DECISION

Fair Work Act 2009
s.156—4 yearly review of modern awards

Four yearly review of modern awards—District Allowances
(AM2014/190)

DEPUTY PRESIDENT KOVACIC
DEPUTY PRESIDENT BULL
COMMISSIONER BISSETT CANBERRA, 29 NOVEMBER 2019

Four yearly review of modern awards – District allowances – applications to include district allowances in several awards – applications dismissed.

Introduction

[1] This decision concerns applications by the Shop, Distributive and Allied Employees Association (SDA) and the Australian Services Union (ASU) to vary several modern awards to provide for a district allowance.

[2] Specifically, the SDA seeks the inclusion of a district allowance in the following modern awards:

- the *General Retail Industry Award 2010*[1] (the GRIA);
- the *Fast Food Industry Award 2010*[2] (the FFIA);
- the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*[3] (the Vehicle Award);
- the *Pharmacy Industry Award 2010*[4] (the PIA); and
- the *Hair and Beauty Industry Award 2010*[5] (the HBIA).

[3] The district allowance which the SDA seeks is an hourly allowance of 4.28% of the standard rate in each of the above modern awards. The allowance would apply in the Shires of Ashburton, Broome, Carnarvon, Derby-West Kimberley, East Pilbara, Exmouth, Halls Creek, Shark Bay, Upper Gascoyne and Wyndham-East Kimberley, the City of Karratha and the Town of Port Hedland in Western Australia (together referred to as the SDA locations). In short, the SDA locations are all located in the Kimberley, Pilbara and Gascoyne regions of Western Australia.

[4] The ASU seeks the inclusion of a district allowance in the following modern awards:

- the *Airline Operations—Ground Staff Award 2010*[6] (the Ground Staff Award);
- the *Clerks—Private Sector Award 2010*[7] (the Clerks Award);
- the *Electrical Power Industry Award 2010*[8] (the EPIA);
- the *Legal Services Award 2010*[9] (the LSA);
- the *Local Government Industry Award 2010*[10] (the LGIA);
- the *Rail Industry Award 2010*[11] (the Rail Award); and
- the *Social, Community, Home Care and Disability Services Industry Award 2010*[12] (the SACS Award).

[5] The district allowance sought by the ASU would apply in specified local government areas in NSW (Yancowinna County and Parkes Shire), the Northern Territory (Alice Springs Town Council, Barkly Regional Council, City of Darwin, Jabiru Town Council, Katherine Town Council and Nhulunbuy Corporation), Queensland (Burdekin Shire Council, Cairns Regional Council, Cassowary Coast Regional Council, Charters Towers Regional Council, Hinchinbrook Shire Council, Maranoa Regional Council, Mount Isa City Council, Pal Island Shire Council, Shire of Bowen, Tablelands Regional Council, Torres Shire Council, Townsville City Council and Weipa Town Council) and Western Australia (City of Kalgoorlie-Boulder, the Shires of Ashburton, Broome, Carnarvon, Derby-West Kimberley, East Pilbara, Halls Creek, Shark Bay, Upper Gascoyne and Wyndham-East Kimberley, the City of Karratha and the Town of Port Hedland) (together referred to as the ASU locations). The allowance sought by the ASU ranges in quantum from $920 to $5,270 per annum depending on the location, with the quantum of the allowance doubled for an employee who has a dependent.[13] The locations and quantum of allowance reflected in the ASU's claim were drawn from the Australian Defence Force (ADF) Pay and Conditions Manual.

[6] The Australian Industry Group (AiG), Australian Business Industrial and NSW Business Chamber (ABI & NSWBC), the Pharmacy Guild of Australia (the Guild), the Motor Traders' Association of NSW, the Motor Trade Association of Western Australia and the Motor Trades Association of Queensland (together referred to the MTA Organisations), the Australian Retailers Association (ARA) and MGA Independent Retailers (Master Grocers Association – MGA), together referred to as the Employer Groups, all opposed the applications. AiG also appeared in the proceedings for Hair and Beauty Australia which supported and adopted AiG's submissions to the extent they related to the SDA's claim to vary the HBIA.

[7] Evidence was provided for the SDA by:

- Ms Makere (Manu) Brown, a part-time employee with Woolworths Port Hedland;[14]

- Ms Marites Giltrap, a full-time kitchen hand at McDonald's South Hedland restaurant;[15]

- Ms Foon Meng Cheng, a Customer Assistant at K-Mart's South Hedland store;[16]

- Mr David Carter, the Meat Manager at Woolworths Carnarvon;[17]

- Ms Gillian Nolan, a part-time employee with Woolworths Karratha;[18]

- Ms Shania Simons, a full-time employee with Woolworths Petrol in Broome[19] (Ms Simons was not required for cross-examination);

- Ms Sunserae Churchill, a part-time employee with Woolworths Port Hedland;[20]

- Ms Lea-Ann Hughes-Gage, who resides in Melbourne but had previously worked at Woolworths Port Hedland from September 2013 to March 2014 and November 2014 to April 2015[21] (Ms Hughes-Gage was not required for cross-examination); and

- Mr Peter O'Keeffe, Secretary of the SDA of Western Australia[22] (Mr O'Keeffe was not required for cross-examination).

[8] Evidence was given for the ASU by:

- Mr Malcolm Parker, a Plant Operator with the Town of Port Hedland;[23]

- Ms Jessica Rankin, a casual employee with Bloodwood Tree in South Hedland[24] (Bloodwood Tree is a not-for-profit organisation providing services and support to at risk Aboriginal and Torres Strait Islanders); and

- Mr Mark Lenton, an Electrical Designer with Essential Energy in Broken Hill (NSW).[25]

[9] The Employer Groups did not lead any witness evidence.

[10] For the reasons outlined below we have decided to dismiss the SDA and ASU applications.

Background

[11] In the latter part of 2014 the SDA and ASU made separate applications seeking the inclusion a district allowance in several modern awards. The SDA initially made applications in respect of four awards, with the Vehicle Award subsequently added (the five awards affected by the SDA's claim are set out at paragraph [2] above). The ASU made applications in respect of eleven awards, i.e. the seven awards set out at paragraph [4] above and four other awards.[26] The applications in respect of the four other awards were ultimately not pursued.

[12] In a decision issued on 11 February 2015 (the *2015 Decision*) [27] a differently constituted Full Bench rejected an application by the Australian Council of Trade Unions (ACTU) to *inter*

alia delete transitional provisions relating to district allowances from a number of modern awards. Some key aspects of the *2015 Decision* are worth repeating here to provide context to the matter currently before the Commission:

> "**[52]** Having considered the submissions presented, we decided to reject the ACTU's applications to delete the sunset provisions in the transitional district allowance provisions in modern awards.
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> **[53]** The main reason for this decision is simply that the current transitional district allowances provisions cannot be retained in awards consistent with s.154 of the Act. By the terms of those provisions, they operate only in respect of Western Australia and the Northern Territory. Subsection 154(1)(b) provides that a modern award must not include terms that "are expressed to operate in one or more, but not every, State or Territory." In these circumstances, it would be inappropriate to remove the sunset provisions and thereby purport to continue in operation the current district allowance provisions.
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> **[54]** Apart from this, we do not consider that those provisions can be retained in awards consistent with the modern awards objective (ss.134 and 138). In particular, we consider that the provisions in their present form are complex, difficult to understand and apply and contrary to what is sought to be achieved through the modern award system (see s.134(1)(f) and (g)).
>
> **[55]** Further, we do not consider that a proper case has been made out in the present matter for this Full Bench to depart from the decision taken by the Award Modernisation Full Bench in 2008, namely that the district allowances operating in Western Australia should be preserved in modern awards for a transitional period only and "until there is a proper opportunity to consider whether they should be a permanent feature of the awards and, if so, the basis for their fixation and adjustment." As we noted in our decision, no substantive case was advanced in the proceedings before us for the retention of the allowances applying in Western Australia. In this regard, it has been indicated that the ACTU and affiliated unions will seek to have provisions inserted into various modern awards which provide compensation for employees working in remote localities and/or under harsh conditions and which are drafted having regard to the relevant provisions of the Act. This may provide the opportunity for the "full examination of all matters relevant to the allowances" to be undertaken, as contemplated by the Award Modernisation Full Bench.
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> **[56]** The position regarding the Northern Territory allowances is somewhat different. We note that there were very limited submissions put to us which specifically addressed these allowances. Given the history of the allowances and the decisions taken by industrial tribunals regarding their nature and continuing relevance, we do not envisage that these allowances could be retained in modern awards.
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> **[57]** In relation to the ACTU applications, there are four awards which contain provision for Broken Hill allowance in the district allowance clause. The provision for the allowance is in the following terms:

"**Broken Hill**

An employee in the County of Yancowinna in New South Wales (Broken Hill) will in addition to all other payments be paid an allowance for the exigencies of working in Broken Hill of 4.28% of the standard rate."

[58] The sunset provision in the district allowance clause in the awards applies in relation to the whole clause, including to the Broken Hill allowance.

[59] There was little put by way of submission in the proceedings as to what should be the position regarding the Broken Hill allowance. The ACTU applications sought the removal of the sunset provision which would leave the Broken Hill allowance, together with the district allowances in Western Australia and the Northern Territory, in operation. We have rejected the ACTU applications for the removal of the sunset provisions so far as they relate to district allowances in Western Australia and the Northern Territory. We must however decide whether this should be the result also in relation to the Broken Hill allowance in the four modern awards.

[60] Little or no attention was given to this matter by most parties to the proceedings. The South Australia, Northern Territory and Broken Hill Branch of the SDA submitted that the maintenance of the allowance meets the modern awards objective and in particular provides entitlements under the relevant awards for low-paid workers who would be adversely affected by the removal of the allowance.

[61] The Ai Group in its applications sought the deletion from modern awards of the transitional provisions relating to district allowances on the basis that such clauses would be obsolete after 31 December 2014 and are no longer necessary to achieve the modern awards objective (s.138). It was submitted that the district allowances with respect to employees in Western Australia, Broken Hill and Queensland were, in a similar way as the allowances in the Northern Territory, no longer relevant.

[62] We note that the Broken Hill allowance is in different terms to the transitional provisions relating to district allowances in Western Australia and the Northern Territory. The entitlement to the allowance is specified in the four awards and is expressed as a percentage figure of the standard rate under the award. It does not require reference to any other instruments. The calculation of the allowance is therefore straightforward and the allowance is not a term or condition of employment determined by reference to State or Territory boundaries.

[63] In these circumstances, we cannot conclude on a similar basis as in relation to the district allowances in Western Australia and the Northern Territory that the Broken Hill allowance should not be maintained as part of the safety net for workers covered by the relevant awards. On the basis of the limited material before us, we are satisfied that the maintenance of the Broken Hill allowance in the awards is appropriate having regard to the modern awards objective (ss.134 and 138) and other relevant considerations. The allowance will therefore be retained in the awards.

> **[64]** In so deciding, we note that some of the unions in the proceedings have made application for the inclusion of nationally applicable remote allowance provisions in modern awards and that the SDA has indicated its support for these claims. It may therefore be appropriate for the parties to the awards to revisit the Broken Hill allowance having regard to the outcome of such claims."[28] (Endnotes not included)

[13] The SDA and ASU applications in respect of district allowances were subsequently listed for hearing on 28 and 29 May 2015. However, those hearing dates were vacated given the Australian Chamber of Commerce and Industry's application for a judicial review of the *2015 Decision* in so far as it related to the Broken Hill allowance.

[14] The Full Court of the Federal Court of Australia in *Australian Chamber of Commerce and Industry v Australian Council of Trade Unions* (the *Federal Court Decision*)[29] in a decision handed down on 14 September 2015 determined that the Broken Hill allowance was a disability allowance for the purposes of s.139(1)(g)(iii) of the *Fair Work Act 2009* (the Act) and that s.154(1) of the Act did not apply to prevent or prohibit the term.[30]

[15] Following the *Federal Court Decision* both the SDA and ASU advised the Commission that they wished to press their respective applications. The President referred the applications to this Full Bench in mid-2017.[31] Following several mention and directions hearings the applications were heard in April 2018. At the hearing, Mr David Scaife appeared with permission for the SDA while Mr Nick Tindley appeared with permission for the ARA and MGA. The hearing concluded with the Employer Groups being provided the opportunity to file any further submissions in respect of the Regional Price Index (RPI) summary document[32] tabled by the SDA in its reply submissions and the SDA being provided the opportunity to file a reply to any such submissions. AiG and ABI & NSWBC provided submissions dated 26 and 24 April 2018 respectively, while the SDA filed its reply on 2 May 2018.

