of s 5(2)(a). That limb is directed to three kinds of circumstances. First, circumstances where the aggrieved person does not yet in fact require reasonable adjustments, but the alleged discriminator has foreshadowed that, when and if they are required, they will not be made. Second, this limb may apply to a situation of continuing discrimination and could apply if, for example, Ms Watts had not returned to work in July 2012 and remained on leave at the time of determination of this proceeding. However that is not the case: her claim concerns past events only. Third — and relevantly to the third way the applicant puts her claim — s 5(2)(a) must be construed in a way that recognises its operation in a range of practical circumstances. Part of the work to be done by the second limb is to allow for the position of a discriminator who recognises her or his legal responsibilities, but where consideration and implementation of adjustments requires a period of time. In those circumstances, it cannot be said, consistently with the proper construction of the provision, that a discriminator "proposes not to make" reasonable adjustments. That is why it is correct to describe the position of Australia Post, after 21 May 2012, as "proposing to make" reasonable adjustments for Ms Watts. However, before any acceptance by Australia Post of the task of making those adjustments, it is correct to say it was not "proposing to make" those adjustments.

240 Second, the question posed by the statute is expressed in the negative: did Australia Post propose not to make reasonable adjustments for Ms Watts? Even if I am wrong about the construction of this limb of s 5(2)(a) and it does apply to these facts, I am satisfied that, during the period 18 May 2010 to approximately 21 May 2012 (when the evidence suggests Australia Post formed a view Ms Watts could return to work under the restrictions recommended by

Dr Hollander) Australia Post proposed not to make reasonable adjustments for Ms Watts. Whether or not it was searching in good faith for some accommodation acceptable from its perspective is not the question posed by the statute, because of the expansive definition of "reasonable adjustments". The question is whether it proposed to make the kind of modifications and alterations I have described in [21]-[27] above. On the evidence it plainly did not, and indeed positively refused to at various stages throughout that period.

*The requirements of section 5(2)(b) are met for some of the period contended for*

241 Section 5(2)(b) proceeds, as the applicant submitted, on the premise that there has been a failure to make reasonable adjustments for a person, or there has been a proposal not to make reasonable adjustments for a person. In other words, it proceeds on the premise that s 5(2)(a) has been made out. It then requires an inquiry into the effect of there being no reasonable adjustments for the aggrieved person. It directs attention to the substantive outcome of a failure to accommodate a person's disability. Although the provision still requires a comparison to be undertaken to identify discrimination, the context in which the statute places that comparison is quite different to s 5(1). Both parties' submissions concentrated on an analysis which tended to obscure rather than emphasise the differences between s 5(1) and s 5(2).

242 It is nevertheless correct in my opinion to approach s 5(2)(b) on the basis that the function of a comparator in the context of discrimination is to facilitate the isolation of the reason why the person was treated as he or she was: *Purvis* at [223] per Gummow, Hayne and Heydon JJ. By removing the nominated attribute but otherwise comparing how the aggrieved person was treated in comparison with another person in the same or similar circumstances, it is thought that the "real reason" for the person's treatment more readily emerges. In the context of s 5(2)(b), it can be said that the "real effect" more readily emerges. This explanation in *Purvis*, combined with the particular language in s 5(2)(b), serves to highlight the overlap between "less favourable treatment" and "because of the disability" in s 5(2)(b). They are not two separate elements: rather, by reason of the comparison required, either the conclusion will be that the effect of the failure to make reasonable adjustments was to treat a person less favourably because of her disability, or the conclusion will be that it was not.

243 That is why the circumstances with which the comparator is invested are so critical. The 2009 amendments did not purport to modify the language used in s 5(1) (which was the subject of the decision in *Purvis*) to describe the comparison required. The same language is repeated in s 5(2)(b). Yet the task is quite different. Section 5(2)(b) expressly addresses, in my opinion, the finding of the plurality in *Purvis* at [230] that the comparison must identify "all the effects and consequences of disability that are manifested to the alleged discriminator. What then is asked is: how would that person treat another in those same circumstances?"

244 The distinction between the majority and minority judgments in *Purvis* was the result of a fundamental disagreement in construction concerning s 5(1) of the DDA, and whether it was intended to include in the "same or similar circumstances" manifestations of a person's disability, such as uncontrollable and violent behaviour. Both the plurality and the Chief Justice held that it was

so intended. The plurality explained this by emphasising that the DDA as it then stood was concerned with equality of treatment, not equality of outcome. They said (at [201]):

> Different comparisons may have to be drawn according to whether the purpose is limited to ensuring that persons situated similarly are treated alike, or the purpose is wider than that.

245 As the plurality also pointed out (at [202]), substantive equality directs attention to equality of outcome and begins from the premise that "in order to treat some persons equally, we must treat them differently": *Regents of University of California v Bakke* 438 US 265 (1978) at 407 per Blackmun J.

