



DECISION

Fair Work Act 2009
s.285—Annual wage review

Annual Wage Review 2021–22 (C2022/1)

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT ASBURY
COMMISSIONER HAMPTON
MR FERGUSON
PROFESSOR WOODEN
MS LABINE-ROMAIN

MELBOURNE, 15 JUNE 2022

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Abbreviations

2009–10 Review	<i>Annual Wage Review 2009–10</i>
2012–13 Review	<i>Annual Wage Review 2012–13</i>
2016–17 Review	<i>Annual Wage Review 2016–17</i>
2017–18 Review	<i>Annual Wage Review 2017–18</i>
2018–19 Review	<i>Annual Wage Review 2018–19</i>
2018 Bus Engineering and Maintenance Award	<i>State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2018</i>
2018 Bus Operations Award	<i>State Transit Authority Bus Operations Enterprise (State) Award 2018</i>
2018 Senior and Salaried Officers Award	<i>State Transit Authority Senior and Salaried Officers' Enterprise (State) Award 2018</i>
2019–20 Review	<i>Annual Wage Review 2019–20</i>
2020–21 Review	<i>Annual Wage Review 2020–21</i>
2021–22 Review	<i>Annual Wage Review 2021–22</i>
AAWI	average annualised wage increase
ABI	Australian Business Industrial and Business NSW
ABS	Australian Bureau of Statistics
ACCER	Australian Catholic Council for Employment Relations
ACCI	Australian Chamber of Commerce and Industry
ACOSS	Australian Council of Social Service
Act	<i>Fair Work Act 2009 (Cth)</i>
ACTU	Australian Council of Trade Unions
Ai Group	Australian Industry Group
AMWU	Australian Manufacturing Workers' Union
ARTBIU	Australian Rail Tram and Bus Industry Union
ARA	Australian Retailers Association
ASU	Australian Services Union
AWOTE	average weekly ordinary time earnings
C4	Engineering Associate/Laboratory Technical Officer Level 1
C10	Engineering/Manufacturing Tradesperson Level 1
C14	Engineering/Manufacturing Employee Level 1
Commission	Fair Work Commission

CPI	Consumer Price Index
GDP	gross domestic product
GST	Goods and Services Tax
GVA	gross value added
LCI	Living Cost Index
LITO	low income tax offset
LMITO	low and middle income tax offset
LPC	Low Pay Commission
Manufacturing Award 2020	<i>Manufacturing and Associated Industries and Occupations Award 2020</i>
Miscellaneous Award	<i>Miscellaneous Award 2020</i>
MGA	Master Grocers Australia Limited
NLW	National Living Wage
NMW	national minimum wage
NRA	National Retail Association
Panel	Expert Panel for annual wage reviews
RBA	Reserve Bank of Australia
R&CA	Restaurant and Catering Industry Association
Review	Annual Wage Review
SAWIA	South Australian Wine Industry Association
SDA	Shop Distributive and Allied Employees' Association
SG	Superannuation Guarantee
Statistical report	<i>Statistical Report—Annual Wage Review 2021–22</i>
SWS	Supported Wage System
WAD	Workplace Agreements Database
WPI	Wage Price Index

The Annual Wage Review Decision

1. The Statutory Framework

[1] The *Fair Work Act 2009* (Cth) (Act) requires that each financial year the Commission, constituted by an Expert Panel for annual wage reviews (Panel), conduct and complete a review of the national minimum wage (NMW), modern award minimum wages and make a NMW order (the Review).¹

[2] The NMW order applies to award/agreement free employees² and is dealt with in Division 4 of Part 2-6 of the Act.³ The NMW order sets both the NMW⁴ and special NMWs which apply to employees who are juniors; to whom training arrangements apply; or who have a disability and must set the casual loading for award/agreement free employees.⁵ An award/agreement free employee cannot be paid less than the rate of pay specified in the NMW order.

[3] The making of a NMW order and the review and variation of modern award minimum wages are separate, but related, functions. They are related because they both form part of the ‘safety net’ (see s.3(b)) and s.285(3) of the Act) provide that 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 [R]eview’. It follows from s.285(3) that as part of the decision-making process in a Review the Panel must first form a view about the rate of the NMW it proposes to set (taking into account the statutory considerations relevant to that discrete task) and then take that proposed NMW rate into account (along with the other relevant statutory considerations) in exercising its powers to set, vary or revoke modern award minimum wage rates.

[4] The Panel must conduct the Review within the legislative framework of the Act, particularly the object of the Act in s.3, the modern awards objective in s.134(1) and the minimum wages objective in s.284(1). The Panel’s task is to consider the relevant statutory considerations in the context of the prevailing economic and social circumstances in arriving at its decision in a Review.

[5] In considering the modern awards objective, the Commission 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 the particular considerations identified in s.134(1)(a)–(h). The minimum wages objective provides that the Commission ‘must establish and maintain a safety net of fair minimum wages’ taking into account the considerations identified in s.284(1)(a)–(e). These statutory objectives are very broadly expressed and do not necessarily exhaust the matters which the Panel might properly consider

¹ Fair Work Act, s.285(2)(a)(i)–(ii); s.285(2)(c).

² Fair Work Act, s.294(3) and (4). While a special NMW may apply to a ‘specified class of ... employees’, that has not been the practice to date.

³ Fair Work Act, ss.293–299.

⁴ Fair Work Act, s.294(1)(a).

⁵ Fair Work Act, s.294(1)(b).

to be relevant. The range of such matters ‘must be determined by implication from the subject-matter, scope and purpose’ of the Act.⁶

[6] The minimum wages objective and the object of the Act apply to the review and making of a NMW order.⁷ But the modern awards objective is *not* relevant to the review and making of a NMW order,⁸ as the making of such an order does not involve the performance or exercise of modern award powers.

[7] 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).

[8] 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 account⁹ and a degree of tension is evident between some of these considerations. No particular primacy is attached to any of these considerations.¹⁰ Further, the weight to be attributed to a particular statutory consideration may vary from year to year depending on the social and economic context in a particular Review. It is this complexity that has led the Panel to reject a mechanistic or decision-rule approach to wage fixation.¹¹

[9] The general matters the Panel must take into account in performing its functions contain some common elements. In past Review decisions, the Panel has grouped the matters of direct relevance to the Review into three broad categories:

- economic;¹²
- social;¹³ and
- collective bargaining.¹⁴

⁶ *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]

⁷ This follows from the fact that the minimum wages objective applies to the performance or exercise of the Commission’s functions under Part 2-6 of the Act (s.284(2)(a)) and the review and making of a NMW order is one of the Commission’s functions under Part 2-6. The objects of the Act are also relevant to the performance or exercise of this function (s.578).

⁸ See s.134(2) of the Act. The review and making of a NMW order does not involve the performance or exercise of the Commission’s modern award powers and hence the modern awards objective has no application to that function.

⁹ See [2015] FWCFB 3500 at [88]–[91]; [2016] FWCFB 3500 at [116]; [2017] FWCFB 3500 at [115], [129]

¹⁰ See *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [32]

¹¹ [2017] FWCFB 3500 at [129]

¹² For example, promoting productivity and economic growth (s.3(a)); promoting flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)); the likely impact of any determination on business including on productivity, employment costs and the regulatory burden (s.134(1)(f)); the likely impact of any determination on employment growth, inflation and the sustainability, performance, and competitiveness of the national economy (s.134(1)(h)); the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth (s.284(1)(a)); and acknowledging the special circumstances of small and medium-sized businesses (s.3(g)).

¹³ For example, the establishment and maintenance of a safety net of fair, relevant and enforceable minimum wages within the context of an easy to understand, stable and sustainable modern award system (ss.3(b), 134(1), 134(1)(g) and 284(1)); the promotion of social inclusion through increased workforce participation (ss.134(1)(c) and 284(1)(b)); relative living standards and the needs of the low paid (ss.134(1)(a) and 284(1)(c)); the principle of equal remuneration for work of equal or comparable value (ss.134(1)(e) and 284(1)(d)); and providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability (s.284(1)(e)).

¹⁴ For example, the need to encourage collective bargaining (s.134(1)(b); see also s.3(f)).

[10] In the current Review the Australian Catholic Council for Employment Relations (ACCER) submitted that if the NMW order ‘is set at such a level where persons fall into disadvantage or poverty, then it does not answer the statutory description contained in s 284 of the FW Act’,¹⁵ that is, ‘a safety net of fair minimum wages’.

[11] ACCER contends that the NMW and the C13 to C10 wage rates do not presently constitute ‘a safety net of fair minimum wages’. The short point advanced by ACCER is that ‘to answer that statutory command in s 284, the NMW must be increased sufficiently to lift working people out of poverty’¹⁶ and that the failure to make such an order arising for this Review would amount to a jurisdictional error.¹⁷

[12] During the course of the public consultations, ACCER’s counsel clarified the proposition advanced by ACCER, as being that to comply with the statutory discretion in s 284 that the NMW order should be set at the level at which full-time employees with one or 2 children are above the 60 per cent of median income poverty line. And, any order arising from the Review which did not achieve that result would be affected by jurisdictional error.¹⁸

[13] It was put to counsel that this would require an increase of over 40 per cent to the NMW, which is significantly above ACCER’s proposal.¹⁹ In fact, for a single-earner couple with 2 children, an increase of more than 50 per cent is needed in the NMW for disposable income for this household type to reach the 60 per cent median income poverty line.

[14] ACCER’s counsel accepted that ACCER’s proposal for a 6.5 per cent increase in the NMW would *not* lift these employees out of poverty and hence, were we to accept ACCER’s construction argument, we would fall into jurisdictional error *even if* we were to grant an increase of the magnitude sought by ACCER.

[15] ACCER has advanced similar propositions in previous Reviews. In the *Annual Wage Review 2017–18* (2017–18 Review) proceedings ACCER contended that the Panel’s ‘primary obligation’ is to set a safety net wage that will provide a decent standard of living²⁰ and, further, 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.’²¹

[16] In the 2017–18 Review decision, the Panel rejected ACCER’s submission as to the ‘operational objective’ of minimum wage setting under the Act and said:

¹⁵ ACCER submission, 1 April 2022, at para. 25.

¹⁶ *Ibid* at para. 101.

¹⁷ *Ibid* at para. 18.

¹⁸ Transcript of proceedings, 18 May 2022, PN332–PN354.

¹⁹ *Ibid*, PN341–PN344.

²⁰ ACCER submission, 13 March 2018, at para. 42.

²¹ *Ibid* at para. 215.

‘The proposition advanced finds no support in the words of the statute and seeks to elevate one consideration (“relative living standards and the needs of the low paid”) above all others.’²²

[17] For the same reasons we reject the construction of s.284 advanced by ACCER in these proceedings. Further, it seems to us that the proposition put is contrary to the following observations by the Full Federal Court 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.’²³

[18] As the Panel has stated in numerous previous Review decisions, fairness in this context includes the perspective of employees and employers,²⁴ and the Act requires the Panel to take into account all of the relevant statutory considerations.²⁵

[19] In the *Annual Wage Review 2019–20* (2019–20 Review) decision the Full Bench considered the legislative framework in detail, including a consideration of what the Panel can and can’t do in a Review.²⁶ The Panel adopted those observations in the *Annual Wage Review 2020–21* (2020–21 Review).²⁷ We also adopt those observations.

[20] 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)). The timetable for the Review and all of the submissions and research reports were published on the Commission’s website to ensure that all parties had a reasonable opportunity to participate. The Panel has considered all the material received from parties, the information in the *Statistical Report—Annual Wage Review 2021–22* (Statistical report) and the research referred to in the Research reference list in making its decision.

[21] As was the case last year, the Review timetable was extended to allow parties to provide comment on the most recent available data. The Australian Bureau of Statistics (ABS) March Quarter 2022 *National Accounts* were released on 1 June 2022 and interested parties filed submissions in respect of these data on 3 June and 8 June 2022. In a Statement published on 30 May 2022, the Australian Government was granted leave to lodge a new submission to the Review, by 4pm on Friday 3 June 2022.²⁸

[22] As a practical matter the Review decision had to be published sometime before 30 June 2022 to allow sufficient time for draft variation determinations to be published and for interested parties to submit corrections or other amendments to the draft determinations. Given

²² [2018] FWCFB 3500 at [25].

²³ (2017) 350 ALR 592 at [33].

²⁴ [2020] FWCFB 3500 at [104]; [\[2019\] FWCFB 3500](#) at [10].

²⁵ [2020] FWCFB 3500 at [104]; [\[2019\] FWCFB 3500](#) at [11].

²⁶ See [2020] FWCFB 3500 at [211]–[270].

²⁷ [2021] FWCFB 3500 at [4].

²⁸ [2022] FWCFB 84.

these constraints, our decision has not sought to canvass all of the issues raised in the submissions. We have focussed on the issues which the Act requires that we take into account.

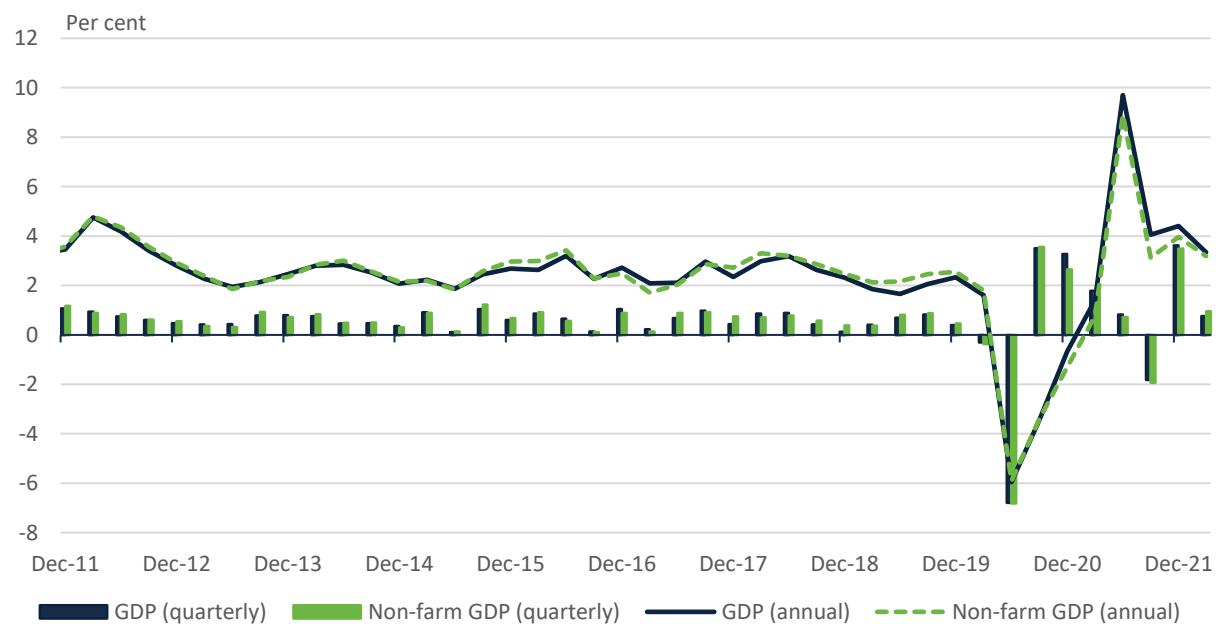
2. Considerations

[23] The economic and social considerations required to be taken into account in relation to the minimum wages objective in s.284(1)(a)–(e) and in relation to the modern awards objective in s.134(1)(a), (b), (c), (d), (e), (f) and (h) are dealt with in this section. A discussion of the key economic and social indicators follows.

2.1 Economic Considerations

[24] The latest National Accounts for the March quarter 2022 show that gross domestic product (GDP) grew by 0.8 per cent in the quarter and by 3.3 per cent over the year (Chart 1). Throughout the year, growth was particularly strong in the December quarter 2021 (3.6 per cent) following a decline in the September quarter (–1.8 per cent) that was affected by the Delta outbreak.²⁹ Annual GDP growth was higher than over the previous year to the March quarter 2021 (1.4 per cent), while there was also an improvement in GDP per capita (2.5 per cent compared with 1.3 per cent) and gross value added (GVA) (4.2 per cent compared with 0.6 per cent).³⁰

Chart 1: Economic growth, annual and quarterly growth rates



Source: Statistical report (version 9), 8 June 2022, Chart 1.1; ABS, *Australian National Accounts: National Income, Expenditure and Product*, March 2022.

[25] Household consumption increased by 1.5 per cent in the March quarter 2022 and by 4.0 per cent over the year. This led to a decline in the Household saving ratio to 11.4 per cent, the lowest since the start of the pandemic, although still above pre-pandemic levels. The increase in household consumption in the March quarter was driven by a rise in Transport

²⁹ ABS, *Australian National Accounts: National Income, Expenditure and Product*, September 2021: *Economic activity decreased 1.9% in September quarter*, media release, 1 December.

³⁰ ABS, *Australian National Accounts: National Income, Expenditure and Product*, March 2022.

services (60.0 per cent); Recreation and culture (4.8 per cent) and Hotels, cafes and restaurants (5.3 per cent).³¹

[26] Reflecting the pattern in household consumption, growth in GVA was highest in the March quarter 2022 in Arts and recreation services (4.4 per cent); Transport, postal and warehousing (4.3 per cent); and Accommodation and food services (3.7 per cent). These industries benefited from easing COVID-19 restrictions and domestic and international border restrictions.

[27] Over the year, GVA growth was highest in Administrative and support services (11.1 per cent); Agriculture, forestry and fishing and Information media and telecommunications (both 10.2 per cent). GVA fell in Mining (–2.0 per cent) and Accommodation and food services (–0.5 per cent).

[28] Severe flooding in parts of Queensland and New South Wales led to lower output in Mining and Construction.³² According to the Budget, the direct economic cost of the floods was expected to reduce real GDP growth by around half a percentage point in the March quarter 2022, largely due to reduced activity in the Mining, Agriculture, Accommodation and food services, Retail trade and Construction industries.³³

(i) *The Labour Market*

[29] The labour market has rebounded strongly from the impacts of the pandemic. The unemployment and underemployment rates are at their lowest for some time, and the participation rate at its highest, in more than 10 years (Chart 2). In fact, the unemployment rate has not been this low since 1974.³⁴

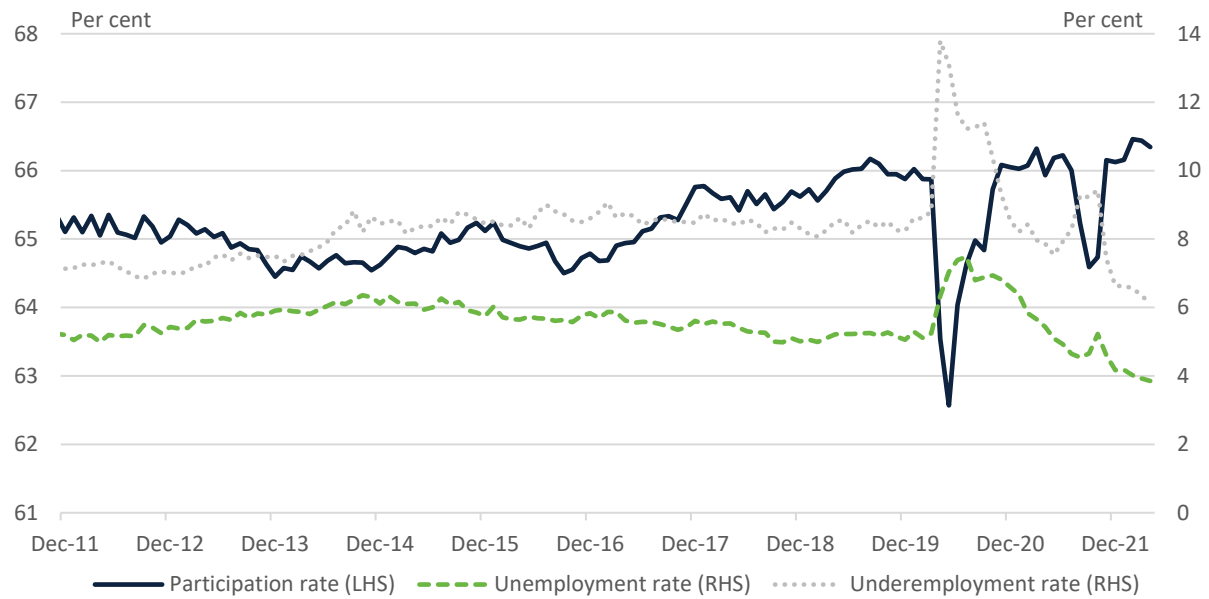
³¹ Ibid.

³² ABS (2022), *Weather and natural disaster impacts on the Australian national accounts*, 1 June.

³³ Australian Government (2022), *Budget 2022–23, Budget Paper No. 1*, 29 March, p. 47.

³⁴ ABS, *Labour Force, Australia*, April 2022: *Unemployment rate at 3.9%*, media release, 19 May.

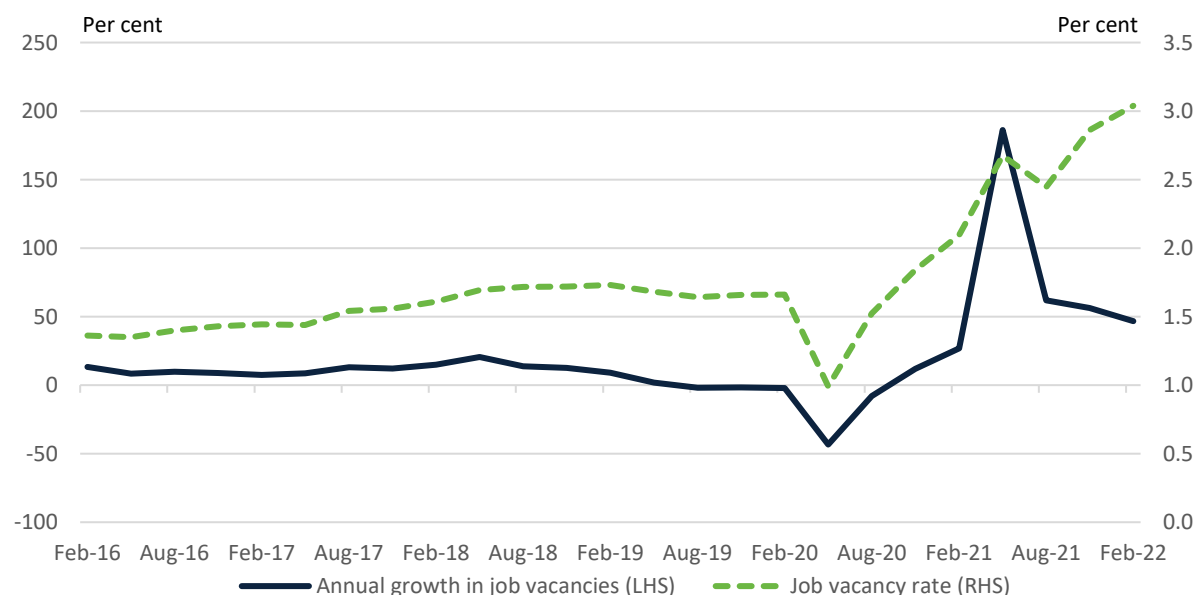
Chart 2: Unemployment, underemployment and participation rates



Source: Statistical report (version 9), 8 June 2022, Chart 6.1; ABS, *Labour Force, Australia*, April 2022.

[30] The strong labour market and demand for labour is also evident in the increase in job vacancies. The Budget noted that the number of unemployed people per vacancy fell to its lowest value on record in November 2021 at 1.6.³⁵ Chart 3 shows that growth in job vacancies has been relatively high over the last year and as a proportion of the labour force (job vacancy rate) is twice as high as it was 5 years ago.

Chart 3: Job vacancies, annual growth and job vacancy rate



Source: Statistical report (version 9), 8 June 2022, Chart 6.11; ABS, *Job Vacancies, Australia*, February 2022; ABS, *Labour Force, Australia*, April 2022.

Note: The ABS define the job vacancy rate as job vacancies as a proportion of the labour force.

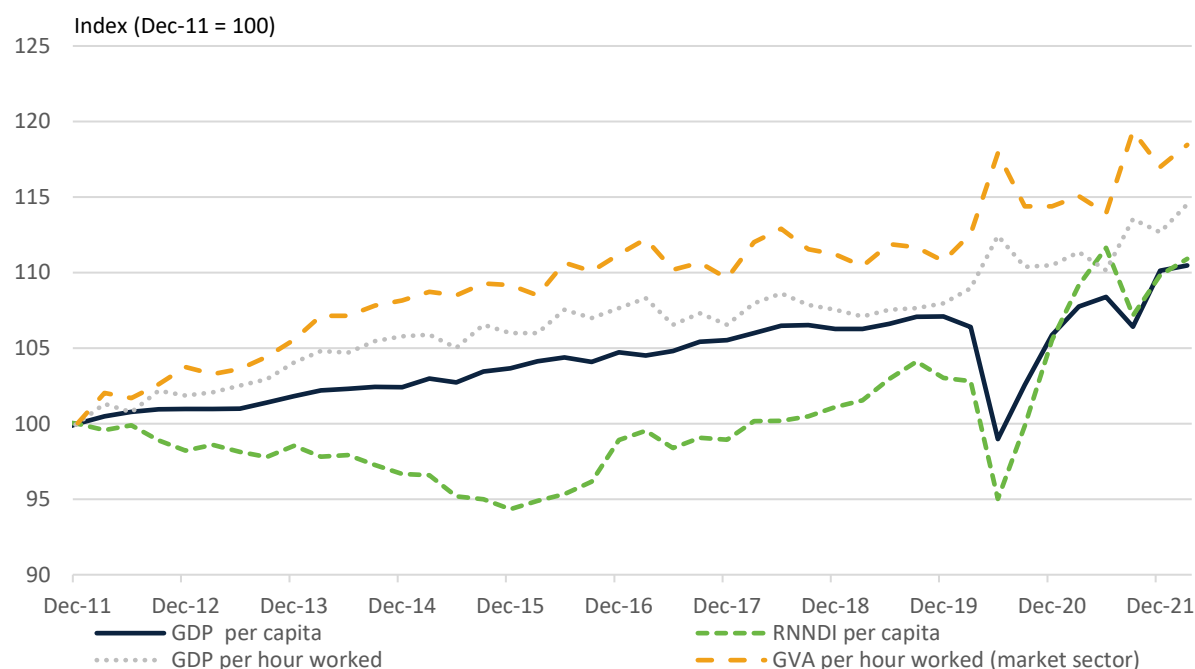
³⁵ Australian Government (2022), *Budget 2022–23, Budget Paper No. 1*, 29 March, p. 55.

[31] A number of the submissions drew attention to the labour shortages faced by businesses, noting that there has been a slow return of skilled migrants and other visa holders following the opening of Australian borders.³⁶

(ii) Productivity

[32] Movements in labour productivity growth over the last couple of years have been impacted by the pandemic, with peaks recorded during lockdown periods as the number of hours worked has been limited. Chart 4 shows that all measures of labour productivity have grown since the beginning of the pandemic. GDP per hour worked increased by 1.7 per cent in the March quarter 2022 to be 2.8 per cent higher over the year. This follows declines in the June and December quarters of 2021 and an increase of 3.1 per cent in the September quarter 2021.

Chart 4: Measures of productivity, indexes—Dec-11=100



Source: Statistical report (version 9), 8 June 2022, Chart 2.1; ABS, *Australian National Accounts: National Income, Expenditure and Product*, March 2022.

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.

(iii) Profits

[33] Total company gross operating profits increased by 25.3 per cent over the year to the March quarter 2022, which is above the 5-year and 10-year averages (Table 1). The profits share was 31.1 per cent in the March quarter 2022, reaching a new peak.³⁷ This indicates that,

³⁶ For example, R&CA, 1 April 2022, at para. 15; ACCI submission, 1 April 2022, at paras 17–19; MGA submission, 29 March 2022, at para. 58.

³⁷ Statistical report (version 9), 8 June 2022, Chart 3.1.

despite some declines, business profits have been able to recover. The wages share fell to 49.8 per cent.³⁸

Table 1: Company gross operating profits, mining and non-mining industries, growth rates

	Mining (%)	Non-mining (%)	Total (%)
Dec-11	4.4	1.2	2.3
Dec-12	-27.1	3.5	-7.4
Dec-13	37.0	1.3	11.2
Dec-14	-20.5	1.3	-6.2
Dec-15	-16.1	2.4	-3.0
Dec-16	78.1	10.7	27.7
Dec-17	2.4	6.3	4.9
Dec-18	28.1	3.0	11.6
Dec-19	8.0	0.9	3.7
Dec-20	3.5	23.6	15.3
Dec-21	37.3	0.7	14.2
Mar-22	48.0	8.5	25.3
5 years to Mar-22*	19.3	5.6	11.3
10 years to Mar-22*	13.6	4.9	8.3

Source: Statistical report (version 9), 8 June 2022, Table 3.3; ABS, *Business Indicators, Australia*, March 2022.

Note: *Average annual growth rates.

[34] As the Reserve Bank of Australia (RBA) observed in its May 2022 *Statement on Monetary Policy*, in respect of the underlying profits of ASX 200 companies:

‘The high level of profits continues to reflect elevated earnings for energy and materials companies, driven by high commodity prices. Even so, the increase in profits was broadly based. Over 70 per cent of all ASX 200 companies reported increased earnings relative to the second half of 2020 (during the earlier phase of the pandemic) with over 50 per cent of these companies exceeding analysts’ expectations.’³⁹

(iv) Wages

[35] Wages growth, as measured by the Wage Price Index (WPI), reached 2.4 per cent over the year to the March quarter 2022, the highest since the December quarter 2018. Annual WPI growth has been below 3 per cent since the March quarter 2013. The WPI grew by 0.7 per cent in the quarter, the second in a row, which is the highest quarterly growth since the March quarter 2014.⁴⁰

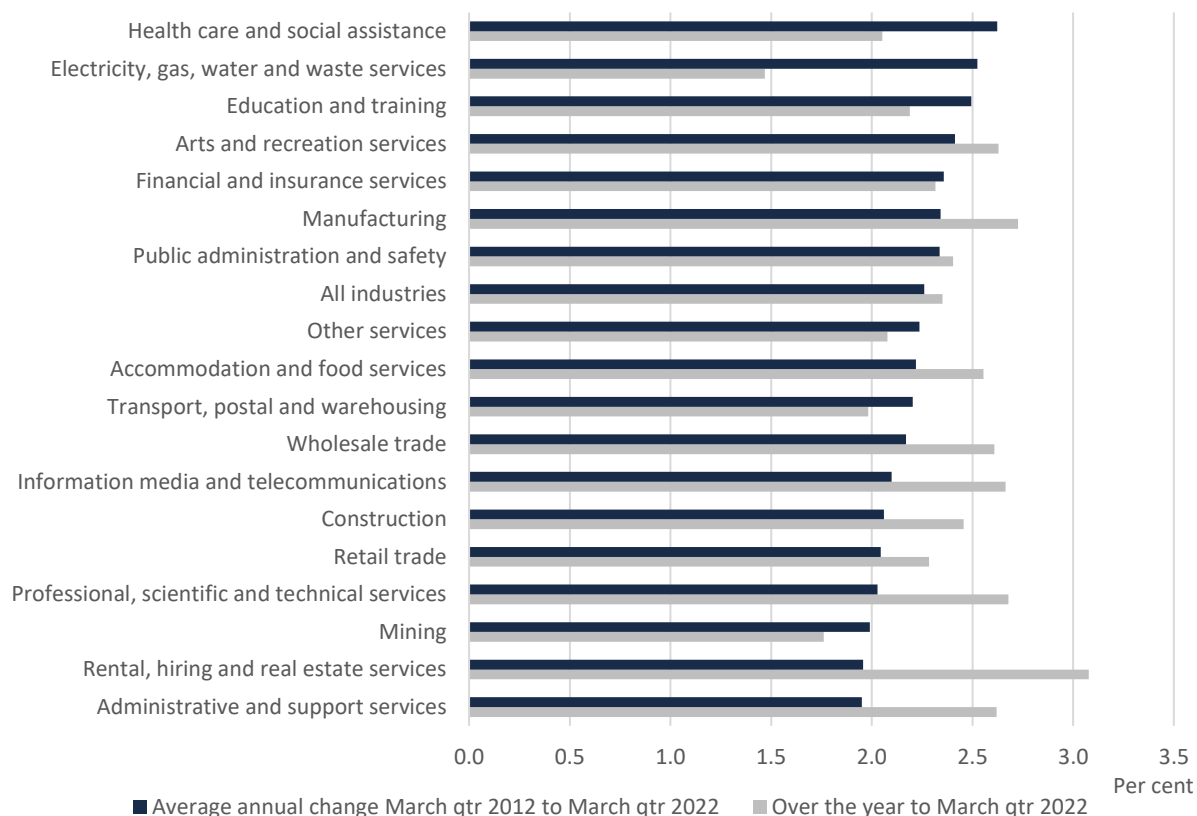
³⁸ Ibid.

³⁹ RBA (2022), *Statement on Monetary Policy*, May, p. 45.

⁴⁰ ABS, *Wage Price Index, Australia*, March 2022.

[36] The highest increases over the year to the March quarter 2022 were in Rental, hiring and real estate services (3.1 per cent), Manufacturing, Professional, scientific and technical services and Information media and telecommunications (all 2.7 per cent) and lowest in Electricity, gas, water and waste services (1.5 per cent) and Mining (1.8 per cent) (Chart 5). Annual growth was above average in Accommodation and food services (2.6 per cent) and below average in Retail trade (2.3 per cent).

Chart 5: Wage Price Index by industry, average annual growth over decade and growth over year to March quarter 2022



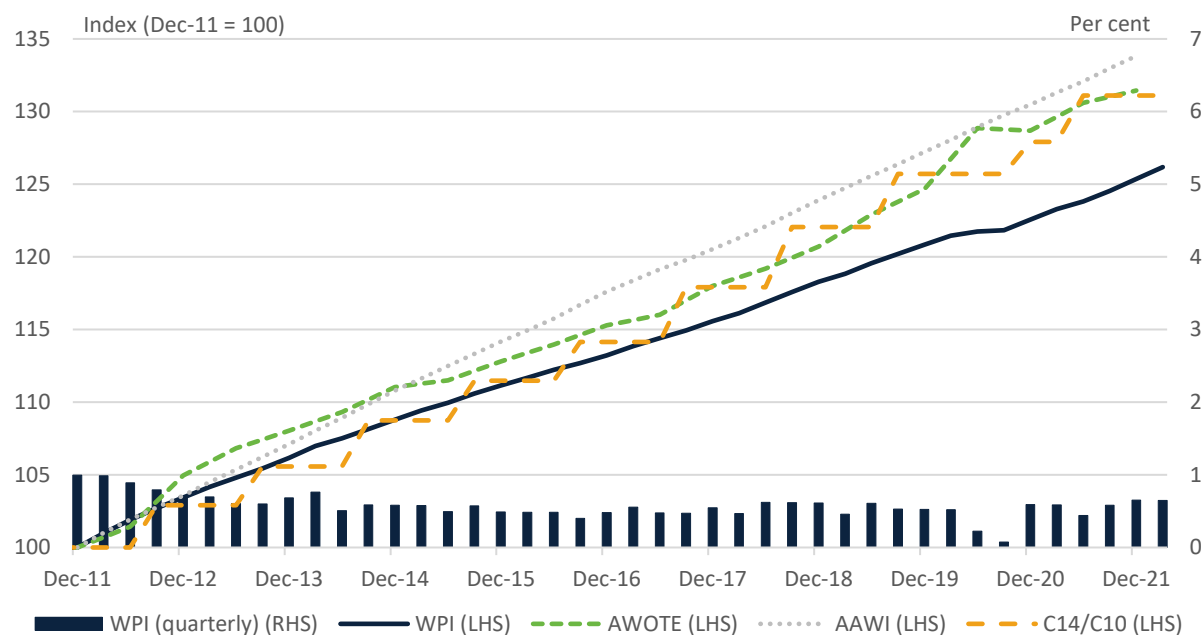
Source: Statistical report (version 9), 8 June 2022, Chart 5.2; ABS, *Wage Price Index, Australia*, March 2022.