The Statutory framework

[16] The Act provides that the Commission must conduct a 4 yearly review of modern awards [s.156(1)]. Section 156(2) deals with what has to be done in a review:

> "(2) In a 4 yearly review of modern awards, the FWC:
>
> (a) must review all modern awards; and
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> (b) may make:
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> (i) one or more determinations varying modern awards; and
>
> (ii) one or more modern awards; and
>
> (iii) one or more determinations revoking modern awards; and
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> (c) must not review, or make a determination to vary, a default fund term of a modern award.
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> Note 1: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).
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> Note 2: For reviews of default fund terms of modern awards, see Division 4A."

[17] Subsections 156(3) and (4) deal with the variation of modern award minimum wages in a Review and are not relevant for present purposes.

[18] Section 156(5) provides that in a review each modern award is reviewed in its own right. However, this does not prevent the Commission from reviewing two or more modern awards at the same time.

[19] The general provisions relating to the performance of the Commission's functions apply to the Review. Sections 577 and 578 are particularly relevant in this regard. In conducting the Review the Commission is able to exercise its usual procedural powers, contained in Division 3 of Part 5-1 of the Act. Importantly, the Commission may inform itself in relation to the Review in such manner as it considers appropriate [s.590].

[20] The modern awards objective is central to the Review. The modern awards objective applies to the performance or exercise of the Commission's "modern award powers", which are defined to include the Commission's functions or powers under Part 2-3 of the Act. The Review function in s.156 is in Part 2-3 of the Act and so will involve the performance or exercise of the Commission's "modern award powers". It follows that the modern awards objective applies to the Review.

[21] The modern awards objective is set out in s.134 of the Act as follows:

> "**134 The modern awards objective**
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> *What is the modern awards objective?*
>
> (1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:
>
> (a) relative living standards and the needs of the low paid; and
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> (b) the need to encourage collective bargaining; and
>
> (c) the need to promote social inclusion through increased workforce participation; and
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> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (da) the need to provide additional remuneration for:
>
> (i) employees working overtime; or
>
> (ii) employees working unsocial, irregular or unpredictable hours; or
>
> (iii) employees working on weekends or public holidays; or
>
> (iv) employees working shifts; and
>
> (e) the principle of equal remuneration for work of equal or comparable value; and
>
> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

> (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
>
> (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.
>
> This is the **modern awards objective**.
>
> *When does the modern awards objective apply?*
>
> (2) The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:
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> (a) the FWC's functions or powers under this Part; and
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> (b) the FWC's functions or powers under Part 2–6, so far as they relate to modern award minimum wages.
>
> Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284)."

[22] The modern awards objective is directed at ensuring that modern awards, together with the National Employment Standards (NES), provide a "fair and relevant minimum safety net of terms and conditions" taking into account the particular considerations identified in ss.134(1)(a) to (h). The objective is very broadly expressed.[33] The obligation to take into account the matters set out in ss.134(1)(a) to (h) means that each of these matters must be treated as a matter of significance in the decision-making process.[34]

[23] No particular primacy is attached to any of the s.134 considerations and not all the matters identified will necessarily be relevant to a particular proposal to vary a modern award.

[24] There is a degree of tension between some s.134 considerations. The Commission's task is to balance the various considerations and ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions.

[25] The modern awards objective requires the Commission to take into account, among other things, the need to ensure a "stable" modern award system [s.134(1)(g)]. The need for a "stable" modern award system supports the proposition that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. As observed by the Full Bench in the *4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* decision (the *Preliminary Issues Decision*), the extent of the merit argument required will depend on the variation sought.[35]

[26] In the Review the Commission will proceed on the basis that *prima facie* the modern award being reviewed achieved the modern awards objective at the time that it was made.[36] The proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective [see s.138]. What is "necessary" in a particular case is a value judgment based on an assessment of the s.134 considerations having regard to the submissions and evidence directed to those considerations.[37]

[27] The Full Bench in the *4 Yearly Review of Modern Awards – Penalty Rates* decision (the *Penalty Rates Decision*)[38] made it clear that it was not necessary, in order to justify the variation of a modern award, that a "material change in circumstances" since the making of the modern award(s) under review be demonstrated.[39]

[28] In performing functions and exercising powers under a part of the Act (including Part 2-3 – Modern Awards) the Commission must take into account the objects of the Act and any particular objects of the relevant part [see s.578(a)]. The object of Part 2-3 is expressed in s.134 (the modern awards objective) to which we have already referred. The object of the Act is set out in s.3 as follows:

> **"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
>
> (c) ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual employment agreements of any kind given that such agreements can never be part of a fair workplace relations system; and
>
> (d) assisting employees to balance their work and family responsibilities by providing for flexible working arrangements; and
>
> (e) enabling fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association and the right to be represented, protecting against unfair treatment and discrimination, providing accessible and effective procedures to resolve grievances and disputes and providing effective compliance mechanisms; 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; and
>
> (g) acknowledging the special circumstances of small and medium-sized businesses."

[29] Finally, we note that the Full Bench in the *Penalty Rates Decision*[40] summarised the task of the Commission in the conduct of the 4 Yearly Review as follows:

> "1. The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are

> 'necessary to achieve the modern awards objective' (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied.
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> 2. Variations to modern awards must be justified on their merits. The extent of the merit argument required will depend on the circumstances. Some proposed changes are obvious as a matter of industrial merit and in such circumstances it is unnecessary to advance probative evidence in support of the proposed variation. Significant changes where merit is reasonably contestable should be supported by an analysis of the relevant legislative provisions and, where feasible, probative evidence.
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> 3. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. For example, the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time it was made. The particular context in which those decisions were made will also need to be considered.
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> 4. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:
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> - the legislative context which pertained at that time may be materially different from the FW Act;
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> - the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or
>
> - the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision."[41] (Endnotes omitted)

[30] In *Shop, Distributive and Allied Employees Association v The Australian Industry Group*[42] a Full Court of the Federal Court of Australia considered applications made by the SDA and United Voice for judicial review of the Full Bench's *Penalty Rates Decision*.[43] In rejecting the applicants' case the Full Court stated among other things:

> **"[38]** The meaning of s 156(2) is clear. The FWC must review all modern awards under s 156(2)(a). In that context "review" takes its ordinary and natural meaning of "survey, inspect, re-examine or look back upon". Consequential upon a review the FWC may exercise the powers in s 156(2)(b). In performing both functions the FWC must apply the modern awards objective as provided for in s 134(2)(a)."[44]

[31] The Full Court in its decision also referred to the decision in *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd*[45] as follows:

> **"[45]** As explained in *Construction, Forestry, Mining and Energy Union v Anglo American Metallurgical Coal Pty Ltd* … at [28]–[29] by Allsop CJ, North and O'Callaghan JJ:

> [28] The terms of s 156(2)(a) require the Commission to review all modern awards every four years. That is the task upon which the Commission was engaged. The statutory task is, in this context, not limited to focusing upon any posited variation as necessary to achieve the modern awards objective, as it is under s 157(1)(a). Rather, it is a review of the modern award as a whole. The review is at large, to ensure that the modern awards objective is being met: that the award, together with the National Employment Standards, provides a fair and relevant minimum safety net of terms and conditions. This is to be achieved by s 138 — terms may and must be included only to the extent necessary to achieve such an objective.
>
> [29] Viewing the statutory task in this way reveals that it is not necessary for the Commission to conclude that the award, or a term of it as it currently stands, does not meet the modern award objective. Rather, it is necessary for the Commission to review the award and, by reference to the matters in s 134(1) and any other consideration consistent with the purpose of the objective, come to an evaluative judgment about the objective and what terms should be included only to the extent necessary to achieve the objective of a fair and relevant minimum safety net." (Underlining added, citation omitted)

[32] We respectfully agree with these approaches and follow them in this case.

The SDA's case

[33] The SDA in its submissions traversed a number of broad issues including the history of district allowances and the principles for varying modern awards, touching on issues such as the interpretation of the modern awards objective and the treatment of prior Commission decisions regarding district allowances. Drawing on several prior decisions regarding district allowances, the SDA posited that the Commission should be guided by a number of principles in considering its claim, including the following:

- district allowances are permitted under s.139(1)(g) of the Act;
- its proposed provisions were not terms that contained state-based differences as per s.154(1) of the Act;
- district allowances had been part of the industrial relations safety net in Australia and particularly the regions affected by its claim since at least the 1920's and were a well-established mechanism through which workers in remote Western Australia were compensated for the disabilities associated with working in those areas; and
- as the Commission and its predecessors had never determined the merits of inserting or maintaining district allowances in modern awards, the Commission was not constrained by any of its earlier decisions in considering the merits of its (i.e. the SDA's) proposal.

[34] As to the evidence of the disabilities associated with working in the SDA locations, key aspects of the SDA's submissions included that:

- the high cost of living in the SDA locations had historically been the justification for district allowances;

- the *Regional Price Index 2017* (*RPI 2017*) produced by the Western Australian Department of Primary Industries and Regional Development[46] established that the cost of a common, weighted basket of goods was 12.9% higher in the Kimberley region, 10.7% higher in the Pilbara region and 9.1% higher in the Gascoyne region;

- the higher cost of living in the SDA locations was not attributable to anyone category or restricted to discretionary goods;

- the high costs faced by workers in the SDA locations were exacerbated by their low pay;

- having regard to the above, the Commission could be comfortably satisfied that the cost of living continued to disproportionately and negatively impact on the value of the minimum terms and conditions prescribed for employees working in the industries covered by the awards captured by its claim;

- the climate in the SDA locations was extremely hot and humid and characterised by periodic severe weather events;

- the Kimberley region experienced upwards of 200 discomfort days per year[47], while the Pilbara and Gascoyne regions experience upwards of 100 discomfort days per year;

- the lay evidence was that severe weather events, e.g. cyclones and flooding, in the SDA locations caused damage to property, shortages of groceries, difficulties with keeping fresh food, increased complaints at work and difficulties in getting to and from work; and

- the SDA locations were defined by the Australian Bureau of Statistics (ABS) as "very remote"[48], highlighting that several of the lay witnesses recounted the difficulties the remoteness of those locations caused in terms of access to health care, education, transport and community amenities.

[35] With regard to the modern awards objective, the SDA expressed the view that without district allowances the awards affected by its claim did not achieve the modern awards objective. More specifically, the SDA submitted *inter alia* that:

- the employees covered by the awards captured by its claim were low-paid workers and that the material before the Commission established that the cost of living was significantly higher in the SDA locations, adding that in order to maintain a standard of living that was relative to that experienced by employees in less remote regions employees in the SDA locations were required to incur significantly greater costs and that the value of their wages was therefore diminished in real terms [s.134(1)(a)];

- district allowances were ill-suited to resolution through collective bargaining, particularly as most enterprise agreements in the industries covered by the awards affected by its claim were negotiated on a national basis [s.134(1)(b)];

- the establishment of minimum district allowances was likely to encourage collective bargaining by providing a basic entitlement that both retained employees who were more likely to collectively bargain with their employer and provided opportunities for employers and employees to bargain variations [s.134(1)(b)];

- district allowances could also address the poorer social inclusion outcomes caused by isolation, e.g. low paid workers were more likely to be able to take time off work if they or their family were required to travel for medical attention and would have a greater chance to save in order to fund educational opportunities or travel [s.134(1)(c)];

- while its proposal would increase costs for employers covered by the relevant awards in the SDA locations, the impact was likely to be marginal particularly as district allowances had been a permanent feature of the economic landscape in those locations for much of the past century [s.134(1)(f)];

- its proposal was simple, easy to understand, stable and sustainable [s.134(1)(g)];

- the impact of its proposal on the national economy was likely to be negligible [s.134(1)(h)]; and

- its proposal was plainly necessary to ensure a fair and relevant safety net for employees in the SDA locations.