246 The subject matter of s 5(2) is substantive equality. Its focus is on the effect or outcome of not accommodating the needs of a disabled person, or, to use the language of Blackmun J, the effect or outcome of not treating them differently. As the plurality in *Purvis* foreshadowed, when that is the task, a different comparison is required from that in s 5(1). That is emphasised by the presence of s 5(3).

247 Was the effect of Australia Post failing to make the adjustments I have described in [230]-[237] above that Ms Watts was treated less favourably than another Australia Post employee without her disability would have been treated in those circumstances? In my opinion that question requires an affirmative answer, for some of the contested period.

248 I find that the "treatment" for the purposes of s 5(2)(b) should be identified as the direction or insistence by Australia Post that Ms Watts remain away from work and use up her leave, then take leave without pay, until medical information satisfactory to Australia Post was provided to it. If the adjustments had been made, Ms Watts would have remained at work in a modified role, with her hours adjusted if need be between full time and something less than full time, and with some restrictions around how she was able to deal with workplace issues she found stressful, or with workload pressures. That is what eventually occurred in fact. Therefore, the *effect* of Australia Post failing to make those adjustments was that Ms Watts had to remain away from work and use up her leave, and take leave without pay until she could provide medical evidence satisfactory to Australia Post.

249 Was that effect or outcome to treat Ms Watts less favourably than a person without her disability would have been treated in circumstances that were not materially different?

250 In the circumstances of this case then, the comparator must be a person without a psychological condition of the kind suffered by Ms Watts. There is no reason in principle why an appropriate comparator in a given case might not be a person with a different disability. There may well be circumstances where the absence of reasonable adjustments means people with certain kinds of disabilities are treated less favourably than persons with other kinds of disabilities: it would not advance the purpose of the legislation for such circumstances to be outside the protection otherwise contemplated by the DDA. Indeed the Full Court of this Court has recently dealt with allegations of disability discrimination precisely on the basis of a comparison between people with different disabilities: see *Nojin v Commonwealth* (2012) 208 FCR 1 at [126]-[127] per Buchanan J, at [242] per Katzmann J. Although the respondent relied on remarks from Gilmour J in *Gaffney* at [137] to support the

proposition that the comparator should have no disability, it does not appear from his Honour's reasons that there was any argument put to his Honour on this point in a way which may be necessary in this case.

251 One of the difficulties with the comparators suggested by both parties, and indeed many of the arguments on other aspects of unlawful discrimination by both parties, is they ignore what I consider to be a critical fact: namely, that Ms Watts was not away from the workplace when what in my opinion was the act of discrimination occurred. She was in the workplace, performing alternative and modified duties for Mr Schell. This is not, in my opinion, a "return to work" case at all. It is about a return to an employee's contracted position.

252 In my opinion, for the circumstances here to be "not materially different", as s 5(2)(b) requires, the (hypothetical) comparator Australia Post employee must be in the circumstances facing Ms Watts in approximately February 2010. That is, she was at work, performing modified or restricted duties in another part of Australia Post's business, performing well and to her supervisor's satisfaction. She was not in her contracted role as bid manager, and had not been for some time. In order for the circumstances to be "not materially different", the comparator must, in my opinion, be performing modified or restricted duties because of an injury found to be work related. Like Ms Watts, the comparator will have a long and good performance record with Australia Post and will be willing to return to her position as bid manager. Like Ms Watts, there will be no evidence to suggest that the comparator will ultimately be unable to return to her position as bid manager.

253 Where there was no apparent difficulty with the employee continuing (at least for some period) in the modified or restricted duties, and no suggestion the person would ultimately be unable to return to her position as bid manager, would Australia Post have required such an employee instead to provide further medical information setting out whether and how that employee could return, substantively straight away, to the full-time position as bid manager for which she was employed? That is, effectively, what Ms Scott-Brown required of Ms Watts in and from February 2010. Would Australia Post have directed such an employee to take leave if the information was not provided?

254 In my opinion the answer to these questions is "no". That is because Australia Post would, I infer, have continued to deal with that employee on the basis of rehabilitating her from her work-related injury and effecting a transition back to her position as bid manager. For example, in my opinion, if a bid manager had a back injury which was work related but the employee was back at work on modified duties, I find Australia Post would have let that employee remain at work and transition back to a bid manager position.

255 Without the adjustments being made for her, Ms Watts's psychological condition meant she could not return to a full-time position as bid manager in February 2010, when Australia Post (through Ms Scott-Brown) first raised the matter of her returning to this position, nor by 18 May 2010 when Australia Post directed her to remove herself from the workplace and go on leave. This outcome, for Ms Watts, was less favourable than a comparator employee.

256 No doubt Ms Scott-Brown's rather sudden intervention in February 2010, seeking to apply a policy that did not in its terms squarely apply to Ms Watts, was a key event, one that proved disastrous for both Ms Watts and Australia Post. I have dealt at [210]-[225] above with why the application of the policy to Ms Watts was misconceived. For the task required by s 5(2)(b) this is, however,

nothing more than a circumstantial explanation of why there might have been a failure to make the adjustments Ms Watts required in a timely manner. This explanation does not affect the conclusions I have reached.