Note: Data are expressed in original terms.

[37] Over the 10 years to the December quarter 2021, the NMW and modern award minimum wages have increased by more than the WPI and have closely matched growth in average weekly ordinary time earnings (AWOTE) (Chart 6).

[38] Growth in AWOTE has been larger than the WPI, for a range of reasons including compositional changes. Cumulative growth in the average annualised wage increase (AAWI) in federal enterprise agreements has been higher than both average measures of wages growth, the NMW and modern award minimum wages.

Chart 6: Measures of nominal wages growth, quarterly and cumulative growth rates, index



Source: Statistical report (version 9), 8 June 2022, Chart 5.1: ABS, *Average Weekly Earnings, Australia*, November 2021; ABS, *Wage Price Index, Australia*, March 2022; *Manufacturing and Associated Industries and Occupations Award 2010*; *Manufacturing and Associated Industries and Occupations Award 2020*.

[39] Some employer groups submitted that we should take a cautious approach because of the relationship between wage increases and inflation. For example, the Australian Industry Group (Ai Group) submitted that ‘[a]n excessive minimum wage increase would fuel inflation’,⁴¹ while the Australian Chamber of Commerce and Industry (ACCI) submitted that ‘any excessive increase in wages has the potential to trigger further inflation, which only adds to the already increasing costs to consumers and businesses’.⁴²

[40] Ai Group also submitted that the recent increase to the cash rate by the RBA ‘implies an increased sensitivity to wage pressures and heightens the likelihood of interest-rate driven disemployment effects flowing from wages pressures’ and that ‘a further period of wage moderation would help contain inflationary pressures and extend the run of job creation and the inroads that have been made into underemployment... [and] also help address the clear risk that a temporary rise in inflation could become a self-reinforcing cycle of rises in nominal wages and price.’⁴³

[41] Increases awarded in previous Reviews have been above the aggregate WPI growth for much of the last decade and have not resulted in a breakout of wages growth across the broader economy. As for the relationship between aggregate wages growth and inflation, the RBA stated the following in its *Statement on Monetary Policy* for May 2022 as a key domestic uncertainty:

⁴¹ Ai Group submission in reply, 10 May 2022, at p. 2.

⁴² ACCI, Transcript of proceedings, 18 May 2022, at PN191.

⁴³ Ai Group submission in reply, 10 May 2022, p. 4.

‘Inflation in Australia and internationally is now forecast to be elevated for much of the forecast period. As well as dampening real incomes, a period of higher inflation could change how governments, businesses and households respond to actual and expected movements in prices. Given the labour market is already quite tight, workers might be more able to demand and achieve higher wages to compensate for the increased cost of living even in the absence of a lift in productivity; if employers pass these increased wage costs on to consumers, this could result in inflation being sustained at a higher rate than currently anticipated.’⁴⁴

(v) *Inflation*

[42] The most significant difference since the time of the last Review has been the increase in the Consumer Price Index (CPI). The CPI increased by 2.1 per cent in the March quarter 2022 to be 5.1 per cent higher over the year, the highest annual increase since the introduction of the Goods and Services Tax (GST). Underlying inflation as measured by the trimmed mean increased by 1.4 per cent in the quarter and 3.7 per cent over the year, the highest since 2009.⁴⁵ Inflation is significantly higher than at the time of the last Review, where annual growth in the CPI and the trimmed mean were both 1.1 per cent (Chart 7).⁴⁶

[43] The main contributions to the sharp increase in inflation in the quarter were increases in new dwelling purchases by owner occupiers (5.7 per cent), due to rising construction costs and fewer grant payments, and Automotive fuel (11.0 per cent), driven by the Russian invasion of Ukraine. Over the year, new dwelling purchases by owner occupiers increased by 5.7 per cent and Automotive fuel increased by 35.1 per cent. Together, these items accounted for around one-third of the quarterly CPI increase and over one-quarter of the annual CPI increase.⁴⁷

[44] These increases in Automotive fuel are captured in the CPI in the March quarter 2022. The ABS shows that the average price of unleaded petrol was \$1.83 per litre in the quarter, up from \$1.64 per litre in the December quarter 2021.⁴⁸ The Budget announced that the fuel excise and excise-equivalent customs duty rate that applies to petrol and diesel will be halved for 6 months.⁴⁹ This commenced from 30 March 2022 and therefore any effect on the CPI would be after the March quarter 2022.

[45] The RBA commented that the sources of inflation broadened in the March quarter 2022 from durable goods and new dwellings to also include groceries. Strong demand is also enabling firms to pass on increases in input costs,⁵⁰ and retailers in the RBA’s liaison program have been more willing to accept price increases from their suppliers due to the broad-based cost increases they have faced.⁵¹

⁴⁴ RBA (2022), *Statement on Monetary Policy*, May, pp. 67–68.

⁴⁵ ABS, *Consumer Price Index, Australia*, March 2022.

⁴⁶ [2021] FWCFB 3500 at [116]

⁴⁷ ABS, *Consumer Price Index, Australia*, March 2022.

⁴⁸ Ibid; ABS, *Consumer Price Index, Australia*, December 2021.

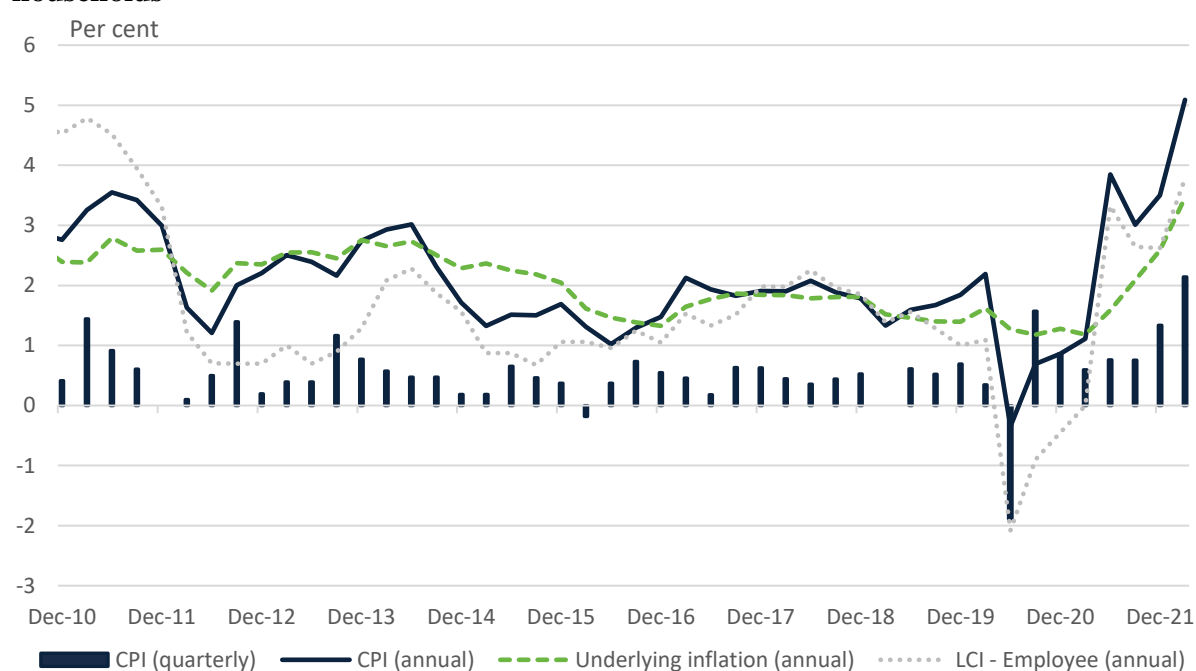
⁴⁹ Fair Work Commission (2022), *Information note—Low and middle income tax offset (LMITO) and fuel excise*, 16 May.

⁵⁰ RBA (2022), *Statement on Monetary Policy*, May, p. 49.

⁵¹ Ibid at p. 53.

[46] Another measure that the ABS produces that is relevant to this Review is the living cost index (LCI) for employee households. This index increased by 1.7 per cent in the March quarter to be 3.8 per cent higher over the year. This was the highest annual increase since the September quarter 2011. An information note published by Commission staff for last year's Review explained that a significant driver of changes in the LCI since the pandemic has been a fall in mortgage interest as a result of the RBA lowering the cash rate during the period. Mortgage interest is not considered in the calculation of the CPI, while it is included as part of the LCI. The information note also showed that low-paid employees are less likely to own a home or currently be paying off a mortgage.⁵² It would then be expected that any increases to mortgage interest, as forecast by the RBA,⁵³ will lead to higher increases in the LCI for employee households than the CPI.

Chart 7: Measures of inflation—CPI, underlying inflation and LCI for employee households



Source: Statistical report (version 9), 8 June 2022, Chart 4.1; ABS, *Consumer Price Index, Australia*, March 2022; ABS, *Selected Living Cost Indexes, Australia*, March 2022.

[47] Underlying inflation, calculated as the average of the trimmed mean and weighted median, does not necessarily measure the impact of changes in the cost of living faced by award-reliant workers, as it is calculated by reducing the impact of irregular or temporary price changes in the CPI.⁵⁴ This includes economic shocks that have a significant and temporary impact on the CPI, such as changes in world oil prices which affects the price of automotive fuel⁵⁵, a non-discretionary item.⁵⁶

⁵² Fair Work Commission (2021), *Information note—Living costs, housing costs and low-income earners*, additional material for the 2020–21 Review, 13 May.

⁵³ *Statement by Philip Lowe, Governor: Monetary Policy Decision*, 7 June 2022.

⁵⁴ [2020] FWCFCB 3500 at [132]

⁵⁵ Cassidy N, Rankin E, Read M & Seibold C (2019), *Explaining low inflation using models*, Reserve Bank of Australia Bulletin, June.

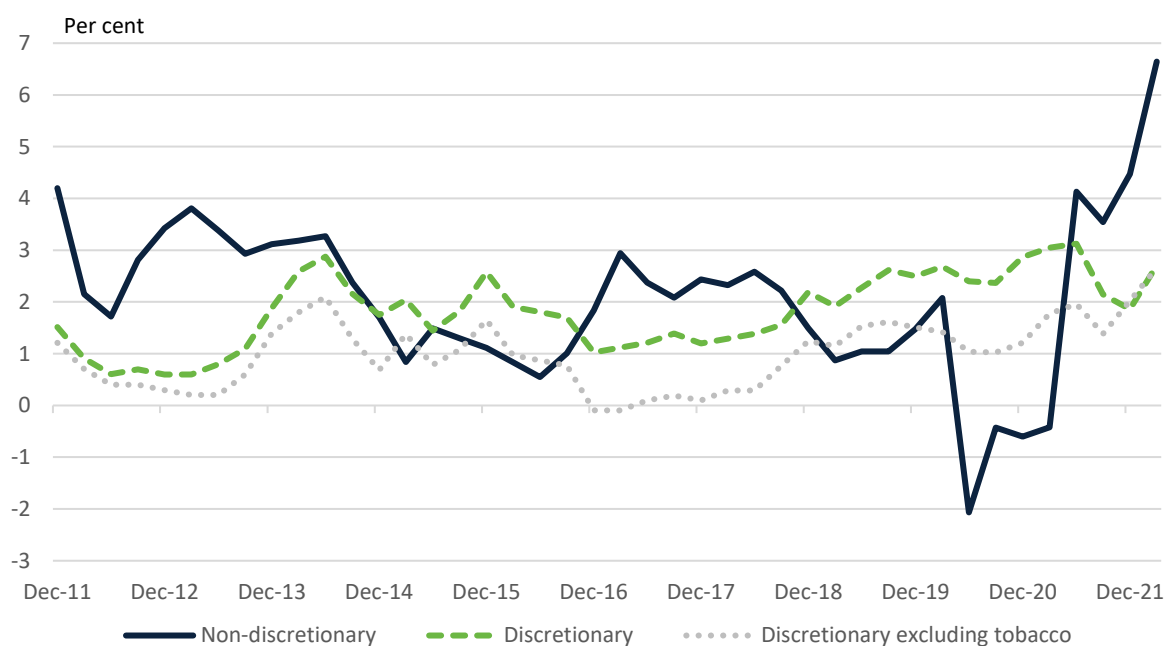
⁵⁶ ABS (2021), *Measuring Non-discretionary and Discretionary Inflation*, 25 May.

[48] The Australian Council of Trade Unions (ACTU) submitted that:

‘... headline inflation is the better measure than the trimmed mean because a fair minimum safety net involves considering the costs workers are actually facing... Workers are presently facing significant cost-of-living pressures, including for essential goods and services included in headline inflation, such as petrol and key items of food and groceries but currently excluded from underlying or trimmed mean inflation. In reality workers are paying for costs associated with headline inflation (such as higher petrol prices), because firms are passing on headline inflation to consumers to protect their profit margins...’⁵⁷

[49] Inflation in non-discretionary items increased by 6.6 per cent over the year to the March quarter 2022, much higher than for discretionary items (2.7 per cent) (Chart 8). Non-discretionary items are goods or services purchased because they meet a basic need, are required to maintain current living arrangements or are a legal obligation. As submitted by the ACTU, these include key items such as food and groceries, automotive fuel, electricity, gas and other household fuels.⁵⁸

Chart 8: Non-discretionary and discretionary inflation, cumulative growth rates



Source: Statistical report (version 9), 8 June 2022, Chart 4.4; ABS, *Consumer Price Index, Australia*, March 2022.

Note: The ABS define non-discretionary expenditure as goods or services that are purchased because they meet a basic need (food, shelter, healthcare), are required to maintain current living standards, or are a legal obligation. Discretionary expenditure includes goods or services that could be considered as ‘optional’ purchases.

[50] Households are likely to face increases in their power bills as electricity and gas prices increase. The Australian Energy Regulator reported that volume weighted average prices for electricity increased across all regions in the first quarter of 2022 compared with the same

⁵⁷ ACTU submission regarding the National Accounts March quarter 2022, 3 June 2022, at para. 19.

⁵⁸ ACTU submission, 1 April 2022 at para. 93.

quarter last year and at least doubled in most regions and quadrupled in Queensland.⁵⁹ Domestic gas prices were elevated in the first quarter of 2022, setting a new first quarter record, with increases already in the second quarter of the year.⁶⁰ Further, oil prices have surged following the European Leaders agreement to ban 90 per cent of Russian oil imports by the end of the year.⁶¹

[51] The Australian’s Global Food Forum discussed impacts on the grocery bill of Australians including labour shortages, the cost of raw materials and rising cost of fuel and utilities. Woolworths reported an overall average price inflation of 2.7 per cent and Coles of 3.3 per cent.⁶² These factors combined suggest that households, particularly those that are low paid, will face further cost of living pressures.

[52] The ACTU submitted that ‘there are various choices for measuring living cost inflation, with varying degrees of sensitivity to particular household circumstances’.⁶³ It was further submitted that:

‘... it would be hard to quantify a single optimal inflation rate that could be adopted to fully and fairly insulate the differing cost of living baskets from rising inflation. In our view, a broad range of indicators should be considered by the Panel given that it is entrusted to maintain a safety net for all award and minimum wage reliant workers including those who are least able to mitigate the inflation risks most relevant to their particular circumstances.’⁶⁴

[53] We have taken into account each measure of inflation and the cost of living as presented in the Statistical report and in submissions. Further, as noted in last year’s Review decision,⁶⁵ we accept that price increases and the cost of living at the aggregate level can mask the lived experience of low-paid workers. Price increases in non-discretionary purchases, such as rent and basic food staples, are more likely to affect the household budgets of the low paid.⁶⁶

(vi) Employment effects of minimum wage increases

[54] Since the research by Bishop (2018) was undertaken and discussed in the 2017–18 Review,⁶⁷ there has been no new Australian research on the employment effects of minimum wages. Parties therefore continue to rely on international research to discuss these effects.

[55] The ACTU provided commentary on international literature published since the last Review and concluded that:

⁵⁹ Australian Energy Regulator (2022), *Wholesale markets quarterly Q1 2022, January–March*, May at p. iv.

⁶⁰ Australian Energy Regulator (2022), *Wholesale markets quarterly Q1 2022, January–March*, May at p. v.

⁶¹ European Commission (2022), *Opening remarks by President von der Leyen at the joint press conference with President Michel following the special meeting of the European Council*, 30 May.

⁶² Raphael A (2022), *Coles, Woolworths and ALDI expect grocery bills will continue to rise*, news.com.au, 3 June.

⁶³ ACTU submission in reply, 8 May 2022, at para. 55.

⁶⁴ *Ibid.*

⁶⁵ [2021] FWCFB 3500 at [113].

⁶⁶ *Ibid* [121]–[122].

⁶⁷ [2018] FWCFB 3500 at [230]–[232].

‘... the impacts of minimum wages suggests that the Panel cannot be satisfied that a minimum wage increase of the order sought in this review will have any measurable disemployment effect. The Panel can however be satisfied that lifting minimum wages may encourage adaptive strategies at the firm or industry level that increase productivity and efficiency (such as may be achieved through bargaining), may remove distortions in labour demand attributable to monopsony power and will reduce the gender pay gap and contribute to aggregate demand.’⁶⁸

[56] The studies included in the review discussed the work of Georgiadis and Franco Gavonel (2021), Campos-Vazquez and Esquivel (2021) and Clemens and Strain (2021). These were also considered by Ai Group.

[57] The first study referred to was prepared for the Low Pay Commission (LPC) and considers the effects of the National Living Wage (NLW), COVID-19 and Brexit on care homes in England. Georgiadis and Franco Gavonel (2021) found that on average, NLW increases in April 2020 and April 2021 had a positive and significant effect on wages growth in care homes, but no significant effect on employment and hours.⁶⁹ The authors argue that these effects could be explained by other offsets to the NLW, such as a reduction in employees’ absenteeism and training, and the deterioration of quality of care.⁷⁰

[58] Campos-Vazquez and Esquivel (2021) consider the effect of minimum wage increases in Mexico following a program introduced in 2019 that doubled the minimum wage in municipalities that shared a border with the United States. By 2021, the minimum wage was 51 per cent higher on the northern border than in the rest of the country.⁷¹ The authors did not find any significant effect on employment following the doubling of the minimum wage but found that the increase raised workers earnings, especially at the bottom of the wage distribution.⁷²

[59] The Clemens and Strain (2021) study differentiated between the effects of large and small wage increases and between short and medium run effects based on US state and federal minimum wage policy over the past decade. The authors argued that the time period used provides a suitable opportunity to study the medium-run effects of both moderate and historically large minimum wage changes.⁷³ Their results found that relatively large minimum wage increases had substantial, negative effects on employment among individuals with low levels of experience and education, while small minimum wage increases had only modest

⁶⁸ ACTU submission, 1 April 2022, at para. 56; ACTU submission in reply, 8 May 2022, at para. 134.

⁶⁹ Georgiadis A & Franco Gavonel M (2021), *The impact of the National Living Wage on the adult social care sector in England in the light of COVID-19 pandemic and Brexit*, report for the Low Pay Commission, Brunel University and University of Exeter, December, p. 2.

⁷⁰ Ibid, p. 17.

⁷¹ Campos-Vazquez RM & Esquivel G (2021), ‘The effect of doubling the minimum wage on employment and earnings in Mexico’, *Economics Letters*, Vol. 209, Issue C, December, p. 1.

⁷² Ibid, p. 4.

⁷³ Clemens J & Strain MR (2021), *The heterogeneous effects of large and small minimum wage changes: evidence over the short and medium run using a pre-analysis plan*, IZA Discussion Paper Series No. 14747, September, pp. 2–3.

effects.⁷⁴ Their results also suggest that the medium-run effects of large minimum wage increases are larger and more negative than their short-run effects.⁷⁵

[60] In its reply submission Ai Group argued that most of the material relied upon by the ACTU was ‘irrelevant to the Australian economy’⁷⁶ and that the results from Georgiadis and Franco Gavonel (2021) is unlikely to have ‘relevance or implications for the entire Australian economy’, noting that the health care sector in Australia has seen a higher increase in the WPI compared with other industries.⁷⁷ In reference to the conclusion made by Clemens and Strain (2021) that large minimum wage increases have negative effects on employment among individuals with low levels of experience and education, Ai Group argued that ‘[g]iven that most of the occupations reliant on minimum wage increases in Australia are also classified as ‘less qualified occupations’, a 5.5% increase in minimum wages would have a significant negative impact on employment levels in these occupations.’⁷⁸

[61] The Australian Government’s submission of 1 April 2022 also provided a summary of Australian and international studies on the employment effects of minimum wages. Although much of the literature was dated and had been addressed in previous Reviews,⁷⁹ reference was made to recent work published by Cribb et al. (2021) commissioned by the LPC.

[62] Cribb et al. (2021) estimate the effect of the introduction of the NLW in the UK in 2016 and subsequent increases up to 2019.⁸⁰ The Australian Government submitted that the study found that workers had experienced ‘positive wage effects’ from the increases in the NLW and commented that ‘[r]ecent LPC commissioned studies have found no statistically significant employment effects for workers in areas with higher exposure to the minimum wage following the NLW increases between 2016 and 2019.’⁸¹

[63] The RBA noted that ‘[e]mployment is forecast to grow strongly during 2022, consistent with the ongoing strength in leading indicators of labour demand, before moderating thereafter in line with activity.’⁸² Labour force participation is ‘expected to be sustained at historically high levels over the forecast period, supported by the cyclical strength in labour market conditions and the longer-term trend toward increased participation among females and older Australians’ and ‘the unemployment rate is forecast to decline to around 3½ per cent in early 2023 – the lowest level since 1974 – and remain around this level thereafter.’⁸³

[64] The RBA added that measures of labour underutilisation ‘are also forecast to decline to their lowest level in many years as firms increase staff hours to meet demand’, while ‘the

⁷⁴ Ibid, pp. 6, 32.

⁷⁵ Ibid, p. 3.

⁷⁶ Ai Group submission in reply, 10 May 2022, at p. 7.

⁷⁷ Ibid at p. 7.

⁷⁸ Ibid at p. 8.

⁷⁹ Australian Government submission, 1 April 2022, at paras 245–264.

⁸⁰ Cribb J, Giupponi G, Joyce R, Lindner A, Waters T, Wernham T & Xu X (2021), *The distributional and employment impacts of nationwide minimum wage changes*, report for the Low Pay Commission, Institute for Fiscal Studies, Bocconi University and University College London, December.

⁸¹ Australian Government submission, 1 April 2022, at para. 261.

⁸² RBA (2022), *Statement on Monetary Policy*, May, p. 61.

⁸³ Ibid.

reopening of the border could, over time, help to alleviate labour shortages in some industries, while also adding to demand in the economy’.⁸⁴

[65] We agree with the RBA’s assessment and remain of the view that moderate and regular increases in minimum wages do not result in significant disemployment effects. The growth in job advertisements has largely been among the low skilled who will benefit the most from an increase in the NMW and modern award minimum wages.⁸⁵

2.2 *Social and Other Considerations*

[66] The minimum wages objective and the modern awards objective require the Panel to take into account:

- relative living standards and the needs of the low paid;⁸⁶ and
- the principle of equal remuneration for work of equal or comparable value.⁸⁷

[67] In giving effect to the modern awards objective, we must also take into account ‘the need to encourage collective bargaining’.⁸⁸

[68] These statutory considerations inform the evaluation of what constitutes ‘a fair and relevant minimum safety net of terms and conditions’⁸⁹ and ‘a safety net of fair minimum wages’.⁹⁰

(i) *Relative living standards and the needs of the low paid*

[69] Growth in real wages (measured using the WPI) has shown greater variation during the pandemic, mainly due to changes in the CPI. Annual growth increased over the year to the June quarter 2020 (2.2 per cent) as inflation declined (–0.3 per cent). However, real wages fell over the following year to the June quarter 2021 (–2.1 per cent) as inflation picked up. While real wages have declined in short periods during the last 10 years, this was a much deeper and more sustained fall (Chart 9).

⁸⁴ Ibid.

⁸⁵ Australian Government submission, 1 April 2022, at para. 107.

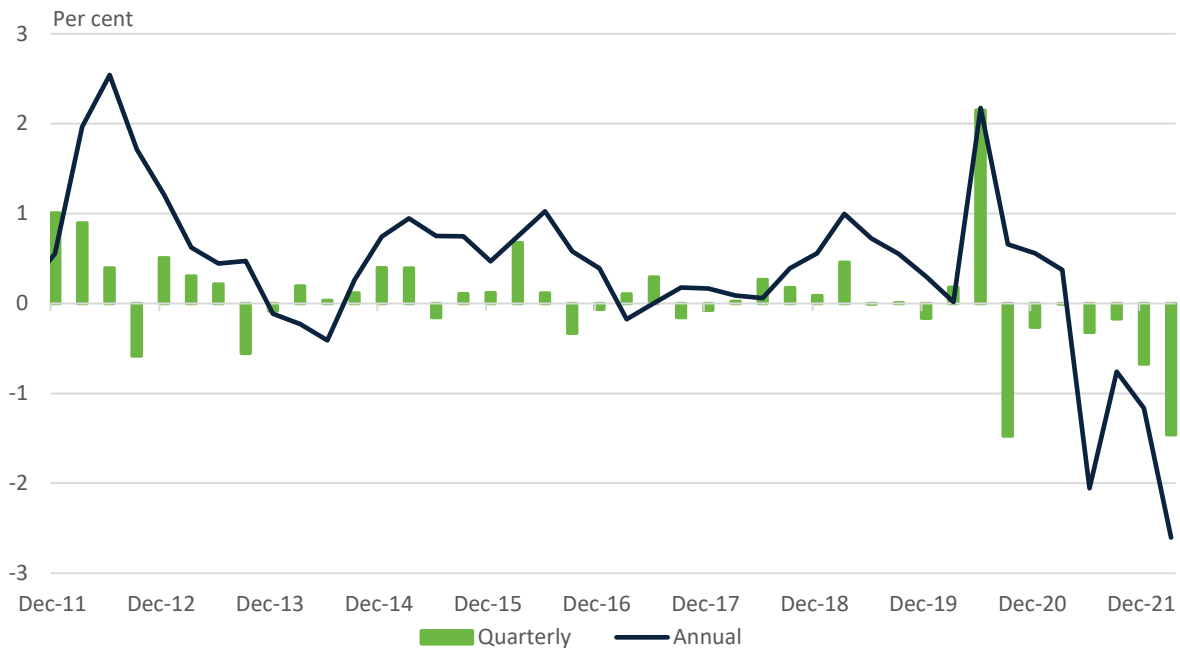
⁸⁶ Ibid s.284(1)(c) and s.134(1)(a).

⁸⁷ Ibid s.284(1)(d) and s.134(1)(e).

⁸⁸ Ibid s.134(1)(b).

⁸⁹ Ibid s.134(1).

⁹⁰ Ibid s.284(1).

Chart 9: Real WPI growth

Source: Statistical report (version 9), 8 June 2022, Chart 9.2; ABS, *Wage Price Index*, March 2022; ABS, *Consumer Price Index*, March 2022.

[70] The Panel has consistently adopted a threshold of two-thirds of median adult full-time ordinary earnings as the benchmark we use to identify who is ‘low paid’.⁹¹

[71] Consistent with previous Review decisions, we accept that if the low paid live in poverty then their needs are not being met. In measuring poverty, we continue to rely on poverty lines based on a threshold of 60 per cent of median equivalised household disposable income and that those in full-time employment can reasonably expect to earn wages above a harsher measure of poverty.

[72] We also acknowledge that there are limitations with measures of equivalised household disposable income when assessing poverty, as they are used to assess the circumstances of a selected household type, rather than individual circumstances. The poverty line essentially measures inequality at the lower end of the income distribution and does not measure observed needs or capacity to meet these needs, which is better indicated by measures of deprivation and financial stress.

[73] The Australian Government’s submission of 1 April 2022 stated that the NMW rose by more than the CPI (and the WPI) between 2010 and 2021.⁹² This aligns with data in the Statistical report, showing that the real NMW increased by 7.9 per cent between the December quarter 2011 and the December quarter 2021.⁹³ As there have been percentage increases in modern award minimum wages awarded in Review decisions during this time, both NMW and award-reliant workers have benefited from real wage increases. This is also demonstrated in the chart below, reproduced from the Statistical report, which shows the increase in the real

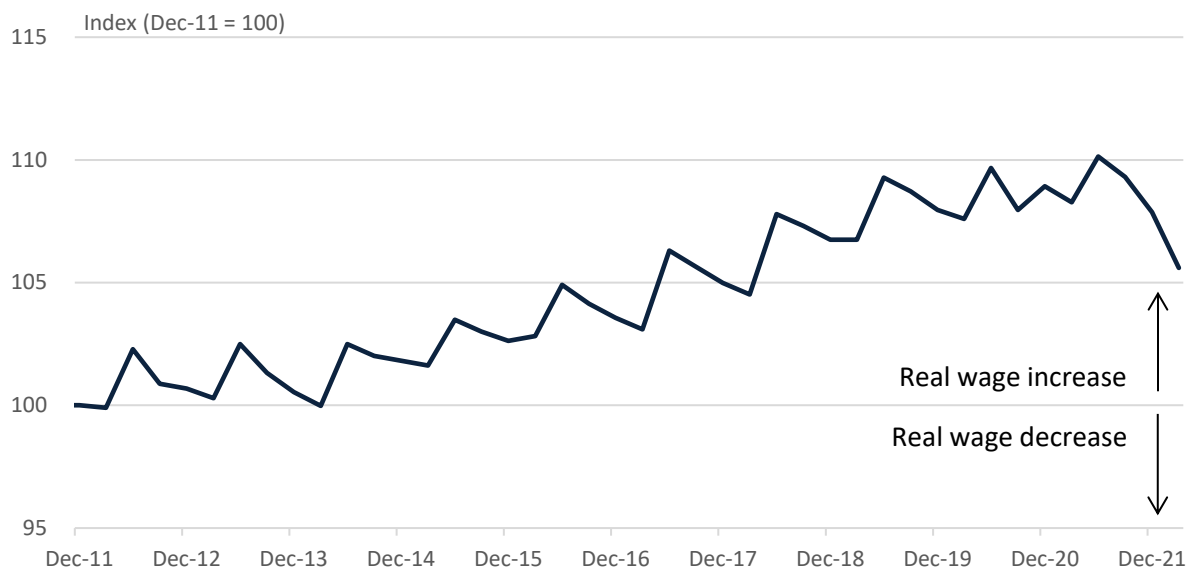
⁹¹ [2020] FWCFB 3500 at [359]

⁹² Australian Government submission, 1 April 2022, at paras 298–300, Chart 8.3.

⁹³ Statistical report (version 9), 8 June 2022, Table 9.1.

value of the NMW over the last decade. The recent rise in inflation has resulted in the real value declining substantially since the last Review (Chart 10).

Chart 10: Real value of the NMW, index



Source: Statistical report (version 9), 8 June 2022, Chart 9.1; ABS, *Consumer Price Index, Australia*, March 2022; Fair Work Australia/FWC decisions.

Note: Only percentage increases have been awarded since the *Annual Wage Review 2010–11*, hence, the real increase across all modern award minimum wage rates has been the same across the period. For the purpose of analysis, only the NMW is presented.

[74] The Statistical report again contains estimates of disposable incomes for selected household types earning various wage rates in comparison to a 60 per cent median income poverty line. This is shown at Appendix 3. While over the last year there was a relatively large fall in the ratio for households that were receiving the JobSeeker payment, there was also a decline across all household types at all wage rates.

[75] As the Panel has previously observed, these differences mean that it is not feasible for minimum wages alone to ensure that all of the family types with a minimum wage employee working full time have incomes that exceed relative poverty levels.⁹⁴ Differences arise due to some families receiving support from the welfare system. Further, the margin between the 60 per cent median income relative poverty line and the equivalised household disposable income represents, at best, a broad indicator of the extent to which the needs of the low paid are met.

[76] Eight of the 14 household types had disposable incomes below the poverty line when earning the NMW. These included all single-earner households, except for single adult and single parent working full-time (with 1 or 2 children). This is 3 more household types than in the last Review following the removal of the additional JobSeeker payment. This was also the case for household types earning the C10 rate, however, single-earner couples receiving JobSeeker payment with 1 or no children had disposable incomes equivalent to the poverty line.

⁹⁴ [2021] FWCFB 3500 at [142]

[77] The ABS has again reported on indicators of financial stress in its *Household Impacts of COVID-19 Survey*. The latest survey, undertaken in April 2022, shows improvement across the proportion of households that were able to raise \$2000, pay bills on time and expect to be able to pay bills in the next three months since May 2021 (Table 2).

Table 2: Change in household financial stress

	May 2021 (%)	April 2022 (%)	May 2021 to April 2022 (ppt change)
Whether household could raise money for something important within a week*			
Able to raise \$2000	76.2	86.7	10.5
Able to raise \$500 but not \$2000	12.1	10.2	-1.9
Unable to raise \$500	5.4	2.2	-3.2
Don't know	6.1	0.9 [^]	-5.2 [^]
Whether household was unable to pay bills on time in the last three months due to a shortage of money**			
Was unable to pay bills on time	8.4	6.0	-2.4
Was able to pay bills on time	90.4	93.9 [^]	3.5 [^]
Whether household expects to be able pay bills received in the next three months			
Yes	90.9	96.6	5.7
No	2.2	0.5	-1.7
Don't know	6.9	2.9	-4.0

Source: Statistical report (version 9), 8 June 2022, Table 12.3; ABS, *Household Impacts of COVID-19 Survey*, May 2021; ABS, *Household Impacts of COVID-19 Survey*, April 2022.

Note: * The definition of 'something important' was deliberately left up to the respondent to define. Examples given included paying unexpected bills and covering the cost of emergencies. ** Only includes households that received a selected bill in the last three months. Selected bills include electricity, gas or telephone bills, mortgage or rent payments, car registration or insurance, and home and/or contents insurance. [^] Proportion has a margin of error greater than 10 percentage points or proportion \pm margin of error is less than 0 per cent or greater than 100 per cent, which should be considered when using this information.

[78] We also assess these measures using data from the HILDA survey, which are provided annually and presented in the Statistical report for employee households and low-paid employee households. The proportion of households that reported any financial stress actually declined in 2020, and there was a significant decline among low-paid employee households. However, comparing the 2 tables shows that low-paid employee households were twice as likely to experience any financial stress as all employee households (24.0 per cent compared with 12.1 per cent) in 2020.⁹⁵

[79] Low-paid employee households were more than twice as likely to report the following financial stress indicators (Table 3).

⁹⁵ Statistical report (version 9), 8 June 2022, Tables 12.1 and 12.2.

Table 3: Financial stress experienced by households

	Low-paid employee households (%)	All employee households (%)
Unable to raise \$4000 in a week for something important	9.6	4.6
Could not pay electricity, gas or telephone bills on time	10.0	4.9
Went without meals	3.1	1.4
Could not afford to heat home	2.2	1.0
Sought assistance from welfare/community organisation	3.8	1.3
Sought financial help from friends or family	9.0	3.9

Source: Statistical report (version 9), 8 June 2020, Tables 12.1 and 12.2; Household, Income and Labour Dynamics in Australia Survey, Wave 20.