[36] As to the 4.28% rate of district allowance proposed by the SDA, the SDA submitted among other things that:

- given the imprecise and qualitative nature of calculating district allowance it would essentially be impossible, or at least highly resource intensive, to calculate a figure for each SDA location that exactly accounted for the disabilities caused by cost of living, climate and isolation;

- its proposed rate reflected the rate adopted by the Commission in respect of the Broken Hill allowance;

- the rate proposed fell within the range of location allowances that were awarded by the Western Australian Industrial Relations Commission (WAIRC) for work in the SDA locations (see paragraph [55] below); and

- there was no unfairness in its proposed approach given that it was designed to achieve a minimum safety net while preserving simplicity and comprehensibility to the maximum degree.

[37] In conclusion, the SDA contended that the materials it relied upon demonstrated that the disabilities associated with working in the SDA locations in terms of cost of living, climate and isolation that underpinned district allowances in the Western Australian industrial relations system remained real and substantial. The SDA further posited that a fair and relevant safety net therefore required the reinstatement of an appropriate system of district allowances in the SDA locations.

[38] Key aspects of the SDA's oral submissions included that:

- district allowances were not new to the safety net, adding that they had their genesis in the State safety net award system;
- its claim should succeed if it was able to demonstrate the continued existence of the disabilities that had historically justified the inclusion of district allowances in the safety net;
- that aspect of the Australian Industrial Relations Commission's December 2008 Award Modernisation decision (the *Award Modernisation Decision*)[49] which dealt with district allowances (see paragraph [93] below) and the *2015 Decision* should not bind this Full Bench, adding that the presumption that the modern awards affected by its claim currently achieved the modern awards objective should also not apply in this case;
- the *RPI 2017* demonstrated that the cost of living in the SDA regions was substantially and persistently higher than in the Perth metropolitan area and other regions of Western Australia;
- with regard to employer submissions that it had not engaged in calculations to arrive at a figure that properly compensated for the disabilities experienced, it was both inappropriate and impossible to go through that type of calculation because disability allowances by their very nature were qualitative, i.e. they were about the subjective experiences of workers and were not easily translatable into a figure;
- the task for the Commission was to make a value judgement about the claim, the evidence presented and the appropriate response to the disability;
- the lay witness evidence corroborated the high cost of living in the SDA locations as reflected in the *RPI 2017*, adding that the lay witness evidence regarding climate and isolation should be afforded considerable weight;
- it had not called witnesses from every industry covered by the five modern awards affected by its claim;
- the failure of the employer parties to lead substantial evidence in opposition to its case was demonstrative of the fact that their opposition to district allowances was illusory rather than real;
- no evidence had been led of hardship to businesses;

- it was unable to provide an indication as to how many employees living in the SDA locations might be reliant on the awards affected by its claim;

- the disabilities experienced by the lay witnesses were unaffected by whether they were covered by an enterprise agreement or the relevant modern award;

- drawing on both the *RPI 2017* and the witness evidence, the Commission could be satisfied that the relative living standards of workers covered by the awards affected by its claim who work in the SDA locations were lower than the living standards of workers in regional centres or capital cities;

- district allowances were fundamentally about dealing with social inclusion;

- the fact that a government was taking action to address an issue, e.g. remoteness, had never traditionally been a reason for the Commission not to have some sort of industrial response;

- there were some SDA locations that would in a sense go forward compared to the Western Australian industrial relations system and others that would be going backward relatively were its claim successful;

- there was no requirement in the Act for a nationally consistent approach to district allowances;

- it had demonstrated that the disabilities that had historically justified district allowances persisted and had not radically changed since district allowances were removed following the end of the transition period;

- Perth was plainly a relevant comparator for the SDA locations given that it is a major capital city; and

- having regard to its submissions concerning the history of district allowances, there was sufficient material for the Commission to infer that any disruption caused by the introduction of district allowances would be minimal.

[39] In its reply to the AiG and ABI & NSWBC submissions regarding the RPI summary document[50], the SDA contended *inter alia* that:

- ABI & NSWBC had conflated housing costs with rental and mortgage rates, adding that in contrast to the 2016 Census data relied upon by ABI & NSWBC the RPI included in housing costs matters such as rates, charges, utilities and insurance costs;

- ABI & NSWBC's criticisms in this regard should therefore be disregarded entirely;

- in the absence of an alternative data set there was no unfairness in using Perth as the relevant comparator for the purposes of assessing whether the cost of living was higher in the SDA locations;

- the Consumer Price Index (CPI) data referred to in AiG's further submissions did not compare the current cost of living between cities and therefore could not be relied upon to support the comparative contentions made by AiG;

- the relatively higher cost of living in the SDA locations exceeded its proposed uniform 4.28% allowance, adding that its proposal was modest in partially addressing the disability and therefore suitable for inclusion in the award safety net;

- AiG's contention that its proposed uniform allowance was inappropriate appeared to support a method of fixing district allowances that would vary the allowance from year to year and location to location, adding that such an approach sat uncomfortably with the concept of a safety net (as opposed to a minimum floor), s.134(1)(g) of the Act and the fact that disability allowances could not be precisely fixed by virtue of the qualitative and variable nature of the disabilities to which they related; and

- the very high cost of living was a disability associated with the performance of work in the SDA locations, which together with the disabilities associated with climate and isolation and the history of district allowances in the SDA locations, justified its claim.

[40] We summarise below the key aspects of the SDA's evidentiary case.

Ms Makere Brown

[41] Ms Brown moved to South Hedland from New Zealand about five years ago. She lives with her partner in his 5-bedroom house which she stated had a massive mortgage on it with the council rates on the property having been just over $3,000 in the previous year. Ms Brown deposed that the cost of her average weekly shop was about $300, adding that all the products in the shops in South Hedland were more expensive than they were in Perth. Ms Brown further deposed that she paid about $50 for fuel for her motor vehicle every three weeks, her mobile phone cost her $80 per month and that her electricity bill increased in the summer months due to the greater use of air conditioning. As to medical services, Ms Brown stated that other than for minor problems she and her partner were required to travel to Perth for treatment, adding that in the past year her partner had had to go to Perth three times for medical appointments with return flights to Perth costing about $600 per person. Ms Brown also stated that in the past 6 months there were three funerals that she would have liked to have attended (one in New Zealand and two in Perth) but that she could only afford to attend one of the three.

Ms Marites Giltrap

[42] Ms Giltrap initially moved to South Hedland in 2005 and subsequently lived in other locations as a result of her husband's work, returning to South Hedland in 2014. Ms Giltrap deposed that she and her husband rent a 3-bedroom house for $290 per week, with her husband receiving rental assistance from his employer. Ms Giltrap further deposed that groceries were more expensive in South Hedland than Mandurah (where she had previously lived), with fruit and vegetables not as fresh as they were in Mandurah.[51] Ms Giltrap stated that petrol and medical treatment were also expensive, adding that she and her husband both had fly to Perth for medical treatment in respect of chronic conditions. Beyond that, Ms Giltrap deposed that it

was very hot and humid in South Hedland in the summer resulting in an increase in her electricity bill due to the greater use of air conditioning, that it took her about 5 minutes to drive to work, that there was not much to do in South Hedland in her spare time and that Karratha, which was over 200 kms away, was the nearest major town after Port Hedland.

Ms Foon Meng Cheng

[43] Ms Cheng has lived in Port/South Hedland since 1987. Ms Cheng and her husband own their 3-bedroom home. Ms Cheng deposed that in 2017 she and her husband paid $1,228 in council rates and that on average they spent almost $5,900 per annum on utilities (i.e. electricity, water, gas and phone/internet), highlighting that their electricity bill was usually higher during the summer months due to the greater use of air conditioning. Ms Cheng also stated that she spent about $150 per fortnight on fuel. Based on her regular visits to Perth, Ms Cheng deposed that she considered groceries in South Hedland to be more expensive, with fruit not as fresh. Ms Cheng noted that while minor medical issues could be treated at the local hospital, more serious issues required having to travel to Perth which was 1,700 km away. Ms Cheng added that in her experience a one-way flight to Perth cost on average about $300 per person, with accommodation costs in Perth an additional expense. Ms Cheng expressed the view that living in South Hedland limited her choices in terms of shopping and services but described the community facilities as okay.

Mr David Carter

[44] Mr Carter has lived in Carnarvon since 2000 and made mortgage repayments of $600 per month on the 3-bedroom house in which he lived. Mr Carter deposed that he spent about $120 per month on his phone and internet, about $30 per month on a pre-paid mobile phone, around $100 per week on groceries and that his electricity bill spiked in summer due to the use of air conditioning. Mr Carter further deposed that the quality of fresh produce in Carnarvon was not the same as in Perth, that petrol and gas were more expensive than in Perth, that clothes were more expensive at the local stores and that the City of Geraldton, the closest main town to Carnarvon, was 490 km away. Mr Carter stated that there was not the same variety of places to go or things to do in Carnarvon as there were in Perth, that there was a lack of job opportunities in Carnarvon and that while there was a TAFE in town the range of courses offered was limited. Mr Carter also stated that Carnarvon had a hospital and a couple of doctor's surgeries, that if someone needed an operation they would need to travel to Perth and that there was not a dentist in Carnarvon.

Ms Gillian Nolan

[45] Ms Nolan has lived in her current house in Karratha, which she owns with her husband, for about 12 years. Their mortgage repayments are $2,600 per month and the council rates on the property are about $2,700 per annum, adding that she paid rates of $1,100 per annum on a similar sized property located just outside Mackay in Queensland. Ms Nolan deposed that her husband received an allowance towards electricity, an air conditioning allowance and two free flights each year from his employer. Ms Nolan further deposed that she and her husband paid about $500 per month for their mobile phones and internet, spent about $300 per week on their "shop" (including cigarettes and alcohol), adding that groceries were more expensive in Karratha with the quality poor when compared to Perth. Ms Nolan stated that her husband

complained about the cost of freight to have car parts he ordered online delivered to Karratha. Ms Nolan described the medical facilities in Karratha as poor, highlighting that while she recently had an operation on her right hand in Karratha prior to the operation she had to travel to Perth twice for consultations regarding her hand with the cost of a return flight to Perth being a minimum of $500. Ms Nolan also stated she visited the emergency department at the hospital in Karratha as it cost up to $90 to visit the doctor.

Ms Shania Simons

[46] Ms Simons has lived in Broome for about 2 years, having previously lived in Derby with her family. Ms Simons lives with her partner and mother-in-law in a 3-bedroom unit which they rent for $400 per week. In her witness statement Ms Simons stated that the household electricity bill was about $700 per month, that she paid about $40 per quarter towards the household water bill, her pre-paid mobile phone cost her about $60 per month and that she spent about $150 per month on an internet connection and between $70-$100 per week on petrol. Ms Simons deposed that groceries and petrol were more expensive in Broome and that flights to and from Broome were expensive, adding that fruit and vegetables and bread were never fresh in Broome. Ms Simons further deposed that there were often cyclones in Broome and that she was frustrated by the lack of resources and events in Broome, adding that the closest town to Broome was Derby which was a 2 hour drive while Port Hedland was a 6 hour drive. As to medical services, Ms Simons stated that there was one major hospital in Broome which could treat most minor issues but that major surgery required travel to Perth and that the doctors in Broome were good though it could take up to 2 weeks to get an appointment.

Ms Sunserae Churchill

[47] Ms Churchill moved from Brisbane to Port Hedland in April 2016 when her partner was offered a full-time position with his current employer. Ms Churchill deposed that she and her partner and their 11 year old daughter rent a 3-bedroom property for $325 per week, describing the quality of the property as poor and of a lower standard than what could be had for the same rent in Brisbane. Ms Churchill deposed that she spent about $40 per month on a pre-paid mobile phone and between $400-$500 per fortnight on groceries, adding that the quality of the produce was not as good as in cities. Ms Churchill added that utility bills were a lot more expensive in Port Hedland than Brisbane, highlighting that the electricity bill always goes up in summer due to the use of air conditioning. Beyond that, Ms Churchill deposed that air fares to and from Port Hedland were expensive, that there were not many career opportunities in Port Hedland and that while doctors bulk billed for children, medication was a lot more expensive. In respect of the latter point, Ms Churchill stated that medication which she was able to get for $5 under the Pharmaceutical Benefits Scheme in Brisbane cost her $42 in Port Hedland. Ms Churchill also stated that both she and her husband received an allowance for living in a remote location, with in her case the allowance being around 70c per hour worked. Ms Churchill opined that in her view the allowance did not properly reflect the additional costs associated with living in Port Hedland. Ms Churchill further stated that she loved the weather in Port Hedland and that her house was only a 5 minute drive to work.