257 Australia Post's invocation of the policy is a distraction from the task under the DDA. It seemed to contend that, unless there was a challenge by the applicant to the lawfulness of the policy, she could not succeed. This approach misunderstands the operation of the relevant aspects of the DDA. The DDA is concerned with conduct: what an aggrieved person must prove, first and foremost, is the conduct the discriminator is alleged to have engaged in. That conduct will then be characterised in accordance with the DDA as properly construed, including ascertaining the reason for the conduct (s 5(1)) and, more importantly in the present case, the *effect* of that conduct (s 5(2)).

258 There is no doubt Ms Scott-Brown sought strictly to adhere to the policy in the way she dealt with Ms Watts. There is some force in the applicant's submission that the focus of those at Australia Post most closely dealing with Ms Watts (such as Ms Scott-Brown and Ms Garrad) was really on enforcing compliance with what they considered the policy required, in the face of what they saw as a lack of cooperation and a degree of belligerence by Ms Watts. Whether or not Australia Post's conduct was consistent with its internal policy does not alter the analysis required by the DDA. Conduct pursued because an employer's policy requires it to be pursued can just as much constitute unlawful discrimination as conduct pursued without guidance from a policy. There is, as I have observed at [22], nothing in a cause of action based on direct discrimination as defined in s 5(2) of the DDA which authorises the Court to assess the reasonableness of the decision-making processes, or the reasonableness of the conduct, of an alleged discriminator.

259 Australia Post also submitted it was an important factor that Ms Watts had never been certified by her treating GP, Dr Saranathan, as fit to return to her duties as bid manager before August 2012. This, it said, also indicated she could not have been treated less favourably because she was never certified as fit for her position as bid manager without restrictions. Given the matters I have set out above about the construction and operation of s 5(2), this submission is perhaps ill-suited to s 5(2) and better suited to s 5(1). Nevertheless, for completeness' sake I address it.

260 It is not in dispute that Dr Saranathan had been providing similarly-worded medical certificates in respect of Ms Watts for the period she was working with Mr Schell. It is also not disputed that he continued to provide medical certificates once she was directed to go on leave by Ms Scott-Brown in June 2010. Most of those certificates were not in evidence, but Ms Garrad's evidence was that the certificates stated that she was fit to return to the full duties of her nominal position on reduced hours, but subject to Ms Selvi's prescribed restrictions. This accords with emails from Ms Scott-Brown which were in evidence.

261 However, the certificate which was relied on by Australia Post for its contention (that Ms Watts had never been certified as fit to return to her position as bid manager) assists Ms Watts' arguments rather than those of Australia Post. It is dated 5 May 2010 and covers a period of a month from that date. In form, it is a certificate used for workers' compensation claims, although clearly that is not the use to which it was being put for Ms Watts. It described the injury or illness as "Mishandling of selection process for development Program.

Significant Depression and Anxiety leading to Insomnia". It describes Ms Watts' type of work as "Bid Consultant". It certifies that she is "Fit for modified duties" from 5 May 2010 to 2 June 2010, with restrictions specified as "5-7.35 hours per day, Mon-Fri. RTW must take into consideration Andrea's medical and psychological needs as specified in the letter from Muradiye Selvi". It sets a next review date of 3 June 2010. I infer Dr Saranathan was aware Ms Selvi would shortly be supplying a report to Australia Post. The evidence is that 7.35 hours per day is full-time hours. This medical certificate was contemplating Ms Watts could work full-time hours. It placed no inflexible restrictions on the way she needed to perform her work, but rather advised her employer to "consider" Ms Watts' medical and psychological needs as Ms Selvi described them.

262 There is nothing in the contents of this certificate which could support a contention that Ms Watts' treating GP was advising she could not remain at work with reasonable adjustments, or which supported the need for a direction that she stay away from work on sick leave. Quite the contrary. That is why s 5(2)(b) is made out — without Australia Post supplying those reasonable adjustments, the effect was that Ms Watts was unable to return to her position as bid manager.

263 A final point should be made about the analysis required by s 5(2). The focus of s 5(2) on the effect of not making reasonable adjustments, as distinct from the focus of s 5(1) on the reason for a person's treatment, means that it is unclear what role s 10 of the DDA has to play in any application of s 5(2). In my opinion, it may be very little, but that is not a matter I need to decide in the present case.

264 Section 5(2)(b) requires, as I have outlined, an effect of the failure to make reasonable adjustments to be identified. That is a factual question. Here, the effect I have identified on the evidence is twofold. First, the failure to make reasonable adjustments prevented Ms Watts from returning to her role as bid manager when Australia Post wanted her to do so in and from February 2010. In turn, the second effect was that Australia Post directed her to remain away from work, using up her leave, as it was not satisfied she could return to her position as bid manager. Those effects of Australia Post's failure to make reasonable adjustments continued for so long as Ms Watts was willing and ready to return to work, and resulted in less favourable treatment of Ms Watts than a comparator employee.