(ii) Collective Bargaining

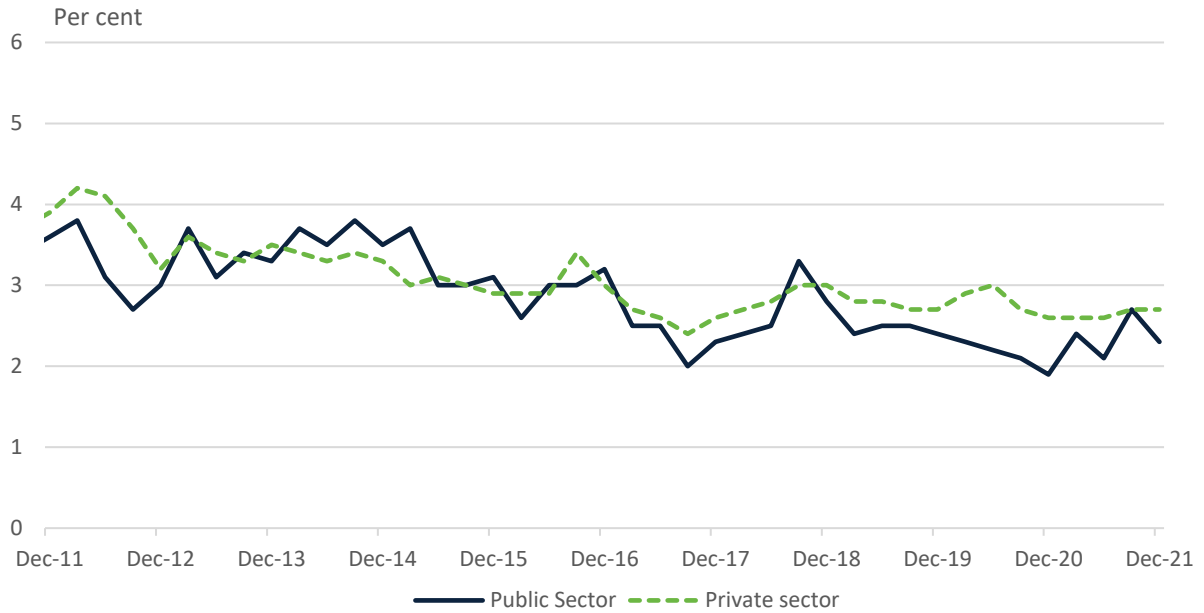
[80] In making the NMW order, the Panel must give effect to the minimum wages objective. While the minimum wages objective does not refer to ‘the need to encourage collective bargaining’, one of the objects of the Act is to encourage collective bargaining and, on that basis, it is appropriate to consider that legislative purpose in making the NMW order.⁹⁶

[81] The Attorney-General’s Department report *Trends in Federal Enterprise Bargaining* presents data on federal enterprise agreements that have not passed their nominal expiry date captured in the Workplace Agreements Database (WAD).

[82] The report includes a measure of wages growth calculated from these agreements. Chart 11 shows that AAWIs for agreements in the private sector was 2.7 per cent in the December quarter 2021 and has been around 2.6 to 2.7 per cent since the September quarter 2020. AAWIs for public sector agreements have been lower than in the private sector since the December quarter 2018, and was 2.3 per cent in the December quarter 2021.

⁹⁶ Fair Work Act, s.3(f).

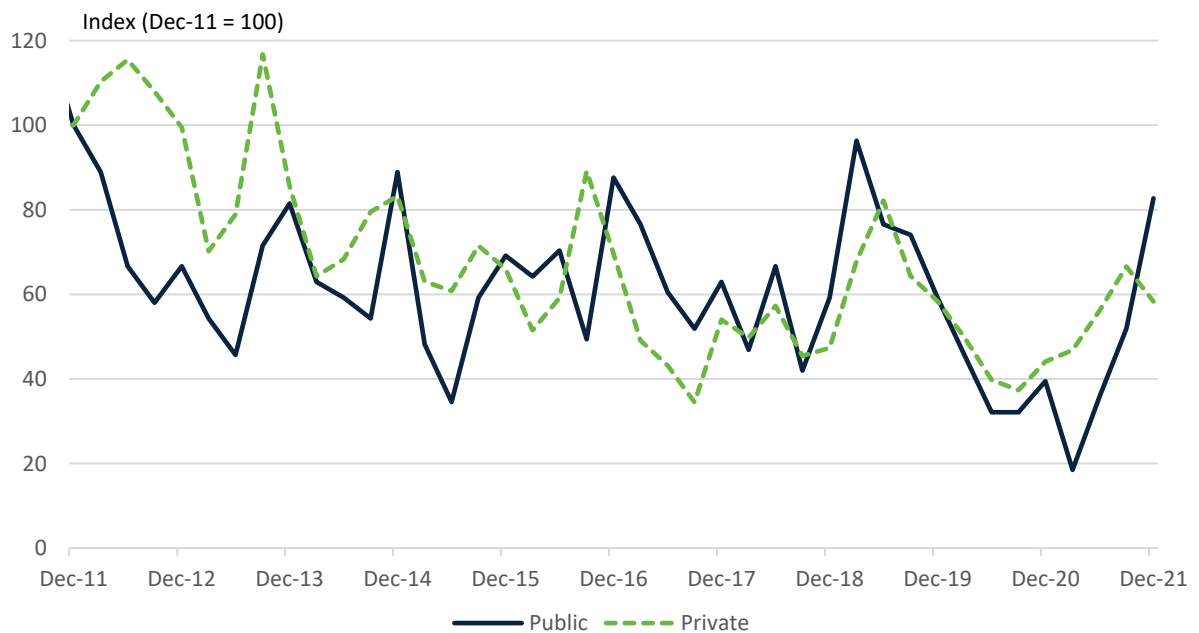
Chart 11: AAWI for agreements approved in the quarter by sector



Source: Statistical report (version 9) 8 June 2022, Chart 10.2; Attorney-General’s Department, *Trends in Federal Enterprise Bargaining*, December quarter 2021.

[83] The number of federal enterprise agreements approved in both the private and public sector has increased following the lows experienced in 2020 and early 2021 (Chart 12).

Chart 12: Number of agreements approved in the quarter by sector, index



Source: Statistical report (version 9) 8 June 2022, Chart 10.1; Attorney-General’s Department, *Trends in Federal Enterprise Bargaining*, December quarter 2021.

[84] We accept that there has been a decline in current enterprise agreements, but 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.⁹⁷ Given the complexity of these factors we are unable to predict the precise impact of our decision on bargaining.

[85] The increases we have determined in this Review may impact on bargaining in different sectors in different ways. We cannot be satisfied that the increase we have determined will *encourage* collective bargaining. We have taken this into account along with the other statutory considerations in determining the outcome in this Review.

(iii) Equal remuneration

[86] The gender pay gap refers to the difference between 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. The Statistical Report sets out 3 measures of the gender pay gap, ranging from 8.8 per cent to 15.2 per cent.⁹⁸

[87] The consideration of the ‘principle of equal remuneration for work of equal or comparable value’ was comprehensively addressed in the 2017–18 Review decision and that discussion was adopted in the 2018–19 and 2019–20 Review decisions.⁹⁹ We also adopt those observations. In particular, 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.

3. The Decision: NMW and Modern Award Minimum Wages

3.1 The parties’ proposals

[88] The Panel received submissions from bodies representing the interests of employees, employers and other groups, the Australian Government and various state governments. The quantum and form of the proposed increase to the NMW and to modern award minimum wages varied significantly among the submissions. The timing of any increase was also the subject of a range of views. We deal with the timing issues in Chapter 4.

[89] The ACTU, supported by a number of individual union submissions, sought a 5.5 per cent increase to the NMW and modern award minimum wages.¹⁰⁰ ACCER sought an increase of 6.5 per cent to the NMW and ‘at a minimum to the C13 to C10 rates...in modern awards’.¹⁰¹

[90] There was a diversity of views among various employer interests. ACCI supported an increase of ‘up to 3 per cent’.¹⁰² Ai Group proposed ‘a modest wage increase of 2.5 per cent’.¹⁰³ Australian Business Industrial and Business NSW (ABI) recommended that the Panel determine an increase of between 2.5 and 3 per cent, and submitted that:

⁹⁷ [2020] FWCFB 3500 at [116]

⁹⁸ Statistical report (version 9), 8 June 2022, Table 11.1.

⁹⁹ Ibid at [403]; [2019] FWCFB 3500 at [388]; [2018] FWCFB 3500 at [35]–[38]

¹⁰⁰ ACTU submission in reply, 8 May 2022 at para. 2.

¹⁰¹ ACCER submission, 1 April 2022, at para. 9.

¹⁰² ACCI submission in reply, 10 May 2022 at para. 11.

¹⁰³ Ai Group submission in reply, 10 May 2022 at p. 2.

‘an increase in wages significantly above underlying inflation, would compound the effects of increasing non-labour costs and undermine fragile business confidence. An increase *broadly in line* with inflation would help maintain relative living standards for workers and it is our view most businesses would have the capacity to accommodate these cost increases.’¹⁰⁴

[91] We return shortly to ABI’s observation about an increase ‘broadly in line with inflation’.

[92] The Australian Retailers Association (ARA) supported an increase in minimum wages to ‘keep pace with the rising cost of living’ using the trimmed mean inflation rate as a measure of underlying inflation.¹⁰⁵ We note that the most recent data show that the trimmed mean inflation rate was 3.7 per cent over the year to the March quarter 2022 and the latest RBA forecast expects the trimmed mean to increase by 4.5 per cent over the year to the June quarter 2022.

[93] Master Grocers Australia Limited (MGA) sought ‘further restraint in respect of any wage increases in the coming year’ and submitted that:

‘Any increase in minimum award wage in 2022 would severely damage the continuing viability of many small businesses as they grapple with the ongoing threat of COVID-19 and the recovery process.’¹⁰⁶

[94] Restaurant and Catering Industry Association (R&CA) submitted that there ‘be no change to the minimum wage’.¹⁰⁷

[95] The Australian Government’s submission of 3 June 2022 recommends that the Panel:

‘ensures that the real wages of Australia’s low-paid workers do not go backwards... It is critical to ensure that these workers do not bear a disproportionate impact of these challenging conditions.’¹⁰⁸

[96] Various state governments also made submissions to the Review.

[97] The Victorian Government supported an increase of ‘at least’ 3.5 per cent to the NMW and award minimum wages and submitted:

‘an increase in the NMW and award wages of less than 3.5 per cent would effectively be seen as a cut to relative living standards and the needs of the low paid.’¹⁰⁹

¹⁰⁴ ABI submission, 1 April 2022, at p. 3.

¹⁰⁵ ARA submission, 1 April 2022 at p. 2.

¹⁰⁶ MGA submission, 29 March 2022, at para. 4.

¹⁰⁷ R&CA submission, 28 March 2022, at para. 22.

¹⁰⁸ Australian Government submission, 3 June 2022, at paras 5, 7.

¹⁰⁹ Victorian Government submission, 31 March 2022, at para. 4.

[98] The New South Wales Government submitted that we should adopt a ‘cautious approach’ to the Review.¹¹⁰

[99] The Government of South Australia recommended that the Panel adopt a ‘fair and balanced approach, which allows real wage growth to reflect a fair share of labour productivity growth, while mindful of ongoing uncertainty and challenging trading conditions faced by many businesses.’¹¹¹

[100] The Queensland Government supported an increase in minimum wages that is ‘fair and reasonable’.¹¹²

[101] The Government of Western Australia recommended that the Panel award a ‘meaningful pay increase’ to minimum and award wage earners and should adopt a ‘balanced approach’ in determining the quantum of such an increase.¹¹³

[102] A list of the material filed is set out at Appendix 1. A summary of the positions advanced by the various parties is set out in Appendix 2.

3.2 The low paid and award reliant

[103] As mentioned in Chapter 1, the Panel’s task in a Review is to review the NMW, modern award minimum wages and to make a NMW order.

[104] Both the minimum wages objective and the modern awards objective require that we take into account, among other considerations, ‘relative living standards and the needs of the low paid’.¹¹⁴

[105] As mentioned in Chapter 2.2, the Panel has consistently adopted a threshold of two-thirds of median adult full-time ordinary earnings as the benchmark used to identify the ‘low paid’.

[106] Using ABS data for May 2021, earnings below \$22.20 per hour are considered to be ‘low paid’; if using HILDA survey data the threshold is \$22.56 per hour.¹¹⁵ The Australian Government’s submission of April 1 2022 provided an estimate of the number of low-paid award-reliant employees as at May 2021 using a pay threshold of below \$22.20 per hour, which was between the C11 modern minimum award rate (\$21.92) and the C10 rate (\$23.09) as at May 2021.¹¹⁶

[107] Workers paid at the current NMW rate (\$20.33 per hour) and at award classification levels *below* the C10 rate (\$23.67 per hour) are ‘low paid’ within the meaning of s.134(1)(a) and s.284(1)(c) of the Act.

¹¹⁰ New South Wales Government submission, 1 April 2022, at para. 57.

¹¹¹ Government of South Australia submission, 6 May 2022, at para. 18.

¹¹² Queensland Government submission, 5 May 2022, at p. 2.

¹¹³ Government of Western Australia submission, 1 April 2022, at paras 6–7.

¹¹⁴ Fair Work Act ss.284(1)(e) and 134(1)(a).

¹¹⁵ Australian Government submission, 1 April 2022, at paras 336, 338.

¹¹⁶ *Ibid* at Chart 2.1.

[108] The C10 classification is the minimum award rate set under the *Manufacturing and Associated Industries and Occupations Award 2020* (the Manufacturing Award 2020) (and predecessor awards) that has traditionally been used as a benchmark for setting minimum wages across awards. Under the Manufacturing Award 2020, workers at the C10 classification are those with recognised trade certificate, Certificate III in Engineering—Mechanical Trade, or Certificate III in Engineering—Fabrication Trade, or Certificate III in Engineering—Electrical/Electronic Trade, or equivalent.¹¹⁷

[109] The current NMW rate of \$20.33 per hour is equivalent to the base rates (or lowest pay points) in 43 of the 121 modern awards. For convenience these modern award base rates are referred to as the C14 rate. The wage rates of workers in the other pay point classifications in these 43 awards, as well as the base wage rates in the remaining 78 modern awards, are all above the NMW rate.¹¹⁸

[110] Analysis by the Australian Government in its 1 April 2022 submission using the HILDA survey data shows that in 2020 just over half (55.2 per cent) of low-paid workers were female and that low-paid work tends to be concentrated among younger workers.¹¹⁹ Over half (52.4 per cent) of low-paid workers were aged under 30, with 13.4 per cent aged between 15 and 19 years, and around a quarter (24.2 per cent) in the 20-to-24-year-old age cohort.¹²⁰ Some 53.9 per cent of low-paid workers worked part-time hours and 56.9 per cent were on casual contracts.¹²¹

[111] The vast majority of Australian workers have their pay set by one of three different methods: awards, enterprise agreements and individual arrangements.

[112] Chart 2.1 in the Australian Government’s submission of 1 April 2022 shows that:

- 2,659,400 (23 per cent) of employees had their pay set by awards;
- 805,200 award reliant employees were ‘low paid’, including 88,900 award reliant employees paid the NMW rate; and
- Up to 184,000 employees in total (1.6 per cent of employees) are paid the NMW rate¹²² comprising: 88,900 award-reliant employees; 79,200 employees on individual agreements; and 15,900 employees covered by enterprise agreements.¹²³

[113] The Panel’s decision also affects some employees covered by enterprise agreements or individual pay-setting arrangements.

¹¹⁷ MA000010

¹¹⁸ Australian Government submission, 1 April 2022, at para. 23.

¹¹⁹ Ibid at para. 32.

¹²⁰ Ibid.

¹²¹ Ibid, Appendix A, Table A.2.

¹²² This excludes workers paid junior, apprentice and disability rates of pay.

¹²³ Australian Government submission, 1 April 2022 at Chart 2.1.

[114] Using data from the WAD, the Australian Government’s submission of 1 April 2022 submitted that 94,354 employees on federal enterprise agreements have wages directly linked to Review decisions.¹²⁴ This estimate includes the number of employees covered by agreements current as at 31 December 2021 with a clause which states that the entirety of the Review decision will be applied in full and automatically to wages.

[115] Some employees on individual arrangements have their wages set above the relevant award but are influenced by Review decisions, though there is some uncertainty about the nature and extent of the impact of Review increases.¹²⁵

[116] A 2013 survey of non-public sector award-reliant organisations asked whether they passed on the *Annual Wage Review 2011–12* decision of a 2.9 per cent increase to minimum wages to any of their employees on over-award arrangements. Some 24 per cent of respondents passed on the increase to more than half of their employees on over-award arrangements, 6 per cent passed on the increase to half of these employees and 70 per cent did not pass on the adjustment.¹²⁶

[117] A more recent paper by Bishop and Cassidy (2019) suggests that ‘around 12 per cent of all wage changes in [enterprise agreements] and 8 per cent of all wage changes in individual arrangements ... are influenced by award decisions.’¹²⁷

3.3 *The Panel’s approach*

[118] The Panel’s approach to its statutory function is broadly reflected in the following extract from the *Annual Wage Review 2014–15* 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 ... 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.’¹²⁸

[119] Generally 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.¹²⁹ 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 to inform our decision.

¹²⁴ Ibid.

¹²⁵ [2014] FWCFB 3500 at [47].

¹²⁶ Wright S and Buchanan J (2013), *Award reliance*, Research Report 6/2013, Fair Work Commission, December, p. 37.

¹²⁷ Bishop J & Cassidy N (2019), *Wages Growth by Pay-setting Method*, RBA Bulletin, June, p. 81.

¹²⁸ [2015] FWCFB 3500 at [7]

¹²⁹ *Gala v Preston* (1991) 172 CLR 243 [12]

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

[121] We turn first to the changes in the economic circumstances since last year's decision. The key differences in economic indicators between last year and this year are set out in Table 4 below.

Table 4: Key differences in economic indicators between 2020–21 Review and 2021–22 Review

Indicator	2020–21 Review	2021–22 Review
CPI growth	1.1 per cent over year to March quarter 2021	5.1 per cent over year to March quarter 2022
Trimmed mean inflation	1.1 per cent over year to March quarter 2021	3.7 per cent over year to March quarter 2022
Unemployment rate	5.5 per cent in April 2021	3.9 per cent in April 2022
Persons employed	13 040 400 in April 2021	13 401 700 in April 2022
Non-mining business investment growth	–3.0 per cent over year to March quarter 2021	5.3 per cent over year to March quarter 2022
WPI growth	1.5 per cent over year to March quarter 2021	2.4 per cent over year to March quarter 2022

Source: Statistical report (version 9), 8 June 2022; *Statistical report—Annual Wage Review 2020–21* (version 12), 15 June 2021; ABS, *Australian National Accounts: National Income, Expenditure and Product*, March 2022.

[122] The most significant changes since the time of the 2020–21 Review decision have been the sharp rise in the cost of living, as evidenced by the various measures of inflation, and the strengthening of the labour market. We turn first to the labour market.

[123] At the aggregate level, labour market performance has been particularly strong. The unemployment rate has fallen to 3.9 per cent, compared to 5.5 per cent in April 2021.¹³⁰ Measures of underemployment have also fallen. The improvement in the labour market is forecast to continue in the period ahead. As the RBA states in its May 2022 *Statement on Monetary Policy*:

‘The labour market has improved further and demand for labour is strong. The unemployment rate reached 4 per cent in recent months and measures of underemployment have also declined. The level of job vacancies is very high, at a time when the participation rate and the ratio of employment to working-age population are already at historical highs. The unemployment rate is therefore forecast to decline further, to around 3½ per cent in early 2023. This would be its lowest level in almost 50 years.’¹³¹

[124] As mentioned, there has been a sharp rise in the cost of living since last year's Review.

¹³⁰ Since revised to 5.4 per cent.

¹³¹ RBA (2022), *Statement on Monetary Policy*, May, p. 1.

[125] The main measures of inflation that we consider are the CPI and underlying inflation. There are two measures of underlying inflation—the trimmed mean and weighted median.¹³² As discussed in the 2019–20 Review decision, underlying inflation is calculated to remove volatility in the quarterly price changes in the CPI due to large, irregular price movements to determine the underlying trend.¹³³

[126] At the time of last year’s Review decision, the CPI and the trimmed mean measure of inflation both stood at 1.1 per cent over the year to the March quarter 2021. The comparable figures now stand at 5.1 per cent (for the CPI) and 3.7 per cent (for the trimmed mean).

[127] There is also a marked difference in the inflation forecasts. Table 5 highlights the different inflation forecasts now compared with last year.

Table 5: RBA forecasts of inflation, 2020–21 Review and 2021–22 Review

As at 2020–21 Review	Jun-21	Dec-21	Jun-22	Dec-22
CPI	3¼	1¾	1¼	1½
Trimmed mean	1½	1½	1½	1¾
As at 2021–22 Review	Jun-22	Dec-22	Jun-23	Dec-23
CPI	5.5	5.9	4.3	3.1
Trimmed mean	4.5	4.6	3.6	3.1

Source: [2021] FWCFB 3500 at [37]; RBA (2022), *Statement on Monetary Policy*, May, Appendix: Forecasts.

[128] As the RBA noted in its May 2022 *Statement on Monetary Policy*:

‘The outlook for inflation is also materially higher than envisaged three months ago. Headline inflation is now expected to peak at around 6 per cent in the second half of this year, partly driven by higher petrol prices and sharp increases in the cost of new dwellings. Trimmed mean inflation is expected to peak at around 4¾ per cent.’¹³⁴

[129] The sharp rise in inflation impacts business and workers. The cost of business inputs increases which, depending on the capacity to pass on those costs, adversely impacts profitability. Absent a wage increase, inflation erodes the real value of workers’ wages, reduces their living standards and the capacity of the low paid to meet their needs.

[130] The low paid are particularly vulnerable in the context of rising inflation.

[131] In its May 2022 *Statement on Monetary Policy*, the RBA noted that the sources of inflation are broadening, beyond petrol prices and other global factors with price increases picking up for many grocery items:

¹³² The RBA uses the trimmed mean for forecasting because it strips out extremes on both the high and low sides, and does not presume where the noise comes from.

¹³³ [2020] FWCFB 3500 at [132]

¹³⁴ RBA (2022), *Statement on Monetary Policy*, May, p. 1.

‘Grocery prices have also picked up strongly over recent months as supermarkets passed through supplier cost increases and reduced discounting activity in response to supply disruptions ... Grocery prices (excluding fruit & vegetables) increased by 2.8 per cent in the quarter—the strongest quarterly outcome since 1983—with prices 4.9 per cent higher than a year ago... Price increases for most fresh food categories were strong in the quarter, including for meat, which continued to be affected by limited supply as farmers restock herds... Prices of fruit & vegetables increased by 2.3 per cent in the quarter to be 6¾ per cent higher over the year.’¹³⁵

[132] As the Panel also noted in last year’s decision, price increases and the cost of living at the aggregate level can mask the lived experience of low-paid workers.¹³⁶ Research from the RBA has shown that, compared with low-income households, high-income households tend to allocate a larger share of their spending to discretionary services such as travel and recreation, as well as to durable goods. In contrast, low-income households tend to allocate a larger share of spending to non-durable goods and rent.¹³⁷ Price increases in non-discretionary purchases, such as rent and basic food staples are more likely to adversely affect the household budgets of the low paid.¹³⁸

[133] It is notable that the non-discretionary components of the CPI increased by 6.6 per cent over the year to the March quarter 2022.¹³⁹ The increased cost of non-discretionary items will particularly impact low-income households and many low-paid workers.

[134] As the RBA observed in its May 2022 *Statement on Monetary Policy*:

‘Cost-of living pressures from rising food and fuel costs are likely to fall unevenly across households, as lower-income households spend a greater proportion of their income on food and fuel and have relatively limited buffers of savings to draw upon.’¹⁴⁰

[135] The 2.5 per cent increase awarded in last year’s Review decision exceeded the RBA’s forecasts at that time for CPI growth and trimmed mean inflation, which were forecast to increase by 1.25 per cent and 1.5 per cent respectively, over the year to the June quarter 2022.¹⁴¹ Had these forecasts been realised the 2.5 per cent increase would have resulted in a real wage increase for employees affected by the Review decision. As noted above, the position has changed markedly. As at the March quarter 2022 the headline CPI rate is 5.1 per cent and trimmed mean inflation is at 3.7 per cent. Consequently, award-reliant employees and low-paid employees have seen a fall in their real wages.

[136] The changes in the economic context weigh in favour of an increase in the NMW and modern award minimum wages.

¹³⁵ RBA (2022), *Statement on Monetary Policy*, May p. 53.

¹³⁶ [2021] FWCFB 3500 at [113]

¹³⁷ Beech A, Dollman R, Finlay R & La Cava G (2014), *The Distribution of Household Spending in Australia*, RBA Bulletin, March, p. 15.

¹³⁸ ACTU submission, 1 April 2022 at para. 206; van Kints M & Bruenig R (2021), ‘Inflation variability across Australian households: implications for inequality and indexation policy’, *Economic Record*, Vol. 97, Issue 316, pp 1–23.

¹³⁹ ABS, *Consumer Price Index, Australia*, March 2022.

¹⁴⁰ RBA (2022), *Statement on Monetary Policy*, May, p. 56.

¹⁴¹ [2021] FWCFB 3500 at [37]

[137] The approach taken by the Panel to forecasts and actual data outcomes is encapsulated in the following observation in the *Annual Wage Review 2012–13* (2012–13 Review) decision:

‘To the extent that the forecast economic indicators do not ultimately reflect the actual performance of the economy, this forms part of our broad assessment and our consideration of the actual indicators in subsequent reviews.’¹⁴²

[138] Applying this approach in the present context also weighs in favour of an increase in the NMW and modern award minimum wages.

(i) *Social and other considerations*

[139] As mentioned in Chapter 1, in addition to various economic considerations we are required to have regard to various social considerations and to ‘the need to encourage collective bargaining’. The minimum wages objective and the modern awards objective require us to take into account ‘relative living standards and the needs of the low paid’.

[140] As mentioned in Chapter 2.2, the Statistical Report contains estimates of disposable incomes for selected household types earning various wage rates in comparison to a 60 per cent median income poverty line. As shown in Appendix 3, as at December 2021 the position of all household types, across all wage rates, had declined compared to their position in December 2020. Eight of the household types had disposable incomes below the poverty line, 3 more than at the time of last years’ Review.

[141] Data from the HILDA survey shows that low-paid employee households were twice as likely to experience financial stress when compared to all employee households.

[142] The requirement to take into account relative living standards and the needs of the low paid supports an increase in the NMW and modern award minimum wages.

[143] As we cannot be satisfied that an increase in minimum wages will *encourage* collective bargaining this fact weights against an increase in minimum wages.

(ii) *Superannuation and Budget Measures*

The Superannuation Guarantee Rate Increase

[144] The *Superannuation Guarantee (Administration) Amendment Act 2012* (Cth) amended the *Superannuation Guarantee (Administration) Act 1992* to increase the Superannuation Guarantee (SG) rate from 9 per cent to 12 per cent. The increase was to be phased in and increased by 0.25 percentage points on 1 July 2013 to be 9.25 per cent and on 1 July 2014 to be 9.5 per cent.¹⁴³ The planned increases were postponed following amendments provided in the *Minerals Resource Rent Tax Repeal and Other Measures Bill 2014* (Cth). The next increase is planned for 1 July 2022, where it will increase by 0.5 percentage points to 10.5 per cent, and eventually reach 12 per cent by 1 July 2025.

¹⁴² [2013] FWCFB 4000 [8]

¹⁴³ *Ibid* at [334]

[145] In last year's Review, we noted that the 2021–22 Commonwealth Budget proposed to remove the threshold of \$450 per month (before tax) under which employees do not need to be paid the SG by their employer.¹⁴⁴ The removal of the threshold will apply from 1 July 2022 and the Australian Government estimates it will affect around 300,000 individuals, 63 per cent of whom are women.¹⁴⁵

[146] The increase in the SG rate and the removal of the threshold will increase employment costs and for that reason they are moderating factors in our consideration of the adjustment to minimum wages.

2022–23 Budget measures to support households

[147] The 2022–23 Budget made several other announcements regarding changes to support businesses and to households. As the Panel has previously stated, it does not take into account proposed changes that have yet to be legislated. Two proposals that have been legislated and received Royal Assent are the increase to the low and middle income tax offset (LMITO) and the cost of living payment.¹⁴⁶

[148] We have previously discussed and considered the LMITO.¹⁴⁷ The LMITO was introduced for the 2018–19 financial year and is paid as a lump sum after the lodging of income tax returns. The 2019–20 Budget announced that the LMITO would be extended for the 2019–20, 2020–21 and 2021–22 financial years. The Budget also announced an increase to the LMITO: the minimum offset amount would increase to \$255 (up from \$200), with the rate increasing by 7.5 cents per dollar (up from 3 cents) to the new maximum level of \$1080 (up from \$530), before phasing out at 3 cents per dollar (up from 1.5 cents). This higher LMITO replaced the initial offset amounts for the 2018–19 financial year and thereafter.

[149] In the 2020–21 Review decision, the Panel accepted the submission of the ACTU that the retention of the LMITO for the next financial year means no change in the net position for impacted workers relative to the current state.¹⁴⁸

[150] In the 2022–23 Budget, the Australian Government announced an increase of \$420 to the LMITO for the 2021–22 financial year, paid from 1 July 2022, thereby increasing the maximum payment from \$1080 to \$1500.¹⁴⁹

[151] For the 2022–23 year, the LMITO provided an offset of \$675 for those whose personal income is less than \$37 000, increasing to \$1500 for incomes from \$37 000 to less than \$48 000 at a rate of 7.5 cents per dollar. This includes the \$420 Cost of living tax offset. The maximum

¹⁴⁴ [2021] FWCFB 3500 at [60]

¹⁴⁵ *Ibid*; [Treasury Laws Amendment \(Enhancing Superannuation Outcomes For Australians and Helping Australian Businesses Invest\) Act 2022](#); 2021–22 Budget Measures, Budget Paper No.2, 1 March 2021 p. 26.

¹⁴⁶ See Fair Work Commission (2022), *Information note—Summary of measures from the 2022–23 Budget*, 14 April.

¹⁴⁷ [2021] FWCFB 3500 at [64]–[65]; [2020] FWCFB 3500 [357]; [2019] FWCFB 3500 at [50]–[51]; Fair Work Commission (2019), *Information note—Changes to the tax-transfer system*, additional material for the 2018–19 Review, 3 April.

¹⁴⁸ [2021] FWCFB 3500 at [69]

¹⁴⁹ Australian Government (2022), *Budget 2022–23, Budget Paper No. 1*, 29 March, p. 15.

LMITO of \$1500 applied to incomes between \$48 000 and \$90 000. For incomes above \$90 000, the LMITO phased out at a rate of 3 cents per dollar. The LMITO worked in conjunction with the low income tax offset (LITO), which applied to incomes of \$37 000 or less. The maximum LITO is \$700.

[152] All LMITO recipients will benefit from the \$420 increase except those who do not require the full offset to reduce their tax liability to zero. All other features of the current LMITO remain unchanged. The fact that the maximum LMITO applies to those earning between \$48 001 and \$90 000 means that this additional offset is likely to benefit middle-income earners more than the low paid.

[153] Also announced in the Budget and since legislated is a one-off cost of living payment of \$250 made in April 2022 to eligible recipients to assist with higher cost of living pressures.¹⁵⁰ Those receiving the one-off payment are those receiving payments such as the age pension, disability support pension, parenting payment, carer payment, JobSeeker payment and youth allowance. These recipients are less likely to be working and therefore the benefit to low-paid workers of these payments is likely to be small.

[154] Consistent with the position taken in past Review decisions we have taken into account the 0.5 percentage point increase in the SG rate, the removal of the \$450 SG threshold and the 2022–23 Budget measures mentioned above in determining the level of increases in minimum wages in this Review, but we have not applied a direct, quantifiable discount to the minimum wage increases. These SG changes and Budget measures are moderating factors in our consideration of the adjustment to minimum wages and consequently the increase in the NMW and modern award minimum wages we have determined in this Review are lower than they would have been absent these factors.

[155] It is convenient to deal here with a submission advanced by Ai Group in support of its proposed ‘modest wage increase of 2.5 per cent’:

‘When the proposed 2.5% wage increase is considered alongside the 0.5% Superannuation Guarantee increase that is operative from 1 July 2022 and the equivalent of a 1.3% increase in pre-tax income that an employee on the NMW will receive in the coming months as a result of the announced increase in the Lower and Middle Income Tax Offset, our proposal would result in the equivalent of a 4.3% increase in pre-tax remuneration for low paid employees.’¹⁵¹

[156] Ai Group’s analysis is flawed in three respects. First, as mentioned above, the Panel has consistently eschewed the application of a direct, quantifiable discount for SG increases and Budget measures. Ai Group’s attempt to quantify the value of particular measures as a means of justifying a lower increase in minimum wages is inconsistent with the Panel’s approach. Second, quantifying the benefit of the LMITO as the equivalent of a 1.3 per cent increase in pre-tax income for an employee on the NMW is apt to mislead as there are comparatively few full-time employees paid at the NMW level. The benefit provided by the increase in the LMITO varies significantly depending on income and may provide little or no benefit to many low-paid part-time employees who are not employed on a full-time basis.

¹⁵⁰ Ibid, p. 167; *Treasury Laws Amendment (Cost of Living Support and Other Measures) Act 2022*

¹⁵¹ Ai Group reply submission, 10 May 2022, p. 2.

[157] And, finally, Ai Group’s reliance on the 0.5 percentage point increase in the SG rate to arrive at ‘the equivalent of a 4.3% increase in pre-tax remuneration for low paid employees’ ignores the fact the SG rate increase is a *deferred* benefit; it does not assist low-paid employees to meet their current needs and cost of living pressures.

Consideration

[158] As mentioned in Chapter 1, the Panel’s task is to consider the relevant statutory considerations in the context of the prevailing economic and social circumstances in arriving at its decision.

[159] A number of the submissions drew attention to the complexity of the Panel’s task in the prevailing circumstances. As ABI put it:

‘this year may be one of the most difficult years for the Panel’s decision due to the evidence indicating the continuation of a two-speed economy, significantly increasing costs to business, lingering uncertainty due to the ongoing pandemic and low business confidence, against a backdrop of rising inflation and consumer costs.’¹⁵²

[160] The statutory tasks in ss 134 and 284 involve an ‘evaluative exercise’ in which the considerations in s.134(1)(a)–(h) and s.284(1)(a)–(e) 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’.

[161] As the Panel has observed in numerous past Review decisions there is often a degree of tension between the economic and social considerations which we must take into account. A substantial wage increase may better address the needs of the low paid and improve the living standards of award-reliant employees relative to those employees who are not award reliant; but it may, depending upon the prevailing economic circumstances, adversely affect the performance and competitiveness of the national economy. A substantial wage increase may reduce the capacity to employ the marginalised and hence impact on employment growth or add to inflationary pressures. The range of considerations we are required to take into account calls for the exercise of broad judgment, rather than a mechanistic approach to minimum wage fixation.