Ms Lea-Ann Hughes-Gage

[48] Ms Hughes-Gage's evidence was that while the majority of her life had been spent living in Melbourne her experience living in Port and South Hedland was that both towns had a hotter and harsher climate than Melbourne, that the cost of living was significantly higher than in Melbourne and that both towns were very isolated from capital cities. Ms Hughes-Gage also deposed that while she was living in Port and South Hedland she received a location allowance.

Mr Peter O'Keeffe

[49] Mr O'Keeffe deposed that the SDA in Western Australia had around 22,500 members of whom 549 worked in the Kimberley, Gascoyne and Pilbara regions, with only about six of those members reliant on the modern award for their terms and conditions or employment. Mr O'Keefe further deposed that since the removal of district allowances from modern awards it had become more difficult for the SDA to bargain for district allowances, adding that in the last round of bargaining with Coles the SDA had managed to grandfather existing employees so that they would continue to receive district allowances but that otherwise district allowances had been removed from the agreement (the Coles Agreement).[52] Mr O'Keeffe also highlighted the practical difficulty of advancing claims on behalf of members in the Kimberley, Gascoyne and Pilbara regions when negotiating national enterprise agreements, noting that of the estimated 75,000 employees covered by the Coles Agreement there were about 146 SDA members who worked for Coles in those regions.

RPI 2017

[50] As noted above the SDA relied on the *RPI 2017* in support of its applications. The Introduction section of the *RPI 2017* describes the RPI as follows:

> "The Regional Price Index (RPI) is produced by the Department of Primary Industries and Regional Development, on behalf of the State Government … The aim of the project is to create a spatial index, a comparison of location-based prices for a common basket of goods, with Perth as the basis for comparison with each regional location. The RPI is used as one component for calculating the District Allowances for public servants working in regional Western Australia; and by the private sector to assist in setting regional wages and salaries. It is also used in regional policy deliberations.
>
> The basket of more than 600 goods and services the basket permits the construction of a comparative index of costs, which are indicative of the differences of the cost of living at different locations around the state."[53] (Footnotes not included)

[51] The RPI compares the cost of eight different baskets of goods, i.e. food; cigarettes tobacco and alcohol; clothing; housing; household equipment operation; health and personal care; transport and recreation in nine regional locations with Perth. In addition, the RPI compares the cost of all of those goods (hereafter referred to as "All Groups").

[52] The *RPI 2017* shows that the cost of the All Groups category was 12.9% higher in the Kimberley region when compared to Perth (down from 15.4% higher in the *Regional Price*

Index 2015 – RPI 2015), 10.7% higher in the Pilbara region (down from 17.5% higher in *RPI 2015*) and 9.1% higher in the Gascoyne region (down from 12.3% higher in *RPI 2015*).[54]

[53] In response to a question from the Commission, the SDA provided a summary document[55] which set out the findings of each RPI report since 2000 in respect of the abovementioned eight baskets of goods and the All Groups category. Set out below is a table which summarises the findings for the All Groups category in the summary document provided by the SDA in respect of the three regions affected by its claims.

LOCATION	**YEAR**					
	2000	**2007**	**2011**	**2013**	**2015**	**2017**
Gascoyne Region						
Carnarvon	105.9	102.1	106.7	108.5	108.7	105.2
Exmouth	114.0	112.7	115.8	110.1	120.7	117.0
Gascoyne	105.9	105.3	109.3	109.0	112.3	109.1
Kimberley Region						
Broome	113.2	117.2	115.2	116.0	114.0	109.1
Derby	114.6	114.5	132.6	110.7	117.7	118.4
Halls Creek	-	-	118.0	116.6	121.3	116.8
Kimberley	113.5	116.9	120.0	106.5	115.4	112.9
Kununurra	112.7	121.6	-	-	-	-
Wyndham-Kununurra	-	-	117.9	115.4	113.4	113.7
Pilbara Region						
Karratha	110.8	123.1	137.5	118.8	118.0	110.4
Newman	-	-	137.9	111.9	116.8	107.5
Pilbara	111.2	120.1	137.1	118.6	117.5	110.7
Port Hedland	111.6	117.6	136.1	121.8	117.2	113.5

Other evidentiary material

[54] The SDA also relied on a 2006 paper *The Role of pecuniary and nonpecuniary factors in teacher turnover and mobility decisions*[56] which explored the determinants of teacher experts from and mobility within the Queensland state school system. The paper concluded among other things that "The payment of locality allowances on top of basic pay for teachers who move to rural and remote schools reduces the likelihood of turnover, especially in the case of female teachers. In addition, the allowance appears to encourage some movement of female teachers to remote and rural schools."[57]

[55] In addition, the SDA relied on a 1982 document mapping "Heat Discomfort Western Australia".[58] The document appears to have been developed for the purposes of proceedings before The Western Australian Government School Teachers' Tribunal in respect of an application by State School Teachers' Union of Western Australia (Incorporated) for an award to provide allowances for teachers employed outside the Perth metropolitan area.[59]

[56] As previously alluded to, attached to the SDA's submission was a table[60] setting out the value of location allowances determined by the WAIRC as a percentage of the standard rate. The percentages ranged from 2.23% in Carnarvon, Denham and Shark Bay (all in the Gascoyne

region) up to 7.23% in Kununurra (Kimberley region). In 14 of the 25 locations included in the table the location allowance determined by the WAIRC as a percentage of the standard rate was higher than the 4.28% sought by the SDA in this case, while in the remaining 11 locations the percentage figure was below 4.28%.

The ASU's case

[57] The ASU submitted that its proposed award variations were consistent with s.134(1) of the Act. The ASU also referred the Commission to s.139(g)(iii) of the Act which provided that modern awards may include terms about allowances for "disabilities associated with the performance of particular tasks or work in particular conditions or locations". More specifically, the ASU submitted that its proposed district allowance should apply to all award covered employees working in the industries covered by the awards affected by its claim to compensate employees for the disabilities associated with the performance of work in harsh climatic conditions and remote locations. As to the methodology for calculating the allowance, the ASU relied on the rationale used in determining ADF district allowances, positing that the ADF allowances provided a modern, clear and consistent rationale for recognising remote locations and calculating an allowance which was not restricted by State or Territory boundaries or instruments.

[58] Beyond this, key aspects of the ASU's submissions included that:

- district allowances should become a permanent feature of modern awards, adding that locations Australia-wide that were at least as remote, if not more remote than Broken Hill, should be able to attract a district allowances as a minimum award entitlement;

- as the ACTU highlighted to the Commission in its submissions of August 2014 regarding the district allowance transitional provisions, there were numerous institutions and programs that recognised that those living in remote areas required special or additional payments or assistance as a direct result of the disadvantages created by their remoteness, e.g. Remote Area Tax Zones, Remote Area Allowance, the health and aged care sector and the ADF;

- the history of district allowances was inextricably linked to the award safety net and had only been supplemented by enterprise bargaining in recent years;

- the history of district allowances had been to encourage settlement in regional and remote locations for permanent work;

- in the industries subject to its application, the nature of work required travel away from a primary place of business, with the work often outdoors or in facilities not provided by the employer who could address the conditions; and

- the questions at issue were not whether to include district allowances in modern awards but where to pay them and how much to pay, adding that without a minimum standard in modern awards the disabilities associated with working in remote locations were not otherwise compensated.

[59] The ASU supported and adopted the submissions of the SDA insofar as those submissions dealt with the principal issues of whether a district allowance could and should be paid to compensate for the cost of living, climate and remote location of work in order for the modern awards objective to be met.

[60] In its oral submissions the ASU stated *inter alia* that:

- of the seven awards affected by its claim only the Legal Services Award did not include a transitional provision regarding district allowances;
- the ADF model reflected in its claim was a starting point for the Commission, adding that the methodology that underpinned the ADF arrangements was not something that it was proposing the Commission should adopt and that the model it proposed acknowledged that the Commission had discretion around the construction of the model;
- as to the mechanism for the adjustment of district allowances, the Annual Wage Review should consider whether district allowances should be adjusted by the rates proposed for other allowances;
- given the *Federal Court Decision* regarding the Broken Hill allowance, the only issues which remained to be determined in this review were the rationale for where to pay a district allowance and by how much to compensate for the disability of living and working remotely; and
- it had not put on any evidence regarding Queensland, adding that the operation of district allowances had been reviewed in Queensland as part of that State's award modernisation process and had been terminated in that particular jurisdiction.

[61] We summarise below the key aspects of the ASU's evidentiary case.

Mr Malcolm Parker

[62] In his witness statement Mr Parker deposed that he was covered by the *Town of Port Hedland Enterprise Agreement 2017*[61] under which his current rate of pay was $29.33 per hour plus a Port Hedland Allowance (the Allowance) of $9.27 per hour. Mr Parker opined that his employer would continue to try and reduce or remove the Allowance when bargaining for a new agreement. Mr Parker further opined the reason that fuel, power and basic food items all cost more in Port Hedland was because they were transported to Port Hedland from Perth by road, later stating that his weekly shop cost $250 for essentials. More particularly, Mr Parker deposed that while there was usually plenty of choice in respect of food and other essentials, the prices were always considerably higher than in the city and that the weather put a lot of pressure on his income, particularly his electricity bill. Mr Parker stated that he needed to visit Perth at least once a year for medical tests and for professional development. Mr Parker added that for his Perth trips he had to drive as the cost of a flight was always at least $1,000 and that while the Department of Veterans Affairs contributed to the cost of his travel it did not pay for it all. Mr Parker further deposed that he believed he was disadvantaged because Port Hedland was very remote, adding that even on his income of almost $58,000 per annum plus the

Allowance of $18,317 per annum it was very difficult to live in any semblance of comfort in Port Hedland as a single person. In conclusion, Mr Parker stated that if his employer had to pay him a minimum district allowance that he could plan and respond to the effects of living in the northern remote regions of Western Australia with less worry.

Ms Jessica Rankin

[63] The gist of Ms Rankin's evidence was that living in the Pilbara was more expensive than living in a city area and that having a district allowance was essential for coping with the higher cost of living in Port Hedland. Specifically, Ms Rankin deposed that groceries were expensive in Port Hedland (Ms Rankin stated that she and her partner spent an average of $200-$300 per week on groceries), that it was expensive to travel anywhere to visit family with flights to Perth costing an average of $300-$700 per person one way, that health and dental care were expensive with many medical specialists not residing in the Pilbara, that commuting was expensive due to the cost of fuel and that insurance costs were higher due to the high incidence of cyclones. Ms Rankin also stated that as a casual employee she was not paid when her workplace closed due to the threat of a cyclone, adding that this affected her earnings.

Mr Mark Lenton

[64] Mr Lenton deposed that he had lived in Broken Hill for the past 57 years and that his experience was that the cost of living in Broken Hill was much higher than in Mildura and Adelaide, highlighting the cost of food, clothing, transportation and utilities such as water, electricity and telephones in particular. Beyond that, Mr Lenton deposed that there were also significant costs associated with accessing health services, particularly when travel outside Broken Hill was required, and that the absence of a university in Broken Hill added to the cost of living in Broken Hill in circumstances where residents' children wanted to access higher education.

AiG's case

[65] AiG opposed the SDA's and ASU's applications for the following key reasons:

- the SDA and ASU had not established that the cost of living, climatic conditions or isolation of the various locations affected by their applications warranted the introduction of a district allowance;
- the history of district allowances suggested that such allowances were no longer relevant, appropriate or necessary;
- the SDA and ASU had failed to propose a fair, rational and consistent basis for fixing and adjusting the district allowances proposed;
- the evidence advanced by the SDA and ASU fell well short of establishing the factual propositions on which they sought to rely; and
- granting the applications would be unfair to employers, increase employment costs and be inconsistent with the maintenance of a stable system of awards.

[66] Beyond the above and with regard to the SDA's claim, AiG *inter alia*:

- disputed that the SDA locations warranted the payment of a district allowance or that the quantum of the allowance should be the same, adding that the evidence did not establish that such an approach was appropriate;

- contended that the SDA in its submissions virtually conceded that the quantum of its proposed allowance was arbitrary and that the Commission could not be satisfied that a randomly selected amount for an allowance was necessary to achieve the modern awards objective; and

- submitted that the evidence in this matter was not probative in nature and did not enable the Commission to properly assess a number of factors such as the cost of living, climatic conditions and the isolation of each of the SDA locations, how those factors compared to other locations, whether those factors warrant the introduction of a district allowance and if so the quantum of any such allowance.