265 Nevertheless, in my opinion there was a point at which, on the facts of this case, those effects of Australia Post's failure to make adjustments ceased. There came a point at which it was not Australia Post's refusal to modify temporarily Ms Watts' working hours, or alter temporarily the contents of the role she was performing, that was keeping her away from work. There came a point at which it was not Australia Post's refusal to modify temporarily how Ms Watts could deal with workplace stressors or workload pressures that was keeping her away from work. Rather, there came a point at which what was keeping her away from work (and compelling her to use up her leave or take leave without pay) was her own lack of cooperation with her employer, and thus her own willingness and readiness to return to work. That point was reached when, having had a long list of questions about why she needed to see Dr Hollander answered, Ms Watts still refused to see him.

266 The first appointment for Ms Watts to see Dr Hollander was scheduled for

4 February 2011. As I set out at [184] above, Ms Watts had communicated some concerns to Australia Post about the necessity for this appointment, and suggested that it be postponed. This, it must be remembered, was prior to Ms Watts providing Australia Post with the second report by Ms Selvi, on 21 February 2011. At this stage, Ms Watts was asking Australia Post to accept Ms Selvi's advice and recommendations. These events also occurred in the context of Australia Post undertaking a "reasonable adjustments assessment", which I describe in more detail at [192]-[196] above. However, by April 2011, the "reasonable adjustments assessment" process within Australia Post had concluded, Ms Watts had provided Ms Selvi's second report to Australia Post and been told by Ms Scott-Brown that the report was unsatisfactory for its purposes. Yet, Ms Watts still refused to attend an appointment with Dr Hollander. In my opinion, it is at this point, in late April 2011, that Ms Watts' lack of cooperation and lack of willingness and readiness to return to work resulted in the effect that Ms Watts was kept away from work. It was no longer Australia Post's failure to make reasonable adjustments which had the effect of keeping Ms Watts away from work.

267 In making this finding, I have relied on the following evidence. First, Ms Watts' refusal, in writing to Australia Post on 21 April 2011, to see Dr Hollander at her scheduled appointment on 29 April 2011 (to which I refer in more detail at [197] above). Second, her continuing refusal, I infer, between April and October 2011, to cooperate in securing an appointment with Dr Hollander. Third, following a formal written direction to Ms Watts that she attend an appointment with Dr Hollander, made by Australia Post on 13 October 2011, Ms Watts' continued unwillingness to attend appointments made for her with Dr Hollander, demonstrated by her ongoing debate with Australia Post about the lawfulness of its direction, and her insistence that appointments made for her with Dr Hollander be rescheduled (set out at [198]-[201] above).

268 Although the direction to take leave remained in place, the period between 21 April 2011 when Ms Watts refused in writing to see Dr Hollander, and when she in fact did see him in late April 2012, was a period out of the workplace because of Ms Watts' lack of cooperation. It was no longer the effect of Australia Post's failure to make reasonable adjustments for her psychological condition. It was the effect of her own, uncooperative, decision-making. By this stage she was not, I find, willing and ready to return to work. She had become, for her own reasons (about which I need not and do not make any findings) fixated on securing a resolution to her return to work on her terms and only on her terms. That resolve only broke down when she was faced with the possibility of losing her employment due to non-compliance with her employer's direction, and even then she complied under much protest.

269 If Ms Watts had complied in a timely fashion with Australia Post's request to be independently assessed by Dr Hollander, then what occurred in April 2012 through to July 2012 would, I am prepared to infer and to find, have occurred in April 2011 through to July 2011. Ms Watts could have been back at work by the end of July 2011 instead of the end of July 2012.

270 Accordingly I find there was discrimination within the meaning of s 5(2) of the DDA between 18 May 2010 and 21 April 2011, but not between 21 April 2011 and when Ms Watts returned to her bid manager position on 31 July 2012.

*Was the discrimination unlawful?*

271 In my opinion there were contraventions of s 15(2)(b) of the DDA as contended by the applicant. The matters Ms Watts has identified (see [66] above) are benefits associated with her employment. They are the kinds of matters that an employee would usually enjoy and secure through attendance at the workplace and participation as a productive member of a workforce. Bearing in mind that these terms are to be seen neither from the exclusive perspective of the employer or the employee, these are positive outcomes an employee could ordinarily expect to enjoy and receive from attendance at work. Since they are essentially positive matters, they are within s 15(2)(b) rather than s 15(2)(d), in my opinion.

272 In her applications and consolidated amended statement of claim dealing with both proceedings, the applicant nominated a variety of dates on which she alleged the unlawful discrimination began. However, by the time of trial and in final submissions, it was clear that she sought relief in respect of loss from June 2010 through to 30 July 2012. That is the case to which Australia Post responded. I have taken the reference to June 2010 to mean the direction given to Ms Watts on 29 June 2010 that she take sick leave and remain away from work. Accordingly, despite my finding that there was discrimination from 18 May 2010, it is not appropriate on the applicant's case as it was articulated at trial to grant any relief for the period 18 May to 28 June 2010.