[162] The submissions on behalf of the various employer interests tended to highlight the downside risks to the economy. ACCI submitted that the ‘fragility of the recovery remains problematic’ and that ‘[t]here is an overwhelming impression of risks and the unknown’.¹⁵³ Similarly, Ai Group urged the Panel to adopt ‘a cautious approach’ and submitted:

‘While the Australian economy has bounced back at a faster and stronger pace than had been anticipated, there are many hurdles to a complete recovery.’¹⁵⁴

¹⁵² ABI submission, 1 April 2022, p. 3.

¹⁵³ ACCI submission in reply, 10 May 2022, at paras 3, 6.

¹⁵⁴ Ai Group submission, 1 April 2022, p. 4.

[163] While it may be accepted, as a general proposition, that we live in uncertain times and there are significant downside risks to the economic outlook, the employer submissions present a stark contrast with the generally optimistic assessment in the 2022–23 Budget and by the RBA.

[164] The 2022–23 Budget noted that the ‘Australian economy has proved remarkably resilient to the ongoing impacts of the pandemic, consistently outperforming expectations and all major advanced economies’.¹⁵⁵ Economic growth as measured by GDP was 3.4 per cent in the December quarter 2021, the equal highest quarterly increase in 46 years, and this strong outcome does not appear to have been derailed by the Omicron outbreak in early 2022.¹⁵⁶

[165] Household consumption exceeded pre-pandemic levels for the first time in the December quarter 2021.¹⁵⁷ As noted in the 2022–23 Budget, a record proportion of Australians are in work¹⁵⁸ and this strong demand for labour is expected to continue.¹⁵⁹ Higher consumer spending and employment than previously expected has led to improved growth forecasts.¹⁶⁰ Business confidence returned quickly after the Omicron wave and business investment is expected to be strong, driven by non-mining business investment.¹⁶¹ The economic and fiscal outlook is positive as noted in the Budget Overview section of Budget Statement No. 1:

‘The Australian economy has proved remarkably resilient to the ongoing impacts of the pandemic, consistently outperforming expectations and exceeding pre-pandemic levels of activity by more than the major advanced economies.

A strong economic recovery is well underway, notwithstanding the pandemic and new shocks, such as the recent floods in Queensland and New South Wales and the Russian invasion of Ukraine. Economic growth forecasts have been revised upwards, driven by stronger-than-expected momentum in the labour market and consumer spending. Real GDP is expected to grow by 4¼ per cent in 2021-22, 3½ per cent in 2022-23 and 2½ per cent in 2023-24 ... The strength of the economy, and in particular the labour market, combined with higher near-term commodity prices, has driven large upward revisions to tax receipts and reductions in unemployment benefit payments ... Net and gross debt as a share of GDP are both expected to be lower than at MYEFO and decline over time.’¹⁶²

[166] The positive outlook is captured in Table 1.1: Major economic parameters in Budget Paper No. 1 reproduced below:

¹⁵⁵ Australian Government (2022), *Budget 2022–23, Budget Paper No. 1*, 29 March, p. 31.

¹⁵⁶ *Ibid* pp. 31, 45. Since revised to 3.6 per cent.

¹⁵⁷ *Ibid* p. 49.

¹⁵⁸ *Ibid* p. 39.

¹⁵⁹ *Ibid* p. 45.

¹⁶⁰ *Ibid* p. 31.

¹⁶¹ *Ibid* pp. 51–52.

¹⁶² *Ibid* pp. 5–6.

Table 1.1: Major economic parameters

	Outcome	Forecasts				
	2020–21	2021–22	2022–23	2023–24	2024–25	2025–26
Real GDP	1.5	4¼	3½	2½	2½	2½
Employment	6.5	2¾	1½	1½	1	1
Unemployment rate	5.1	4	3¾	3¾	3¾	4
Consumer price index	3.8	4¼	3	2¾	2¾	2½
Wage price index	1.7	2¾	3¼	3¼	3½	3½
Nominal GDP	4.4	10¾	½	3	5¼	5

Source: Australian Government (2022), *Budget 2022–23, Budget Paper No. 1*, 29 March, p. 6, Table 1.1.

Note: Real GDP and Nominal GDP are percentage change on preceding year. The consumer price index, employment, and the wage price index are through-the-year growth to the June quarter. The unemployment rate is the rate for the June quarter.

[167] We note that the 2022–23 Budget was handed down on 29 March 2022, a month prior to the CPI data published on 27 April 2022. The Budget forecast for the CPI in 2021–22 (4¼ per cent) is unlikely to be met given the sharp rise in the CPI in the March quarter of 2022.

[168] We also note that the Australian Government’s submission of 3 June 2022 is less sanguine about the economic outlook. While supporting an outcome that ‘ensures that the real wages of Australia’s low paid workers do not go backwards’, the Australian Government referred to the ‘highly unusual and challenging economic conditions’ and submitted:

‘Economic conditions are particularly challenging given inflation is at a 21 year high of 5.1 per cent and is expected to increase further in the near-term due to persistent and compounding supply shocks. The current inflation rate is 2.7 percentage points higher than wages growth as measured by the Wage Price Index (WPI), which means on average, Australians are experiencing the sharpest decline in real wages in 21 years.’¹⁶³

[169] The RBA’s assessment of the current state of the economy and the economic outlook is also generally positive. In its May 2022 *Statement on Monetary Policy*, the RBA stated:

‘the Australian economy remains resilient and is expected to grow strongly this year. GDP is forecast to expand by 4¼ per cent over 2022. Growth is expected to moderate thereafter, to 2 per cent over 2023, as the recovery matures and as extraordinary policy support is withdrawn. The expansion is likely to be driven by robust consumption growth as spending on discretionary goods and services continues to recover, underpinned by strong household balance sheets and high real household disposable income, despite rising prices...The underlying strength in the economy has been particularly evident in the labour market, where conditions are the most robust in many years. Strong labour demand and fiscal measures are supporting growth in household income, although recent large increases in food and energy prices are having a significant negative impact on household budgets.’¹⁶⁴

¹⁶³ Australian Government submissions, 3 June 2022, para. 4.

¹⁶⁴ RBA (2022), *Statement on Monetary Policy*, May, pp. 2, 23.

[170] The RBA forecasts GDP growth to be 3.6 per cent over the year to the June quarter 2022, rising to 4.2 per cent over the year to the December quarter 2022. Household consumption growth is expected to peak at 5.8 per cent over the year to the December quarter 2022, while business investment is forecast to peak in 2023. This follows a strong upswing in business investment in the first half of 2021 that has regained momentum.¹⁶⁵ The unemployment rate is forecast to decline further and reach 3.6 per cent in 2023, while growth in the WPI is expected to increase over the forecast period and be 3.0 per cent over the year to the December quarter 2022.

[171] It seems to us that the Australian economy is recovering strongly from the impact of the COVID-19 pandemic, with the recovery forecast to continue and drive further employment growth, as encapsulated in the Australian Government's submission of 1 April 2022:

‘The Australian economy has proved remarkably resilient to the ongoing impacts of the pandemic, consistently outperforming expectations and all major advanced economies. Forecasts for economic activity in the 2022–23 Budget have been revised up significantly, reflecting stronger-than-expected momentum in the labour market and consumer spending. This expansion is forecast to see the unemployment rate fall to 3¾ per cent by the September quarter of 2022 and remain there until 2024–25.

The ongoing pandemic, Russian invasion of Ukraine, strained supply chains and rising inflationary pressures all present risks to the global and domestic outlooks. Nonetheless, the resilience of the Australian economy throughout the pandemic demonstrates that the economy is well placed to adapt to these new developments.’¹⁶⁶

[172] The employer submissions also highlight the diversity of business experience in the recovery. As ACCI puts it:

‘Businesses in some sectors are doing very well, with some employees experiencing positive outcomes in tightening labour markets. Others are saddled with post-pandemic debt, flaky consumer confidence, and changes in consumer behaviours and demand.’¹⁶⁷

[173] A diversity of business experience across the economy is not a new phenomenon; nor is it uncommon for businesses to experience changes in consumer behaviour and demand. The economy rarely moves forward as a cohesive unit. Indeed it is more likely that growth and profitability will vary between the various sectors of the economy. We deal with the challenges facing particular sectors in Chapter 4.

[174] The level of minimum wage increases proposed by ACCI, Ai Group and ABI (2.5 to 3.0 per cent) would result in real wage reductions for award-reliant workers, many of whom are low paid. Further, if we were to accept the submissions of some of the employer bodies, such as the MGA and R&CA, and award no increase, then the real wage reduction would be even more severe.

¹⁶⁵ Ibid, p. 63.

¹⁶⁶ Australian Government submission, 1 April 2022, at paras 43–44.

¹⁶⁷ ACCI submission in reply, 10 May 2022, at para. 3.

[175] The ARA adopted a more nuanced approach and proposed an increase based on the trimmed mean inflation rate, as a measure of underlying inflation and advanced the following principles-based approach:

‘Principle 1: Wages growth should keep pace with higher costs of living, using the Trimmed Mean Inflation (TMI) rate as a measure of underlying inflation, removing volatile inputs from the Consumer Price Index (CPI).

Principle 2: Any increase in wages for 2022-23 should be based on the RBA’s actual rate of underlying inflation at the time the Annual Wage Review is handed down, and factor in the increase in the Superannuation Guarantee Rate, from 10.0% to 10.5%, in-line with the approach taken by the panel for last year’s review.

Principle 3: Any increase in wages that exceeds underlying inflation should be offset by productivity gains, to help retailers absorb higher labour costs without placing additional financial pressure on businesses.’¹⁶⁸

[176] ABI also appeared to base their proposal on the rate of underlying inflation.¹⁶⁹

[177] As noted earlier, the most recent data shows that the trimmed mean inflation rate was 3.7 per cent over the year to the March quarter 2022 and the RBA forecasts the trimmed mean to increase by 4.5 per cent over the year to the June quarter 2022. The RBA’s forecast may be optimistic, it was published on 6 May 2022 and in a statement on the monetary policy decision on 7 June 2022, the Governor of the RBA said:

‘Higher prices for electricity and gas and recent increased in petrol prices mean that, in the near term, inflation is likely to be higher than was expected a month ago.’¹⁷⁰

[178] Further, the trimmed mean or underlying rate of inflation understates the impact of cost of living increases on low-paid workers. The non-discretionary components of the CPI increased by 6.6 per cent over the year to the March quarter 2022 and these increased costs will particularly impact low-income households and many low-paid workers.

[179] We accept the need for moderation in order to constrain the inflationary pressures arising from our decision. The SG rate and threshold changes, and the 2022–23 Budget measures are also moderating factors. That said, we are conscious that the low paid are particularly vulnerable in the context of rising inflation. Further, given the sharp rise in the cost of living since last year’s Review, the increases awarded last year have resulted in a fall in the real value of the NMW and modern award minimum wages.

[180] Taking all the relevant considerations into account have led us to award an increase of \$40 to the NMW, which amounts to an increase of 5.2 per cent. The NMW will be \$812.60 per week or \$21.38 per hour. The hourly rate has been calculated by dividing the weekly rate by 38, on the basis of a 38-hour week for a full-time employee. This level of increase will protect the real value of the wages of the lowest-paid workers.

¹⁶⁸ ARA submission, 1 April 2022 at p. 2.

¹⁶⁹ ABI submission, 1 April 2022 at p. 3.

¹⁷⁰ RBA (2022), *Statement by Philip Lowe, Governor: Monetary Policy Decision*, 7 June.

[181] Given the strength of the labour market and the relatively small number of employees paid at the NMW rate (184,000 employees or 1.6 per cent of all employees) we do not think that such an increase will have any material impact on ‘the performance and competitiveness of the national economy’ (s.284(1)(a)).

[182] The proposed NMW and our assessment of all the relevant considerations have also led us to increase modern award minimum wages.

[183] We propose to provide a proportionately higher increase to low-paid employees. As mentioned earlier, workers paid at classification levels below the C10 rate (\$23.67 per hour) are ‘low paid’ within the meaning of s.134(1)(a) and s.284(1)(e) of the Act and the NMW rate is equivalent to the base rates (or lowest pay points) in 43 of the 121 modern awards;¹⁷¹ commonly referred to as the C14 rate.

[184] As to the form of the adjustment, we note since the *Annual Wage Review 2010–11* decision, adjustments to the NMW and modern award minimum wages have been by uniform percentage increases. In the decade prior to 2011 most adjustments to award wages were by ‘flat dollar’ amounts, as such increases provided a greater relative benefit to low-paid employees. But, flat dollar increases also compress wage relativities and reduce the incentive for skill acquisitions; these considerations led the Panel to move away from flat dollar adjustments.

[185] During the course of the public consultations on 18 May 2022, the Panel sought the views of the parties in respect of the proposals before us which advocate a flat dollar increase or a variation on that theme, including a percentage increase with a minimum adjustment. Specific mention was made of the impact on award classification relativities of flat dollar increase. In response Ai Group said:

‘... awarding a higher increase for lower paid employees than high paid employees is not likely to distort relativities to the extent that it would be a major problem, but we’re comfortable with our proposal of two and a half per cent for all levels.’¹⁷²

[186] ACCI later associated itself with Ai Group’s remarks.¹⁷³

[187] We note that Ai Group adopted a different position in its reply submission of 8 June 2022 in which it submitted:

‘To the extent that the Australian Government’s submission could be interpreted as urging the Panel to award a different level of wage increase to employees earning the National Minimum Wage or classified at lower levels in award classification structures, we do not support this approach. The same percentage increase should apply to all classification levels. Also, we do not support the awarding of a flat dollar increase. Such

¹⁷¹ Australian Government submission, 1 April 2022 at para. 23.

¹⁷² Transcript of proceedings, 18 May 2022, PN179.

¹⁷³ Ibid, PN200.

approaches would disturb the relativities between classification levels and make the assessment of work value far more complicated.¹⁷⁴

[188] No explanation was proffered for the change in Ai Group’s position and the above submission was not the subject of any further elaboration.

[189] We also note that the ACTU urged the Panel ‘not to depart from adjusting the NMW and modern award minimum wages by a uniform percentage amount in this Review’¹⁷⁵, for the reasons set out at [39] of its Supplementary Submission of 3 June 2022, which included ‘legitimate concerns regarding the distortion of relativities’.

[190] Further, as noted earlier, the performance of the labour market has been particularly strong. Low-paid work tends to be concentrated among younger workers, and at lower skill levels. Accordingly, it is particularly relevant that the youth unemployment rate has fallen from 13.1 per cent in October 2021 to 8.8 per cent in April 2022, well below the 11.6 per cent recorded in March 2020. The youth underemployment rate has also declined from 17.3 per cent in October 2021 to 14.3 per cent in April 2022 and is 5.1 percentage points below the rate recorded in March 2020.¹⁷⁶

[191] The present circumstances warrant an approach which affords a greater level of support to the low paid while seeking to constrain inflationary pressures.

[192] We propose to increase modern award minimum wages by 4.6 per cent subject to a minimum increase to adult award classifications of \$40 per week.¹⁷⁷ In effect modern award minimum wage rates above \$869.60 per week will receive a 4.6 per cent increase. Wage rates in adult award classifications that are below \$869.60 per week will be increased by \$40 per week.

[193] In most modern awards the effect of our decision will be that the 4.6 per cent adjustment will cut in at around the C10 rate, or trade level, and the flat \$40 increase will apply to the lower classifications. For example, in the Hospitality Industry (General) Award 2020:

	AWR Increase		
	\$ per week	\$ per week	%
Introductory level (C14)	772.60	812.60	5.2
Level 1 (C13)	794.80	834.80	5.0
Level 2 (C12)	825.20	865.20	4.8
Level 3 (C11)	853.60	893.60	4.7
Level 4 (C10)	899.50	940.90	4.6

¹⁷⁴ Ai Group submission in reply regarding the National Accounts March quarter 2022, 8 June 2022, at p. 3.

¹⁷⁵ ACTU submission in reply regarding the National Accounts March quarter 2022, 8 June 2022, para. 29.

¹⁷⁶ ABS, *Labour Force, Australia*, April 2022.

¹⁷⁷ This applies on the basis of a 38-hour week for a full-time employee.

[194] We accept that the approach we have adopted will result in some, albeit minor, compression in relativities, but that consideration is to be balanced against the need to provide greater relief to low-paid workers in the context of rising cost of living pressures. Given the current strength of the labour market the adjustment we propose to make will not have a significant adverse effect on ‘the performance and competitiveness of the national economy’ (ss.134(1)(h) and 284(1)(a)).

[195] In our view awarding an increase in all modern award minimum wages of the magnitude proposed by ACCER (6.5 per cent) and the ACTU (5.5 per cent) in the present economic circumstances would pose a real risk of significant adverse effects to the national economy.

[196] We acknowledge that the increases we have determined will mean a real wage cut for some award reliant employees. This is an issue that can be addressed in subsequent Reviews.

[197] We now turn to consider the timing of these adjustments.

4. Timing

[198] The Act provides that, absent exceptional circumstances, variations to a NMW order and modern award minimum wages arising from a Review are to operate from 1 July in the following financial year. In respect of a NMW order, s.287(1) provides that an order

‘that is made in an annual wage review comes into operation on **1 July in the next financial year** (the *year of operation*).’ [Emphasis added]

[199] While a NMW order must come into operation on 1 July in the next financial year, the effect of some or all of its components may be delayed in ‘exceptional circumstances’.¹⁷⁸

[200] Section 286(1) provides that:

‘a determination (a *variation determination*) varying one or more modern awards to set, vary or revoke modern award minimum wages that is made **in an annual wage review** comes into operation on **1 July in the next financial year.**’ [Emphasis added]

[201] Section 286(2) provides that if the Commission ‘is satisfied that there are exceptional circumstances justifying why a variation determination should not come into operation until a later day’ [emphasis added] the Commission may specify that later day as the day on which the variation determination comes into operation. If the Commission does so, the variation determination comes into operation on that later day (s.286(3)).

[202] No party contests the capacity of the Commission, to the extent justified by exceptional circumstances, to delay the variation of modern award minimum wages on an award-by-award basis. That said, the expression ‘exceptional circumstances’ is to be interpreted in the context of Part 2-6 and a strong case must be made out in order to warrant the deferral of an increase in minimum wages.¹⁷⁹

[203] In the 2019–20 Review, the majority of the Panel decided to increase modern award minimum wages in 3 groups based on industry clusters. Depending on the modern award and the industry cluster it was allocated, the increases to modern award minimum wages occurred on either 1 July 2020, 1 November 2020 or 1 February 2021.

[204] Using the ABS series *Weekly Payroll Jobs and Wages in Australia* and other data, the majority separated the 19 industries (according to the Australian and New Zealand Standard Industrial Classification) into 3 clusters based on the impact of the COVID-19 pandemic at the time.¹⁸⁰ The separation in these clusters was also supported by data on business expectations of how COVID-19 would adversely impact them over the next 2 months,¹⁸¹ GVA and profits.¹⁸²

¹⁷⁸ Fair Work Act, s. 287(4).

¹⁷⁹ [2021] FWCFB 3500 at [219].

¹⁸⁰ [2020] FWCFB 3500 at [45]–[46].

¹⁸¹ *Ibid* at [55].

¹⁸² *Ibid* at [309].

[205] The modern awards in Group 1 covered industries which were less affected by the pandemic than those covered in Groups 2 and 3. These included modern awards applying to ‘frontline’ health workers, teachers and childcare workers and employees engaged in other essential services. The majority was not satisfied that there were exceptional circumstances justifying the variation determinations in respect of these modern awards coming into operation on a day later than 1 July 2020.¹⁸³ The modern awards in Group 2 covered industries adversely impacted by the pandemic, but not to the same extent as the industries covered by the Group 3 awards. The modern awards in Group 3 covered industries which were most adversely affected by the pandemic. The majority was satisfied that there were exceptional circumstances justifying the variation determinations in respect of modern awards in Groups 2 and 3 coming into operation on a later date.¹⁸⁴

[206] As part of the research program for last year’s Review, Professor Jeff Borland conducted a series of reports assessing the economic effects of the COVID-19 pandemic (Borland reports). Included in the research was consideration of whether the industry clusters identified in the 2019–20 Review remained relevant a year later. Professor Borland derived a different set of classifications based on the experiences of industries: fully recovered; almost recovered; and lagging recovery.

[207] The Panel decided that the increase should apply from 1 July 2021 for the majority of awards. A delayed increase was awarded for the following modern awards and modern enterprise awards that came into operation on 1 November 2021:

- *Air Pilots Award 2020*
- *Aircraft Cabin Crew Award 2020*
- *Airline Operations – Ground Staff Award 2020*
- *Airport Employees Award 2020*
- *Airservices Australia Enterprise Award 2016*
- *Alpine Resorts Award 2020*
- *Amusement, Events and Recreation Award 2020*
- *Dry Cleaning and Laundry Industry Award 2020*
- *Fitness Industry Award 2020*
- *Hair and Beauty Industry Award 2010*
- *Hospitality Industry (General) Award 2020*
- *Live Performance Award 2020*
- *Mannequins and Models Award 2020*
- *Marine Tourism and Charter Vessels Award 2020*
- *Nursery Award 2020*
- *Racing Clubs Events Award 2020*
- *Racing Industry Ground Maintenance Award 2020*
- *Registered and Licensed Clubs Award 2020*
- *Restaurant Industry Award 2020*
- *Sporting Organisations Award 2020*
- *Travelling Shows Award 2020*
- *Wine Industry Award 2020.*

¹⁸³ Ibid [162].

¹⁸⁴ Ibid [163]–[164].

[208] The variation determinations in respect of the *General Retail Industry Award 2020* came into effect on 1 September 2021.

[209] Since the last Review, the Australian economy has been impacted by restrictions during the second half of 2021, predominantly in New South Wales and Victoria, and higher case numbers in early 2022 due to the Omicron variant affecting all states and territories, leading to an increase in the number of people in isolation and unavailable to work. However, the majority of the eligible population has since received at least 2 doses of a vaccine and the risk of further lockdowns is lower due to a changed approach from governments, including reduced isolation restrictions and fewer restrictions on business operations.

[210] Severe floods impacted parts of New South Wales and Queensland in early 2022. According to the Australian Government, these are expected to reduce GDP growth by around ½ a percentage point in the March quarter 2022, with the effect mainly being in the Mining, Agriculture, Accommodation and food services, Retail trade and Construction industries. This will be partly offset by replacing and rebuilding infrastructure and goods over time. The impact on the labour market is likely to be through fewer hours worked.¹⁸⁵

[211] The Australian Government has provided support to households and businesses impacted by the floods in New South Wales and Queensland in early 2022. This includes:¹⁸⁶

- \$2.2 billion to households for income support, temporary accommodation and social services;
- \$665.0 million to businesses and farmers for repairs, new equipment and support services; and
- \$588.6 million for community clean-up and recovery, including \$300 million from the Emergency Response Fund for recovery and post-disaster resilience initiatives.

[212] An [information note](#) undertaken by staff of the Commission was published for this Review that included an assessment by Professor Borland of industry conditions using the most recent data.¹⁸⁷ We return to the data in the information note and Professor Borland's assessment shortly.

[213] A number of employer parties submitted that exceptional circumstances justified delayed operative dates for particular awards.

[214] Ai Group stated that domestic and international air travel and tourism have not recovered from the impacts of the pandemic,¹⁸⁸ and that this is further supported by the conclusion in the information note from Professor Borland.¹⁸⁹ Ai Group submitted that economic conditions remain difficult in Accommodation and food services, with gross value

¹⁸⁵ Australian Government (2022), *Budget 2022–23, Budget Paper No. 1*, 29 March, p. 47, Box 2.3.

¹⁸⁶ *Ibid*, p. 16.

¹⁸⁷ Fair Work Commission (2022), *Information note – Industry analysis*, 26 May.

¹⁸⁸ Ai Group submission, 1 April 2022, pp. 56–58.

¹⁸⁹ Ai Group submission regarding the National Accounts March quarter 2022, 3 June 2022, pp. 6–7.

added, payroll jobs, profits, income from sales, and the number of temporary visa holders remaining below pre-pandemic levels, while average labour costs per hour increased between December 2019 and December 2021.¹⁹⁰

[215] In its submission regarding the National Accounts for the March quarter 2022, Ai Group maintained that a delayed operative date for Accommodation and food services is needed with employment and the number of hours worked lower than in February 2020.¹⁹¹

[216] Ai Group argued that the higher job vacancy rate than before the pandemic is ‘not necessarily a sign of industry health’,¹⁹² submitting that:

‘For the industries in relation to which Ai Group sought a delayed increase in modern award minimum wages, lower immigration levels have generated significant difficulties for employers in sourcing staff. Increasing cost pressures by allowing for a sudden increase in minimum rates of pay would likely expose enterprises in these sectors to significant difficulties in continuing their recovery. An existing labour and skills shortage is being exacerbated by increased labour mobility and turnover, thereby increasing competition for employees. This has no doubt contributed to the increase in the Wage Price Index (WPI) for all industries by 3.9% between the March quarter 2020 and the March quarter 2022.³ The stronger bargaining position of employees in more recent times is further evinced by the increase in individual arrangements as the method of setting the rate of pay.’¹⁹³

[217] Ai Group also stated that higher vacancy rates are indicative of structural issues around skill shortages in Australia, which have been exacerbated by the closure to international borders, particularly affecting Retail trade and Arts and recreation services, that have higher numbers of part-time, casual and award-reliant workers.

[218] ACCI stated that businesses in customer facing services industries, particularly Accommodation and food services, Arts and recreation services and Retail trade, as well as tourism-related businesses in the Transport sector were again affected by the most by COVID-related disruptions.¹⁹⁴ ACCI argued that there is a ‘clear case for exceptional circumstances’ for these businesses, and that the current situation for these industries and the outlook is ‘far worse than it was at the time the Panel made its decision in 2021’.¹⁹⁵

[219] For the transport sector, ACCI stated that while international borders were reopened, it will take time for businesses to return to full capacity and return to profitability.¹⁹⁶ ACCI also submitted that the price of jet fuel has more than doubled in the past 12 months, leading to higher airfare costs, which will further stagnate international and domestic travel.¹⁹⁷

¹⁹⁰ Ai Group submission, 1 April 2022, pp. 58–59.

¹⁹¹ Ai Group submission regarding National Accounts March quarter 2022, 3 June 2022, at p. 7.

¹⁹² Ibid.

¹⁹³ Ibid.

¹⁹⁴ ACCI submission, 1 April 2022, at para. 39.

¹⁹⁵ Ibid, at para. 41.

¹⁹⁶ Ibid, at para. 47; ACCI submission in reply, 10 May 2022, at para. 35.

¹⁹⁷ Ibid, at para. 38.

[220] For Accommodation and food services and Arts and recreation services, ACCI stated that both these sectors were most affected by the COVID-related lockdowns, have yet to fully recover, with gross value added and employment remaining below pre-pandemic levels, and are most at risk to future COVID outbreaks.¹⁹⁸ ACCI also stated that these industries are highly award-reliant and that increases to award wages on 1 July risks ‘compromising the viability and recovery of some businesses’.¹⁹⁹

[221] ACCI recommended that the Panel adopt a similar approach to the last Review, delaying the commencement of the wage increase for specific award classifications to no earlier than 1 November 2022.²⁰⁰ ACCI submitted that the information note on industry analysis ‘reinforces ACCI’s assessment that we face a multispeed economy’.²⁰¹

[222] ACCI were concerned with the data on job vacancies, submitting that:

‘It is not likely that workers will quickly return to these sectors. The high vacancy rates will take some time to dissipate, with businesses continuing to face staff shortages as they struggle to recruit new employees over the next 12 months. This will have implications for their ability to rebuild, recover debt and remain viable, despite the strengthening economy.’²⁰²

[223] In relation to this, ACCI added:

‘High job vacancies are a constraint on businesses ability to operate at full capacity and should be viewed as a factor likely to slow the recovery of an industry sector. The Panel should not interpret high job vacancy rates as the sign of a strong recovery or an indication that businesses in the sector are performing well. ACCI disagree with the use of job vacancies in this analysis as an indicator of economic recovery.’²⁰³

[224] ACCI concluded that data on payroll jobs and employment and the updates to business performance indicators shows that ‘the case for exceptional circumstances continues to exist for accommodation and food services, tourism related transport and arts and events subsectors’.²⁰⁴

[225] ABI provided analysis during different subperiods of the pandemic and submitted that the data support delaying the operative dates for some industries as there is variation in performance. It added that employment growth has yet to resume its pre-pandemic pace, with the labour market constrained by a slow return of skilled migrants and other working visa holders.²⁰⁵

¹⁹⁸ ACCI submission, 1 April 2022, at para. 48.

¹⁹⁹ ACCI submission in reply, 10 May 2022, at para. 48.

²⁰⁰ ACCI submission regarding the National Accounts March quarter 2022, 3 June 2022, at para. 15.

²⁰¹ Ibid, at para. 42.

²⁰² Ibid, at para. 46.

²⁰³ Ibid, at para. 48.

²⁰⁴ Ibid, at para. 53.

²⁰⁵ ABI submission regarding the National Accounts March quarter 2022, 3 June 2022, pp. 12–16.

[226] The National Retail Association (NRA) agreed with ACCI, Ai Group and ABI and submitted that the operative date for any variation determination made in this Review for the Restaurant Award or the Hospitality Award should be deferred to 1 November 2022.²⁰⁶ NRA submitted that employers covered by the Restaurant and Hospitality Awards ‘are currently experiencing a labour shortage crisis’ which has coincided with high input costs, so that these exceptional circumstances justify deferring the operative date of any variation determination for the Restaurant and Hospitality Awards.²⁰⁷

[227] Australian Chamber–Tourism supported Professor Borland’s recommendation that the Transport, postal and warehousing industry remain in the ‘lagging recovery’ classification²⁰⁸ and submitted that ‘circumstances exist again that warrant the deferral of any variation determination arising from this Review for these awards, and that a delay until no earlier than 1 November 2022 is justified.’²⁰⁹ However, Australian Chamber–Tourism argued that the Accommodation and food services industry should remain in the ‘lagging recovery’ sector and disagreed with the use of job vacancies as an indicator of economic recovery. Australian Chamber–Tourism commented that ‘[h]igh job vacancies are a constraint on businesses ability to operate at full capacity and should be viewed as a factor likely to slow the recovery of an industry sector. The Panel should not interpret high job vacancy rates as the sign of a strong recovery or an indication that businesses in the sector are performing well.’²¹⁰

[228] ABI also commented that ‘the slow return to Australia of skilled migrants and other visa holders with work rights such as working holiday makers and international students’ had ‘severely constrained’ the labour market.²¹¹ However, noting that there were a range of opposing data to indicate ‘tacit support for both a larger and a smaller increase’ in the NMW, ABI referred to ‘record job vacancy data’ and ‘widespread reports of labour and skills shortages’ as reasons for supporting a ‘larger increase’ in the NMW.²¹²

[229] R&CA submitted that any increase should take effect from 12 months after the date that the previous increase took effect.²¹³

[230] The ACTU contended that any deferral in operative dates was not warranted and submitted that ‘whilst there are differences between industry performance shown in the information note (and some inconsistencies in the data relating to some industries), that in itself is insufficient to satisfy the Panel that there are exceptional circumstances’ and that ‘[t]here is a diminishing basis for attributing all facets of differential industry performance to the COVID-19 Pandemic, as Professor Borland’s conclusion to the information note acknowledges’.²¹⁴

²⁰⁶ NRA submission regarding the National Accounts March quarter 2022, 3 June 2022, at para. 2.6.

²⁰⁷ *Ibid.*, at paras 3.1–3.8.

²⁰⁸ Australian Chamber–Tourism submission regarding the National Accounts March quarter 2022, 3 June 2022, at p. 1.

²⁰⁹ *Ibid.*, at p. 3.

²¹⁰ *Ibid.*

²¹¹ ABI submission regarding the National Accounts March quarter 2022, 3 June 2022, at p. 12.

²¹² ABI submission, 1 April 2022 at p. 25.

²¹³ R&CA submission, 28 March 2022, at para. 24.

²¹⁴ ACTU submission regarding the National Accounts March quarter 2022, 3 June 2022, at paras 111, 111(a).

[231] The ACTU further submitted that:

‘The analysis upon which the initial finding of exceptional circumstances was based in the 2019/20 decision was an analysis designed to measure industry differences in the demand side impacts of the pandemic, or more precisely, of measures designed to control the pandemic. The reports provided by Professor Borland in the following year were similarly designed to measure “recovery” in those demand side effects. The information note seeks to continue largely the same frame of analysis, albeit with the welcome addition of job vacancy data. As is increasingly evident from each of our submissions in the current review and most pointedly from the detailed analysis in the preceding sections of this chapter, demand side impacts of pandemic control measures are simply not [a] feature of the economy at present and demand has returned to approximately normal or better levels in all award reliant sectors. If anything, the true constraint on the economy is supply based, principally in the labour market amid soaring demand for workers, rather than any continuation or persistence of the same exceptional circumstances found to exist earlier.’²¹⁵

[232] The Shop Distributive and Allied Employees’ Association (SDA) also submitted that there are no exceptional circumstances requiring a delay.²¹⁶

[233] We now return to the information note and Professor Borland’s assessment.

[234] Following Professor Borland’s work for the 2020–21 Review the information note provides a summary of the performance of industries since the 2020–21 Review. The note has been undertaken by staff of the Commission and Professor Borland has provided a conclusion to the analysis.

[235] The ABS data analysed in the information note include changes in the number of jobs based on the Weekly Payroll Jobs and Wages series, employment and hours worked from the Labour Force Survey, job vacancies and wages growth as measured by the WPI.

[236] Labour market indicators since the last Review showed that payroll jobs have increased across most industries (Table 6). These data are more susceptible to short-term changes and may reflect temporary absences from work due to the Omicron variant and floods in early 2022. Seasonally adjusted data on employment show that there have been increases across most industries, including in each of the industries in the ‘lagging recovery’ group. The number of hours actually worked also increased in each of these industries in this period.

²¹⁵ Ibid, at para. 111(b).

²¹⁶ SDA submission regarding the National Accounts March quarter 2022, 3 June 2022, at para. 5.

Table 6: Jobs and employment indicators by industry, percentage change

	Payroll jobs	Employment	Hours actually worked
	3 July 2021 to 16 April 2022	May quarter 2021 to February quarter 2022	May quarter 2021 to February quarter 2022
Lagging recovery			
Accommodation and food services	-10.1	1.6	1.1
Transport, postal and warehousing	-1.4	3.8	6.9
Information media and telecommunications	3.2	16.9	17.4
Almost recovered			
Manufacturing	-0.8	-6.1	-7.8
Construction	-2.9	0.1	-1.8
Wholesale trade	0.1	-11.3	-13.8
Education and training	3.0	0.4	0.5
Arts and recreation services	11.2	-11.1	-6.1
Fully recovered			
Agriculture, forestry and fishing	-1.4	-3.8	-3.0
Mining	5.0	-0.4	-0.4
Electricity, gas, water and waste services	0.1	14.1	9.7
Retail trade	0.7	-2.0	-2.2
Financial and insurance services	1.2	14.3	15.4
Rental, hiring and real estate services	-3.3	14.0	6.4
Professional, scientific and technical services	3.1	1.3	4.2
Administrative and support services	1.5	2.1	1.5
Public administration and safety	2.3	2.1	2.9
Health care and social assistance	2.1	9.4	9.6
Other services	-3.9	-3.5	-3.5

Source: Fair Work Commission (2022), Information note—Industry analysis, 26 May, Table 1; ABS, *Weekly Payroll Jobs and Wages in Australia*, Week ending 16 April 2022; ABS, *Labour Force Survey, Australia, Detailed*, March 2022.