[67] Similarly, in respect of the ASU's claim, AiG submitted that:

- the ASU's reliance on the ADF Pay and Conditions Manual as the basis for the locations and quantum of allowance reflected in its claim was entirely misplaced, particularly as there was no material before the Commission explaining how the amounts prescribed for the ADF were derived or the factors taken into account in arriving at the relevant figures;

- the ASU had not proposed any method for adjusting the allowances, nor had it proposed a term that was consistent with s.149 of the Act; and

- the ASU and SDA claims included several common locations in Western Australia with the difference in the amounts claimed in respect of some of those locations almost $70 per week.

[68] On the issue of cost of living, AiG noted that the SDA contended that the *RPI 2017* established that employees living in the locations captured by its claim faced a higher cost of living. AiG stated that it did not accept that higher prices for a basket of goods in one part of the country rendered the provision of an additional allowance necessary for the purposes of s.138 of the Act. AiG submitted that it appeared the overall cost of living relative to Perth between 2015 and 2017 had fallen in each of the SDA locations, with the fall sizeable in some of those locations. However, AiG noted that the 2015 and 2017 results were not directly comparable because the latter excluded education costs. AiG further contended that the *RPI 2017* demonstrated a downward trend in the cost of living in SDA locations which it posited did not lend support to the SDA's claims. AiG also made the point that the SDA had not led any evidence regarding the expected trajectory of the cost of living in the SDA locations.

[69] As to the cost of living in the ASU locations, AiG contended that the ASU had comprehensively failed to establish one of the basic propositions advanced in support of its case, highlighting that save for evidence from one employee employed in Broken Hill there was no evidence before the Commission regarding the cost of living in any of the ASU

locations in NSW, Queensland and the Northern Territory. As a result, AiG submitted, the Commission could not be satisfied that employees in those locations did in fact face a higher cost of living.

[70] AiG also referred to various government schemes and policies designed to assist those who live in regional and remote areas across Australia, citing the Zone Tax offset, the Remote Area Allowance administered by the Commonwealth Department of Human Services and patient assistance travel schemes administered by the NSW, Queensland, Western Australian and Northern Territory governments. AiG posited that it should not be the role of an employer to provide financial assistance to its employees on account of a higher cost of living in a particular geographic area, adding that this was a matter for governments and social assistance/welfare schemes.

[71] In commenting on the evidence led by the SDA and ASU, AiG emphasised that there was no evidence before the Commission regarding the HBIA, LSA and Vehicle, Ground Staff, Clerks, Rail and SACS Awards. As a result, AiG contended that the Commission was unable to make an assessment as to whether there were any employees covered by those awards in the SDA and ASU locations, the employment arrangements of such employees and the impact of the absence of an entitlement to district allowance on employees covered by those awards. AiG further contended that if the SDA and ASU sought to frame their respective claims by reference to the higher cost of living, climatic conditions and isolation faced in certain locations it was incumbent on them to bring evidence that went to each of those factors in the locations covered by their claims.

[72] With regard to s.138 of the Act, AiG noted that s.138 provided that a modern award could only include such terms as are necessary to achieve the modern awards objective, adding that the SDA and ASU had failed to mount a case that established that the proposed provisions were necessary to ensure that the relevant awards met the modern awards objective. Against that background, AiG posited that an overarching determination as to whether district allowances should form part of the safety net would be insufficient and did not amount to the Commission discharging its statutory function in the four yearly review of modern awards. AiG also submitted that no adverse inference could or should be drawn from the absence of evidence called by the Employer Groups with respect to a particular award or establishing that most employers in an industry would be affected.

[73] As to the modern awards objective, key aspects of the AiG submissions included that:

- the *Annual Wage Review 2016-2017* decision[62] dealt with the interpretation of relative living standards and needs of the low-paid [s.134(1)(a)], adding that the SDA and ASU had failed to undertake the requisite analysis that might otherwise permit them to rely on s.134(1)(a), e.g. they had not established that the relevant group of employees were low-paid and had not examined the extent to which the employees were able to purchase the essentials for a decent standard of living and to engage in community life;

- the absence of an award provision regarding district allowances would leave greater room for bargaining and may incentivise employers and employees to negotiate terms and conditions specific to their location and conditions of employment

[s.134(1)(b)], adding that the proposition that the absence of district allowances would reduce the incidence of district allowances in enterprise agreements was of no relevance to these proceedings;

- the *Penalty Rates Decision*[63] dealt with the proper interpretation of s.134(1)(c) of the Act, adding that there was no material before the Commission that the proposed provisions would promote increased employment and encourage employees to seek and remain in employment in regional and remote areas or which suggested that in the absence of a district allowance workforce participation would decrease or indeed had decreased;

- the claims were not consistent with s.134(1)(d) of the Act in that they may impact on labour mobility which was contrary to the need to promote flexible work practices;

- the claims if granted would self-evidently impose additional employment costs and a new and significant regulatory burden on employers [s.134(1)(f)];

- the need to maintain a stable award system told against granting the SDA and ASU claims in the absence of a proper and convincing evidentiary case [s.134(1)(g)]; and

- the SDA and ASU claims were likely to adversely impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy [s.134(1)(h)].

[74] In its oral submissions, AiG contended among other things that:

- the nature of the disabilities relied upon by the SDA and ASU in support of their respective claims were not directly related to the performance of work, noting that there was no evidence that the employees covered by the various awards and living in the SDA and ASU locations were required to live there by their employers;

- the SDA and ASU had comprehensively failed to make out a case for the allowances they had proposed;

- the *RPI 2017* dealt exclusively with Western Australia, adding that the report did not explain how the cost of goods in the Pilbara for instance compared to the cost of goods in Sydney or Melbourne or Hobart among other locations nor did it compare the cost of goods in the various regions of Western Australia to some sort of national aggregate or average;

- the SDA and ASU had not explained why Perth was the appropriate comparator;

- none of the witness evidence was based on a robust comparative exercise that might establish that the cost of a representative basket of goods in the SDA and ASU locations was more or less than in some other part of Australia;

- there was a paucity of material before the Commission in relation to cost of living, noting that there was no material before the Commission that went to the cost of living in a significant proportion of the locations captured by the SDA and ASU claims;

- the SDA and ASU had not established that the cost of living in the relevant locations warranted the allowances sought;

- similarly, there was no evidence about the climatic conditions or isolation experienced by persons in a significant proportion of the SDA and ASU locations;

- the SDA and ASU had failed to propose a fair, rational and consistent basis to fixing and adjusting the allowances proposed; and

- the grant of the SDA and ASU claims would increase employment costs.

[75] As to the SDA's RPI summary document,[64] AiG submitted that the absence of any evidence as to the source of the data or an explanation as to how it was compiled significantly undermined its value and that little could be made of the document. AiG further submitted that:

- there was doubt as to the extent which the data could be relied upon to compare the RPI over time due to changes in the categories of goods reported on and in the composition/size of the basket of goods measured by the RPI;

- the RPI and movements in the RPI in any given year were not uniform across the SDA locations thereby rendering the method for fixing the allowances sought by the SDA inappropriate;

- the RPI did not include housing costs associated with mortgages and interest repayments for the purchase of established properties or land only, adding that this seriously called into question the extent to which the *RPI 2017* provided a wholistic representation of the cost of living in the SDA locations; and

- CPI data for the March 2018 quarter noted that:

  - increases in the costs of certain goods and services in Perth had been "partially offset by falls in new dwelling purchase by owner-occupiers (-1.8%) and rents (-1.6%). The fall in rents is due to a continuation of excess housing stock leading to high vacancy rates",[65]

  - the CPI in Perth was less than the weighted average CPI of the eight capital cities, and

  - of all the capital cities, the CPI in Perth was only higher than the CPI in Darwin.

ABI & NSWBC's case

[76] ABI & NSWBC opposed the SDA and ASU claims. Among other things, ABI & NSWBC contended that:

- no sufficient evidentiary or substantive case had been made out as to the relative disability of working in the locations subject to the claims or why an award inclusive of an allowance to offset that disability would satisfy the modern awards objective within the scope of s.138 of the Act; and

- no attempt had been made by either the SDA or ASU to quantify the allowances claimed against the apparent disabilities complained of.

[77] In respect of the SDA claim, ABI & NSWBC posited *inter alia* that:

- the SDA's characterisation of its claim as not trivial but not significant did not bear scrutiny for a number of reasons, including that the claim was for a uniform amount which had no specific application in relation to the awards affected by the SDA's claim and the SDA locations and that the claim was likely to cover employees who had not historically been in receipt of a district allowance;

- no sufficient comparative case had been made out by the SDA to justify the introduction of district allowances in the SDA locations in comparison to other regions of Australia or other modern awards;

- prior to the introduction of a new disability allowance the Commission would need to be satisfied that a particular region or regions in receipt of the new allowance experienced comparative disadvantage against regions not in receipt of the allowance, adding that this went to the central concept of fairness required in the safety net;

- the Commission did not have the material before it to make such an assessment nor had the SDA sought in any meaningful way to quantify its claims;

- the Commission was not required to create an inducement to work in remote areas as part of its role in the four-yearly review;

- the mere existence of historical district allowances could not be called in support of their creation now, adding that not only was the relevant test as to whether a district allowance should be included in a modern award different but that a real question arose as to whether the evidence established that the disabilities experienced by those working in the SDA locations had remained unchanged over time;

- clearly some disabilities which were considered when establishing the existence of district allowances many decades ago either no longer applied or had significantly reduced due to developments such as the advent of the internet;

- the cost of living evidence provided by the SDA focussed on an apparent disparity in the costs of some consumer goods, petrol and air-conditioning between capital cities

and some regional/remote areas, with any analysis of housing costs peripheral to the SDA's evidentiary position;

- data drawn from the 2016 Census of Population and Housing (the 2016 Census) disclosed that generally capital cities had higher housing costs than the SDA and ASU locations, highlighting that for many of those locations housing costs were significantly lower than the respective capital city;[66]

- while it accepted that housing costs were not the sole determinant of living costs in Australia, it should be beyond argument that they represent a significant proportion of household spending;

- CoreLogic's *Housing Affordability Report December 2016*[67] (the CoreLogic Report) identified that housing costs as a proportion of income vary between regions but were nevertheless a significant proportion of household income;

- based on the materials filed, the Commission was simply not in a position to determine that work in the SDA and ASU locations warranted the unique treatment sought, particularly when compared to other awards and regions where housing costs were significantly higher;

- the SDA has not attempted to identify what difference the payment of the district allowance sought would make to the disabilities purportedly experienced in the locations captured by its claim;

- the selection of the Broken Hill allowance as the appropriate quantifier of its claims was arbitrary, with Broken Hill not subject to the conditions experienced in the locations captured by its claim and that any correlation between the allowance sought and the disability experienced in the locations captured by its claim therefore being coincidental; and

- s.138 of the Act required that the allowance sought by the SDA only be included to the extent necessary to achieve the modern awards objective, adding that the SDA should not be granted a claim which it acknowledged would reach a requisite minimum level in some locations but would go over and above what was required to achieve the modern awards objective in other locations.

[78] As to the ASU's claim, ABI & NSWBC posited that the ASU's reliance on the ADF arrangements as the basis for its claim was inappropriate, adding that the entitlements sought were manifestly excessive having regard to a fair and reasonable safety net and if applied would result in arbitrary results based on irrelevant considerations unique to the ADF which had not been explained. ABI & NSWBC further posited that:

- the ADF does not seek to establish a minimum safety net for its members as the ADF does not have regard to the modern awards objective nor does it set its pay scales for anything other than its own purposes;

- the ADF differed from most businesses in that it actively posted members to remote locations as a requirement of service;

- while the ASU had added three locations in Western Australia it had not forensically sought to assess whether any of those locations warrant district or disability allowances beyond the fact that they were listed by the ADF;

- the upper amounts proposed by the ASU could represent up to a 25% increase in the minimum safety net in the awards affected by the ASU's claim; and

- the issue of adjustment had not been addressed by the ASU.

[79] As to the evidence led by the SDA and ASU in support of their claims, ABI & NSWBC contended that it fell well short of the standard necessary to support their proposed variations. Among other things ABI & NSWBC contended that:

- it appeared that none of the witness statements were from employees whose terms and conditions were covered by a modern award, with enterprise agreements covering all employees;

- the witness statements filed were not representative of those employees who would be affected by the claims, adding that four national system employers were represented in the witness evidence over six regions and three awards and that two of the ASU's witness statements had been filed by non-national system employees;

- the evidence developed no sound or relevant basis for the amounts sought; and

- no evidence had been filed in respect of most locations affected by the SDA and ASU claims.