**Conclusions on applicant's second argument**

273 Given my findings on the first argument, it is not necessary to determine the narrower ground relied on by the applicant, in relation to the periods June 2010 – February 2011, and February 2011 – June 2012. This ground is based on Ms Watts having identified reasonable adjustments through the two reports by Ms Selvi, and so dates from the time of Ms Selvi's first report.

274 For reasons I have outlined above, the adjustments were available from before the time Ms Scott-Brown decided that the policy should be applied to Ms Watts. There was no attempt by Australia Post to replicate how Ms Watts was working with Mr Schell within the bid management team, nor to approach Ms Watts (and Ms Selvi) to see how Ms Watts might restart working in the bid management team with the kind of transition that resulted in her successfully working with Mr Schell. There has been no suggestion that any of the kinds of adjustments proposed (including those rejected by Australia Post in its internal assessment in March 2011) imposed unjustifiable hardship on Australia Post, nor could that reasonably be suggested. The failure to make reasonable adjustments had the effect required by s 5(2)(b) but, as I have explained above, only until April 2011, and not thereafter. Those findings apply equally to the applicant's second argument and do not alter the period over which there was unlawful discrimination.

**Conclusions on applicant's third argument**

275 Similarly, this much more confined argument need not be determined in light of the findings I have already made. I have already found that, between Dr Hollander's report and Ms Watts' return to work in July 2012, reasonable adjustments were available in Australia Post's workplace for Ms Watts. I have also found those adjustments had always been available. There was no vagueness about them which was not inherent in the kinds of adjustments they were. Neither Ms Selvi nor Dr Saranathan ever expressed any of their

recommendations in absolute terms. No-one suggested Ms Watts could never be subject to a tight deadline for the first three months. The recommendation was to "avoid" them. These kinds of qualitative recommendations are to be expected when one is dealing with a psychological condition and a transition back into the role in which the illness previously arose. Dr Hollander's report in a sense recognised this, including recognising what Ms Watts was, and had always been, capable of doing.

276 However, if I am wrong about my conclusions on the first and second argument, then in my opinion it is clear that there was no unlawful discrimination by Australia Post in the period after it received Dr Hollander's report.

277 The phrase "does not make … reasonable adjustments" should, as I have observed at [30] above, be construed as incorporating some time for consideration and implementation of reasonable adjustments by the discriminator. That, in a sense, is why the alternative of "proposes not to make reasonable adjustments" is present. A discriminator would no doubt be considered to be "proposing" to make reasonable adjustments if, over a short period of time, it had accepted its legal responsibility to do so and was planning and arranging implementation of them. That is the situation in this proceeding, certainly by Australia Post's letter of 21 May 2012. In that letter, Australia Post states that it received Dr Hollander's report on 9 May 2012. The interval between 9 and 21 May is the kind of period the legislation contemplates for a discriminator to accept legal responsibility and consider implementation. This scheme must be given a practical effect.

**Does the exception in section 21A apply?**

278 For the reasons I have set out above, it is clear that s 21A(4) excludes s 21A from having any operation in relation to discrimination which is unlawful by reason of s 15(2)(b) or s 15(2)(d).

279 I have already expressed my reasons why it is not appropriate to consider the submission that the application of the policy to Ms Watts involved any change in the terms and conditions of her employment, such as to engage s 15(2)(a) and therefore s 21A.

**Loss and damage**

280 Section 46PO(4) of the *Australian Human Rights Commission Act* empowers the Court to grant relief when it is satisfied there has been unlawful discrimination by a respondent. Relevantly, it provides:

> (4) If the court concerned is satisfied that there has been unlawful discrimination by any respondent, the court may make such orders (including a declaration of right) as it thinks fit, including any of the following orders or any order to a similar effect:
>
> …
>
> (b) an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;
>
> …
>
> (d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;

281 The provision grants plenary power to the Court to make orders "as it thinks

fit". In particular, subs 4(d) provides the Court with a "wide discretion as to the amount of compensation the Court may order for loss or damage suffered because of unlawful discrimination": *Ewin v Vergara (No 3)* [2013] FCA 1311 at [601] per Bromberg J. The Court's exercise of that discretion is to be governed by the text of the relevant statute: *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 at [94] per French and Jacobson JJ. The principles relevant to the assessment of damages in tort may be of assistance (see *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217 at 239 per Lockhart J, at 281 per French J), but only to the extent that they do not conflict with the words of the statute: *Ewin* at [604] per Bromberg J.

282 An order for compensation may be made for "any loss or damage suffered *because of* the conduct of the respondent". Phrases such as "by reason of", "because of" and "by virtue of" require a "practical application of causation principles": *Macabenta v Minister for Immigration and Multicultural Affairs* (1998) 90 FCR 202 at 213. A phrase like "because of" "implies a relationship of cause and effect" between the unlawful conduct of the respondent and the damage incurred by the applicant: see *Human Rights and Equal Opportunity Commission v Mount Isa Mines Ltd* (1993) 46 FCR 301 at 321 per Lockhart J; *Ewin* at [605].