Note: Data for payroll jobs and hours actually worked are in original terms. Data on employment are seasonally adjusted. The change in the number of payroll jobs is measured from 3 July 2021 as the data are less likely to be impacted by the transition to STP reporting of small employers from 30 June 2021.

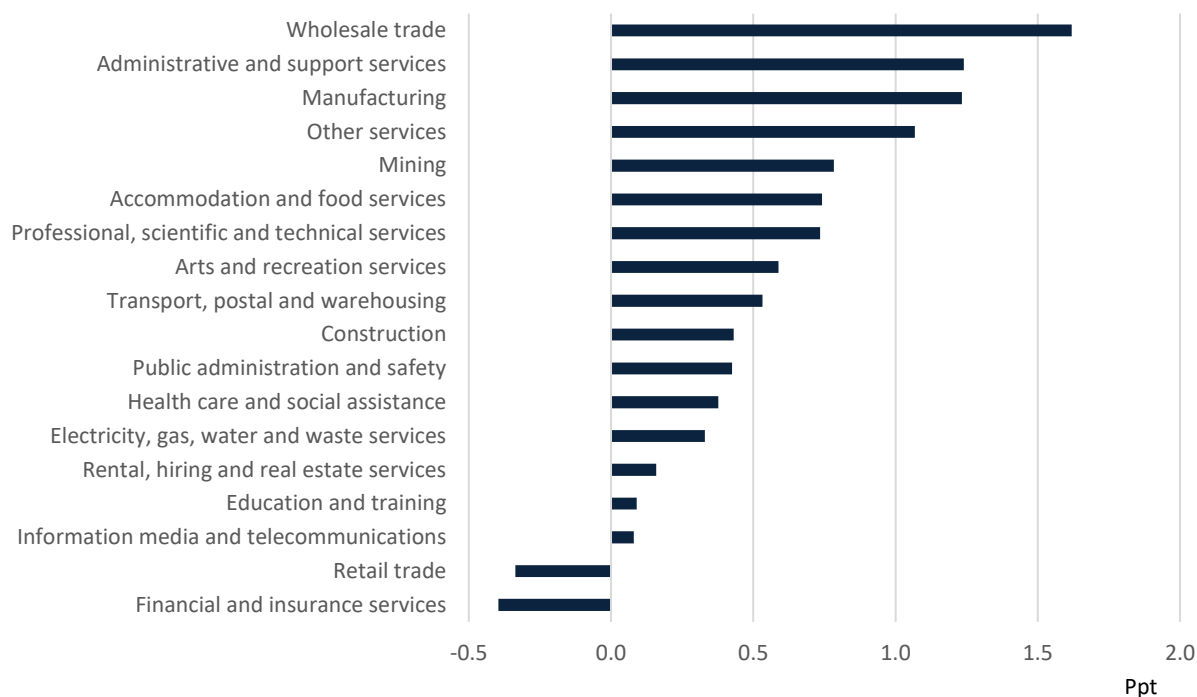
[237] At the industry level, the job vacancy rate is calculated as the number of job vacancies as a proportion of total employment *plus* job vacancies. Changes in the vacancy rate since the last Review are presented in Chart 13 below.²¹⁷

[238] The vacancy rate has increased across most industries since the last Review. The largest increases were in Wholesale trade (1.6 percentage points); Administrative and support services (1.2 percentage points); Manufacturing (1.2 percentage points); and Other services (1.1 percentage points). For 2 of these industries (Wholesale trade and Manufacturing), this improvement is in contrast to the labour market indicators presented in Table 6.

²¹⁷ The change in job vacancy rate also takes into account that the job vacancy rate is often higher in some industries than others.

[239] The increase in the job vacancy rate was also relatively large for Accommodation and food services (0.7 percentage points) in the same period. The ABS noted that while Accommodation and food services has been impacted by the effects of the pandemic and floods, there are more than double the number of job vacancies than prior to the pandemic.²¹⁸ This suggests that labour market conditions in the industry may be influenced by other impacts, including a lack of skilled or migrant labour.²¹⁹

Chart 13: Percentage point change in the job vacancy rate, May 2021 to February 2022



Source: Fair Work Commission (2022), Information note—Industry analysis, 26 May, Chart 1; ABS, *Labour Force Survey, Australia, Detailed*, March 2022; ABS, *Job Vacancies, Australia*, February 2022.

Note: Data on job vacancies by industry are in original terms but the job vacancy rate is constructed using seasonally adjusted employment data. Series does not cover Agriculture, forestry and fishing.

[240] The performance of businesses also provides an indication of the conditions in each industry. The information note analyses changes in GVA, profits and income of goods and services across industries since the time of the last Review (June quarter 2021 to the December quarter 2021).

[241] Table 7 shows that improvements in GVA and profits occurred across most industries during this time. Declines in each indicator were recorded for Accommodation and food services; Electricity, gas, water and waste services; and Other services.

[242] GVA growth was strongest in Agriculture, forestry and fishing; Professional, scientific and technical services; and Information media and telecommunications. Profit and income

²¹⁸ ABS (2022), *Payroll jobs growth continues to be slower in 2022*, media release, 12 May.

²¹⁹ In 2016, there were around 430 000 people working in Australia on temporary visas. These workers accounted for around 18 per cent of all jobs in food trades and 13 per cent in the hospitality sector. Most of these workers were on either temporary visas for skilled workers or student visas. See Lowe P (2021), *The Labour Market and Monetary Policy*, *Speech to the Economic Society of Australia*, 8 July.

growth was highest in Financial and insurance services. Income declined in Manufacturing and Construction, however, profits increased.

[243] Each indicator improved for Retail trade; Financial and insurance services, Rental hiring and real estate services, Professionals, scientific and technical services, and Information media and telecommunications in the period.

Table 7: Business performance indicators by industry, percentage change

	Gross Value Added	Income from goods & services	Company gross operating profits
	June quarter 2021 to December quarter 2021	June quarter 2021 to December quarter 2021	June quarter 2021 to December quarter 2021
Lagging recovery			
Accommodation and food services	-6.1	-5.8	-22.7
Transport, postal and warehousing	-0.3	-4.5	10.8
Information media and telecommunications	4.5	3.6	7.5
Almost recovered			
Manufacturing	0.6	-0.1	35.1
Construction	0.9	-1.8	17.4
Wholesale trade	-2.2	-1.7	2.2
Education and training (private)	0.8	n/a	n/a
Arts and recreation services	1.0	0.6	-3.9
Fully recovered			
Agriculture, forestry and fishing	12.7	n/a	n/a
Mining	0.6	-2.9	0.1
Electricity, gas, water and waste services	-1.0	-4.3	-2.4
Retail trade	3.8	0.9	0.1
Financial and insurance services	2.3	18.6	74.2
Rental, hiring and real estate services	2.3	2.3	19.7
Professional, scientific and technical services	4.7	5.1	18.4
Administrative and support services	3.3	3.3	-36.7
Public administration and safety (private)	2.5	n/a	n/a
Health care and social assistance (private)	3.5	n/a	n/a
Other services	-0.3	-0.4	-2.1

Source: Fair Work Commission (2022), *Information note—Industry analysis*, 26 May, Table 2; ABS, *Business Indicators, Australia*, December 2021; ABS, Australian National Accounts, National Income, Expenditure and Product, December 2021.

[244] Table 3 in the information note summarises the outcomes of the labour market and business performance indicators since the last Review. Following the table is a conclusion from Professor Borland that includes a reclassification of the industry clusters accompanied by an explanation.

[245] Professor Borland's assessment of the data is as follows:

Having reviewed my previous report, the data presented in the preceding sections of this this report and made my own investigation of those data, my revised recommended classification of industries into the same set of clusters as of May 2022 is:

Lagging recovery:	Transport, postal and warehousing	
Almost recovered:	Accommodation and food services Wholesale trade	
Fully recovered:	Agriculture, forestry and fishing Mining Manufacturing Electricity, gas, water and waste services Construction Retail trade Information media and telecommunications Finance and insurance services	Rental, hiring and real estate services Professional, technical and scientific services Administrative support services Public administration and safety Education and training Health care and social assistance Arts and recreation services Other services

[246] Table 8 presents a summary of information on changes in industry-level labour market outcomes (number of filled jobs and vacancy rate) and GVA from prior to COVID-19 to the most recent time period for which those data are available.

Table 8: Industry Level Labour Market Outcomes

	Number of filled jobs	Vacancy rate	Gross Value Added
	14 March 2020 to 16 April 2022	March quarter 2020 to December quarter 2021	March quarter 2020 to December quarter 2021
Agriculture, forestry and fishing	+4.5	+0.4	+49.5
Mining	+8.3	+1.3	-1.8
Manufacturing	-3.9	+1.9	+1.1
Electricity, gas, water and waste services	+6.4	+1.2	-0.8
Construction	+3.7	+1.3	+1.7
Wholesale trade	-2.2	+0.9	+5.3
Retail trade	+2.7	+0.7	+8.5
Accommodation and food services	-12.5	+2.3	-4.1
Transport, postal and warehousing	-7.3	+0.9	-6.0
Information media and telecommunications	0.0	+0.9	+7.9
Finance and insurance services	+6.6	+1.4	+5.0
Rental, hiring and real estate	-2.9	+1.8	+6.4
Professional, technical and scientific services	+9.0	+1.0	+5.7
Administrative and support services	+5.5	+0.5	-2.1
Public administration and safety	+3.3	+0.5	+5.1
Education and training	+3.6	+0.4	+2.1
Health care and social assistance	+11.9	+1.3	+10.5
Arts and recreation services	+7.2	+1.5	-0.3
Other services	+0.2	+1.0	+2.6
Total	+4.8	+1.1	+4.0

Sources: Fair Work Commission (2022), Information note—Industry analysis, 26 May, Table 5; Number of jobs: ABS, *Weekly Payroll Jobs and Wages*, Australia, Week ending 16 April 2022, Table 4; Vacancy rate: ABS, *Labour Accounts, Australia*, Industry Summary Table; GVA: ABS, *Australian National Accounts: National Income, Expenditure and Product*, Table 6.

[247] We turn first to the NMW order. As mentioned in Chapter 3, very few employees have their wage set by the NMW order and there are no data as to the industries in which they work. The NMW order only applies to ‘award/agreement free employees’ (see s.294). Section 12 defines an award/agreement free employee to mean ‘a national system employee to whom neither a modern award nor an enterprise agreement applies’. The coverage of the *Miscellaneous Award 2020* (the Miscellaneous Award) means that there are very few (if any) employees whose wage rate is set at the NMW by the NMW order. It follows that very few employers would face additional complexity arising from different operative dates for the NMW order and any variations to modern award minimum wages because very few employees are covered by (and paid at the rates specified in) the NMW order.²²⁰

[248] The adjustment set by the NMW order arising from last year’s Review decision operated from 1 July 2021.

²²⁰ [2020] FWCFB 3500 at [147]

[249] We are not satisfied that there are ‘exceptional circumstances’ such as to justify the adjustments set by a NMW order taking effect on a day later than 1 July 2022. The NMW order will come into operation on 1 July 2022.

[250] We now turn to the date of operation of the determinations varying modern award minimum wages.

[251] Professor Borland’s categorisation of industry sectors into ‘fully recovered’; ‘almost recovered’ and ‘lagging recovery’, and the data on which that categorisation is based, is relevant to our assessment of whether, in respect of a particular modern award, there are exceptional circumstances such as to warrant a delayed operative date. But, as we noted in last years’ Review decision, the categorisation by industry sectors is likely to mask significant variation at the modern award level.²²¹ Transport, postal and warehousing illustrates that point.

[252] Further, the period of time between successive Review increases in a particular modern award is also relevant to our assessment of exceptional circumstances. As we said in last years’ Review decision, in response to Ai Group’s submission that the delayed operative dates in the previous years’ Review was an ‘exceptional circumstance’ warranting a delayed increase the following year:

‘Two things may be said about this.

First, the mere fact of a deferred date of operation of an increase in last year’s Review is not, in and of itself, an exceptional circumstance such as to warrant a deferral in this year’s Review.²²² It should not be presumed that differential treatment is appropriate for this year’s decision merely because differential treatment was afforded by the majority in last year’s Review decision.²²³ Accepting the premise of Ai Group’s argument would create a self-perpetuating mechanism whereby the exception became the rule.²²⁴ However, we accept that the period of time between successive increases, together with other data, is relevant to an overall assessment of whether exceptional circumstances exist such as to warrant a delayed operative date.

Second, the submission put ignores the fact that these employers had the benefit of a delayed operative date arising from last year’s decision. Further, the delay is sought to be perpetuated with no analysis of the contemporary circumstances applying in the industries covered by the relevant awards.’²²⁵

[253] The modern awards mapped to the Transport, postal and warehousing sectors are as set out below:²²⁶

- Road Transport and Distribution Industry Award 2020

²²¹ [2021] FWCFB 3500 at [245]

²²² ACTU submission in reply, 23 April 2021, at para. 74.

²²³ Ibid [65].

²²⁴ Ibid [74].

²²⁵ [2021] FWCFB 3500 at [225]–[227].

²²⁶ Fair Work Commission (2020), *Information note—Modern awards and industries*, 30 March.

- Passenger Vehicle Transportation Award 2020
- Rail Industry Award 2020
- Seagoing Industry Award 2020
- Marine Tourism and Charter Vessels Award 2020
- Air Pilots Award 2020
- Stevedoring Industry Award 2020
- Port Authorities Award 2020
- Coal Export Terminals Award 2020
- Marine Towage Award 2020
- Airline Operations – Ground Staff Award 2020
- Airport Employees Award 2020
- Storage Services and Wholesale Award 2020
- Transport (Cash in Transit) Award 2020
- Road Transport (Long Distance Operations) Award 2020
- Ports, Harbours and Enclosed Water Vessels Award 2020
- Aircraft Cabin Crew Award 2020

[254] The modern awards mapped to this sector include a number of awards (which are highlighted) which align with the aviation and tourism sector. The increase from last years' Review decision came into effect on 1 November 2021 in respect of these awards. In this Review we are satisfied that there are exceptional circumstances justifying the variation determinations in respect of the highlighted awards coming into operation on 1 October 2022.

[255] Save for the highlighted awards, we are *not* persuaded that there are exceptional circumstances such as to warrant a later operative date than 1 July 2022 in respect of any of the other awards mapped to the Transport, postal and warehousing sector.

[256] The following modern awards are mapped to the Accommodation and food services industry:²²⁷

- *Hospitality Industry (General) Award 2020*;
- *Restaurant Industry Award 2020*;
- *Fast Food Industry Award 2010*; and
- *Registered and Licensed Clubs Award 2020*.

[257] In last years' Review decision we were satisfied that there were exceptional circumstances applying to these awards (save for the *Fast Food Industry Award 2010*) which justified a delay until 1 November 2021. The minimum wage increases in respect of the *Fast Food Industry Award 2010* operated from 1 July 2021.

²²⁷ [2020] FWCFB 3500 [66]

[258] In the current Review, Professor Borland recommends that the Accommodation and food services sector be allocated to the ‘Almost recovered’ category. We disagree. On most measures the Accommodation and food services sector is clearly in the ‘lagging recovery’ category:

Table 9: Indicators for Accommodation and food services, percentage changes

3 July 2021 to 16 April 2022 Payroll jobs	June quarter 2021 to December quarter 2021		
	Gross Value Added	Income	Operating Profits
-10.1	-6.1	-5.8	-22.7

[259] We are satisfied that there are exceptional circumstances justifying a delayed variation determinations in respect of the Accommodation and food services sector (with the exception of the *Fast Food Industry Award 2010*). The *Alpine Resorts Award 2020* is also aligned with this sector and was the subject of a deferred operative date in last year’s Review. The combination of factors applying to these awards, the material set out in the information note and the operative date arising from last years’ Review, is exceptional and justifies a delay until 1 October 2022.

[260] In respect of the remaining modern awards we are not persuaded that there are exceptional circumstances such as to warrant a delayed operative date in the variation determinations arising from this Review. We acknowledge that an operative date of 1 July 2022 will mean that businesses covered by some of these modern awards will face 2 minimum wage increases within a 12-month period. But those businesses have had the benefit of the delayed operative date arising from the 2020–21 Review. The timing issue is not, of itself, sufficient to warrant a finding of exceptional circumstances. To determine otherwise would create a self-perpetuating mechanism whereby the exception became the rule. We have considered the submissions advanced in respect of the remaining modern awards and the data in the information note, and we are not persuaded that a case has been made out in respect of these modern awards.

[261] In reviewing modern award minimum wages, we are also required to review the minimum wages in modern enterprise awards and state reference public sector modern awards.²²⁸ In the 2019–20 Review decision, the majority allocated the modern enterprise awards and state reference public sector modern awards to the 3 ‘clusters’ based on their alignment with the modern awards in the 3 groups.²²⁹ We have decided to follow the same approach this year.

[262] Save for the *Airservices Australia Enterprise Award 2016*, the variation determinations in respect of all other modern enterprise awards and state reference public sector awards to give effect to our decision will operate from 1 July 2022. The variation determination in respect of the *Airservices Australia Enterprise Award 2016* will take effect on 1 October 2022.

²²⁸ See Schedules 6 (at Item 17) and 6A (at Item 20) of the *Fair Work (Transitional Provisions and Consequential Amendments Act) 2009*.

²²⁹ [\[2020\] FWCFB 3500](#) at [165].

5. Transitional instruments

Transitional Australian Pay and Classification Scales, Division 2B State awards and other transitional instruments

[263] The Panel is required to review and may make one or more determinations varying wages in a number of transitional instruments as part of the Review.

[264] 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.²³⁰ These instruments may be considered as part of the Panel's review.²³¹ Transitional APCSs and State reference transitional awards operate until the Commission makes an order to terminate them,²³² or they terminate pursuant to legislative provisions.²³³

[265] The content and coverage of most transitional instruments was discussed in the *Annual Wage Review 2009–10 (2009–10 Review) decision*,²³⁴ and in *Fair Work Australia's Research Report 6/2010*.²³⁵ Further background in relation to these instruments was provided in the *Annual Wage Review 2016–17 Preliminary decision*.²³⁶

[266] 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 that cover employees also covered by enterprise instruments;²³⁷
- transitional instruments that cover employees also covered by State reference public sector transitional awards which have not been terminated by the Commission or replaced by a State reference public sector modern award;²³⁸ and

²³⁰ A more detailed outline of these instruments can be found at [2013] FWCFB 4000 [553]–[559]; and [2017] FWCFB 1931 [81].

²³¹ *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), items 10 and 20 of Sch. 9, items 7 and 12A(5) of Sch. 3.

²³² *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), items 7–8 of Sch. 9, and item 3(2) of Sch. 5.

²³³ For example, *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), item 20(1) of Sch. 3.

²³⁴ [2010] FWAFB 4000 [370]–[396].

²³⁵ 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.

²³⁶ [2017] FWCFB 1931 [81].

²³⁷ *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), items 5(1)–(5) and 9(4) of Sch. 6.

²³⁸ *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth), at items 5(3), 6 and 10(1) of Sch. 6A.

- transitional instruments that were not terminated as part of the termination of modernisable instruments process which commenced in 2010.²³⁹

[267] For convenience, we shall refer to transitional instruments that we are required to review in this Review and that remain in operation as ‘relevant transitional instruments’.

[268] In the Annual Wage Review (2016–17) Review decision, the Panel concluded that the Act did not authorise the Panel to terminate transitional instruments in the course of conduct of the Review,²⁴⁰ and in the 2020 Review decision, the Panel expressly stated that it did not propose to terminate any transitional instruments.²⁴¹

[269] The ACTU, ACCI and Ai Group submitted that the approach taken by the Panel in previous Reviews should be maintained, such that the rates in relevant transitional instruments be increased consistently with any increase determined for modern award minimum wages.²⁴²

[270] Consistent with these submissions, we have decided that the wage rates in relevant transitional instruments will be varied by the same percentage amount we have determined shall apply to modern award minimum wages.

²³⁹ 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.

²⁴⁰ [2017] FWCFB 3500 [697].

²⁴¹ [2020] FWCFB 3500 [409].

²⁴² ACTU submission, 1 April 2022, at para. 308; ACCI submission, 1 April 2022, at para. 287; Ai Group submission, 1 April 2022, at p. 62.

6. Copied State awards

6.1 Background

[271] In the 2021–22 Review, Keolis Downer, Transdev Australasia Pty Ltd (Transdev), Busways North West Pty Limited (Busways) and Transit Systems West Services Pty Ltd and its related entities (Transit Systems) (collectively, the Employer parties) have made submissions that the Panel should take account of the wage increases already provided to their ‘transferring employees’ under copied State awards.²⁴³

[272] Copied State awards 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 (transferring employees).

[273] The Employer parties commenced employing transferring employees on or around the following dates:

- Transit Systems — 1 July 2018
- Keolis Downer — 31 October 2021
- Busways — January 2022, and
- Transdev — 4 April 2022.

[274] Transit Systems has also made an application seeking that the Commission retrospectively vary or revoke determinations made in the 2018–19 and 2019–20 Review decisions so that the minimum wage increases from those Reviews do not apply to copied State awards applying to Transit Systems. Only Transit Systems is affected by previous annual wage review determinations varying copied State awards, as the copied State awards covering Keolis Downer, Busways and Transdev came into operation after 1 July 2021.

[275] The Australian Rail Tram and Bus Industry Union (ARTBIU), the Australian Manufacturing Workers’ Union (AMWU) and the Australian Services Union (ASU) (collectively, the Unions) oppose the Employer parties’ submissions.²⁴⁴

[276] On 25 May 2022, the Commission published a Statement²⁴⁵ and Background Paper prepared by staff of the Commission outlining the legislative framework that applies to copied State awards in an annual wage review and posing some questions to the parties (Background Paper). The Employer parties and the Unions lodged submissions and a short hearing was held before Commissioner Hampton on 3 June 2022. We have reviewed the transcript of that hearing, the Statement published by the Commissioner on 6 June 2022 and the documents referred to in that Statement.

²⁴³ Keolis Downer submissions, 1 April 2022 and 1 June 2022; Busways submissions, 1 April 2022 and 1 June 2022; Transdev submissions, 1 April 2022 and 1 June 2022; and Transit Systems submissions, 1 April 2022 and 1 June 2022.

²⁴⁴ ARTBIU, AMWU and ASU submissions in reply, 6 May 2022; ARTBIU, AMWU and ASU submission in response to the Background Paper, 1 June 2022.

²⁴⁵ [2022] FWCFB 78.

[277] The Explanatory Memorandum for the *Fair Work Amendment (Transfer of Business) Bill 2012* (EM) outlines the scheme of the transfer of business regime in Part 6-3A of the Act as follows:

‘Currently, where a non-national system employee transfers to employment with a national system employer due to a transfer of business (e.g. an outsourcing arrangement due to a restructure or pursuant to an arrangement for the sale of the employer’s assets), the employee’s terms and conditions of employment are determined by the industrial instrument governing employment with the new employer. This means that the employee loses the benefit of the terms and conditions in the industrial instrument with the non-national system employer. This will be the case even though they are performing the same work. The amendment Bill will ensure that a State public sector employee will continue to enjoy the terms and conditions of employment with the non-national system employer through the preservation of those terms and conditions where they become transferring employees in a transfer of business to a national system employer ...’²⁴⁶

[278] The Commission may vary copied State instruments only in limited circumstances, including under ‘item 20 of Schedule 9 to the Transitional Act (which deals with variation of instruments in annual wage reviews) as that item has effect because of section 768BY’.²⁴⁷ Item 20 of Schedule 9 to the Transitional Act provides:

‘20 Variation of Division 2B State awards in annual wage reviews under the FW Act

- (1) In an annual wage review, the FWC may make a determination varying terms of a Division 2B State award relating to wages.
- (2) For that purpose, Division 3 of Part 2-6 of the FW Act (other than section 292) applies to terms of a Division 2B State award relating to wages in the same way as it applies to a modern award.’

[279] As modified by s.768BY, item 20 in Schedule 9 to the Transitional Act has effect in relation to a transferring employee as if a reference to a ‘Division 2B State award’ is a reference to a ‘copied State award for the transferring employee’.²⁴⁸ Accordingly, the Panel is required to review and, if appropriate, may make one or more determinations varying wages in copied State awards in an annual wage review.

[280] As the submissions of the Employer parties and Unions address the treatment of particular copied State awards in this Review and in previous Reviews, we have included a more detailed overview of the statutory framework applying to copied State awards and how copied State awards have been dealt with in previous Reviews, at Appendix 5 of this decision.

²⁴⁶ Explanatory Memorandum for the *Fair Work Amendment (Transfer of Business) Bill 2012* (Cth) p. 4.

²⁴⁷ Fair Work Act s.768AW(c).

²⁴⁸ See Fair Work Act s.768BY, including item 2 of the table in s.768Y(1) and column 3 of item 14 of the table in s.768BY(2).

6.2 Transit Systems' application to vary or revoke previous Review determinations adjusting wages in copied State awards

[281] In this Review, Transit Systems has applied to the Commission to retrospectively vary or revoke determinations made in the 2018–19 and 2019–20 Reviews so they do not apply to copied State awards applying to Transit Systems. These copied State awards are derived from the following 3 awards made by the Industrial Relations Commission of New South Wales (**IRCNSW** or **NSWIRC**) as in force at 1 July 2018:

- State Transit Authority Bus Operations Enterprise (State) Award 2018 (the **2018 Bus Operations Award**)
- State Transit Authority Senior and Salaried Officers' Enterprise (State) Award 2018 (the **2018 Senior and Salaried Officers Award**), and
- State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2018 (the **2018 Bus Engineering and Maintenance Award**).

[282] Copied State awards derived from the 2018 Bus Operations Award and the 2018 Senior and Salaried Officers Award currently apply to Transit Systems' transferring employees.²⁴⁹

[283] Transit Systems' application is in the following terms:

'1. Vary or revoke the Commission's 2018–19 and 2019–20 Annual Wage Review (**AWR**) determinations to provide that the minimum wage increases of 3% and 1.75% in the 2019-20 and 2020-21 financial years respectively do not apply to the following copied State instruments:

- a. [2018 Bus Operations Award]; and
- b. [2018 Senior and Salaried Officers Award].

2. Further or in the alternative to 1, vary the Commission's 2018–19 and 2019–20 AWR determinations to provide that, in lieu of the minimum wage increases of 3% and 1.75% in the 2019–20 and 2020–21 financial years respectively, the Commission's tiered system developed in its 2012–13 AWR decision should be applied to the [2018 Bus Operations Award] and the [2018 Senior and Salaried Officers Award] as copied State instruments.

3. Vary or revoke the Commission's 2018–19 AWR determination to provide that the minimum wage increase of 3% in the 2019–20 financial year does not apply to the [2018 Bus Engineering and Maintenance Award] as a copied State instrument.

4. Further or in the alternative to 3, vary the Commission's 2018–19 AWR determination to provide that, in lieu of the minimum wage increase of 3% in the 2019–20 financial year, the Commission's tiered system developed in its 2012–2013 AWR

²⁴⁹ Transit Systems submission, 1 April 2022, at paras 23–24. The *Transit Systems West Services Engineering and Maintenance Enterprise Agreement 2021* commenced operation on 27 May 2021. From that date, copied State awards derived from the 2018 Bus Engineering and Maintenance Award ceased to apply to transferring employees of Transit Systems covered by this agreement.

decision should be applied to the [2018 Bus Engineering and Maintenance] as a copied State instrument.’

[284] The Unions observe that the Commission’s former ‘tiered approach’ to applying annual wage review increases to copied State awards had regard to wage increases under ‘state minimum wage decisions’, whereas Transit Systems is proposing the Commission apply a similar approach having regard to wage increases provided for under the terms of its copied State awards.²⁵⁰

[285] We note the effect of applying the ‘tiered system’ as proposed (further or in the alternative) by Transit Systems would be that wage rates in copied State awards applying to its transferring employees would not be increased as a result of the 2018–19 and 2019–20 Review decisions.²⁵¹

[286] Transit Systems’ application follows the recent Federal Court decision in *Australian Rail, Tram and Bus Industry Union v Transit Systems West Services Pty Ltd*²⁵² (*ARTBIU v Transit Systems*). In brief:

- A transfer of business occurred between the NSW State Transit Authority and Transit Systems where from 1 July 2018, Transit Systems employed transferring employees who had been covered by the 2018 Bus Operations Award.
- The parties were in dispute as to how the Commission’s 2017–18, 2018–19, 2019–20 and 2020–21 Review decisions operated (if at all) in light of cl.15 of the 2018 Bus Operations Award (and copied State awards derived from that Award).
- Since 1 July 2018, Transit Systems had increased the wages of the transferring employees in accordance with the pay increases in cl.15.1 but did not flow-on any increases from annual wage review decisions. Clause 15.1 provided for wage increases of 2.5 per cent from the first full pay period commencing on or after on 1 January 2018, 2019 and 2020.
- The ARTBIU submitted that Transit Systems was bound by the Commission’s annual wage review determinations to pass on the Review increases in minimum wage rates to the employees covered by the copied State awards derived from the 2018 Bus Operations Award.²⁵³
- Transit Systems counter-argued that cl.15.1 reflected the agreed wage increases that transferring employees would receive and cl.15.2 operated to exclude any wage increases beyond those prescribed in cl.15.1.²⁵⁴ Clause 15.2 provided:

‘The wage increases contained in this Award are in substitution of any State Wages decisions. Any arbitrated safety net adjustments may be offset against any

²⁵⁰ ARTBIU, AMWU and ASU submission re retrospective variations, 6 May 2022, at para. 21.

²⁵¹ Ibid at para. 22.

²⁵² [2021] FCA 1436.

²⁵³ Ibid at [6].

²⁵⁴ Ibid.

equivalent amount in the rates of pay received by employees covered under this Award.’²⁵⁵

[287] In this decision, Rares J observed that while the wage increases contained in cl 15.1 were intended by the parties to be in substitution for any variations to minimum wages otherwise payable pursuant to annual wage review decisions that the IRCNSW might decide to adopt, that intention did not override the Commission’s determinations in the 2018–19, 2019–20 and 2020–21 Reviews that varied every copied State award.²⁵⁶ Accordingly, Rares J held that the Commission’s 2018–19 and 2019–20 Review determinations applied to the copied State awards and, thus, increased the wages payable to the transferring employees by 3 per cent and 1.75 per cent respectively.²⁵⁷

[288] However, Rares J held that the payments Transit Systems made in accordance with cl.15.1 should be offset against any larger sum determined in the Commission’s annual wage review for the relevant financial year,²⁵⁸ and ‘[t]he consequence is that it will be necessary to allow an offset of some of the 2.5% increases, which Transit Systems paid under cl 15.1.’²⁵⁹

[289] In his April 2022 decision *Australian Rail, Tram and Bus Industry Union v Transit Systems West Services Pty Ltd (No 2)*²⁶⁰ (*ARTBIU v Transit Systems [No. 2]*), Rares J held that it would be inappropriate to order Transit Systems to make compensation payments at that time because a supplementary audit of underpayments was being undertaken and:

‘... there is a possibility that those employees will be paid money that they have to repay or have set-off against later payments or wages if, in the forthcoming annual wage review, the Commission were to grant Transit Systems’s application for a variation or revocation of its earlier decisions.’²⁶¹

...

In my opinion, the appropriate course is to make one set of orders for payment, with effect from the last payday in June 2022, of all moneys due to the affected employees with interest ... so that those orders will operate in a self-executing way. Those orders also would take effect in the event that the Commission dismisses Transit Systems’s application to review its earlier determinations. In the event that the Commission accedes to Transit Systems’s application ... the position as to what orders ought be made can be determined in light of the new position, including having regard to any judicial challenge to the Commission’s finding.’²⁶²

[290] Transit Systems contends s.603(1) of the Act is the source of the Commission’s power to vary or revoke previous annual review wage determinations adjusting wages in copied State

²⁵⁵ 2018 Bus Operations Award, Clause 15.2.

²⁵⁶ See [2021] FCA 1436 at [51]–[52].

²⁵⁷ Ibid at [53].

²⁵⁸ Ibid at [54]–[56].

²⁵⁹ Ibid at [54].

²⁶⁰ [2022] FCA 389.

²⁶¹ Ibid at [56].

²⁶² Ibid at [61].

awards.²⁶³ Transit Systems submits that a decision to vary wages in copied State awards is not a decision made under Part 2-6 of the Act, but a decision made under item 20(1) of Schedule 9 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Transitional Act), as that item relates to copied State awards because of s.768BY of the Act.²⁶⁴

[291] Transit Systems relies on 3 discrete points to support its contention:

- (a) On its proper construction, item 20(1) of Schedule 9 to the Transitional Act is the source of the Commission’s power to vary terms of a copied State award relating to wages in an annual wage review.
- (b) The Commission’s 2018–19 and 2019–20 Review decisions made determinations to vary the copied State awards applying to Transit Systems under item 20(1), Schedule 9 to the Transitional Act.
- (c) On its proper construction, s.603(3) of the Act applies to a decision under Part 2-6 of the Act, and not a decision under item 20(1), Schedule 9 to the Transitional Act.²⁶⁵

[292] Transit Systems submits that item 20(1) confers the power for the Commission to vary wages of a copied State award in an annual wage review:

‘Item 20(2) does not alter the power in existence under Item 20(1). The power to vary resides in Item 20(1), however Item 20(2) says that Division 3 of Part 2-6 of the FW Act applies, so that in exercising the power under Item 20(1) the FWC has to take into account the matters prescribed under Division 3 of Part 2-6 of the FW Act. There is a distinction between the existence of power found in Item 20(1) and the matters that are said to apply to the exercise of that power in Item 20(2). By its terms, Item 20(2) is expressed as applying to the exercise of the power. In that sense, it is a provision that is facilitative of the power residing in Item 20(1). It is not and cannot be the source of the power. Thus, it follows that the determinations made were not made under Division 3 of Part 2-6. They were made under Item 20(1).

This construction is reinforced by the terms of s 768AW of the FW Act. Paragraph (c) of this section expressly identifies Item 20 of Schedule 9 of the Transitional Act as the source of the Commission’s power to vary a copied State award. The opening words of s 768AW, read in conjunction with paragraph (c), make plain the legislative intention that terms of copied State awards relating to wages “cannot be varied except under” Item 20. The use of the word “under” in s 768AW, immediately before the wording used in paragraph (c) is instructive, because it shows that the FWC’s decision to vary copied State awards relating to wages is a decision under Schedule 9, Item 20 of the Transitional Act and not a decision under Part 2-6 of the FW Act.²⁶⁶

²⁶³ [Transit Systems submission in response to background paper](#), 1 June 2022, at para. 9.

²⁶⁴ Transit Systems submission, 1 April 2022, at para. 42.

²⁶⁵ [Transit Systems submission in response to background paper](#), 1 June 2022, at para. 2.

²⁶⁶ Ibid at paras 3–4.