[80] With regard to the modern awards objective, ABI & NSWBC submitted among other things that:

- there was no evidence before the Commission of the degree of award reliance for persons eligible for the proposed district allowances, adding that it was difficult to quantify how many people would be entitled to the district allowances proposed by the SDA and ASU and whether they were low-paid [s.134(1)(a)];

- there was a paucity of evidence in relation to the "relative living standards" of the vast majority of locations subject to the claims with no explanation, calculation, analysis or evidence provided as to how the proposed quantum of the allowance would affect living standards or living costs of the low-paid [s.134(1)(a)];

- the SDA and ASU had advanced no probative evidence as to how their respective claims would encourage enterprise bargaining [s.134(1)(b)];

- the SDA and ASU had not advanced sufficient evidence as to the likely impact of their claims on business [s.134(1)(f)]; and

- the SDA and ASU had advanced no evidence as to how their respective claims would promote social inclusion through workforce participation, ensure a simple, easy to understand stable and sustainable modern award system and impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy [ss.134(1)(c), (g) and (h)].

[81] In its oral submissions, ABI & NSWBC submitted *inter alia* that:

- drawing on the *Federal Court Decision*[68], district allowances were historically justified in part as a means of inducing employees to work in particular areas, adding that such considerations formed no part of the modern award system and that this rationale therefore did not appear to be available under the Act;

- with regard to the 1958 and 1980 WAIRC decisions regarding district allowances, in neither case was the need for or merit of a district allowance contested;

- while the *RPI 2017* looked at rent it did not look at mortgage costs, though ABI & NSWBC later acknowledged in response to questioning from the Commission that it was unclear whether the reference in the *RPI 2017* to credit charges in the description of the items included in the housing category[69] captured mortgage costs;

- 2016 Census data regarding median monthly repayments and median weekly rent for each of the towns for which a district allowance was sought raised doubts about the reliability of the *RPI 2017* in respect of housing costs;

- drawing on the CoreLogic Report, housing costs constituted about 30% household income making it one of the biggest expenses which employees have;

- it was prepared to accept that there was a level of increased price in relation to some goods and services in regional areas;

- drawing on 2016 Census data, rental costs were at least 30% less in the SDA and ASU locations;

- even if the cost of goods was 10% more in regional areas this was cancelled out by housing costs being lower in regional areas;

- caution needed to be adopted in respect of the weight afforded to climate given the variation in scores attributed to climate in the 1980 WAIRC decision;

- none of the lay witnesses were suffering a disability as they were content with the quality of their life in the place in which they worked and saw no reason to leave;

- there was no evidence in respect of the ASU's claim as it related to Queensland, NSW and the Northern Territory;

- there was no information before the Commission as to how the ADF allowances relied upon by the ASU had been calculated; and

- the SDA's case did not support an argument that the payment of district allowance promoted social inclusion through workforce participation in circumstances where the costs associated with the proposed district allowance would, if anything, decrease workforce participation.

[82] With regard to the RPI summary document[70], ABI & NSWBC reiterated their concern that the data presented in the *RPI 2017* on housing costs was deficient and inaccurate. This, ABI & NSWBC added, was in stark contrast to 2016 Census data regarding housing costs in the SDA locations which indicated that all of the SDA and ASU locations had substantially lower rental costs than the relevant capital city (often more than 30% lower). ABI & NSWBC also submitted that the material before the Commission did not disclose the source of the data relied upon for the RPI, making it impossible to determine how many inhabitants were surveyed or where the data came from. As such, ABI & NSWBC posited, the reliability of the RPI was inherently unstable and the Commission could not know how representative the survey of housing costs in the RPI data was. ABI & NSWBC also reiterated its view that housing costs continued to form a major part of household expenditure and that based on 2016 Census data housing costs in regional areas were less expensive than housing costs in the relevant capital city.

The Pharmacy Guild's case

[83] The Guild's interest in the proceedings was confined to the SDA's application to vary the PIA. Among other things, the Guild noted that none of the SDA's witnesses were covered by the PIA. As to the modern awards objective, the Guild posited that:

- the SDA had not undertaken the analysis required to demonstrate that employees covered by its claim were in fact low-paid, emphasising that the PIA covered both community pharmacy assistants and pharmacists and that the paucity of evidence did not enable the Commission to find that the claim was justified by virtue of s.134(1)(a);

- the SDA's evidence demonstrated that there was presently no impediment to collective bargaining in the SDA locations and that a district allowance was a matter commonly negotiated [s.134(1)(b)];

- there was no probative evidence to support the SDA's contention that the inclusion of its proposed district allowance in the PIA would encourage employees to seek and remain in employment in remote areas, adding that the study regarding Queensland teachers relied upon by the SDA was of little relevance to this case [s.134(1)(c)];

- the SDA had not adduced any evidence or made any submissions regarding ss.134(1)(d), (da) and (e);

- the SDA's claim if granted would impose additional employment costs on employers, with those additional costs difficult to absorb [s.134(1)f)];

- the SDA and ASU had not adduced any evidence regarding s.134(1)(g); and

- the SDA's claim if granted was likely to adversely impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy [s.134(1)h)].

[84] In summary, the Guild submitted that the SDA's claim was inconsistent with ss.134(1)(a) to (c) and ss.134(1)(f) to (h) of the Act and should therefore be dismissed.

[85] At the hearing, in response to a question from the Commission, the Guild indicated that in the SDA locations there were some pharmacies that would be covered by the Western Australian industrial relations system and others that would be covered by the national workplace relations system.

The MTA Organisations' case

[86] The MTA Organisations opposed the inclusion of district allowances in the Vehicle and Clerks Awards, adding that the SDA and ASU had not provided any substantive evidence as to why such provisions should be reinstated. The MTA Organisations also posited that the SDA and ASU submissions and supporting evidence did not point to any hardship following the removal of transitional provisions regarding district allowances from modern awards in early 2015. Beyond this, the MTA Organisations:

- opposed the use of ADF rates of district allowance as proposed by the ASU, noting that the ADF payments were made to those ADF members posted to remote locations;

- disputed that there had been a history of district allowances for clerical employees working in the Parkes Shire in NSW or that there had been a loss of transitional entitlements to a district allowance for these employees;

- submitted that the ASU had provided no cogent evidence as to why clerical employees in the Yancowinna County in NSW should receive a district allowance, adding that any claims of higher costs of groceries, clothing and fuel in Broken Hill were outweighed by savings in mortgage repayments and rental costs when compared to Sydney; and

- further submitted that the ASU had not provided any evidence to support why employees covered by the Clerks Award in those Queensland areas affected by its claim should receive a district allowance.

The ARA and MGA's case

[87] The ARA and MGA supported and adopted the submissions of ABI & NSWBC and AiG. The ARA did not file any submissions beyond its written submissions received by the Commission on 17 May 2016 in which it contended *inter alia* that the SDA application should be dismissed.

[88] The MGA opposed the SDA's application to include a district allowance in the GRIA, noting in its submissions that a substantial majority of employees in the independent supermarket and liquor sector were employed under the GRIA. The MGA submitted that while

it noted that district allowances had been a part of industrial awards for many decades and decided on factors such as the cost of living, climate and isolation, the significance of these factors had diminished and could no longer be relied upon as valid reasons as to the need for such payments.

[89] As to the modern awards objective, key aspects of the MGA's submissions included that:

- while there were examples of some costs being higher in country areas than in major cities it was possible that the statistics were not considering the different cost burdens felt by those who lived in cities [s.134(1)(a)];

- it was questionable whether employers should be responsible for carrying the burden of providing additional funding to support costs that should be the responsibility of State and federal governments [s.134(1)(a)];

- the inclusion of a district allowance in the GRIA would add some $27,000 to the annual wage expense of a small store in regional Western Australia which employed 10 full-time staff (all at the Retail Employee Level 1), adding that this would inevitably mean a reduction in staff or an increase in prices and that it was inequitable for the employer to have to shoulder that burden [s.134(1)(a)];

- the introduction of a district allowance in Western Australian regional towns was likely to discourage collective bargaining in circumstances where there was little appetite for collective bargaining among MGA members [s.134(1)(b)];

- there was nothing in the SDA's evidence suggesting that increased performance would result from the introduction of a district allowance [s.134(1)(d)];

- employers would inevitably be adversely affected were the SDA's application granted [s.134(1)(f)]; and

- the SDA had not provided any evidence to support its contention that were its application granted the impact on the national economy would be negligible [s.134(1)(h)].

[90] Attached to the MGA's submissions was a copy of the WA Council of Social Service Cost of Living 2017 Report.[71] The MGA referred to the Report in positing that there were political avenues available to relieve the needs of the low-paid and disadvantaged in remote areas. In that context, the MGA highlighted that the recommendations in the Report[72] referenced various mechanisms of assistance to disadvantaged groups and also pointed to the observations made in the Report's conclusion regarding housing.[73] On the latter issue, the MGA contended that the Report's observations regarding housing reinforced its view that it was not employers that carried the burden of providing better accommodation and that employers were not responsible for high rentals or the inability of an employee to pay high rentals.

[91] At the hearing the MGA submitted among other things that:

- the SDA had not conducted any analysis of the impact of the removal of district allowances from the awards affected by its claim (as a result of the operation of the transitional provisions) on the needs of low-paid employees;

- in circumstances where there were likely to be pharmacies in the regions captured by the SDA's claim covered by the Western Australian and national workplace relations systems, the SDA had failed to assess how the needs of one group of employees was being met against the others; and

- with regard to Mr O'Keefe' evidence regarding the Coles Agreement, no evidence was given as to the nature of the SDA's claim or Coles' position regarding district allowances and that as a result it considered the issue irrelevant.

The history of district allowances

[92] In the *Federal Court Decision* Justice Buchanan provided the following overview of the genesis of district allowances:

> "15 District, locality, zone, isolation and climatic allowances have been features of the federal (and State) award landscape for a long time. They were variously justified as a means of compensation for additional difficulty or discomfort associated with particular work, or as a legitimate means of inducing employees to work in particular areas. In the present case, origins of that kind may also be seen in the language of the Broken Hill terms ("an allowance for the exigencies of working in Broken Hill").
>
> 16 In 1932, Drake-Brockman J (sitting as the Commonwealth Court of Conciliation and Arbitration) referred to the second aspect (inducement) in connection with railway construction and development in *Commonwealth Railways Commissioner v Australian Workers Union* (1932) 31 CAR 815 at 820:
>
> > … Zone, district, isolation or climatic allowances as they are variously called, have for many years been granted in Australia. Historically they appear to have been granted for the purpose of inducing labour to go to remote localities during the pioneering period. The tendency appears to have been for them to diminish in amount as the localities concerned became more settled and the social amenities increased and improved. These allowances being sums deemed sufficient to attract labour, they naturally have varied from time to time and from place to place. The only factor that has been consistent appears to have been, "What amount will induce the required labour to go to the locality concerned?" This factor naturally varied with the condition of the labour market in different localities and times. The factor mentioned seems to have been the prevailing influence during the period of railway construction in determining the varying amounts of the allowances which in the main still exist.
>
> 17 Drake-Brockman J repeated this thesis seven years later when he observed in *Australian Railways Union v Commissioner for Railways New South Wales* (1939) 41 CAR 614 at 620:

> The climatic allowance provided in the awards does, from the reading of the clauses, appear to be an allowance for disability of climate only—nothing else. However, from the evidence and argument in these proceedings, I think the word has been used loosely and a better one would have been "inducement".

18 Whatever the pragmatic foundation for allowances of this kind, it became commonplace, in federal awards and in federal and State public sector employment, for some form of loading to be paid for climatic conditions or isolation. For very many years, for example, special arrangements were made for some employees in the Northern Territory (such as federal public servants) and in New South Wales it was common for a "western district" allowance to be paid (e.g. to New South Wales public servants, including teachers).

19 In the industrial and award history of New South Wales, the County of Yancowinna (i.e. Broken Hill, together with the neighbouring town of Silverton and their surrounds) was a special case. New South Wales awards usually excluded the County of Yancowinna from their coverage and operations altogether, leaving local arrangements to be negotiated directly with employers under the auspices of the Barrier Industrial Council. The County of Yancowinna is separated from the rest of New South Wales in time also, observing Australian Central Time (Standard or Daylight) rather than Australian Eastern Time.