283 The parties have agreed on the calculations of specific loss of leave entitlements, income while on unpaid leave and loss of opportunity of bonuses, filing a spreadsheet reflecting that agreement.

284 The applicant submitted an appropriate way to compensate her for the loss of her leave was to order that Australia Post re-credit it. Australia Post did not submit there was no power to make such an order. I am satisfied there is power to make such an order under either s 46PO(4) or under s 23 of the *Federal Court of Australia Act 1976* (Cth). Since I have found that one of the benefits which Ms Watts has been denied is the choice to use her sick and recreation leave as she needed or chose to, orders to re-credit that leave most closely reflect the kind of compensation which is consistent with my findings. It will, as much as an order operating on past conduct can, restore Ms Watts to the position she would have been in, had the unlawful discrimination not occurred. There should be a discount of 50% in respect of her sick leave re-credit, to take into account the likelihood that Ms Watts would have accessed quite a lot of her sick leave, even if she had returned to the bid management team. The evidence about her past use of sick leave during her return to work predominantly with Mr Schell after October 2008 supports this finding.

285 There is no evidence about the pattern of Ms Watts' use of recreation or annual leave other than that, based on the amount she had to her credit and available to be used during 2010-2012, she did not previously take all her leave entitlements annually. There should be a discount of 25% applied to annual leave to be re-credited, on the basis she would have used some of that leave. If Ms Watts had entitlements to long service leave, they should be wholly re-credited, because there is no evidence to suggest she would otherwise have accessed that leave.

286 Ms Watts may have been entitled to compensation for loss of income during any period of unlawful discrimination where she had to take leave without pay. However, on the evidence it appears that she did not use up her paid

entitlements until 4 August 2011. Since I have found there was no unlawful discrimination after 21 April 2011, Ms Watts is not entitled to compensation for loss of income.

287 If I was wrong in the conclusions I have reached at [241]-[268] above about when the effects of Australia Post's failure to make reasonable adjustments cease, and therefore when the discrimination ceases, I would in any event have found that Ms Watts failed to mitigate her losses, or failed reasonably to avoid further damage by way of economic loss, by her lack of cooperation with her employer in attending for a medical examination with Dr Hollander on and from April 2011.

288 In my opinion, Ms Watts' conduct was unreasonable in not attending to see Dr Hollander promptly after she was requested to do so by Australia Post, and after all her extensive questions about why she needed to do so had been answered. The evidence discloses no good reason at all for her prevarication about appointments made on her behalf. Her subsequent conduct in April 2012 attending for and participating responsibly in an appointment with Dr Hollander can only be explained, I find, by her finally realising her employment itself was in jeopardy because of her lack of cooperation. Australia Post should not have had to reach a point in its working relationship with Ms Watts where it had to resort to such a direction, but her lack of cooperation finally brought the matter to that level. The evidence discloses that none of the reasons she initially gave for not attending with Dr Hollander ended up in fact operating as impediments to her attendance.

289 In the context of other statutory compensation schemes, a failure reasonably to avoid damage has been held to justify refusal to order compensation even though the contravention may have continued for longer than the period covered by the award of compensation. The relevant authorities mostly concern s 82 of the *Trade Practices Act 1974* (Cth) (the TPA). For example, in *Murphy v Overton Investments Pty Ltd* (2001) 112 FCR 182 at [47], Branson J held (RD Nicholson J agreeing):

> an applicant will not recover under s 82 of the TPA loss or damage which he or she could reasonably have avoided (*Finucane v New South Wales Egg Corporation* (1988) 80 ALR 486 per Lockhart J at 519; *Leigh Enterprises v Transcrete Pty Ltd* (1984) ATPR 40-452 per Fitzgerald J at 45,234; *Brown v Jam Factory Pty Ltd* (1981) 53 FLR 340 per Fox J at 351). While the authorities speak of a duty to mitigate loss, the basis of that duty is to be found, in my view, in the statutory requirement that the loss or damage recoverable under s 82 be loss or damage suffered "by conduct of another person". Where any loss or damage could reasonably have been avoided, it is, in the context of s 82 of the TPA, to be regarded not as loss or damage suffered by reason of the conduct of another, but loss or damage suffered by reason of the unreasonable conduct of the applicant.

Section 46PO(4)(d) is expressed in terms similar to s 82 of the TPA. It provides that the Court may make "an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered *because of the conduct* of the respondent".

290 A similar approach was taken to an equivalent compensation provision by the New South Wales Administrative Decisions Tribunal in *Smith v Department of Education and Communities (NSW)* [2013] NSWADT 162.

291 In my opinion, between April 2011 and April 2012, any economic loss

suffered by Ms Watts was not because of the conduct of Australia Post: it was because of her unreasonable and to my mind inexplicable lack of cooperation in attending Dr Hollander for a medical examination when asked.