[293] Transit Systems submits that s.603(3) should not be given a meaning ‘that is broader than its words will fairly allow’.²⁶⁷

[294] Transit Systems submits that ‘[t]here is clear precedent for the Commission exercising its powers to overcome the effect of a Federal Court decision interpreting award provisions’, and that the Commission can ‘make, vary or revoke its own decisions as it sees appropriate in the circumstances’.²⁶⁸

[295] Transit Systems further submits that the 2018–19, 2019–20 and 2020–21 Review decisions ‘have resulted in windfall gains for employees amounting to approximately \$3.5 million.’²⁶⁹ It submits that ‘this was the very kind of situation that the Commission had always intended to avoid when it developed the tiered methodology’²⁷⁰ and that:

‘While this tiered methodology was abandoned by the FWC as a default rule, the FWC stated that it would not only consider but actively “address any ‘double dipping’” and like injustices on a case-by-case basis, as in the present case of Transit Systems. Granting the relief sought by Transit Systems would also be consistent with the FWC’s obligation to exercise its powers – in this case, the FWC’s power of revocation under s 603(1) – in a manner that is fair and just (s 577(a)), and by taking into account “equity, good conscience and the merits of the matter”’: s 578(b).’²⁷¹

[296] The Unions oppose Transit Systems’ approach and submit that as the 2018–19 and 2019–20 Review decisions were made under Part 2-6, the Panel is prevented from making the variations sought by s.603(3)(d) of the Act.²⁷² The Unions contend that:

‘Schedule 9 of the transitional provisions simply expands the powers that are available to the Commission when it is conducting annual wage reviews under [Part 2-6]. The forced interpretation that it somehow stands alone, despite being wholly integrated into the Commission’s decision-making process in the reviews, isn’t a sensible reading of the text, and you do have to read these pieces of legislation as a whole, as part of an integrated scheme. That scheme involving these awards being considered and decisions made about them in the annual wage review under [Part 2-6].’²⁷³

[297] The Unions submit that ‘[d]ecisions made under Part 2-6 provide employees with substantive rights as to the minimum wages they must be paid. Certainty is critical ... decisions of this kind are not conventionally amenable to retrospective variation.’²⁷⁴ The Unions submit that each of the 2018–19 and 2019–20 Review decisions were made by the Panel constituted

²⁶⁷ Ibid at para. 7.

²⁶⁸ Transit Systems submission, 1 April 2022, at paras 48–49, citing *Re Mitsubishi Motors Australia Ltd Award 1998 (the Vehicle Industry Public Holidays case)* 3 October 2001, Print T1300.

²⁶⁹ Ibid at para. 55.

²⁷⁰ Ibid.

²⁷¹ [Transit Systems submission in response to background paper](#), 1 June 2022, at para. 14.

²⁷² See ARTBIU, AMWU and ASU submission re retrospective variations, 6 May 2022, at paras 24–36.

²⁷³ Transcript, 3 June 2022, PN176.

²⁷⁴ ARTBIU, AMWU and ASU submission re retrospective variations, 6 May 2022, at para. 26.

under s.617(1)(a) for the purposes of the annual wage review required under Part 2-6, and in their terms, were determinations made under ss.285(1)(b) and (c).²⁷⁵

[298] The Unions submit that s.768AW restricts the Commission’s power to vary a copied State instrument, and the general power granted by s.603 is fettered by its specific restrictions.²⁷⁶ The Unions submit that the only power to vary copied State award wage terms is that provided by s.768AW(c), ‘*per “item 20 of Schedule 9 to the Transitional Act (which deals with variation of instruments in annual wage reviews)”*’.²⁷⁷

‘It is difficult to read this as reflecting a legislative intention other than that copied state instruments, insofar as the wages they contain are concerned could be varied, and could *only* be varied, by the Commission exercising its wage review powers under Part 2-6. It is wholly inconsistent with the idea that a stand-alone variation power is instead created by s.768AW(c).

...

[T]he text alone is not apt to support an interpretation that a completely separate power to vary is created. The better interpretation is that Item 20 simply operates to *expand* what the Commission can do under Part 2-6: but its exercise of those powers still, in substance, involves making a decision under that Part.²⁷⁸

[299] The Unions submit this interpretation is reinforced by the following:

- ‘a. Schedule 9 itself is preoccupied with annual wage reviews, and amending that particular process, rather than creating any new system or systems; and
- b. the Transitional Act itself functions to amend and modify the Act’s application, not to create entirely new obligations or powers.’²⁷⁹

[300] The Unions further submit their interpretation is consistent with ‘basic common sense’ and the ‘policy objectives’ it has discussed — ‘there is fundamentally no reason that decisions about the wage rates in copied state instruments could be retrospectively varied within a scheme that permits this for minimum wage decisions for *no other kind of instrument*.’²⁸⁰

[301] In the alternative, the Unions submit that even if the Commission has the power to make the variations sought, it should not do so as ‘[i]t is a matter of basic principle that the discretion to make such orders should not be exercised where the orders interfere with substantive rights.’²⁸¹ The Unions submit that Transit Systems’ claim for retrospective variations will

²⁷⁵ Ibid at para. 27.

²⁷⁶ Ibid at para. 29.

²⁷⁷ Ibid at para. 30.

²⁷⁸ Ibid at paras 31, 33.

²⁷⁹ Ibid at para. 34.

²⁸⁰ Ibid at para. 35.

²⁸¹ Ibid at para. 37 and see paras 38–51, citing *Hartley Poynton Ltd v Ali* (2005) 11 VR 568, *RTBU v Metro Trains* [2020] FCAFC 81, *Mealing v P Chand t/as Fastfix* (2003) 57 NSWLR 305, *Castle Construction Pty Ltd v North Sydney Council* [2007] NSWCA 164 at [97], *Esso Australia v AWU* (2017) 263 CLR 551 and distinguishing the *Vehicle Industry Public Holidays Case* 3 October 2001, Print T1300.

reduce the rate of pay to which employees are currently entitled, and ‘expunge an existing entitlement to backpay for the underpaid amounts enjoyed by each employee.’²⁸²

[302] The Unions submit that in both the 2018–19 and 2019–20 Review decisions, the Commission intended to, and did, vary the wage rates in all copied State awards and the Panel made a ‘deliberate choice to abandon’ the tiered system.²⁸³

[303] The Unions submit that Transit Systems had an opportunity to make submissions in the 2018–19 and 2019–20 Reviews but did not do so.²⁸⁴ They submit that while ‘[t]he outcome may well be inconvenient to Transit Systems ... [t]hat inconvenience is hardly an “*exceptional circumstance*”’; it is not nearly a sufficient basis to justify the extraordinary interference in long-standing decisions of this Commission.²⁸⁵ Further, granting Transit Systems’ claim ‘would do little more than diminish public confidence in the certainty of the Commission’s decisions on crucial matters i.e. wages’.²⁸⁶

[304] The ACTU supports the Unions’ submissions ‘in relation to the lack of jurisdiction and justification for varying the past decisions of the Panel.’²⁸⁷

Consideration

[305] The source of the Commission’s power to vary or revoke its decisions made under the Act is s.603(1). Section 603(1) provides:

‘603 Varying and revoking the FWC’s decisions

(1) The FWC may vary or revoke a decision of the FWC that is made under this Act (other than a decision referred to in subsection (3)). [Emphasis added]

[306] The types of decisions that may be varied or revoked under s.603(1) are limited by s.603(3), which relevantly provides:

‘(3) The FWC must not vary or revoke any of the following decisions of the FWC under this section:

...

(d) a decision under Part 2-6 (which deals with minimum wages)’.

[307] It follows that the Commission cannot under s.603 vary or revoke a decision made under Part 2-6 of the Act.²⁸⁸

²⁸² Ibid at para. 19. See also Transit Systems submissions re undertakings, 3 June 2022; and ARTBIU, AMWU and ASU submissions in response to undertakings, 5 June 2022.

²⁸³ Ibid at para. 46, citing [2018] FWCFB 2 at [43].

²⁸⁴ Ibid at paras 47–48.

²⁸⁵ Ibid at para. 51.

²⁸⁶ Ibid.

²⁸⁷ ACTU submission in reply, 8 May 2022, at paras 159–160.

²⁸⁸ See also [2020] FWCFB 3500 at [220]. Variation under s.603 is to be distinguished from the Commission’s power to correct an obvious error in a decision under s.602 of the Fair Work Act (see [2018] FWCFB 2 at [37]). The Commission may correct errors in modern awards and national minimum wage orders under ss.160 and 296 of the Fair Work Act.

[308] As related earlier, Transit Systems contends s.603(1) is the source of the Commission’s power to vary or revoke previous annual review wage determinations adjusting wages in copied State awards.²⁸⁹ Transit Systems further contends that a decision to vary wages in copied State awards is not a decision made under Part 2-6 of the Act, but rather a decision made under item 20(1) of Schedule 9 to the Transitional Act; and consequently the s.603(3)(d) exclusion from variation under s.603(1) does not apply.²⁹⁰

[309] Neither Transit Systems nor any other party proposes that, apart from s.603, there is any other possible source of power for the Commission to vary the determinations concerned.

[310] Transit Systems also submits that the Commission ‘has always identified Item 20(1) of Schedule 9 as the source of its power to make determinations varying copied State awards in relation to wages’ and that this is ‘a matter of objective fact’ ‘evident from a plain reading of the FWC’s 2018–19 and 2019–2020 Review decisions’²⁹¹ [footnotes omitted].

[311] Dealing with that submission first, we do not draw the same conclusion from those Review decisions and in any case we do not think that conclusion would necessarily determine the point at issue.

[312] Item 20(2) of Schedule 9 to the Transitional Act, as applied by s.768BY of the Act, provides that, *in an annual wage review*, for the purpose of making a determination varying terms of a copied State award relating to wages, ‘Division 3 of Part 2-6 of the Act ... *applies to* terms of a copied State award ... relating to wages in the same way as it applies to a modern award’ [emphasis added].

[313] In our view, when the Panel makes a determination varying wages in a copied State award in an annual wage review, that is a decision made ‘under’ the Act for the purposes of s.603(1) of the Act and ‘under’ Division 3 of Part 2-6 of the Act for the purposes of s.603(3)(d) of the Act. It follows that the Commission cannot vary or revoke such a determination under s.603(1) of the Act.

[314] We agree with Transit Systems that with the introduction of Part 6-3A of the Act, the legislature did not extend s.603(3) to decisions made under the Transitional Act.²⁹² We observe that the legislature also did not extend s.603(1) to decisions made under the Transitional Act.

[315] Transit Systems’ contentions appear self-defeating. If a decision to vary wages in copied State awards was a decision made under item 20(1) of Schedule 9 to the Transitional Act for the purposes of s.603(3)(d), then it would also be a decision made under the Transitional Act and not made under the Act for the purposes of s.603(1). It would follow that s.603(1) did not apply on its terms.

²⁸⁹ [Transit Systems submission in response to background paper](#), 1 June 2022, at para. 9.

²⁹⁰ Ibid at paras 3–4, 7.

²⁹¹ Ibid at paras 5–6. We note that Transit Systems refers to the 2018–19 and 2019–20 Review decisions but cites the 2017–18 and 2018–19 Review decisions

²⁹² [Transit Systems submission in response to background paper](#), 1 June 2022, at para. 7.

[316] Having regard to the Unions' submissions as outlined earlier, we consider our reading of s.603 is also to be preferred as giving a more coherent operation to the legislative scheme.

[317] In any case, even if we had discretion to vary or revoke determinations made in the 2018–19 and 2019–20 Review decisions as sought in Transit Systems' applications, in the circumstances we would decline to do so.

[318] As submitted by the Unions, the effect of the applications, if granted, would be to reduce existing employment entitlements and entitlements to backpay for some transferring employees.²⁹³ As Rares J observed in *ARTBIU v Transit Systems*, Transit Systems could have applied, but did not apply, to the Commission to exercise its discretion to vary the impact of its annual wage review determination on the copied State awards or to take account of wage increases provided for in the copied State awards in another way.²⁹⁴

[319] On 2 December 2021, Rares J made declarations as to the correct rates of pay for employees of Transit Systems covered by copied State awards derived from the 2018 Bus Operations Award.²⁹⁵ As we understand it, these rates of pay give effect to the Court's view as to the appropriate offsetting of wage increases under cl.15.1 of the Award and the increases from the 2018–19, 2019–20 and 2020–21 Reviews. As the Unions submit, the logic of the Court's judgment also applies to copied State awards derived from the 2018 Senior and Salaried Officers Award and the 2018 Bus Engineering and Maintenance Award.²⁹⁶

[320] The Unions also submit that granting Transit Systems' applications would give it 'an enormous collateral advantage' in bargaining for an enterprise agreement to replace the copied State awards.²⁹⁷ Transit Systems on the other hand considers the 'last two' annual wage review increases to the wage rates in its copied State awards 'have been a real impediment to effective enterprise bargaining.'²⁹⁸

[321] Transit Systems submits that:

'Fairness should be a key determinant of whether the Commission's AWR determinations should be varied or revoked in this matter. The variation or revocation of those AWR determinations is necessary to avoid the impact of double dipping, namely to avoid a situation whereby the transferring employees receive a double benefit of wage increases derived from the Copied State Awards, as well as the AWR decisions of the Commission, covering the same periods.'²⁹⁹

²⁹³ See also the Transit Systems submissions re undertakings, 3 June 2022; and the ARTBIU, AMWU and ASU submissions in response to undertakings, 5 June 2022.

²⁹⁴ [2021] FCA 1436 at [57].

²⁹⁵ See attachment to ARTBIU, AMWU and ASU submissions in response to undertakings, 5 June 2022.

²⁹⁶ ARTBIU, AMWU and ASU submissions in response to undertakings, 5 June 2022, at para. 5, where the Unions state that Transit Systems accepts this proposition.

²⁹⁷ ARTBIU, AMWU and ASU submission re retrospective variations, 6 May 2022, at para. 53.

²⁹⁸ Affidavit of Jamie Sinclair, 1 June 2022 [15]; see also [Transit Systems submission in response to background paper](#), 1 June 2022, at para. 14.

²⁹⁹ Transit Systems submission, 1 April 2022, at para. 53.

[322] While s.603 of the Act might be applied in a manner that affects the substantive rights of parties³⁰⁰—in this instance pay and backpay entitlements of employees that are enforceable under the Act—we would not consider that appropriate in all of the circumstances. Nor, in all of the circumstances, do we consider that granting Transit Systems’ applications, were that course open to us, would best satisfy the Commission’s obligations to perform its functions and exercise its powers in a manner that is ‘fair and just’ and ‘promotes harmonious and cooperative workplace relations’, and to take into account ‘equity, good conscience and the merits of the matter’.³⁰¹ Those views are not altered by Transit Systems’ undertaking that, if the Commission granted its applications, Transit Systems would not decrease the wage rates of employees covered by the 2018 Bus Operations Award below the rates it is currently paying in accordance with Rares J’s declaration.³⁰²

[323] Accordingly, we dismiss Transit Systems’ applications that we vary or revoke the relevant determinations made in the 2018–19 and 2019–20 Reviews.

6.3 Other applications made with respect to copied State awards in the Annual Wage Review 2021–22 and the parties’ positions

(i) Statutory criteria

[324] In this Review, the Employer parties contend the Panel should address specific copied State awards on a case-by-case basis, to take account of the wage increases already provided to their transferring employees under the terms of the copied State awards.³⁰³

[325] The statutory framework applying to annual wage reviews, including the statutory criteria for varying modern award minimum wages, is set out in Chapter 1 above.

[326] As related earlier, in an annual wage review Division 3 of Part 2-6 (except s.292) applies to the terms of a copied State award relating to wages in the same way it applies to a modern award.³⁰⁴ Accordingly, in varying wage rates in copied State awards, the Panel ‘must take into account the rate of the national minimum wage that it proposes to set in the Review’.³⁰⁵

[327] Sections 577(a) and (d) require the Commission to perform its functions and exercise its powers in a manner that is fair and just, and that promotes harmonious and cooperative workplace relations. In performing its functions and exercising its powers in relation to a matter, the Commission must take into account the objects of the Act (and the object of the relevant part of the Act) and equity, good conscience and the merits of the matter.³⁰⁶ Sections 3(a), (b) and (f) of the Act provide:

³⁰⁰ *Esso Australia v AWU* 263 CLR 551 at [49].

³⁰¹ FW Act ss.577(a) and (d), and 578(b).

³⁰² See Transit Systems response to question at hearing, 3 June 2022.

³⁰³ See, for example, Keolis Downer submission, 1 April 2022, at paras 9–10; Busways submission, 1 April 2022, at paras 72 and 89; Transdev submission, 1 April 2022, at para. 17, and submission in response to background paper, 1 June 2022, at para. 9; and Transit Systems submission, 1 April 2022, at paras 53–57.

³⁰⁴ Item 20(2) of Schedule 9 to the Transitional Act.

³⁰⁵ See FW Act s.285(3).

³⁰⁶ FW ACT ss.578 (a) and (b).

3 Object of this Act

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

- (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations; and
- (b) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders; and
- ...
- (f) achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

[328] Several parties have addressed the minimum wages objective in s.284(1) in support of their positions, as discussed below.³⁰⁷ Section 284(1) is in Division 2 of Part 2-6 of the Act. Section 284(2)(a) provides that the minimum wages objective 'applies to the performance or exercise of ... the ... [Commission's] functions or powers under ... [Part 2-6]'. The minimum wages objective requires that the Commission 'must establish and maintain a safety net of fair minimum wages' taking into account the considerations identified in s.284(1)(a)–(e). While these statutory considerations inform the evaluation of what might constitute 'a safety net of fair minimum wages', they do not necessarily exhaust the matters which the Panel might properly consider to be relevant, and no particular primacy is attached to any of these considerations.³⁰⁸ Fairness is to be assessed from the perspective of the employees and employers affected by Review decisions.

[329] The modern awards objective defined in s.134(1) of the Act 'applies to the performance or exercise of the ... [Commission's] ... functions or powers under Part 2-6, so far as they relate to modern award minimum wages' (s.134(2)). We agree with Busways' submission that s.134 would not appear on its terms to apply to the Commission's performance of functions or exercise of powers under Part 2-6 so far as they relate to copied State award wages.³⁰⁹ However, as the Panel has previously noted,

'[t]here is a degree of overlap between the matters specified in the modern awards objective, the minimum wages objective and the objects of the Act. To the extent that these matters are of direct relevance to the Review they may, generally speaking, be grouped into three broad categories: economic; social; and collective bargaining.'³¹⁰

³⁰⁷ See Transdev submission, 1 April 2022, at para. 19; Keolis Downer submission, 1 April 2022, at paras 7–9; Busways North West Pty Ltd submission, 1 April 2022, at paras 4–5; ABI submission in reply, 6 May 2022, at paras 15, 19(c).

³⁰⁸ See *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [32]

³⁰⁹ Transcript, 3 June 2022, PN153–PN154.

³¹⁰ [2013] FWCFB 4000 at [359].

(ii) Copied State awards applying to Keolis Downer, Busways and Transdev

[330] Copied State awards derived from the following State awards are in operation and apply to Keolis Downer's, Transdev's and Busways' transferring employees:

- State Transit Authority Senior and Salaried Officers' Enterprise (State) Award 2021 (the **2021 Senior and Salaried Officers Award**), and
- State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2020 (the **2020 Bus Engineering and Maintenance Award**).

[331] Copied State awards derived from the State Transit Authority Bus Operations Enterprise (State) Award 2021 (the **2021 Bus Operations Award**) also apply to Transdev's and Busways' transferring employees.³¹¹

[332] In 2022, these copied State awards conferred wage increases on transferring employees as follows:

- 2021 Senior and Salaried Officers Award – cl.10.1 relevantly provides for a wage increase of 2.04 per cent³¹² from the first full pay period commencing on or after on 1 January 2022, with cl.10.2 providing that this is 'in substitution of any State Wages decisions. Any arbitrated safety net adjustment may be offset against any equivalent amount in the rates of pay received by Employees covered under this Award.'
- 2020 Bus Engineering and Maintenance Award – cl.58.3 relevantly provides for a wage increase of 2.04 per cent³¹³ from 1 April 2022, with cl.58.5 providing that this is 'in substitution of any State Wage Case decisions. Any arbitrated safety net adjustments may be offset against any equivalent amount in rates of pay received by Employees.'
- 2021 Bus Operations Award – cl.15.1 relevantly provides for a wage increase of 2.04 per cent³¹⁴ from the first full pay period commencing on or after on 1 January 2022, with cl.15.2 providing that this is 'in substitution of any State Wages decisions. Any arbitrated safety net adjustments may be offset against any equivalent amount in the rates of pay received by Employees covered under this Award.'³¹⁵

³¹¹ Keolis Downer submission, 1 April 2022, at para. 5. It is understood that copied State awards derived from the *State Transit Authority Bus Operations Enterprise (State) Award 2021* ceased to cover Keolis Downer's transferring employees following commencement of the *KDNB Bus Operations Enterprise Agreement 2021*. Transdev submission, 1 April 2022, at para. 5; Busways submission, 1 April 2022, at para. 2. The copied State awards apply to Transdev transferring employees from 4 April 2022 and to Busways' transferring employees from January 2022.

³¹² Assuming a 0.5 per cent increase to the Superannuation Guarantee Charge (SGC) from 1 July 2022.

³¹³ Given the 0.5 per cent increase to the SGC from 1 July 2022.

³¹⁴ Assuming a 0.5 per cent increase to the SGC from 1 July 2022.

³¹⁵ See Transdev submission, 1 April 2022, at paras 16–17; and Busways submission, 1 April 2022, at para. 59.

[333] The copied State awards do not provide further wage increases beyond the above dates.

[334] Keolis Downer submits that to prevent double-dipping, transferring employees who have received pay increases in 2022 under the above terms of the 2021 Senior and Salaried Officers Award and the 2020 Bus Engineering and Maintenance Award should be excluded from any minimum wage increase awarded in the 2021-22 Review.³¹⁶

[335] Keolis Downer submits that ss.284(1)(a) ‘the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth’ and (c) ‘relative living standards and the needs of the low paid’ are relevant.³¹⁷

[336] Keolis Downer submits that copied State awards are not in practice ‘minimum wage’ instruments and so are not comparable to modern awards.³¹⁸ Keolis Downer contends that the copied State awards already ensure beneficial living standards for the transferring employees by setting ‘fair and reasonable conditions of employment for employees’³¹⁹ with built-in wage increases.

[337] Keolis Downer submits that any increase to copied State awards would go ‘far beyond the FW Act objectives and the application of section 284 of the FW Act’,³²⁰ and ‘clearly, there exists the risk of double dipping’.³²¹

[338] Keolis Downer submits that the wage rates in copied State awards ‘far exceed the minimum wage rates set by the [Commission] for comparable employees in conformity with section 284 of FW Act’ to the significant benefit of employees.³²² A further increase to the wage rates in copied State awards would lead to a further disparity between Keolis Downer and other national system employers.³²³

[339] Keolis Downer submits that ‘employees will not lose future increases to their safety net and will remain significantly better off than had they been covered by the relevant modern award and subject to the Annual Wage Review decision.’³²⁴

[340] Keolis Downer refers to the object of the Act at s.3(f) and submits the Commission should not provide any additional wage increases as this would risk ‘de-emphasising enterprise level collective bargaining’³²⁵ and:

³¹⁶ Keolis Downer submission, 1 April 2022, at para. 9. Keolis Downer withdrew its initial alternative submission that any wage increase in the 2021–22 Review should be reduced by wage increases contained in copied State awards: see Keolis Downer submission in response to background paper, 1 June 2022, at para. 22.

³¹⁷ [Keolis Downer submission in response to background paper](#), 1 June 2022, at para. 6.

³¹⁸ Ibid at para. 10. In support of this argument, Keolis Downer reference [Busways submission](#), 1 April 2022, at paras 71–72; and [ACCI submission in reply](#), 10 May 2022, at paras 176–203: Ibid at para. 10.

³¹⁹ *Industrial Relations Act 1996* (NSW) s.10.

³²⁰ [Keolis Downer submission in response to background paper](#), 1 June 2022, at para. 10.

³²¹ Ibid at para. 11.

³²² Ibid at paras 7, 12.

³²³ Ibid at para. 13 and table at Attachment 1.

³²⁴ Ibid at para. 19.

³²⁵ Ibid at para. 8.

‘the FWC can be satisfied, given the significant increase in weekly wages available to employees covered under the Copied State Awards against the applicable modern award, that employees will not be disadvantaged by the fact that there is no applicable increase available to the employees after January 2023.’³²⁶

[341] Keolis Downer also submits that its transferring employees are likely to be entitled to future wage increases from 2023 onwards pursuant to enterprise agreements it expects to implement in the immediate future.³²⁷

[342] Busways contends that the Panel should not apply any 2021-22 Review increase to its copied State awards as transferring employees have already had the benefit of the increases awarded by the IRCNSW that commenced on or after 1 January 2022 and before 1 July 2022.³²⁸

[343] Busways submits that the Panel must consider the objective of achieving fairness from both the perspective of both employees and employers,³²⁹ and that ss.284(1)(a) and (c) are relevant to the Commission’s task.³³⁰ With regard to s.284(1)(a), Busways submits that in a transfer of business under Part 6-3A of the Act, typical contractual terms may constrain the new employer from being able to take steps to ameliorate unplanned additional labour costs arising from Review decisions, and this effect ‘is heightened for many businesses in the current high inflationary economic period’.³³¹ With regard to s.284(1)(c), Busways submit that this ‘requires a comparison of the living standards of workers reliant on minimum wages with those of other groups that are deemed to be relevant’, and the Panel should focus especially on non-managerial workers.³³²

[344] Busways has provided tables showing the percentage difference between weekly wage rates for workers under the lowest classification in its copied State awards and the current national median equivalised disposable household income.³³³ Busways submits that these tables should satisfy the Panel that ‘workers covered by the Busways copied State awards receive wages which allow for a living standard which is equivalent to or better than the average Australian worker.’³³⁴

[345] Busways submits that if an increase in minimum wages were to be applied to its copied State awards, its transferring employees would receive 2 wage increases in a period of 6 months or less, resulting in double-dipping.³³⁵ Busways submits that the Panel should also consider the

³²⁶ Ibid at para. 14.

³²⁷ Ibid at paras 16–18. Employees covered by copied State awards derived from the 2021 Senior and Salaried Officers Award voted to approve an enterprise agreement on 30 May 2022, and ‘negotiations with bargaining representatives for employees covered by ... [copied State awards derived from the 2020 Bus Engineering and Maintenance Award] are almost complete ...’

³²⁸ Busways submission, 1 April 2022, at paras 5 and 62.

³²⁹ [Busways submission in response to background paper](#), 1 June 2022, at paras 4.2–4.3, citing [2019] FWCFB 3500 at [10].

³³⁰ Ibid at paras 3.2 and 3.5.

³³¹ Ibid at paras 3.3–3.4.

³³² Ibid at paras 3.6–3.7.

³³³ Ibid at paras 3.8–3.10 and Tables at para. 3.9.

³³⁴ Ibid at para. 3.11.

³³⁵ Ibid at para. 4.4.

compounding effects of such increases,³³⁶ and says that absorbing wage increases built into copied State awards would not address this.³³⁷

[346] Busways submits that ‘[t]o further apply a wage increase to these employees is to provide the employees with a windfall gain above that which was determined as “fair and reasonable wages” for 2022 by the NSWIRC’,³³⁸ and ‘this action inherently assumes that the wages set by the NSWIRC for the Relevant Awards in 2022 are not an appropriate safety net.’³³⁹ Busways submits that such an assumption could not be drawn without assessing the work value of the services performed by the relevant employees; and ‘grappling with why the wages under the Relevant Awards are not a fair and relevant safety net when they already substantially exceed the wages contained in the modern award covering exactly the same work.’³⁴⁰

[347] Busways submits that the copied State awards applying to it ‘contain wage rates that were determined under a different jurisdiction where the wage rates were not intended to be a minimum safety net, but rather, were intended to create *fair and reasonable conditions of employment*.’³⁴¹ Busways further contends that the approach to setting and increasing wages in NSW State awards is different to the national minimum wage setting approach as:

- NSW State awards are largely determined by the IRCNSW by consent between the parties (particularly in circumstances where the award applies to a single employer) and enterprise specific awards tend to be ‘paid rates awards’ rather than ‘minimum wage awards’,³⁴² and
- there is no general overriding minimum wage decision made by the IRCNSW that automatically affects all NSW State awards. Since 2010, all adjustments to awards ordered as part of State Wage Cases have been made only to minimum wage awards and the 3 copied State awards were not subject to the NSW State Wage Case but were subject to their own specific wage rate increases.³⁴³

[348] Busways submits that ‘the wages contained in the 3 Busways copied State awards are already between 16.8% and 52.24% higher than the equivalent modern award rates’.³⁴⁴ Given this, Busways ‘does not accept that it is possible to “top-up” a shortfall in this scenario’³⁴⁵ and to do so would not only deviate from the purpose of the Review, but would be contrary to the objectives of the Fair Work Act and the minimum wages objective.’³⁴⁶ [footnotes omitted]

³³⁶ Ibid at paras 4.4–4.5, citing Busways submission, 1 April 2022, paras 73–80.

³³⁷ Ibid at paras 8.6–8.7.

³³⁸ Ibid at para. 8.9.

³³⁹ Ibid at para. 8.10.

³⁴⁰ Ibid at para. 8.11.

³⁴¹ Busways submission, 1 April 2022, at para. 4(j)(ii). See also paras 66–70.

³⁴² Ibid at para. 68.

³⁴³ Ibid at paras 69–70.

³⁴⁴ [Busways submission in response to background paper](#), 1 June 2022, at para. 7.10, citing Busways submission, 1 April 2022, at paras 81–83.

³⁴⁵ Ibid at para. 7.1.

³⁴⁶ Ibid at para. 7.12.

[349] If the Panel were to see value in increasing wages in copied State awards, contrary to the Employer parties' submissions, Busways submits that any wages so increased should not exceed the corresponding modern award rate,³⁴⁷ or if not, the Panel should revert to the tiered-approach adopted prior to the 2017-18 Review decision.³⁴⁸

[350] Busways also submits that the Panel should consider the object in s.3(f) and the requirement in s.577(d) of the Act.³⁴⁹

[351] Busways submits that terms and conditions in State awards transfer to the national system for a finite period of up to 5 years, with the intention of encouraging parties in the interim to seek to bargain for an enterprise agreement.³⁵⁰ However, Busways argues that if wages under the 3 copied State awards already 'leapfrogged equivalent arrangements in similar business/industries ... any incentive to Busways to bargain will be dissolved.'³⁵¹

[352] Busways submits that it has already commenced bargaining with the ARTBIU for an enterprise agreement to replace the 2021 Bus Operations Award³⁵² and it intends to bargain with the other 2 workforces this year so 'there is every likelihood that enterprise agreements will be in place ... by the end of 2022.'³⁵³ To the extent that enterprise agreements are not agreed before the next Review (and so employees experience 18 months without a pay rise), Busways submits that the Unions may then argue that the IRCNSW's determination of 'fair and reasonable wages' in the copied State awards is no longer current,³⁵⁴ and can make submissions to that Review about the appropriate way to address any financial detriment suffered by employees.³⁵⁵

[353] Transdev submits that that the Commission should not apply any increase to its copied State awards in the 2021–22 Review as the transferring employees have already had the benefit of the increases awarded by the IRCNSW that commenced on or after 1 January 2022 and before 1 July 2022.³⁵⁶

[354] Should that submission not be accepted, Transdev submits that any Review increase should be limited to the difference between the annual wage review increase and the increases already provided for in the copied State awards, i.e. the 'top-up' approach.³⁵⁷

[355] In addition to ss.284(1)(a) and (c), Transdev submits that s.284(1) 'the principle of equal remuneration for work of equal or comparable value' is relevant to its submission.

³⁴⁷ Ibid at para. 7.7, citing Transit Systems submission, 1 April 2022, at para. 4.

³⁴⁸ Ibid at para. 7.15.

³⁴⁹ Ibid at para. 4.8.

³⁵⁰ Ibid at para. 4.11.

³⁵¹ Ibid at para. 4.11, citing [Busways submission](#), 1 April 2022, at para. 87. See also ACCI submission in reply, 10 May 2022, at para. 192.

³⁵² Ibid para. 8.18, citing Witness Statement of Will O'Neill, 30 March 2022 at para. 32.

³⁵³ Ibid at para. 8.18.

³⁵⁴ Ibid at para. 8.5.

³⁵⁵ Ibid at para. 8.19.

³⁵⁶ Transdev submission, 1 April 2022, at paras 16–17, 19–20; and [Transdev submission in response to background paper](#), 1 June 2022, at para. 9.

³⁵⁷ [Transdev submission in response to background paper](#), 1 June 2022, at paras 10–11.

[356] Transdev submits that any Review increase would have a direct impact on the profitability of its business as it would have to pass on 2 wage increases to approximately 1,232 transferring employees³⁵⁸ and it is concerned about the compounding effect of these increases.³⁵⁹ Transdev submits that the increased labour cost may disincentivise national system employers from employing State public sector employees in circumstances where there will be a transfer of business. Transdev further submits that the application of Review increases to copied State awards that already contain a wage increase in respect of the same period will impact those businesses' profitability and will have 'a negative impact on the performance and competitiveness of the national economy, particularly business competitiveness and viability.'³⁶⁰

[357] Transdev submits that as transferring employees have or will already receive the benefit of wage increases made as 'fair and reasonable conditions of employment' by the IRCNSW its position is consistent with ensuring relative living standards of transferring employees.³⁶¹ Transdev further submits that as its copied State awards do not contain future wage increases, if the tiered approach is applied transferring employees would not be deprived of Review increases in the future.³⁶²

[358] Transdev submits that should any Review increase apply to its copied State awards, the wage rates in the copied State awards will exceed 'the rates for equivalent work under the equivalent modern awards, creating a difference in minimum rates for the same work' (as well as the rates for equivalent work under State Awards which continue to apply to State public sector employees in respect of the same work.³⁶³

[359] Transdev notes that, since providing its initial submission, it has made an enterprise agreement with employees covered by the 2021 Bus Operations Award but this has not yet been approved.³⁶⁴ Transdev has also commenced discussions to bargain for enterprise agreements which, if made, would replace the 2020 Bus Engineering and Maintenance Award and the 2021 Senior and Salaried Officers Award.³⁶⁵

[360] The Unions submit the tiered approach to adjusting wage rates in copied State awards is inappropriate³⁶⁶ and modern award wage increases should be flowed-on to copied State awards. However, the Unions 'accept that wage increases that have occurred in this financial year should be taken [into] account to avoid any double dipping.'³⁶⁷ Accordingly, wages should be 'topped up' to 'the difference between those internal increases (which were subject to the NSW Government's 2.5% cap regardless of merit considerations, and were in most cases

³⁵⁸ Ibid at para. 6(a)(i).

³⁵⁹ Ibid at para. 6(a)(ii), citing ABI submission, 6 May 2022, at para. 15.

³⁶⁰ Ibid at para. 6(a)(iii).

³⁶¹ Ibid at para. 6(b).

³⁶² Ibid at para. 6(b)(ii)

³⁶³ Ibid at para. 6(c).

³⁶⁴ Ibid at para. 7.

³⁶⁵ Ibid at para. 8. Transdev does not anticipate any such enterprise agreements being made any earlier than 3 months from 1 June 2022.

³⁶⁶ [ARTBIU, AMWU and ASU submission in response to background paper](#), 1 June 2022, at para. 15.