20 Those special award arrangements no longer exist. The four modern awards at issue in the present case apply to the County of Yancowinna equally with the rest of Australia. It is unsurprising, however, that a clause like the Broken Hill term should have survived that transition. It has not been suggested in the present case that the term is meritless. That would be a question for the FWC, but retention of the clause tends against the proposition. Rather, the argument in the present case is that the clause (and the allowance it preserves) has been abolished by s 154(1)(b) in the interests of uniformity."[74]

[93] For reasons of context, we set out below an extract from the *Award Modernisation Decision* regarding district allowances:

> "**District allowances**
>
> **[79]** In our statement of 12 September 2008 we drew attention to the existence of various allowances which apply on a limited geographic basis in the following passage:
>
> > "**[28]** There is an unresolved issue concerning allowances variously described as district, locality or remote area. A number of pre-reform awards and NAPSAs contain such allowances. Questions arise about such allowances. They are by nature confined to particular locations. In that connection it is relevant that modern awards will apply throughout Australia. If it is appropriate that these allowances be included in modern awards, which is a matter for discussion, there must be a consistent and fair national basis for their fixation and adjustment. Without a rational system the inclusion of these allowances in modern awards could lead to inconsistency and consequent unfairness. We would welcome

views and proposals on these questions. The allowances have not been included in the exposure drafts."

[80] While it may be that historically the allowances in question are related to the cost of living in the relevant geographic areas, as indicated already, if they are to be a part of the modern award system, there must be a consistent and fair national basis for their fixation and adjustment. We should indicate that we are concerned at this point only with allowances applying in Western Australia and the Northern Territory. We are not aware of any allowances in other States which are of significant magnitude overall to require consideration. The Western Australian Industrial Relations Commission has regularly adjusted the district allowances applying in Western Australian awards for many years. The allowances are of course reflected in the Western Australian NAPSAs. As we understand the position, allowances in NAPSAs remain at the level they were in the relevant State award on 27 March 2006. Approximately 4 per cent of pre-reform awards applying in Western Australia include the location allowances and are therefore not a common feature of federal awards applying in that State. The Northern Territory allowance, contained in all pre-reform awards which apply in the Territory, was frozen at its current level some years ago by decision of a Full Bench. In that decision it was indicated that the allowance was outmoded and should not be adjusted again. There are also other allowances of this kind in the Northern Territory.

[81] In relation to the allowances in NAPSAs and pre-reform awards operating in Western Australia, it is appropriate that those should be maintained in modern awards until there is a proper opportunity to consider whether they should be a permanent feature of the awards and, if so, the basis for their fixation and adjustment. We do not intend to provide for any automatic adjustment at this stage. Because of the nature of the Northern Territory allowance, it cannot be maintained for more than five years and, because of the decision of the Full Bench, it should not be adjusted during that period. We shall provide that the district, locality or remote area allowances, described generally as district allowances, applying in Western Australia and the Northern Territory be preserved for a period of five years in a transitional provision."[75] (Endnotes not included)

Consideration of the issues

[94] Initially, we note that the Full Bench in the *Award Modernisation Decision* stated that if district allowances were to be included in modern awards that "there must be a consistent and fair national basis for their fixation and adjustment."[76] We respectfully agree with that view.

[95] We further note that in the light of the *Federal Court Decision* it was not disputed that a district allowance was a disability allowance for the purposes of s.139(1)(g)(iii) of the Act and therefore capable of being included in a modern award.

[96] We consider firstly the evidence in this case. There a number of key conclusions which can be drawn from the evidentiary material before the Commission, including that:

- district allowances have historically been premised on three grounds – cost of living, climate and isolation, with inducement/attraction of workers also being a factor on occasions in respect of some locations;

- based on the *RPI 2017*, the cost of living in the SDA locations is higher than the cost of living in Perth based on an equivalent basket of goods;

- the RPI data for the period 2000-2017 indicates that the cost of living in the SDA locations has both increased and decreased across the period;

- none of the lay witnesses are required by their employer to live where they reside;

- it is hot in the SDA locations, with most witnesses attesting that they resorted to the greater use of air-conditioning during the hotter months with an associated increase in their electricity bills;

- the SDA's proposed approach would, as acknowledged by the SDA, see some employees living in the SDA locations over-compensated relative to the level of district allowance for those locations provided in Western Australian State awards while other employees would be under-compensated; and

- the applications, if granted, would increase costs for employers.

[97] However, we consider that there are a number of significant gaps in the evidentiary material before the Commission. These include:

- the absence of any comparison of the cost of living in the SDA locations with locations outside Western Australia;

- the lack of any evidence whatsoever regarding the cost of living in the ASU locations in NSW (other than Broken Hill), Queensland and the Northern Territory;

- no evidence regarding the HBIA, LSA and Vehicle, Ground Staff, Clerks, Rail and SACS Awards;

- no indication as to how many employees living in the SDA and ASU locations are reliant on the awards affected by the SDA's and ASU's respective claims; and

- no explanation of the methodology which underpins the ADF arrangements regarding district allowances reflected in the ASU's claim, i.e. no explanation of the factors or considerations taken into account in determining the quantum of the allowance and the locations which attract district allowance or the weight attributed to those factors/considerations.

[98] These evidentiary gaps would in our view need to be addressed to ensure a consistent and fair national basis for the fixation of district allowances and to enable a comprehensive assessment of the SDA and ASU claims against the modern awards objective. For instance, in respect of the cost of living, while we note the SDA's contention that Perth is an appropriate

comparator regarding the cost of living in the SDA locations, in the context of the national workplace relations system and modern awards which apply nationally we consider that Perth is a convenient as opposed to robust or appropriate comparator. Put more bluntly, we do not consider that using Perth as the comparator in respect of the SDA locations provides a consistent and fair national basis for the fixation of district allowances. In our view, a more appropriate comparator would have a national focus as opposed to a purely State based focus, e.g. the average cost of a common, weighted basket of goods in all capital cities and in regions outside Western Australia. We acknowledge that such data may not be readily available. However that is not a reason to rely solely on RPI data in respect of the SDA locations.

[99] As to the ASU's claim, in the absence of any evidence whatsoever regarding the cost of living in the ASU locations in NSW (other than Broken Hill), Queensland and the Northern Territory and the lack of any probative evidence regarding the cost of living Broken Hill, there is simply no basis for the Commission to be satisfied of the nature and extent of the disability which the ASU's claim seeks to address. This evidentiary gap is in our view fatal to the ASU's claim in respect of the ASU locations.

[100] As to the issue of climate, most of the SDA lay witnesses emphasised that the heat and humidity in the hotter months resulted in greater use of air-conditioning and therefore higher electricity bills. On that point, we note that the cost of utilities is included in the housing component of the RPI.[77] Similarly, a number of lay witnesses referred to the impact of climate on insurance premiums, e.g. as a result of cyclones. Again, we note that insurance is included in the housing component of the RPI.[78] Accordingly, relying on these dimensions of climate runs the risk of double counting. We further note that the SDA relied on a document mapping "Heat Discomfort Western Australia"[79] (see paragraph [55] above). The weight that can be attached to that document is arguable for number of reasons, including that the document is now over 35 years old and the availability, affordability and efficiency of air-conditioning is likely to have advanced significantly since the document was prepared. In our view, the lack of probative evidence regarding the impact of climate in the SDA and ASU locations does not allow us to form a view as to the nature and extent of any disability related to climate let alone place a financial value on any such disability. Indeed, in circumstances where higher utility and insurance costs are accounted for in a measure of the cost of living it begs the question as to whether climate remains a relevant consideration.

[101] In respect of isolation, we note that there are a range of government initiatives, both State and Federal, designed to recognise this factor. While we note the lay witness evidence on this issue, we also note that there was no probative evidence as the extent to which the abovementioned range of government initiatives were insufficient in compensating for the exigencies of living in the SDA and ASU locations. As such, we are unable to form a view as to the nature and extent of any disability related to isolation let alone place a financial value on any such disability.

[102] Finally regarding the evidentiary material before us, we have attached little weight to the 2006 paper *The Role of pecuniary and nonpecuniary factors in teacher turnover and mobility decisions*[80] relied upon by the SDA. We do so primarily for two reasons. First, the report does not relate to any of the SDA locations. Second, the report appears to consider locality allowances as an attraction and retention payment as opposed to a payment to compensate for the disabilities associated with working in a particular location.

[103] We turn now consider the claims against the modern awards objective. In doing so, we note that the ASU in its submissions simply asserted that its proposed variations were consistent with the modern awards objective and in particular s.134(1)(a) of the Act. Hence there is no reference to ASU submissions in the following consideration

Relative living standards and the needs of the low paid – s.134(1)(a)

[104] The *Annual Wage Review 2016-2017* decision dealt with the interpretation of s.134(1)(a) of the Act as follows:

> "**[361]** The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the Review with those of other groups that are deemed to be relevant and focuses on the comparison between low-paid workers (including NMW and award-reliant workers) and other employed workers, especially non-managerial workers.
>
> **[362]** The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a 'decent standard of living' and to engage in community life, assessed in the context of contemporary norms."[81] (Endnotes not included)

[105] The SDA posited that the Commission could be satisfied that the relative living standards of workers covered by the awards affected by its claim who work in the SDA locations were lower than the living standards of workers in regional centres or capital cities. More particularly the SDA submitted that the employees covered by the awards captured by its claim were low-paid workers and, given the cost of living was significantly higher in the SDA locations, that the value of the wages of employees in the SDA locations was diminished in real terms relative to less remote locations.

[106] On the other hand, AiG submitted that the SDA and ASU had not established that the relevant group of employees were low-paid and had not examined the extent to which the employees were able to purchase the essentials for a decent standard of living and to engage in community life. Similarly, ABI & NSWBC submitted *inter alia* that there was no explanation, calculation, analysis or evidence provided as to how the proposed quantum of the allowance would affect living standards or living costs of the low-paid.

[107] Drawing on the interpretation of s.134(1)(a) of the Act set out above, we note that there is no material before the Commission comparing the relative living standards of those employees affected by the SDA and ASU claims with other relevant employees/workers. Nor is there any probative material before the Commission which goes to the extent employees affected by the claims "are able to purchase the essentials for a 'decent standard of living' and to engage in community life". In addition, there is little material before the Commission going to the question of whether the employees affected by the SDA and ASU claims are in fact low-paid, though we are inclined to assume that they are. In the absence of such materials, we are unable to conclude that the claims satisfy this element of the modern awards objective.

The need to encourage collective bargaining – s.134(1)(b)

[108] The SDA submitted among other things that district allowances were ill-suited to resolution through collective bargaining as most industries covered by the awards affected by its claim were negotiated on a national basis. Mr O'Keefe's evidence was that, based on the negotiations for the Coles Agreement, the removal of district allowances from modern awards had made it more difficult for the SDA to bargain for district allowances. Mr O'Keeffe also highlighted the practical difficulty of advancing claims on behalf of members in the SDA locations when negotiating national enterprise agreements.

[109] AiG contended *inter alia* that the absence of an award provision regarding district allowances would leave greater room for bargaining and may incentivise employers and employees to do so, while ABI & NSWBC submitted that the SDA and ASU had advanced no probative evidence as to how their respective claims would encourage enterprise bargaining. We note also the MGA's view that the introduction of a district allowance was likely to discourage collective bargaining in circumstances where there was little appetite for collective bargaining among its members.

[110] There is evidence before the Commission that bargaining does occur on the issue of district allowances, with that evidence limited to the retail, fast food and vehicle industries.[82] However, with the exception of the Coles Agreement, that evidence relates to agreements which were approved in 2012 and 2013 and is therefore of little relevance. While we note the practical difficulty highlighted by Mr O'Keefe in respect of national agreements, that difficulty has presumably always been the case in circumstances where employees working in remote locations might constitute a minority of employees covered by a proposed national agreement.

[111] Having regard to the material before us we consider that the granting of the SDA claim is unlikely to either encourage or discourage collective bargaining. However, given the maximum quantum of district allowance proposed by the ASU (i.e. $5,270 per annum for a single employee or $10,540 per annum for an employee with a dependant), we consider that the ASU's claim may discourage collective bargaining. As such, we do not consider that the SDA and ASU claims satisfy this element of the modern awards objective.