292 The applicant sought to have an amount awarded in respect of her superannuation entitlements. What that order might be was not specified by the applicant.

293 There is no evidence before the Court about Ms Watts' superannuation entitlements, nor what occurred to them between May 2010 and April 2011, given she was on some form of leave during that time. The applicant, having failed to adduce any evidence about whether she has sustained a loss of entitlements of this nature, or to quantify them, has failed to discharge her burden of proof in relation to this category of loss and no award should be made.

294 Ms Watts also claimed by way of compensation an order that Australia Post pay her bonuses she maintained she would have earned had she been at work as a bid consultant. The amounts were calculated by reference to bonuses previously paid to Ms Watts. Australia Post submitted that there should be no compensation for lost bonuses because Ms Watts has not proven she would have been entitled to such bonuses. Ms Psarologos' evidence was that only employees with a performance rating of about 3 and above were awarded bonuses. After her return to work in July 2012, his evidence was that Ms Watts was given a performance rating of 2 for the 2012/2013 year. I accept that evidence. In my opinion, even if she had been at work for those two years (and, contrary to my findings, was subject to unlawful discrimination for that whole time), it is likely on the whole of the evidence that Ms Watts would have been working at less than her full capacity for much of the time, and that she may have had periods where she had ongoing difficulties at work affecting her performance. There was evidence that had occurred in the period between her return to work in 2008 and her direction onto sick leave in May 2010. For example, Mr Schell annexed to his affidavit a series of emails from Ms Watts between 12 February 2009 and 16 July 2009 where Ms Watts sought reductions to her working hours from time to time. I am not prepared to find on the balance of probabilities that she would have had a performance rating at 3 or above such as to entitle her to a bonus.

295 Finally, Ms Watts is entitled to compensation for the stress, anxiety and disruption the unlawful discrimination has caused. In her own evidence, Ms Watts describes the effect of Australia Post's conduct on her in the following way:

> I was willing and able to return to my work as a Bid Consultant (on a graduated adjusted basis) during the whole period from the provision of the first Selvi report until my actual return to work in 30 July 2012.
>
> The long delay in providing a return to work program for me has had a terrible effect. I felt rejected and sidelined. My life was put on hold for over two years and I was unable to apply my skills as a Bid Consultant. The long drawn-out delay did nothing to assist me in my recovery from the psychological injury which had given rise to the need for a return to work program.
>
> The way I was treated was humiliating and disrespectful. I have been a very good and loyal employee of the Respondent. I consider that I have performed well for Australia Post. I have never been subject to discipline for poor performance or misconduct. I have never come close, apart from the threats made to me because of my resistance to another medical examination by Dr Hollander.

296 She was not cross-examined on this evidence and I accept it, to the extent it relates to events until April 2011.

297 In a report annexed to her affidavit given in this proceeding, Ms Selvi describes the effect of Australia Post's conduct on Ms Watts, as she observed Ms Watts, in the following way:

> I have had the opportunity to work with Ms Watts over an extended period of time and feel confident in my assessment of her as a highly motivated and enthusiastic woman who's primary goal over this period of time has been to return to her former position with Australia Post. … Ms Watts prides herself and values the work ethos … . Her sense of self worth and self esteem revolve around her ability to work as a valued member of society. She places great worth and value on her ability to work and be productive. These are values that she has voiced throughout the time that I have been working with her.
>
> …
>
> Having had extensive experience with injured workers, I am acquainted with how difficult it is to motivate workers after an injury to make the attempt to return to work. Both medical treatment providers, the employer and insurance companies must invest in vast resources to motivate injured workers back to work and have to deal with serious barriers. In respect to Ms Watts she has been keen and motivated to get back to work within 3 months of her injury, her attitude about returning to her former position with Australia Post was the same from the start …
>
> It was anticipated in early 2010 that psychological intervention with Ms Watts would reduce by mid 2010 and end within few months as she was making great progress at work and had further anticipated that once pending mediation took place and some legal issues resolved that she would be back at her pre injury position and that her life would return to normal.
>
> Unfortunately this is not what happened. The decision taken by Australia Post in early 2010 to consider Ms Watts's medical restrictions as "Non Work Related Medical Restriction" caused a major regression in her overall mental health and emotional stability and seriously impacted upon her sense of self-esteem and self-confidence. She was concerned and worried about loosing her job and not having the opportunity for gainful employment. She was confused, agitated and felt a sense of injustice about what she was going through.
>
> …
>
> It is my opinion that Ms Watts suffered … psychological turmoil and emotional distress for over 20 months as she waited with feelings of helplessness and hopelessness not knowing about the direction of her vocational future which she felt were in the hands of Australia Post.

298 This part (as well as other parts) of Ms Selvi's affidavit was subject to an objection by Australia Post. After hearing submissions and following some concessions on behalf of the applicant, this part and some other parts were admitted. Thereafter, Ms Selvi was not cross-examined on it. I accept her evidence in these paragraphs.