³⁶⁷ ARTBIU, AMWU and ASU submission in reply, 6 May 2022 at para. 5.

actually lower) and whatever is awarded by the Commission, in order to avoid windfall bargains for the operators.’³⁶⁸

[361] The Unions contend ‘this is a highly conservative approach, rather than anything resembling an ambit claim’.³⁶⁹

‘There is no evidence whatsoever that any of the increases previously awarded contained a component recognizing inflation going forward i.e. to preserve the real value of wages. There is a real likelihood that, since the introduction of the state government wages cap a decade ago, these workers have been moving steadily backwards. This conservatism is appropriate given the lack of clarity, and the practical reality that it will see workers’ wages increase twice in a six month period, but no further reduction is warranted.’³⁷⁰

[362] The Unions submit that ss.284(1)(a) and (c) of the Act are principally relevant and also say the modern awards objective applies.³⁷¹

[363] With respect to s.284(1)(a), the Unions observe as a general proposition that wage increases matching both inflation and productivity growth are sustainable without placing upward pressure on headline inflation, and allow workers to maintain existing living standards by meeting cost of living pressures and additionally getting a fair share of national prosperity.³⁷²

[364] With respect to s.284(1)(c), the Unions submit that a number of classifications covered by the copied State awards are low paid using the metric adopted by the Commission. For example:

‘[the 2021 Bus Operations Award] prescribes a minimum rate of \$932.30 per week for Bus Cleaner Level 1 and \$926.40 for Conductors/Sign on Clerks. Other classifications in this Award, while above the \$1000/week, are not far above this threshold. Classifications in the ... [2020 Bus Engineering and Maintenance Award] are similarly placed. As to the ... [2021 Senior and Salaried Officers Award], while Senior Officers are well above the threshold, the majority of Clerk classifications are not.’³⁷³ [Footnotes omitted]

[365] The Unions contend that ‘considerations about maintaining fair and equitable living standards for these workers tell in favour of the Unions’ position in respect of an increase to these wages’ and otherwise rely on their general submissions in the Review and those made by the ACTU.³⁷⁴

³⁶⁸ Ibid at para. 23 and [ARTBIU, AMWU and ASU submissions in response to Background Paper](#), 1 June 2022, at paras 5, 17 and 31.

³⁶⁹ [ARTBIU, AMWU and ASU submission in response to background paper](#), 1 June 2022, at para. 17.

³⁷⁰ Ibid.

³⁷¹ Ibid at paras 3 and 8.

³⁷² Ibid at para. 4.

³⁷³ Ibid at para. 5.

³⁷⁴ Ibid at paras 6–7.

[366] The Unions reject the Employer parties' submissions that their copied State awards should be treated differently because they are '*paid*' rather than minimum rates and say that concept of 'paid rates' awards is something of a historical anomaly and has been an irrelevance in NSW since the referral of powers.³⁷⁵

[367] The Unions submit that Busways 'cannot say that these rates [in the relevant State Awards] were ever properly set, or adequately recognise the value of the relevant work,'³⁷⁶ and even if it is assumed that the IRCNSW 'succeeded in its task of setting "fair and reasonable wages", this does not lead to a conclusion that the rates *remain so indefinitely*.'³⁷⁷

[368] The Unions also note this increase in the copied State awards relates to only part of the financial year, such that inflationary pressures after January 2023 have not been taken into account in the wage fixing exercise.³⁷⁸

[369] In response to Busways' submissions, the Unions submit that no wage increases would leave employees, absent bargaining, without an increase to their wages for up to 18 months³⁷⁹ and this itself could be seen as a disincentive to bargain.³⁸⁰ The Unions submit 'the preferable and appropriate course [is] to ... bring these federal employees in line with the timing used in the federal system':³⁸¹

'It is far more desirable that these employees, absent bargaining, continue to be provided with an annual wage increase like any other award-covered employee, rather than enduring up to 18 months without one.'³⁸²

[370] In response to Busways' argument that any Review increase will be costly,³⁸³ the Unions submit that 'these calculations assume the full increase, rather than the reduced amount sought by the Unions to remove double-dipping ... and ... are made without any *context*: the number itself is meaningless without an understanding of what it really means within the business, and there is no support for the proposition that this will affect Busways' viability.'³⁸⁴

[371] The Unions further observe that the Employer parties cannot claim ignorance of the law, and that the effect of the Panel's Review decisions on copied State awards was 'entirely foreseeable'.³⁸⁵

³⁷⁵ Ibid at paras 9–11.

³⁷⁶ ARTBIU, AMWU and ASU submission in reply, 6 May 2022, at para. 24.

³⁷⁷ Ibid at para. 22.

³⁷⁸ Ibid at para. 17.

³⁷⁹ Ibid at para. 23.

³⁸⁰ Ibid at paras 23, 25.

³⁸¹ Ibid at para. 23.

³⁸² Ibid at para. 18.

³⁸³ Busways submission, 1 April 2022, at paras 56, 75.

³⁸⁴ ARTBIU, AMWU and ASU submission in reply, 6 May 2022, at para. 26.

³⁸⁵ See for example ibid at para. 27 (in response to Busways submission, 1 April 2022).

[372] Accordingly, the Unions submit that the Panel should increase the wages in the copied State awards applying to Keolis Downer, Busways and Transdev by the full amount determined in the 2021–22 Review as applicable to modern awards, less 2.04 per cent.³⁸⁶

[373] The ACTU supports the Unions’ submissions in relation to the appropriate increase to be awarded in this Review.³⁸⁷

Consideration

[374] Part 6-3A of the Act is directed to ensuring that where there is a transfer of business from a non-national system employer that is a State public sector employer to a national system employer, transferring employees continue to enjoy the terms and conditions of employment to which they were entitled with the State public sector employer.³⁸⁸ Even where a copied State instrument ceases to apply to an employee through the effluxion of time and a modern award instead covers the employee, the Commission may make a take-home pay order to remedy any resulting reduction in take-home pay.³⁸⁹

[375] The intent of the legislative scheme is to preserve transferring employees’ terms and conditions in the State industrial instrument with the non-national system employer, in their new employment under the national system.

[376] In the course of these proceedings, much has been made of the different nature of awards made under the NSW industrial relations system and modern awards; and we think correctly so. The IRCNSW’s statutory functions of ‘setting fair and reasonable conditions of employment for employees’³⁹⁰ is different to our objectives in an annual wage review and in particular pursuant to the minimum wages objective in s.284 (‘establishing and maintaining a safety net of fair minimum wages’) the modern awards objective in s.134 (ensuring that ‘modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions’) and s.3(b) of the Act (‘ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions’).

[377] We agree that the copied State Awards concerned bear some characteristics of enterprise agreements as a result of the NSW disputes-based system. The copied State awards are derived from State awards made by consent by the State Transit Authority and its workforces and include agreed annual wage increases applied over a specified period (although as the Unions point out, the negotiated wage outcomes were subject to a State government wages cap).

[378] The evidence before us is that the current wage rates in the copied State awards applying to Keolis Downer, Busways and Transdev and their transferring employees are already significantly higher than the corresponding modern award rates. We also observe that the

³⁸⁶ Ibid at paras 17, 30–31; and ARTBIU, AMWU and ASU submission in response to background paper, 1 June 2022, at para. 15.

³⁸⁷ ACTU submission in reply, 8 May 2022, at paras 159–160.

³⁸⁸ Explanatory Memorandum to the *Fair Work Amendment (Transfer of Business) Bill 2012* at p. 4.

³⁸⁹ Fair Work Act s.768BU. The note under this section observes that the take-home pay order will continue to apply even if an enterprise agreement starts to apply to the employee.

³⁹⁰ *Industrial Relations Act 1996* (NSW) s.10.

statutory underpinning for wage rates in copied State awards is the NMW³⁹¹ rather than modern award rates.

[379] Relevant to this Review, the wage clauses in the 2021 Senior and Salaried Officers Award, the 2020 Bus Engineering and Maintenance Award and the 2021 Bus Operations Award each conferred agreed wage increases that commenced on or after 1 January 2022 (in cl.10.1, 58.1 and 15.1 respectively).

[380] Further, each of those wage clauses contains an ‘offsetting’ clause in similar terms to that considered in *ARTBIU v Transit Systems* (in cl.10.2, 58.3 and 15.2 respectively). In *ARTBIU v Transit Systems*, Rares J observed that the offsetting clause in cl.15.2 of the 2018 Bus Operations Award could be understood as seeking to provide that the parties to the Award intended that the wage increases contained in cl 15.1 were to be in substitution for any variation of minimum wages that would otherwise be payable pursuant to annual wage review decisions that the IRCNSW might decide to adopt.³⁹²

[381] The Act does not compel us to vary the wage rates in copied State awards. The Panel has discretion to vary some or all wages in copied State awards in the context of a Review and in exercising that discretion will be guided by the applicable statutory considerations and the requirement under s.577 that the Commission perform its functions and exercise its powers in a manner that is fair and just.

[382] The parties have variously addressed ss.284(1)(a), (c) and (d) and ss.3(a)(b) and (f) of the Act in their submissions, as well as the modern awards objective and the requirements in ss.577 and 578 of the Act.

[383] We first observe that s.284(1)(d) is not relevant to this matter; it is directed to *gendered* differences in remuneration.³⁹³

[384] In relation to s.284(1)(a)—‘the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth’— the Panel has previously observed:

‘the underlying intention of the various economic considerations referred to in ss.284 and 134 is that the Panel take into account the effect of its decisions on national economic prosperity and in so doing give particular emphasis to the economic indicators specifically mentioned in the relevant statutory provisions. Such an approach is supported by the object of the Act.’³⁹⁴

[385] As related earlier, Keolis Downer, Busways and Transdev submit that s.284(1)(a) is relevant, and note generally the impacts on profitability of their own and other businesses nationally that are covered by copied State awards, should annual wage review increases be applied to copied State awards which also provide wage increases in respect of the same period.

³⁹¹ Fair Work Act s.768BY (including items 2, 11 and 12 of the table in s.768Y(1) and item 14 ‘Part 5 of Schedule 9’ of the table in s.768BY(2)) and Transitional Act item 16 of Part 5 of Schedule 9.

³⁹² [2021] FCA 1436 at [50].

³⁹³ Fair Work Act ss.12 and 302(2).

³⁹⁴ [2015] FWCFB 3500 at [88]–[89].

Transdev also notes the potential for such annual wage review increases to ‘disincentivise national system employers from employing State public sector employees’ in circumstances of a transfer of business. The Unions observe as a general proposition that wage increases matching both inflation and productivity growth are sustainable without placing upward pressure on headline inflation and would allow workers to maintain existing living standards and get a fair share of national prosperity.

[386] We have earlier discussed the requirement in s.284(1)(c) that we take into account ‘relative living standards and the needs of the low paid.’ The Unions have pointed to 2 classifications in the 2021 Bus Operations Award that are below the Panel’s benchmark for who is ‘low paid’, and other classifications that are not far above this.³⁹⁵ The Unions submit that classifications in the 2020 Bus Engineering and Maintenance Award are similarly placed, and the majority of Clerk classifications in the 2021 Senior and Salaried Officers Award are also not much above the benchmark.

[387] We observe that the majority of adult classifications in the copied State awards have wage rates above the low-paid benchmark. However, there are some classifications that, although above the new NMW (other than the weekly apprentice rates specified in the 2020 Bus Engineering and Maintenance Award), fall below the low-paid benchmark. We have taken this into account in reaching our view.

[388] The objects in s.3 of the Act include ‘ensuring a guaranteed safety net of *fair*, relevant and enforceable minimum terms and conditions’ (s.3(b)) and ‘achieving productivity and *fairness* through an emphasis on enterprise-level collective bargaining’ (s.3(f)) [emphasis added]. Our discussion above regarding the character of the ‘consent’ State Awards with which we are concerned and recent wage increases conferred under those State Awards is relevant to considerations of fairness.

[389] In respect of s.3(f), the parties have provided information on the status of enterprise bargaining to replace the copied State awards and made submissions on the impact on the bargaining of annual wage review wage increases.

[390] We note Keolis Downer’s, Busways’, Transdev’s and the Unions’ material as to the progress of enterprise bargaining negotiations. As we are considering potential wage increases on an enterprise basis, while we cannot predict the precise impact of our decision on collective bargaining,³⁹⁶ we observe as a general proposition that an upward adjustment to wage rates in these copied State awards may act as a disincentive to bargaining, in circumstances where the employers are already paying above modern award rates of pay.³⁹⁷

[391] In view of the above matters and the particular circumstances evident here, we are satisfied that the current wage rates in the copied State awards applying to Keolis Downer, Busways and Transdev provide a safety net of fair minimum wages. Accordingly, having regard to the NMW order in this Review and the relevant statutory considerations (including in ss.3, 577 and 578), we consider that the Review increase to modern award minimum wages

³⁹⁵ That is, a threshold of two-thirds of weekly median adult full-time ordinary earnings: see [2021] FWCFB 3500 at [137].

³⁹⁶ See, for example, [2016] FWCFB 3500 at [540]. Further, various annual wage review research reports have examined factors that may have influenced changes in the collective agreement coverage of employees.

³⁹⁷ See, for example, [Busways submission in response to background paper](#), 1 June 2022, at para. 4.11, citing [Busways submission](#), 1 April 2022, at para. 87. See also ACCI submission in reply, 10 May 2022, at para. 192.

should *not* be applied to the copied State awards applying to Keolis Downer, Busways and Transdev, and their transferring employees on this occasion.

[392] Nor do we consider the ‘top up’ approach proposed by the Unions is appropriate in the circumstances. Part 6-3A is directed to preserving the employment terms and conditions of the transferring employees as they would have been in the absence of the transfer of business to a national system employer, subject, of course, to the Commission’s obligation to maintain a safety net of fair minimum wages. Had the transferring work and the transferring employees remained with the old State employer, the transferring employees would have received – as they have – a 2.04 per cent wage increase in January or April of this year. They would not have received any further increases under the State Awards and we do not consider any further adjustments to their wages fair or appropriate in all the circumstances.

[393] Finally, we note that none of the copied State awards contain ‘built-in’ wage increases beyond this Review cycle. That is something the Panel can properly take into account in the 2022–23 Review if the copied State awards are not replaced by enterprise agreements or otherwise cease to apply in the interim.

(i) Copied State awards applying to Transit Systems

[394] As related earlier, copied State awards derived from the 2018 Bus Operations Award and the 2018 Senior and Salaried Officers Award currently apply to Transit Systems’ transferring employees.³⁹⁸

[395] The wages clause in the 2018 Bus Operations Award was described earlier. Clause 10.1 in the 2018 Senior and Salaried Officers Award relevantly provided for wage increases of 2.5 per cent from the first full pay period commencing on or after on 1 January 2018, 2019 and 2020, with cl.10.2 providing that this is ‘in substitution of any State Wages decisions. Any arbitrated safety net adjustment may be offset against any equivalent amount in the rates of pay received by employees covered under this Award.’

[396] Transit Systems submits that if the variations or revocations it has sought in relation to copied State awards derived from the 2018 Bus Operations Award and the 2018 Senior and Salaried Officers Award *are not* granted, no increase should be awarded to these copied State awards. However, if the variations or revocations sought *are* granted, any increased wage rates in any classification level in its copied State awards should not exceed the rate of pay for the same work under the relevant modern award.³⁹⁹

[397] Transit Systems submits the object in s.3 of the Act and in particular ss.3(a), (b) and (f) are relevant to this matter.⁴⁰⁰ Those provisions were extracted earlier.

³⁹⁸ Transit Systems submission, 1 April 2022, at paras 23–24.

³⁹⁹ Ibid at para. 4.

⁴⁰⁰ Ibid at paras 46–47, 54, 63–64.

[398] Transit Systems submits that the 2018–19, 2019–20 and 2020–21 Review decisions ‘have resulted in windfall gains for employees amounting to approximately \$3.5 million.’⁴⁰¹ It submits that ‘this was the very kind of situation that the Commission had always intended to avoid when it developed the tiered methodology’⁴⁰² and that:

‘If the Commission’s tiered system had continued to apply in its 2018, 2019 and 2020 AWR decisions, then there would have been no question that the employees covered by the Copied State Awards were not entitled to receive a “double benefit” of an award wage increase and a further minimum wage increase during the same period ...

Fairness ... dictates that the unions should be held to the bargains that were struck when the State Awards were made by consent in the IRCNSW, namely that the 2.5% wage increases provided in cl 15 of the Copied State Award were “*in substitution of*” of minimum wages decisions and increases.

... It is clear that the objective intention of the parties (reflected in cl. 15.2 of the Bus Operators Award) is that the consent award excludes award increases from minimum wages decisions.

Furthermore, it is in the public interest that the Unions should be kept to the consent arrangements that they struck in the IRCNSW, as evidenced by the terms of cl 15 of the Copied State Bus Operator Award and cl 10 of the Senior Officer Award.’⁴⁰³

[399] Transit Systems contends that:

‘this is not merely an “*inconvenient*” outcome as claimed by the Unions; it is fundamentally unfair and contrary to the very kind of outcome that the FWC had always intended to avoid (double-dipping, not sticking to the industrial bargain struck by the Union over wages etc).’⁴⁰⁴

[400] Transit Systems submits the Commission should not increase the current wage rates in its copied State awards because those wage rates are already significantly higher than the equivalent modern award rates, in all cases.⁴⁰⁵ Transit Systems has provided a table that compares wage rates for all bus operator classifications under the relevant modern award and copied State awards derived from the 2018 Bus Operations Award, and submits this:

‘... demonstrates conclusively that should the Commission hold the Union to the bargain that it struck in the IRCNSW when the Bus Operators Award was made, then the employees covered by the Copied State Award will continue to receive a level of

⁴⁰¹ Ibid at para. 19–21. As a result of the Court decision in *ARTBIU v Transit Systems*, Transit Systems has facilitated an independent audit to determine the quantum of wages arising from the Court’s decision, including the compounding effect of earlier decisions. The McCormick Report identifies the total liability as \$3,475,696.72, made up of \$3,273,597.72 in wages and \$202,099.00 in superannuation (but excluding any order for interest): Ibid at paras 19–21.

⁴⁰² Ibid at para. 55.

⁴⁰³ Ibid at paras 56–59 and Transcript, 3 June 2022, PN65–PN67.

⁴⁰⁴ [Transit Systems submission in response to background paper](#), 1 June 2022, at para. 13.

⁴⁰⁵ Ibid at para. 11; Transit Systems submission, 1 April 2022, at para. 60.

remuneration that is substantially above the safety net of wages established in the modern award.

Having regard to its obligations to properly fix minimum rates to provide a fair and relevant safety net, the Commission should intervene in this matter so that the minimum wages differential between employees performing the same work under the relevant modern award and the Copied State Awards is not increased.⁴⁰⁶

[401] Transit Systems submits that the Commission should vary the rates in its copied State awards to remove the impediment to achieving productivity at the enterprise level through collective bargaining: s.3(f).⁴⁰⁷ Transit Systems relies on the affidavit of its managing director, Mr Jamie Sinclair, and submits:

‘(a) There is significant inconsistency in the minimum rates of pay applying to bus drivers in Sydney, depending on whether the bus drivers are covered by the modern award or a copied State award, or an existing State award under the NSW industrial relations system.

(b) The transfer of employment from the NSW Government to private bus operators in some parts of Sydney, but not others, and at different times, has resulted in different minimum rates of pay for bus drivers performing the same work.

(c) Enterprise bargaining negotiations to replace the copied State awards applying to Transit Systems commenced in 2021, however little progress has been made toward a new enterprise agreement despite numerous bargaining meetings and the taking of industrial action.

(d) The previous decisions of the Annual Wage Review Panel to increase the wage rates in the copied State awards applying to Transit Systems have been a real impediment to effective enterprise bargaining.’⁴⁰⁸

[402] Mr Sinclair states that “[if] there was to be another increase this year, the difference between the minimum rates payable by Transit Systems’ to its employees and our competitors to their employees will be greater again’.⁴⁰⁹ Mr Sinclair states, in relation to negotiating an enterprise agreement to replace copied State awards derived from the 2018 Bus Operations Award, that despite numerous bargaining meetings ‘negotiations have failed to advance resulting in all of the original log of claims items remaining’.⁴¹⁰

[403] The Unions submit that the Panel should increase wages in the copied State awards applying to Transit Systems by the full amount determined in the Review as applicable to modern awards.⁴¹¹ The Unions submit that Transit Systems has not suggested that corresponding modern award rates were properly set or adequately recognise work value and submit:

⁴⁰⁶ Transit Systems submission, 1 April 2022, at paras 61–62; and Transcript, 3 June 2022, PN93–PN94.

⁴⁰⁷ Transit Systems submission, 1 April 2022, at para. 63.

⁴⁰⁸ [Transit Systems submission in response to background paper](#), 1 June 2022, at para. 10, and affidavit of Mr Jamie Sinclair, 1 June 2022, [12]-[15].

⁴⁰⁹ [Transit Systems submission in response to background paper](#), 1 June 2022, attaching affidavit of Jamie Sinclair, 1 June 2022, at [15].

⁴¹⁰ *Ibid* at [16].

⁴¹¹ ARTBIU, AMWU and ASU submission in reply, 6 May 2022, at para. 31a.

‘The wages in these awards have not been increased since the last Annual Wage Review. The real value of employees’ wages has dropped in the interim and will, if not increased, drop further; wages which were once set as fair and reasonable will cease to be so.

There is no principled reason why these employees should not receive the same increase as any other award-covered employee.’⁴¹²

[404] The Unions submit that bargaining is ongoing in respect of employees covered by the 2018 Bus Operations Award, and that Transit Systems has not commenced bargaining with employees covered by the 2018 Senior and Salaried Officers Award.⁴¹³

[405] The Unions also submit that ss.284(1)(a) and (c) of the Act are principally relevant.⁴¹⁴

[406] The Unions submit that there is no basis on which the copied State Awards applying to Transit Systems should not be increased at the same level as all other relevant fair work instruments.⁴¹⁵ The Unions contend that the real value of transferring employees’ wages has dropped since the last Review decision ‘and will, if not increased, drop further; wages which were once set as fair and reasonable will cease to be so.’⁴¹⁶ The Unions submit that Transit Systems has not explained how its position fits with the minimum wages objective⁴¹⁷.

[407] The Unions submit ‘[g]ranting Transit Systems’ request would simply involve the Commission endorsing its approach of, until pressed, neglecting its wages obligations to employees.’⁴¹⁸

[408] The ACTU supports the ‘the position put by our affiliate unions in response ... in relation to the appropriate increase to be awarded in this Review.’⁴¹⁹

Consideration

[409] We have set out relevant considerations in our earlier discussion about the copied State awards applying to Keolis Downer, Busways and Transdev. Our earlier observations about the statutory considerations applying to the Panel’s task, the legislative intent of Part 6-3A of the Act and the different character of ‘consent’ State awards under the NSW industrial relations system also apply here.

[410] We also observe that the majority of adult classifications in the copied State awards applying to Transit Systems have wage rates above the low-paid benchmark, there are some classifications in the copied State awards that, although above the new NMW, fall below the low-paid benchmark. We have taken this into account in reaching our view.

⁴¹² Ibid at paras 9–11.

⁴¹³ ARTBIU, AMWU and ASU submission in response to background paper, 1 June 2022, at para. 13.

⁴¹⁴ See also discussion of relevant considerations at ibid at paras 3–11.

⁴¹⁵ Ibid at para. 18.

⁴¹⁶ ARTBIU, AMWU and ASU submission in reply, 6 May 2022, at para. 10.

⁴¹⁷ Ibid at para. 11.

⁴¹⁸ Ibid.

⁴¹⁹ ACTU submission in reply, 8 May 2022, at paras 159–160.

[411] However, there are some key differences in the circumstances of Transit Systems' copied State awards.

[412] In particular, the wage clauses in Transit Systems' copied State awards do not provide for any agreed wage increases in 2021–22. The final wage increases prescribed by the 2018 Bus Operations Award and the 2018 Senior and Salaried Officers Award had effect from the first full pay period commencing on or after 1 January 2020.

[413] We take this to indicate that the wages arrangement agreed between the parties – including the increases to wage rates and the offsetting arrangements – have concluded.

[414] As has been noted, the intended⁴²⁰ offsetting arrangements did not override the Commission's determinations in the 2018–19, 2019–20 and 2020–21 Reviews, that varied all copied State awards including those applying to Transit Systems. Transit Systems submits this has resulted in windfall gains for its transferring employees.

[415] On 2 December 2021, Rares J made declarations as to the correct rates of pay for employees of Transit Systems covered by copied State awards derived from the 2018 Bus Operations Award.⁴²¹ Accordingly, the issue of the correct application of the offsetting clauses in the copied State awards applying to Transit Systems has been dealt with by the Court.

[416] We have already found in this decision that the Commission does not have power to retrospectively vary or revoke the annual wage review determinations varying wages in the Transit Systems' copied State awards and noted that in any event, we would decline to exercise any such discretion to do so. Those reasons are also pertinent here: it could be said that Transit Systems is further seeking to adjust the outcomes of the previous Review determinations in this Review, in a way different to that decided by the Federal Court and in circumstances where it failed to raise its concerns with the Commission during the 2018-19, 2019-20 and 2020-21 Reviews.

[417] However, we note that in this Review other considerations apply to our decision as to whether or not to award any increase to wage rates in Transit Systems' copied State awards.

[418] We reiterate that the statutory underpinning for wage rates in copied State awards is the NMW rather than modern award rates. The evidence before us is that the current wage rates in the copied State awards applying to Transit Systems are higher than the corresponding modern award rates and are also higher than rates payable under Keolis Downer, Busways and Transdev copied State awards. In his affidavit, Mr Sinclair states:

‘The Bus Operator Copied State Award that applies to Transit Systems in Region 6 contains the highest minimum rates of any award setting minimum rates for bus drivers in Sydney.’⁴²²

⁴²⁰ See *ARTBIU v Transit Systems* [2021] FCA 1436 [43] and [48]–[52] (per Rares J).

⁴²¹ See attachment to ARTBIU, AMWU and ASU submissions in response to undertakings, 5 June 2022.

⁴²² Transit Systems submissions in response to background paper, 1 June 2022, attaching affidavit of Jamie Sinclair, 1 June 2022 at [9].

[419] The Table annexed to Mr Sinclair’s affidavit lists bus driver rates of pay as at 30 June 2022 under different instruments. For example, the weekly rates for a Senior Bus Operator (equivalent to Grade 4 of the *Passenger Vehicle Transportation Award*) are listed as follows:

- under the modern award - \$934.20
- under the 2021 Bus Operations Award (the current State Award and copied State awards derived from that Award) - \$1,117.60,⁴²³ and
- under the 2018 Bus Operations Award, which applies to Transit Systems and its transferring employees as copied State awards - \$1,167.80.

[420] Transit Systems addresses the cumulative (uncosted) impacts of the Review decisions on its business. In support of its position against any further Review increase, Transit Systems contends that the ‘last two’ annual wage review increases to the wage rates in its copied State awards ‘are a real impediment to effective enterprise bargaining’⁴²⁴ and ‘[i]f there was to be another increase this year, the difference between the minimum rates payable by Transit Systems to its employees and our competitors to their employees will be greater again.’⁴²⁵

[421] We note Transit Systems’ and the Unions’ material as to the progress of enterprise bargaining negotiations.

[422] Again, while we cannot predict the precise impact of our decision on collective bargaining, we observe as a general proposition that an upward adjustment to wage rates in these copied State awards could act as a disincentive to bargaining, in circumstances where employers are already paying above modern award rates of pay.

[423] We have decided against adjusting wage rates in the copied State awards applying to Keolis Downer, Busways and Transdev, for reasons including our satisfaction that the wage rates in their copied State awards provide a safety net of fair minimum wages.

[424] In view of all the above matters, we are also satisfied that the current wage rates in the copied State awards applying to Transit Systems provide a safety net of fair minimum wages.

[425] Accordingly, having regard to the NMW determined in this Review and the relevant statutory considerations (including in ss.3, 577 and 578), we consider that the Review increase to modern award minimum wages should *not* be applied to the copied State awards derived from the 2018 Bus Operations Award and the 2018 Senior and Salaried Officers Award applying to Transit Systems and its transferring employees.

(ii) *Other copied State awards and our determination*

[426] As set out above, we have decided that the copied State awards applying to:

⁴²³ It appears this rate was increased to \$1,140.40 from the first pay period commencing on or after 1 January 2022 - see [http://www.irgazette.justice.nsw.gov.au/irc/ircgazette.nsf/\(PublicationsByTitle\)/B7A53515B002068DCA2588020022F0E1?OpenDocument](http://www.irgazette.justice.nsw.gov.au/irc/ircgazette.nsf/(PublicationsByTitle)/B7A53515B002068DCA2588020022F0E1?OpenDocument). However, this figure is still below that being paid by Transit Systems.

⁴²⁴ Transit Systems submissions in response to background paper, 1 June 2022 attaching affidavit of Jamie Sinclair, 1 June 2022 [14].

⁴²⁵ Ibid.

- Keolis Downer, Busways and Transdev, and their transferring employees (derived from the 2021 Senior and Salaried Officers Award, the 2020 Bus Engineering and Maintenance Award and the 2021 Bus Operations Award), and
- Transit Systems and its transferring employees (derived from the 2018 Bus Operations Award and the 2018 Senior and Salaried Officers Award) (together, the **excepted copied State awards**)

will not be subject to a wage increase in this Review.

[427] We now turn to the wage rates in other copied State awards.

[428] As related earlier, Part 6-3A is directed to preserving the employment terms and conditions of the transferring employees as they would have been in the absence of the transfer of business to a national system employer, subject, of course, to the Commission’s obligation to maintain a safety net of fair minimum wages.

[429] In the ordinary course, copied State awards operate for a 5-year period. In reviewing and adjusting wages in copied State awards in an annual wage review, the Commission is required to ensure that a safety net of fair minimum wages is maintained. In circumstances where copied State awards do not themselves provide for the maintenance of wages for their term of operation (such as, for example, by specifying annual percentage wage increases), it will be appropriate for the Commission to consider applying wage increases determined in the Review process to them.

[430] There is no information before the Panel that any copied State awards other than the excepted copied State awards, appropriately maintain a safety net of fair minimum wages.

[431] Since the 2017–18 Review, the Commission’s approach to copied State awards has been that annual wage review 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.’⁴²⁶

[432] No other interested parties have raised concerns about ‘double-dipping’ or applied to the Commission for a different outcome in respect of any copied State awards (other than the excepted copied State awards).

[433] Accordingly, in the circumstances of this Review and for the reasons given earlier in this decision in relation to modern award minimum wages, we have decided that the wage rates in copied State awards other than the excepted copied State awards will be increased by the same percentage amount we have determined shall apply to modern award minimum wages.

[434] Our determination in this Review is that the wages in all copied State awards, other than the excepted copied State awards, are increased by 4.6 per cent, subject to a minimum increase of \$40 per week, from the first full pay period on or after 1 July 2022.

⁴²⁶ See [2018] FWCFB 2 at [43], [452] and [495] and [2018] FWCFB 3500 at [446]–[451]

[435] We note the Commission is not required to publish the rates of the wages in copied State awards as so varied.

6.4. *The Panel’s approach to copied State awards going forward*

[436] We note that none of the copied State awards applying to the Employer parties appear to provide for wage increases after 1 July 2022. Therefore, adjustments to wage rates in these copied State awards may not raise the same concerns in future reviews.

[437] ACCI and ABI propose the Commission adopt a new approach to adjusting wages in copied State awards. They submit the Panel should only apply the Review decision to copied State awards on a case-by-case basis, following submissions by parties.⁴²⁷ ABI submits that to the extent that the Commission wishes to adopt a default approach to increasing copied State award wage rates, it should only seek to increase such wages to align with modern award rates.⁴²⁸

[438] ABI submits that the current default approach of applying the Review increases to all copied State awards has a disproportionately negative impact on NSW businesses.⁴²⁹ ABI submits that NSW has been ‘the biggest divestor of state assets by total value over the past five to ten years, divesting an estimated \$19.54 billion in assets between 2014 and 2019 alone’, and that this trend is likely to continue.⁴³⁰ ABI submits that ‘it is reasonable to conclude that the current lion’s share of copied State awards in operation apply to businesses operating in NSW.’⁴³¹

[439] ABI submits that it would be unfair to force the businesses covered by the relevant copied State awards to provide 2 wage increases—one imposed by the IRCNSW and the other through annual wage review decisions.⁴³² Further, the Panel should consider the compounding effect of wage increases, where ‘the monetary cost of the two increases is greater than their combined sum had they been applied at the same time.’⁴³³ ABI submits that it is ‘particularly unfair on businesses which, as a result of standard contractual terms surrounding the sale of a state asset, are often legally constrained from taking measures to ameliorate unplanned labour cost increases.’⁴³⁴

[440] ABI also submits that the NSW-based awards provide employees with 16 to 52 per cent more remuneration than the relevant modern awards would for the same work, which ‘is of fundamental importance when it comes to the Commission exercising a discretion to vary a minimum payment safety net.’⁴³⁵ Accordingly, ABI submits that the Panel’s current approach

⁴²⁷ ACCI submission in reply, 10 May 2022, at paras 188, 203; and ABI submission in reply, 6 May 2022, at paras 4, 5 and 19.

⁴²⁸ ABI submission in reply, 6 May 2022, at para. 19.

⁴²⁹ Ibid at paras 7–13.

⁴³⁰ Ibid at para. 9.

⁴³¹ Ibid.

⁴³² Ibid at para. 14.

⁴³³ Ibid at para. 15.

⁴³⁴ Ibid at para. 16, citing Busways submission, 1 April 2022, at para. 75.

⁴³⁵ ABI submission in reply, 6 May 2022, at para. 12.

fails to properly take into consideration the jurisdictional differences that exist in the setting of federal and State award wage rates.⁴³⁶

[441] ABI submits that the Commission’s current approach (since the 2017-18 Review decision) has placed an ‘unrealistic expectation’ on employers to be aware of and understand the history and the interaction between copied State awards and Review decisions.⁴³⁷

[442] Similarly, ACCI submits that the Commission’s current approach ‘places the entire burden and obligation onto those covered by copied State awards to have to argue the case year by year in order to avoid potentially being subjected a double wage increase hit’.⁴³⁸

‘This seems particularly unfair and burdensome ... to require individual employers to have a deep and thorough understanding and awareness of both statutory and case law history, that even Justice Rares in the recent Federal Court decision in *Australian Rail, Tram and Bus Industry Union v Transit Systems West Services Pty Ltd*, acknowledged “*descends into considerable complexity*”, and in circumstances where those covered by a copied State award have very little to no control or ability under the FW Act to amend wage increases already predetermined to apply to them under a State award.’⁴³⁹

[443] ACCI observes that ‘the Panel is not in a position to know with certainty how many copied State awards are in operation, how many will be affected by a decision to exercise discretion and how those individual copied State awards subject to its decision will be affected by the uniform application of the Annual Wage Review decision to all copied State awards.’⁴⁴⁰ ACCI submits that this issue is heightened by the lack of requirement for the Panel to publish Review variations to copied State award rates.⁴⁴¹

[444] Accordingly, ACCI submits that the inability of the Panel ‘to be able to identify and understand who is affected by its decision should warrant greater discretion in applying the Annual Wage review decision to copied State awards and should in ACCI’s view, warrant the FWC amending its currently uniform approach in favour of a far more cautious and risk averse position going forward.’⁴⁴²

[445] We note that in its 1 April 2022 submissions, ACCI submitted that any increase determined for modern award minimum wages be applied to copied State awards.⁴⁴³ ABI made no initial submissions as to how copied State awards should be dealt with by the Panel. It is only by their submissions in reply dated 10 May 2022 and 6 May 2022 respectively, that ACCI and ABI have put the positions outlined above.⁴⁴⁴

⁴³⁶ Ibid at paras 7, 11.

⁴³⁷ Ibid at para. 18.

⁴³⁸ ACCI submission in reply, 10 May 2022, at para. 189.

⁴³⁹ Ibid at para. 190.

⁴⁴⁰ Ibid at para. 200, citing [2018] FWCFB 2 at [10].

⁴⁴¹ Ibid at para. 201.

⁴⁴² Ibid at para. 202.

⁴⁴³ ACCI submission, 1 April 2022, at para. 287.

⁴⁴⁴ ACCI submission in reply, 10 May 2022, from para. 178; and ABI submission in reply, 6 May 2022, from para. 4.