The need to promote social inclusion through increased workforce participation – s.134(1)(c)

[112] The Full Bench in the *Penalty Rates Decision* set out the proper interpretation of s.134(1)(c) of the Act as follows:

> "**[179]** Section 134(1)(c) requires that we take into account 'the need to promote social inclusion through increased workforce participation'. The use of the conjunctive 'through' makes it clear that in the context of s.134(1)(c), social inclusion is a concept to be promoted exclusively '*through* increased workforce participation', that is obtaining employment is the focus of s.134(1)(c).
>
> **[180]** However, we also accept that the level of penalty rates in a modern award may impact upon an employee's remuneration and hence their capacity to engage in community life and the extent of their social participation. The broader notion of promoting social inclusion is a matter that can be appropriately taken into account in

> our consideration of the legislative requirement to 'provide a fair and relevant minimum safety net of terms and conditions' and to take into account 'the needs of the low paid' (s.134(1)(a)). Further, one of the objects of the FW Act is to promote 'social inclusion for all Australians by' (among other things) 'ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through … modern awards and national minimum wage orders' (s.3(b))."[83] (Endnotes not included, underlining added)

[113] The SDA posited that district allowances were fundamentally about social inclusion and could also address the poorer social inclusion outcomes caused by isolation.

[114] The Employer Groups generally highlighted the lack of material before the Commission as to how to the proposed provisions would promote employment or encourage employees to seek or remain in employment in remote areas.

[115] Having regard to the interpretation of s.134(1)(c) as set out in the *Penalty Rates Decision* we are not satisfied that the introduction of a district allowance would promote increased workforce participation. Accordingly, we do not consider that the SDA and ASU claims satisfy this element of the modern awards objective.

The need to promote flexible modern work practices and the efficient and productive performance of work – s.134(1)(d)

[116] The SDA did not address this element of the modern awards objective in its submissions.

[117] AiG contended that the SDA and ASU claims were not consistent with this element as they would impact on labour mobility which would undermine the need to promote flexible work practices. The MGA submitted that there was nothing in the SDA's case suggesting that increased performance would result from the introduction of a district allowance.

[118] While we note the AiG and MGA submissions, we consider it unlikely that the introduction of a district allowance would have either a positive or negative impact on work practices or the efficient and productive performance of work. We therefore consider this element of the modern awards objective to be a neutral consideration in this case.

The need to provide additional remuneration for employees working overtime or employees working unsocial, irregular or unpredictable hours or employees working on weekends or public holidays or employees working shifts – s.134(1)(da)

The principle of equal remuneration for work of equal or comparable value – s.134(1)(e)

[119] We consider these elements of the modern awards objective are neutral considerations in this case.

The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden – s.134(1)(f)

[120] The SDA acknowledged that its claim would increase employer costs but added that the impact was likely to be marginal as district allowances had been a feature of the workplace relations framework in the SDA locations over a long period of time.

[121] The Employer Groups submitted that the SDA and ASU claims would inevitably increase employment costs, with ABI & NSWBC submitting that the SDA and ASU had not advanced sufficient evidence as to the likely impact of their claims on business and highlighting that the upper amounts proposed by the ASU could represent up to a 25% increase in the minimum safety net in the awards affected by the ASU's claim. AiG also contended that if granted the claims would impose a new and significant regulatory burden on employers.

[122] It is not disputed that the SDA and ASU claims if granted would lead to an increase in employment costs. However, in the absence of any evidence as to how many employees living in the SDA and ASU locations are reliant on the awards affected by the SDA's and ASU's respective claims or are covered by enterprise agreements that use those awards for the purposes of the better off overall test, we are unable to determine the extent of the impact on employment costs.

[123] We note also that the ASU's proposed provision would impose a regulatory burden on employers. For instance, in determining the appropriate amount of district allowance to be paid employers would need to determine whether or not the employee has a dependent and whether or not that dependent is in receipt of a district or locality allowance.

[124] The above analysis supports a finding that the SDA and ASU claims do not satisfy this element of the modern awards objective.

The need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards – s.134(1)(g)

[125] The SDA submitted that its proposal was simple, easy to understand, stable and sustainable.

[126] AiG submitted that the need to maintain a stable award system told against granting the SDA and ASU claims in the absence of a proper and convincing evidentiary case, while ABI & NSWBC and the Guild both submitted the SDA and ASU had advanced no evidence in respect of this element of the modern awards objective.

[127] In the absence of more substantive evidence we are unable to conclude that the SDA and ASU claims satisfy this element of the modern awards objective.

The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy – s.134(1)(h)

[128] The SDA contended that the impact of its proposal on the national economy was likely to be negligible.

[129] AiG and the Guild both submitted that the SDA and ASU claims were likely to adversely impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy. ABI & NSWBC submitted that the SDA and ASU had provided no evidence in respect of this element of the modern awards objective, while the MGA noted that the SDA had provided no evidence to support its above contention.

[130] In the absence of any evidence as to how many employees living in the SDA and ASU locations are reliant on the awards affected by the SDA's and ASU's respective claims, we are unable to determine the impact of the SDA and ASU claims on these factors. To the extent that the introduction of a district allowance impacts on employment costs a reasonable assumption would be that there is the potential for some negative impact on employment growth in the SDA and ASU locations. While the impact on inflation and the sustainability, performance and competitiveness of the national economy might be expected to be modest, this of itself is not sufficient to warrant the granting of the SDA and ASU claims.

[131] In view of the uncertain impact of the SDA and ASU claims on these factors we are again unable to conclude that the claims satisfy this element of the modern awards objective

[132] In short, we do not consider that the SDA and ASU claims satisfy ss.134(1)(a) to (c) and ss.134(1)(f) to (h) of the modern awards objective. Further, we consider the remaining elements of the modern awards objective, i.e. ss.134(1)(d) to (e), to be neutral considerations in this case.

[133] As previously mentioned, both AiG and ABI & NSWBC raised the issue of s.138 of the Act which provides as follows:

> "**138 Achieving the modern awards objective**
>
> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective."

[134] The SDA acknowledged that its approach would see some employees living in the SDA locations over-compensated relative to the level of district allowance for those locations in Western Australian State awards while other employees would be under-compensated. In addition, the SDA posited that it would essentially be impossible, or at least highly resource intensive, to calculate a figure for each SDA location that exactly accounted for the disabilities caused by cost of living, climate and isolation.

[135] While we agree that putting a financial value on the level of disability that may be associated with living in a remote location is not necessarily a precise science and is likely to involve some value judgements, the value needs to have some direct relationship with measurable/quantifiable considerations such as the cost of living. What is clear from the table at paragraph [53] above is that the overall cost of living and movements in the cost of living in the SDA locations when compared to Perth differs between and within those locations. In this case, the SDA has simply adopted the quantum of the Broken Hill allowance without any analysis as to whether that quantum is appropriate in each of the SDA locations. In the absence of any such analysis, we cannot be satisfied that the SDA's proposed approach is consistent

with s.138 of the Act. The SDA's contentions regarding such a localised approach (see paragraph [39] above) overlook s.138 of the Act.

[136] Similarly, the ASU's failure to set out the methodology which underpins its proposed district allowance rates does not allow an assessment of the extent to which the proposed allowance is necessary to achieve the modern awards objective. Accordingly, we are not satisfied that the ASU's proposed approach is consistent with s.138 of the Act

[137] In summary, based on the material before us we are not satisfied that it is necessary to amend the various awards as proposed by the SDA and the ASU. More particularly, we do not propose to grant the SDA and ASU claims because we are not satisfied that:

- the SDA and ASU have proposed a consistent and fair national basis for the fixation and adjustment of district allowances;
- the SDA and ASU claims satisfy ss.134(1)(a) to (c) and ss.134(1)(f) to (h) of the modern awards objective; and
- the SDA's and ASU's proposed approaches are consistent with s.138 of the Act.

[138] Further having regard to the material before us, we consider that each award the subject of the SDA and ASU claims, together with the NES, provide a fair and relevant minimum safety net of terms and conditions in the absence of the inclusion a district allowance.

Conclusion

[139] For all the above reasons, we have decided to dismiss the SDA and ASU applications.

Appearances:

D. Scaife and *P. O'Keefe* for the Shop, Distributive and Allied Employees Association
J. Knight for the Australian Services Union
R. Bhatt for the Australian Industry Group
L. Izzo for Australian Business Industrial and the New South Wales Business Chamber
J. Light for the Pharmacy Guild of Australia

A. Soliven for the Motor Traders' Association of New South Wales, the Motor Trade Association of Western Australia and the Motor Trades Association of Queensland
N.Tindley for the Australian Retailers Association and Master Grocers Australia

Hearing details:

2018.
Sydney.
April 10-12.

Printed by authority of the Commonwealth Government Printer

<PR714702>

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[1] MA000004

[2] MA000003

[3] MA000089

[4] MA000012

[5] MA000005

[6] MA000048

[7] MA000002

[8] MA000088

[9] MA000116

[10] MA000112

[11] MA000015

[12] MA000100

[13] Defined as a spouse or de facto spouse or a child (where there is no spouse or de facto spouse) who does not receive a district or location allowance.

[14] Exhibit 1

[15] Exhibit 2

[16] Exhibit 7

[17] Exhibit 3

[18] Exhibit 4

[19] Exhibit 5

[20] Exhibit 22

[21] Exhibit 9

[22] Exhibit 11

[23] Exhibit 21

[24] Exhibit 8

[25] Exhibit 6

[26] The four awards were the Business Equipment Award 2010, the Contract Call Centres Award 2010, the Labour Market Assistance Industry Award 2010 and the Water Industry Award 2010.

[27] [2015] FWCFB 644

[28] Ibid at [52]-[64]

[29] [2015] FCAFC 131

[30] Ibid at [30] and [41] of Buchanan J's Reasons for Judgement

[31] [2017] FWC 2928 at [17]-[22]

[32] Exhibit 24

[33] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35] per Tracey J.

[34] *Friends of Hichinbrook Society Inc v Minister for Environment (No 3)* (1997) 77 FCR 153; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121; *Edwards v Giudice* [1999] FCA 1836.

[35] [2014] FWCFB 1788 at [60]

[36] Ibid at [24]

[37] Ibid at [35]-[36]

[38] [2017] FWCFB 1001

[39] Ibid at [230]-[264]

[40] [2017] FWCFB 1001

[41] Ibid at [269]

[42] [2017] FCAFC 161

[43] [2017] FWCFB 1001

[44] [2017] FCAFC 161

[45] [2017] FCAFC 123

[46] Exhibit 12

[47] The SDA states in its submissions that discomfort days are the number of days above the Relative Strain Index (an estimate produced by the Bureau of Meteorology) of the average number of days when the relative heat index exceeds the critical comfort level at 3:00pm.

[48] Exhibit 20

[49] [2008] AIRCFB 1000

[50] Exhibit 24

[51] Mandurah is 77kms South of Perth

[52] Coles Supermarkets Enterprise Agreement 2017 [AE428094] – MFI#1

[53] Exhibit 12 at page 2

[54] Ibid at page 7

[55] Exhibit 24

[56] Exhibit 14

[57] Ibid at pages 28-29

[58] Exhibit 19

[59] Government Gazette of Western Australia, 30 July 1982 at page 3014

[60] Exhibit 20

[61] AE425345

[62] [2017] FWCFB 3500 at [361]-[362]

[63] [2017] FWCFB 1001 at [179]

[64] Exhibit 24

[65] AiG Further Submission of 26 April 2018 at paragraph 26

[66] Submission of NSWBC and ABI 4 April 2018 at Annexure A and Exhibit 16

[67] Exhibit 17

[68] [2015] FCAFC 131 at [15] of Buchanan J's Reasons for Judgement

[69] Exhibit 12 at page 4

[70] Exhibit 24

[71] MGA Independent Retailers Submission on Common Issue – Transitional Provisions (District Allowances) March 2018 at Exhibit A

[72] Ibid at page 45

[73] Ibid at page 46

[74] Ibid at [15]-[19]

[75] [2005] AIRCFB at [79]-[81]

[76] Ibid at [80]

[77] Exhibit 12 at page 4

[78] Ibid

[79] Exhibit 19

[80] Exhibit 14

[81] [2017] FWCFB 3500 at [361]-[362]

[82] Exhibit 23 and MFI#1

[83] [2017] FWCFB 1001 at [179]-[180]