299 In her second report of February 2011, Ms Selvi also described the effect of the unlawful discrimination on Ms Watts, as she had observed it:

> Throughout my involvement with Ms Watts, which has extended over a period of two and half years I have found her always to be highly motivated to help herself overcome her predicament and she took an active part in all areas of her rehabilitation. In particular she has always been dedicated and motivated for a viable return back to her job which she enjoys and values as the most important thing in her life.

> Having gained substantial benefit from for psychological rehabilitation Ms Watts used the opportunity to negotiate a return back to Australia Post and by late October 2008 she was back at work with a vision to gradually return to her pre injury position and normal working hours.
>
> Over the course of the next 12 months Ms Watts condition in respect to psychological health continued to improve as she increased her working hours and was gradually taking on more responsible duties.
>
> Despite the workplace stressors in respect to her return to work plans, Ms Watts used the strategies she had developed in her psychological sessions to cope with these and focus on trying to improve the quality of her life and return to her full time employment at her usual occupation.
>
> In fact, as stressful as it was for Ms Watts to have to deal with, she was preparing for mediation which she accepted was a vital step towards recovery and the opportunity to move on in her career which was very important to her.
>
> Ms Watts was progressing very well and it was anticipated that by mid 2010 she would be working normal hours and possibly at the same level of work which she was performing before her injuries. However, work place issues relating to "NON WORK RELATED MEDICAL RESTRITIONS" [sic] made in early 2010, unfortunately halted both her vocational and psychological rehabilitation.
>
> Ms Watts attended her sessions during this period very distressed and once again disillusioned about the way she was being treated, she simply wanted to get on with her life and her job at work but expressed that she felt victimised and hurt by what was happening. She once again was exhibiting symptoms of anxiety and the sleep problems which had resolved, had once again become a problem.
>
> Given her level motivation and determination despite the new stressors which confronted her, she was able to cognitively reappraise her situation and developed coping strategies to allow her to remain at her job and to gradually work towards her goals of increasing her hours and meeting the inherent requirements of her pre injury position.
>
> Hence, on the 16th of June 2010 Ms Watts was cleared to continue to work six hours each day performing the duties which she had been performing while she had been back at her job which she had reported was a an A05 level.

300 I also accept Ms Selvi's evidence to the extent she observed a tangible effect on Ms Watts from Australia Post's conduct and a regression in terms of the symptomatology of her psychological condition. However, throughout this period Ms Watts also presented a determined, sustained and forceful opposition to Australia Post's management of her return to work. That is evident in all the correspondence before the Court. There was also evidence of Ms Watts attending meetings with Australia Post in which at least some Australia Post employees had asserted she was somewhat overbearing. She was dealing regularly and productively with her union representatives. Most importantly of all, her evidence to the Court was, and her representations to Australia Post were, that at all times throughout this period she was ready, willing and able to return to work (with appropriate modifications). This is not an employee who was so wholly undone by the treatment of her employer that she was unable to work. Quite the contrary. Further, I find Ms Watts has a great deal of strength of character and dealt reasonably well with the way Australia Post treated her, preferring to stand her ground and insist on what she believed she was entitled to. By the time she saw Dr Hollander, his opinion was that her psychological condition was in partial remission and her health had improved. Further, I find that some of her distress and anxiety was of her own making: that is, by reason

of her uncooperative and stubborn approach to her employer's requests for information. Not all her distress and anxiety was caused by the unlawful discrimination.

301 For those reasons, and taking into account my finding that the compensable period is 18 May 2010 to 21 April 2011, I do not consider a large award for distress, hurt and humiliation is justified. I award her $10,000 for this head of compensation. Since the second proceeding included allegations of a continuation of the discrimination alleged in the first proceeding, as well as new discrimination after February 2011, I consider it appropriate to award the compensation in the second proceeding.

302 In the originating applications filed for each proceeding, further non-pecuniary orders were sought. Some, such as orders seeking that the applicant be returned to work in her pre-injury role with the respondent (sought in the first proceeding filed on 13 December 2011, prior to Ms Watts' return to work in July 2012) and orders that the respondent organise and pay for a mediation between Ms Marshall and the applicant, are no longer relevant to the proceeding. Others, such as orders that the respondent reimburse the applicant for costs associated with obtaining medical information, an order that staff of Australia Post who work with Ms Watts undertake disability awareness training, and an order for a formal written apology from Australia Post to Ms Watts, were not pursued in written submissions or at trial and, on that basis, I do not propose to make those orders.

303 No declarations were sought by the applicant in her originating applications. However, given that the Court has allowed the applicant's claim only in part, in my opinion it is appropriate to grant declarations with respect to the precise dates of contravention of the DDA by the respondent, in each proceeding as applicable.

The parties will be given a short period of time in which to prepare proposed orders reflecting my reasons, including proposed orders as to costs.

*Orders accordingly*

Solicitors for the applicant: *AED Legal Centre*.

Solicitors for the respondent: *Minter Ellison*.

TAMARA BOONE