[446] We consider there has not been sufficient opportunity for interested persons and bodies to address ACCI's and ABI's submissions as to how copied State awards should be dealt with in future annual wage reviews. Accordingly, we have not determined that matter in this decision.

[447] We propose to hold a preliminary hearing in March 2023, to allow full argument as to how the Panel should deal with copied State awards in the 2022–23 Review and subsequent annual wage reviews.

7. Conclusion

[448] This Section sets out the outcome and other relevant matters to the Review.

[449] The national minimum wage order will contain:

- (a) A national minimum wage of \$812.60 per week or \$21.38 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 \$812.60 per week or \$21.38 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 Supported Wage System (SWS) Schedule;
- (c) Wages provisions for award/agreement free junior employees based on the percentages for juniors in the Miscellaneous Award 2020 applied to the national minimum wage;
- (d) The apprentice wage provisions and the National Training Wage Schedule in the Miscellaneous Award 2020 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.

[450] The NMW order will operate from 1 July 2022.

[451] Modern award minimum wages will be increased by 4.6 per cent subject to a minimum increase for adult award classifications of \$40 per week. This figure is based on a 38-hour week for a full-time employee, consistent with s.62 of the Act.

[452] Modern award minimum wages which are to be increased by \$40 increase per week and \$1.05 per hour (on the basis of a 38-hour week) will be adjusted using the same approach as used in the 2009–10 Review.⁴⁴⁵ The Commission will seek further feedback from the relevant parties on a small number of awards where the award is silent on the method of calculation for a flat dollar increase and the approach used in the 2009–10 Review cannot be replicated.⁴⁴⁶

[453] The default or usual position is that variations to modern award minimum wages arising from a Review operate from 1 July in the financial year following the Review.

⁴⁴⁵ Including the National Training Wage. See [2010] FWAFB 4000

⁴⁴⁶ Modern awards where the application of a flat dollar amount for certain rates and allowances is unclear include: the *Mannequins and Models Award 2020* [MA000117], *Marine Towing Award 2020* [MA000050], *Market and Social Research Award 2010* [MA000030] and 8 enterprise and State Reference Public Sector awards.

[454] The variation determinations in respect of the following awards will operate from 1 October 2022:

- *Aircraft Cabin Crew Award 2020*
- *Airline Operations – Ground Staff Award 2020*
- *Air Pilots Award 2020*
- *Airport Employees Award 2020*
- *Airservices Australia Enterprise Award 2016*
- *Alpine Resorts Award 2020*
- *Hospitality Industry (General) Award 2020*
- *Marine Tourism and Charter Vessels Award 2020*
- *Registered and Licensed Clubs Award 2020*
- *Restaurant Industry Award 2020.*

[455] The variation determinations in respect of all other modern awards, modern enterprise awards and State reference public sector awards will operate from 1 July 2022.

[456] The Panel is required to review and may make one or more determinations varying wages in relevant transitional instruments as part of the Review.

[457] Our determination in this Review is that the wages in all relevant transitional instruments are increased by 4.6 per cent subject to a minimum increase of \$40 per week on the basis of a 38-hour week. This determination comes into operation on 1 July 2022 and takes effect in relation to a particular employee on the start of the employee's first full pay period on or after 1 July 2022.

[458] The Commission is not required to publish the rates of the wages in the relevant transitional instruments as so varied.

[459] With regard to copied State awards, our determination in this Review is that the wages in all copied State awards, other than the excepted copied State awards, are increased by 4.6 per cent, subject to a minimum increase of \$40 per week on the basis of a 38-hour week. This determination comes into operation on 1 July 2022 and takes effect in relation to a particular employee on the start of the employee's first full pay period on or after 1 July 2022.

[460] The Commission is not required to publish the rates of the wages in the relevant copied State awards as so varied.

[461] 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

Appearances:

Melbourne (via Microsoft teams):

Mr Martin Hehir, Ms Sharon Huender and Ms Jennifer Wettinger on behalf of the Commonwealth Attorney-General's Department

Ms Laura Berger-Thomson, Ms Ineke Redmond and Mr Damian Mullaly on behalf of the Treasury.

Mr Trevor Clarke, Mr Lachlan Kerwood-McCall and Ms Lanet Koeu on behalf of the Australian Council of Trade Unions

Mr Stephen Smith, Ms Aneeq Sarwar and Dr Peter Burn on behalf of the Australian Industry Group

Mr Scott Barklamb, Mr Simon Farrow and Mr Peter Grist on behalf of the Australian Chamber of Commerce and Industry

Mr Paul Zahra on behalf of the Australian Retailers Association

Ms Angeline Lee and Mr Jos de Bruin on behalf of the Master Grocers Australian Limited

Mr Wes Lambert on behalf of the Restaurant and Catering Association of Australia

Mr Stephen Mackie (of counsel) and *Ms Megan Kavanagh* on behalf of the Australian Catholic Council for Employment Relations

Hearing details:

Melbourne (via Microsoft teams).

2022.

18 May.

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	Submission in reply	10 May 2022
	Responses to questions from consultations	19 May 2022
Australian Chamber of Commerce and Industry	Initial submission	1 April 2022
	Submission in reply	10 May 2022
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Australian Chamber–Tourism	Submission regarding the National Accounts March quarter 2022	3 June 2022
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Independent Cinemas Australia	Initial submission	31 May 2022
Keolis Downer	Initial submission Submission on copied State awards background paper	1 April 2022 1 June 2022
Master Grocers Australia Limited	Initial submission	29 March 2022
National Farmers' Federation	Initial submission Submission in reply	31 March 2022 16 May 2022
National Retail Association	Initial submission Submission in reply Submission regarding the National Accounts March quarter 2022	1 April 2022 6 May 2022 3 June 2022
New South Wales Government	Initial submission	1 April 2022
Queensland Government	Initial submission	5 May 2022
Restaurant & Catering Industry Association	Initial submission	28 March 2022
Retail and Fast Food Workers Union Incorporated	Submission in reply	9 May 2022
Shop Distributive and Allied Employees' Association	Initial submission Submission in reply	1 April 2022 10 May 2022

Organisation	Document	Date
	Submission regarding the National Accounts March quarter 2022	3 June 2022
South Australian Wine Industry Association	Initial submission	31 March 2022
Transdev Australasia	Initial submission	1 April 2022
	Submission on copied State awards background paper	1 June 2022
Transit Systems	Initial submission	1 April 2022
	Submission on copied State awards background paper	1 June 2022
	Response to question at hearing on copied State awards	3 June 2022
Treasury	Submission in reply	10 May 2022
Victorian Government	Initial submission	31 March 2022

Appendix 2: Proposed Minimum Wages Adjustments

[1] The Panel received submissions from the Australian Government, most state governments, parties that represent the interests of employers and employees, and other bodies. Proposals with respect to the NMW and modern award minimum wages were once again highly polarised. Several parties proposed substantial increases to the NMW and modern award minimum wages, while employer groups ranged from no increase at all to the NMW and modern award minimum wages; increases of between 2.5 and 3 per cent and an approach that had regard to the underlying rate of inflation.

[2] The Australian Government and some state governments did not propose a quantum increase to the NMW and modern award minimum wages.⁴⁴⁷

[3] The Australian Government initially submitted that the Review decision should support the economy and labour market while balancing improving living standards and the viability of businesses.⁴⁴⁸ In a later submission the Australian Government recommended that the Panel ‘ensures that the real wages of Australia’s low-paid workers do not go backwards’.⁴⁴⁹ The New South Wales Government also advised an approach that is balanced and sensitive to the economic and labour market conditions.⁴⁵⁰ The Queensland Government proposed an increase that is ‘fair and reasonable’.⁴⁵¹ The Government of South Australia recommended a ‘fair and balanced approach’.⁴⁵² The Government of Western Australia suggested the Panel should continue to adopt a balanced approach and award a meaningful increase.⁴⁵³

[4] The Victorian Government proposed a 3.5 per cent increase to the NMW and modern award minimum wages.⁴⁵⁴

[5] The Australian Catholic Council for Employment Relations (ACCER) submitted a 6.5 per cent increase to the NMW and a minimum of 6.5 per cent increase to the C13 to C10 rates.⁴⁵⁵

[6] The ACTU proposed a uniform increase of 5 per cent to the NMW and modern award minimum wages.⁴⁵⁶ This was supported by the ASU and SDA.⁴⁵⁷ This was revised up to 5.5 per cent in the ACTU’s submission in reply.⁴⁵⁸

⁴⁴⁷ See Australian Government submission, 1 April 2022; New South Wales Government submission, 1 April 2022; Queensland Government submission, 6 May 2022; Government of South Australia submission, 6 May 2022; Government of Western Australia submission, 1 April 2022.

⁴⁴⁸ Australian Government submission, 1 April 2022 at para. 2.

⁴⁴⁹ Australian Government submission, 3 June 2022, at para. 5.

⁴⁵⁰ NSW Government submission, 1 April 2022 at para. 5.

⁴⁵¹ Queensland Government submission, 6 May 2022, at p. 2.

⁴⁵² Government of South Australia submission, 6 May 2022, at para. 3.

⁴⁵³ Government of Western Australia submission, 1 April 2022 at paras 6–7.

⁴⁵⁴ Victorian Government submission, 1 April 2022, at paras 4; 111.

⁴⁵⁵ ACCER submission, 1 April 2022, at para. 9.

⁴⁵⁶ ACTU submission, 1 April 2022, at para. 4.

⁴⁵⁷ ASU submission, 1 April 2022, at p. 3; SDA submission, 1 April 2022, at p. 1.

⁴⁵⁸ ACTU submission in reply, 8 May 2022, at para. 2.

[7] ACCI and NRA proposed an increase to the NMW and modern award minimum wages of up to 3 per cent.⁴⁵⁹ ACCI supported deferring increases to modern awards relevant to aviation and tourism, accommodation and food services and arts and recreation.⁴⁶⁰ NRA submitted a deferred operative date for the Restaurant and Hospitality Awards to 1 November 2022.⁴⁶¹ ABI recommended an increase of between 2.5 and 3 per cent and a deferred increase to in modern awards consistent with the 2020–21 Review.⁴⁶² Ai Group proposed an increase of 2.5 per cent to the NMW and modern award minimum wages and also supported a deferral of increases to modern awards in the aviation and tourism, accommodation and food services, arts and recreation services, and retail trade sectors consistent with 2020–21 Review.⁴⁶³ The South Australian Wine Industry Association (SAWIA) proposed that if an increase is granted, it should be no higher than 2 per cent.⁴⁶⁴

[8] The ARA recommended an increase equal to the underlying rate of inflation (as measured by the trimmed mean).⁴⁶⁵

[9] MGA recommended no increase, however, proposed that if an increase is granted then it should be 0.5 per cent.⁴⁶⁶ R&CA proposed no increase be granted but that any increase should take effect 12 months after the previous increase.⁴⁶⁷

[10] The Australian Council of Social Service (ACOSS) recommended that the Panel increase real minimum wages and that decisions on the levels of minimum wages be informed based on a benchmark of 60 per cent of full-time median wages.⁴⁶⁸

[11] The AMWU proposed an increase of \$45 per week to the NMW, with a staged process to 60 per cent of full-time median weekly earnings by 2025.⁴⁶⁹ Similarly, Adam Bandt MP also recommended that the NMW reach 60 per cent of the median wage.⁴⁷⁰

⁴⁵⁹ ACCI submission in reply, 10 May 2022, at para. 11; NRA submission, 1 April 2022, at para. 1.1.

⁴⁶⁰ ACCI submission in reply, 10 May 2022, at para. 21.

⁴⁶¹ NRA submission regarding the National Accounts March quarter 2022, 3 June 2022, at para. 4.2.

⁴⁶² ABI initial submission, 1 April 2022, at p. 3.

⁴⁶³ Ai Group submission in reply, 10 May 2022, at p. 2.

⁴⁶⁴ SAWIA initial submission, 31 March 2022, at p. 7.

⁴⁶⁵ ARA submission, 1 April 2022, at pp. 2, 5.

⁴⁶⁶ MGA submission, 29 March 2022, at para. 14.

⁴⁶⁷ R&CA submission, 28 March 2022, at paras 22; 24.

⁴⁶⁸ ACOSS submission, 25 March 2022, at p. 19.

⁴⁶⁹ AMWU submission, 1 April 2022, at p. 2.

⁴⁷⁰ Adam Bandt MP submission, 1 April 2022, at p. 2.

Table A1: 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		
Victorian Government	At least a 3.5 per cent increase, applicable to all		
Government of Western Australia	No quantum specified		
Australian Council of Trade Unions	5.5 per cent increase, applicable to all		
Australian Industry Group	2.5 per cent increase, applicable to all		Defer increase for awards in aviation and tourism, accommodation and food services, arts and recreation services, and retail trade sectors consistent with 2020–21 Review
Australian Chamber of Commerce and Industry	3 per cent, applicable to all		Defer increase for awards in aviation and tourism, accommodation and food services, arts and recreation services
Australian Chamber–Tourism	No quantum specified		Defer increase in awards mapped to Aviation and tourism, Accommodation and food services and Arts and recreation services to 1 November 2022
Australian Council of Social Service	No quantum specified, however, there should be an increase in real minimum wages informed by benchmark estimates (60 per cent of full-time median wages)		

Submission	Proposal		
	National minimum wage	Modern award minimum wages	Exemption/deferral sought
Australian Catholic Council for Employment Relations	6.5 per cent increase	At least 6.5 per cent increase to C13 to C10 rates	
Australian Business Industrial and Business NSW	Between 2.5 and 3 per cent increase, applicable to all		Defer increase in modern awards consistent with 2020–21 Review
Australian Retailers Association	Equal to the rate of underlying inflation (trimmed mean)		
Housing Industry Association	No quantum specified		Deferral of commencement, no date specified
Master Grocers Australia Limited	No quantum specified	No increase. If an increase is granted it should be 0.5 per cent	
National Farmers' Federation	No quantum specified		
National Retail Association	No more than 3 per cent, applicable to all		Defer increase for the Hospitality Award and Restaurant Award to 1 November 2022
Restaurant & Catering Industry Association	No increase		Any increase should take effect 12 months after the previous increase
South Australian Wine Industry Association	If increase is granted, no higher than 2 per cent, applicable to all		
Australian Manufacturing Workers' Union	\$45 per week increase, with a staged process to 60 per cent of full-time median weekly earnings by 2025	No quantum specified	
Australian Services Union	5.5 per cent increase, applicable to all		
RAFFWU	Increase to at least \$26 per hour	Increase rates in retail, miscellaneous and fast food awards to a	

Submission	Proposal		
	National minimum wage	Modern award minimum wages	Exemption/deferral sought
		minimum of \$26 per hour	
Shop Distributive and Allied Employees' Association	5 per cent increase, applicable to all		
Independent Cinemas Australia	No quantum specified		Defer increase in Broadcasting, Recorded Entertainment and Cinemas Award to 2023
Busways	No quantum specified		No increase for State Transit Authority copied State awards
Keolis Downer	No quantum specified		No increase for State Transit Authority copied State awards. ⁴⁷¹ If there is an increase it should only be what is required to 'top-up' the increase to match that awarded
Transdev Australasia	No quantum specified		No increase for State Transit Authority copied State awards ⁴⁷²
Transit Systems	No quantum specified		Vary or revoke previous increases for State Transit Authority copied State awards, and any increase not exceed rate of pay for same work under relevant modern award. If

⁴⁷¹ State Transit Authority Senior and Salaried Officers' Enterprise (State) Award 2021 and State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2020.

⁴⁷² State Transit Authority Senior and Salaried Officers' Enterprise (State) Award 2021, State Transit Authority Bus Engineering and Maintenance Enterprise (State) Award 2020 and State Transit Authority Bus Operations Enterprise (State) Award 2021.

Submission	Proposal		
	National minimum wage	Modern award minimum wages	Exemption/ deferral sought
			previous increases not varied or revoked, no increase
Adam Bandt MP	Increase to 60 per cent of the median wage	No quantum specified	
Barlow, S	\$5 per hour increase, applicable to all		

Appendix 3: Poverty lines

Table A2: Ratio of disposable income of selected households earning various wage rates to a 60 per cent median income poverty line

	December 2016					December 2020					December 2021				
	60% median income PL (\$ pw)	Disposable income as a ratio of 60% median income PL				60% median income PL (\$ pw)	Disposable income as a ratio of 60% median income PL				60% median income PL (\$ pw)	Disposable income as a ratio of 60% median income PL			
		C14	C10	C4	AWOTE		C14	C10	C4	AWOTE		C14	C10	C4	AWOTE
Single adult	519.48	1.17	1.31	1.51	2.25	606.87	1.12	1.29	1.48	2.18	636.50	1.10	1.25	1.44	2.09
Single parent working FT, 1 child	675.32	1.29	1.41	1.54	1.95	788.94	1.21	1.33	1.46	1.82	827.46	1.17	1.29	1.42	1.76
Single parent working PT, 1 child	675.32	0.88	0.96	1.05	1.39	788.94	0.80	0.88	0.97	1.31	827.46	0.78	0.86	0.94	1.27
Single parent working FT, 2 children	831.16	1.19	1.29	1.40	1.73	971.00	1.09	1.20	1.31	1.58	1018.41	1.06	1.16	1.26	1.53
Single parent working PT, 2 children	831.16	0.86	0.92	0.99	1.27	971.00	0.76	0.83	0.90	1.18	1018.41	0.74	0.80	0.88	1.15
Single-earner couple (with NSA/JSP)	779.22	1.03	1.03	1.04	1.50	910.31	1.19	1.27	1.34	1.62	954.76	0.98	1.00	1.01	1.41
Single-earner couple	779.22	0.80	0.89	1.01	1.50	910.31	0.77	0.86	0.99	1.46	954.76	0.74	0.84	0.96	1.41
Single-earner couple, 1 child (with NSA/JSP)	935.06	1.06	1.07	1.11	1.41	1092.37	1.13	1.19	1.27	1.32	1145.71	0.98	1.00	1.02	1.27
Single-earner couple, 1 child	935.06	0.93	1.02	1.11	1.41	1092.37	0.87	0.96	1.06	1.32	1145.71	0.85	0.93	1.02	1.27
Single-earner couple, 2 children (with NSA/JSP)	1090.90	1.02	1.03	1.06	1.32	1274.44	1.05	1.11	1.17	1.20	1336.66	0.93	0.95	0.96	1.16
Single-earner couple, 2 children	1090.90	0.91	0.98	1.06	1.32	1274.44	0.83	0.91	0.99	1.20	1336.66	0.81	0.89	0.96	1.16
Dual-earner couple	779.22	1.21	1.38	1.58	2.36	910.31	1.16	1.34	1.54	2.30	954.76	1.13	1.31	1.50	2.23
Dual-earner couple, 1 child	935.06	1.23	1.32	1.44	1.97	1092.37	1.14	1.25	1.35	1.91	1145.71	1.11	1.21	1.31	1.86
Dual-earner couple, 2 children	1090.90	1.16	1.24	1.34	1.69	1274.44	1.07	1.16	1.23	1.64	1336.66	1.03	1.12	1.19	1.59

Source: Statistical report (version 9), 8 June 2022, Table.8.6; ABS, *Average Weekly Earnings, Australia*, November 2021; ABS, *Household Income and Wealth, Australia*, 2015–16 financial year; ABS, *Household Income and Wealth, Australia*, 2019–20 financial year; Fair Work Commission modelling; *Manufacturing and Associated Industries and Occupations Award 2010*; *Manufacturing and Associated Industries and Occupations Award 2020*; Melbourne Institute of Applied Economic and Social Research, *Poverty Lines: Australia*, December quarter 2021.

Appendix 4: Research for Annual Wage Reviews

Date	Title	Research report no.
February 2022	Experimental estimates for a Consumer Price Index for low-paid households	1/2022
June 2021	An assessment of the economic effects of COVID-19 – Version 5	5/2021
May 2021	An assessment of the economic effects of COVID-19 – Version 4	4/2021
April 2021	An assessment of the economic effects of COVID-19 – Version 3	3/2021
February 2021	Labour market transitions of workers during COVID-19	2/2021
February 2021	An assessment of the economic effects of COVID-19 – Version 2	1/2021
December 2020	An assessment of the economic effects of COVID-19 – Version 1	4/2020
February 2020	Prevalence and persistence of low-paid award-reliant employment	1/2020
February 2020	Budget standards: international measures and approaches	2/2020
February 2020	Modern Awards Database: an introduction	3/2020
February 2019	Overview of research to inform the Annual Wage Review 2018–19	
February 2019	Developments in wages growth	1/2019
February 2019	Insights into underemployment	2/2019
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

Date	Title	Research report no.
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
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 <i>Fair Work Act 2009</i> and the <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i>	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

Date	Title	Research report no.
February 2010	An overview of compositional change in the Australian labour market and award reliance	1/2010

Appendix 5: Copied State awards

The statutory framework for copied State awards

[1] Prior to December 2012, the Act only preserved an employee’s employment terms and conditions in the circumstances of a transfer of business, when the transfer was between 2 national system employers.⁴⁷³

[2] The *Fair Work Amendment (Transfer of Business) Act 2012* (Cth) inserted Part 6-3A into the Act with effect from 5 December 2012.

[3] Part 6-3A of the Act largely reflects the transfer of business provisions in Part 2-8 of the Act. It provides for the transfer of certain terms and conditions of employment when there is a transfer of business from a non-national system employer that is a State public sector employer⁴⁷⁴ (called ‘the old State employer’) to a national system employer (called ‘the new employer’).⁴⁷⁵ Part 6-3A applies where there is a transfer of business from a State public sector employer in New South Wales (NSW), Queensland, South Australia, Tasmania or Western Australia to a national system employer.

[4] There is a transfer of business between the old State employer and the new employer if the following requirements are satisfied:

- the employment of a person who is a public sector employee of the old State employer has terminated
- within 3 months after the termination, the person becomes employed by the new employer
- the person performs the same, or substantially the same, work (the ‘transferring work’) for the new employer as they performed for the old State employer, and
- there is a connection between the old State employer and the new employer as described in ss.768AD(2)–(4) (in broad terms, where the old State employer transfers assets or outsources work to the new employer, or the new employer is an associated entity of the old State employer).⁴⁷⁶

[5] A transfer of business involves the ‘transfer of employment’ of one or more employees of the old State employer to the new employer. Each of those employees is a ‘transferring employee’.⁴⁷⁷

[6] The Explanatory Memorandum for the *Fair Work Amendment (Transfer of Business) Bill 2012* (EM) outlines the scheme of the Bill as follows:

⁴⁷³ By operation of Fair Work Act Part 2-8.

⁴⁷⁴ Section 12 of the Fair Work Act contains definitions of ‘State public sector employer’ and ‘State public sector employee’.

⁴⁷⁵ See *ibid.* s.768AD(1).

⁴⁷⁶ *Ibid.* ss.768AD(1)(a)-(d).

⁴⁷⁷ *Ibid.* ss.768AE(1) and 768AD(1)(a).

‘Currently, where a non-national system employee transfers to employment with a national system employer due to a transfer of business (e.g. an outsourcing arrangement due to a restructure or pursuant to an arrangement for the sale of the employer’s assets), the employee’s terms and conditions of employment are determined by the industrial instrument governing employment with the new employer. This means that the employee loses the benefit of the terms and conditions in the industrial instrument with the non-national system employer. This will be the case even though they are performing the same work. The amendment Bill will ensure that a State public sector employee will continue to enjoy the terms and conditions of employment with the non-national system employer through the preservation of those terms and conditions where they become transferring employees in a transfer of business to a national system employer ...’⁴⁷⁸

[7] Where there is a transfer of business, Part 6-3A provides for certain employment terms and conditions of the transferring employee’s employment with the old State employer to be transferred to their employment with the new employer. This is achieved by creation of a new instrument—a ‘copied State instrument’—for each transferring employee. The new instrument is a federal instrument and is enforceable under the Act.⁴⁷⁹

[8] The EM describes this as follows:

‘18. The transfer of those terms and conditions is achieved by creating a new federal instrument (a copied State instrument), that ‘copies’ the terms and conditions in the State award and/or State employment agreement for the employee as they were immediately before the time of her or his termination of employment with the old employer.

19. The general rule is that each transferring employee will have his or her own copied State instrument(s) because they may have different terms and conditions to each other at the time their employment is terminated (e.g. because each termination of employment may occur at different times).’⁴⁸⁰

[9] There are 2 types of copied State instrument—a ‘copied State award’ and a ‘copied State employment agreement’.⁴⁸¹ A copied State award copies the terms of a State award⁴⁸² that covered the transferring employee and the old State employer immediately before the termination of the employee’s employment with the old State employer.⁴⁸³ The copied State award is taken to come into operation immediately after the ‘termination time’—the start of the day the employment of the employee is terminated by the old State employer⁴⁸⁴—and to

⁴⁷⁸ Explanatory Memorandum for the *Fair Work Amendment (Transfer of Business) Bill 2012* (Cth) p.4.

⁴⁷⁹ Fair Work Act, s.768AG.

⁴⁸⁰ Explanatory Memorandum for the *Fair Work Amendment (Transfer of Business) Bill 2012* (Cth) [18]–[19].

⁴⁸¹ Fair Work Act, s.768AH.

⁴⁸² ‘State award’ is defined in s.768AJ.

⁴⁸³ Fair Work Act, s.768AI.

⁴⁸⁴ *Ibid.* s.768AI and s.768AE(2), and s.768AO(1).

include the same terms as were in the original State award immediately before the termination time.⁴⁸⁵

[10] Generally, the copied State award *covers* the transferring employee and the new employer in relation to the transferring work from the employee's 're-employment time'.⁴⁸⁶ The copied State award will *apply* to the transferring employee/new employer (and be enforceable by them) if the copied State award covers the employee/new employer and is in operation, no other provision of the Act has the effect that the copied State award does not apply, and immediately before the employee's termination time, the employee/old State employer would have been required to comply with the terms of the original State award or have been entitled to enforce it.⁴⁸⁷

[11] While a copied State award for a transferring employee is in operation and covers the employee, or an employer (whether the new employer or another national system employer) or another person in relation to the employee, a modern award will not cover any of them in relation to the employee.⁴⁸⁸

[12] A copied State award can be terminated only in limited circumstances,⁴⁸⁹ but will cease to cover the transferring employee if, after the employee's re-employment time, an enterprise agreement starts to cover the employee in relation to the transferring work.⁴⁹⁰

[13] Unless terminated earlier, a copied State award ceases to operate at the end of 5 years (the default period), starting on the day the employee's termination time occurred.⁴⁹¹ After that time, the transferring employee generally reverts to the fair work instruments that apply at the new employer's workplace.⁴⁹²

[14] Where a copied State award ceases to operate through effluxion of time and as a result a modern award applies to the transferring employee, this is not intended to result in a reduction in take-home pay of the employee.⁴⁹³ Where an employee does suffer a reduction in take-home pay as a result, the Commission may make a take-home pay order to remedy this.⁴⁹⁴ The take-

⁴⁸⁵ Fair Work Act s.768AI(2), and subject to other provisions in Part 6-3A.

⁴⁸⁶ Fair Work Act s.768AN. 'Re-employment time' of a transferring employee is the start of the day the employee becomes employed by the new employer: s.768AE(3).

⁴⁸⁷ Fair Work Act ss.768AM, 768AN and 768AG.

⁴⁸⁸ Fair Work Act s.768AS(1).

⁴⁸⁹ See Fair Work Act s.768AY.

⁴⁹⁰ Fair Work Act s.768AU(2).

⁴⁹¹ Fair Work Act s.768AO(2)(a). Section 768AO(2) also provides for regulations to be made to prescribe a longer period of operation for a copied State award or to allow the Commission to make an order extending the period of operation of a copied State award. No such regulations have been made.

⁴⁹² The copied State award will cease to cover the transferring employee (s.768AN(6)), so that s.768AS(1) will no longer exclude modern award coverage and s.768AU will no longer exclude coverage by a pre-existing enterprise agreement.

⁴⁹³ Fair Work Act s.768BR(1). Section 768BR(3) sets out where a transferring employee suffers a 'reduction in take-home pay'.

⁴⁹⁴ Fair Work Act s.768BS(1).

home pay order will continue to apply to the employee for so long as the modern award continues to cover the employee.⁴⁹⁵

[15] Section 768AW of the Act specifies the circumstances in which the Commission may vary a copied State instrument (including a copied State award):

‘768AW Variation in limited circumstances

A copied State instrument for a transferring employee cannot be varied except under:

- (a) section 768AX24F⁴⁹⁶ or
- (b) item 20 of Schedule 3A to the Transitional Act (which deals with variation of discriminatory instruments) as that item has effect because of section 768BY; or
- (c) item 20 of Schedule 9 to the Transitional Act (which deals with variation of instruments in annual wage reviews) as that item has effect because of section 768BY; or
- (d) Division 4 of Part 3 of Schedule 11 to the Transitional Act (which deals with transfer of business) as that Division has effect because of section 768BY.’

[Emphasis added]

[16] Item 20 of Schedule 9 to the Transitional Act provides:

‘20 Variation of Division 2B State awards in annual wage reviews under the FW Act

- (3) In an annual wage review, the FWC may make a determination varying terms of a Division 2B State award relating to wages.
- (4) For that purpose, Division 3 of Part 2-6 of the FW Act (other than section 292) applies to terms of a Division 2B State award relating to wages in the same way as it applies to a modern award.’

[17] Section 768BY of the Act modifies relevant provisions of the Transitional Act. As a result, item 20 in Schedule 9 to the Transitional Act has effect in relation to a transferring employee as if a reference to a ‘Division 2B State award’ is a reference to a ‘copied State award for the transferring employee’.⁴⁹⁷ Accordingly, item 20 of Schedule 9 as modified by s.768BY of the Act, is to be read as follows:

⁴⁹⁵ Fair Work Act s.768BU. The note under this section observes that the take-home pay order will continue to apply even if an enterprise agreement starts to apply to the employee.

⁴⁹⁶ Fair Work Act s.768AX allows the Commission to vary a copied State instrument in certain circumstances including to resolve ambiguities or uncertainties or to better align the instrument with the working arrangements of the new employer’s enterprise.

⁴⁹⁷ See Fair Work Act s.768BY, including item 2 of the table in s.768Y(1) and column 3 of item 14 of the table in s.768BY(2).

20 Variation of copied State awards for the transferring employees in annual wage reviews under the FW Act

- (1) In an annual wage review, the FWC may make a determination varying terms of a **copied State award for the transferring employee** relating to wages.
- (2) For that purpose, Division 3 of Part 2-6 of the FW Act (other than section 292) applies to terms of a **copied State award for the transferring employee** relating to wages in the same way as it applies to a modern award.⁴⁹⁸

[18] As Division 3 of Part 2-6 (except s.292) applies to the terms of a copied State award relating to wages in the same way it applies to a modern award, in an annual wage review the Panel must review copied State award wages and may make one or more determinations varying wages in copied State awards.⁴⁹⁸

How have copied State awards been dealt with in previous annual wage reviews?

[19] Although not themselves transitional instruments, copied State awards have been dealt with in the transitional instruments chapter of previous annual wage review decisions. In the first annual wage review decision dealing with copied State awards—the 2012–13 Review—the Panel stated:

‘The third category of instruments came into existence in December 2012, when the Act was amended to provide for the continued operation of certain state awards 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. When this occurs, a copied State award is created which contains the same terms as the original state award at that point in time. The Panel is required to review, and, if appropriate, make a determination varying minimum wages in copied State awards.’⁴⁹⁹ [References omitted]

[20] In the 2012–13 Review, the Panel took into account the ACTU submission that the variation of copied State award wage rates should be differentiated depending on when wage increases under copied State awards came into effect:

‘The ACTU ... submitted that any increase to these rates should be differentiated on the basis of when they came into effect (as some copied State awards may include rates of pay that have been increased as a result of state Industrial Relations Commission minimum wage determinations in the previous 12 months). The ACTU therefore submitted that a flow on of the increase awarded in this decision should only apply to those copied State awards that do not include a minimum wage increase awarded by a state Industrial Relations Commission in the past 12 months, with those that include a state increase awarded in the second half of 2012 to receive 50 per cent, and those awarded in the first half of 2013 to receive no increase.’⁵⁰⁰

⁴⁹⁸ Fair Work Act s.285(2). Also see *Annual Wage Review 2016–17* [2018] FWCFB 2 at [14].

⁴⁹⁹ [2013] FWCFB 4000 at [556].

⁵⁰⁰ *Ibid* at [559].

[21] The Panel introduced a ‘tiered approach’ to increasing wages in copied State awards to prevent ‘double-dipping’:

‘We have decided that for copied State awards currently in operation, in order to limit the impact of any “double-dipping” as a result of this decision and minimum wage increases previously awarded by state Industrial Relations Commissions, a tiered increase will be applied to these instruments ...’⁵⁰¹

[22] In the 2012–13 Review decision, the tiered approach was applied to copied State awards as follows:

- the full minimum wage increase was applied to wage rates in copied State awards that were not the subject of a state minimum wage decision that commenced after 1 July 2012 and before 1 July 2013
- half the minimum wage increase was applied to wage rates in copied State awards that were the subject of a state minimum wage decision that commenced after 1 July 2012 and before 1 January 2013, and
- no increase was applied to wage rates in copied State awards that were the subject of a state minimum wage decision that commenced on or after 1 January 2013 and before 1 July 2013.⁵⁰²

[23] This tiered approach was applied by the Panel in subsequent annual wage reviews, up to and including the 2016–17 Review.⁵⁰³

[24] In a decision of 4 January 2018, the Panel proposed to address any ‘double dipping’ concerns on a case-by-case basis rather than by the tiered approach previously applied:

‘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.’⁵⁰⁴

[25] Parties were invited to comment on this *provisional* view in the context of the 2017–18 Review.⁵⁰⁵ As related by the Panel in those proceedings:

‘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,

⁵⁰¹ Ibid at [560]

⁵⁰² See *ibid*.

⁵⁰³ [2014] FWCFB 3500 at [572]; [2015] FWCFB 3500 at [536]; [2016] FWCFB 3500 at [593]; [2017] FWCFB 3500 at [699]

⁵⁰⁴ [2018] FWCFB 2 at [43]

⁵⁰⁵ *Ibid*.

notwithstanding that it does rely on parties to come forward should they contend for a different outcome.”

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.”

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.”

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.

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.

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.” 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.”⁵⁰⁶ [References omitted]

[26] As no party objected to the proposed approach, the Panel in the 2017–18 Review confirmed the provisional view expressed earlier and determined that the adjustment to the rates in modern awards determined in the 2017–18 Review would be applied to copied State awards.⁵⁰⁷

⁵⁰⁶ [2018] FWCFB 3500 at [446]–[451]

⁵⁰⁷ Ibid at [452] and [495]

[27] The Commission applied a similar methodology and reasoning in its next 3 annual wage reviews, to vary wages in copied State awards by the same amount as modern award minimum wages:

- 3 per cent in the 2018–19 Review;⁵⁰⁸
- 1.75 per cent for the 2019–20 Review;⁵⁰⁹ and
- 2.5 per cent for the 2020–21 Review.⁵¹⁰

[28] Until this Review, no party had sought to have the Commission apply a different increase, or no increase, to particular copied State awards. Accordingly, the Panel has not previously needed to address the considerations it may take into account in determining such applications.

⁵⁰⁸ [2019] FWCFB 3500 at [405] and [460].

⁵⁰⁹ [2020] FWCFB 3500 at [411] and [471].

⁵¹⁰ [2021] FWFCB 3500 at [309].