

Fair Work Commission

Fair Work Act 2009

Annual Wage Review 2016-17

Reply Submission by the

Australian Catholic Council for Employment Relations

regarding the proposal to adopt a

Medium-term target for the National Minimum Wage

17 October 2016

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A. Introduction

1. This Reply by the Australian Catholic Council for Employment Relations (ACCER) addresses the question of the capacity of the Fair Work Commission (FWC) to set a medium-term target for the National Minimum Wage (NMW) as proposed by United Voice.
2. In section B we refer to the submissions by United Voice and the Australian Council of Trade Unions (ACTU) of 10 October 2016 in regard to how the proposed target has been identified and its importance to low paid workers. These submissions elaborate on the proposal for the setting of a medium-term target first raised by United Voice in its submission of March 2016 to the Annual Wage Review 2015-16.

3. In section C we include extracts from the submissions filed by the Australian Government and four employer organisations on or about 10 October 2016 in opposition to the setting of a medium-term target. The submissions argue that the setting of a medium-term target would be inconsistent with the powers conferred on the FWC by the *Fair Work Act 2009*.
4. In section D we set out the relevant provisions of the *Fair Work Act* and refer to the legal principles regarding the exercise of a statutory discretion of the kind conferred on the FWC when setting the NMW.
5. In section E we argue that the FWC is able to establish principles and policies as to how it will exercise its jurisdiction over time. Australian wage fixing history illustrates this capacity and its utility.
6. In section F we argue that the proposal advanced by United Voice in its submission of 10 October 2016, and supported by the ACTU, should be accepted by the FWC.

B. The claim for a medium-term target

7. United Voice and the ACTU have filed submissions showing the reasons for the proposed medium-term target and how it should inform future decisions.
8. United Voice has proposed “the adoption of a medium-term (4 year) target of 60% of median wages for the NMW as an additional tool to assist the Panel in the performance of its annual obligations” (page 5). This is said to be consistent with the FWC’s powers under the *Fair Work Act*:

“We submit that the Panel can, as a matter of discretion, adopt a medium-term target. Such a target would not operate to require a particular outcome or to restrict the discretion of the Panel in a given year’s proceeding. Regardless of a target, the precise pace of progress towards it may differ depending on circumstances each year as the Panel balances the various matters it is required to consider.” (Page 15)
9. The submission proposes that the target should be based on the “median weekly earnings for full time workers” published by the Australian Bureau of Statistics (ABS) in *Characteristics of Employment, Australia* (Catalogue No. 6333.0). A wages survey is conducted every August and the results are published 12 months later. In August 2015 the median earnings for full time workers was \$1,230.00 per week. 60% of that figure was \$738.00 per week. At that time the NMW was \$656.90 per week, \$81.10 per week less than the proposed target.

10. The proposed target is limited to the setting of the NMW and does not extend to award rates of pay in excess of the NMW:

“The NMW is a discrete instrument that is compatible with a target. The additional complexity associated with applying a target to the broader range of modern award minimum wages mitigates against its use. This is particularly true in the initial or introduction phase of a target. We also note that while the Act requires the Panel to issue a NMW Order, its power to adjust broader rates is explicitly discretionary.

Accordingly, in respect of modern award minimum wages more generally, we submit that no target should be set at this stage. The quantum and manner of calculation (for example flat dollars, percentage or hybrid) of any annual adjustment to broader modern award minimum wages (and the NMW) would remain a matter to be determined in the annual case.” (Page 19, footnote omitted)

11. The proposed target is seen as providing focus, consistent with the application of the statutory criteria:

“Accordingly, we propose the following headline criteria:

- (a) That a target will assist the Panel in the performance of its obligations under the Act an (sic) in balancing the various factors it must consider;
- (b) That a target contributes to a minimum wage system that is stable, transparent and broadly predictable, while retaining flexibility to respond to economic conditions; and
- (c) That ensures a target ensures appropriate focus on the needs and relative leaving standards of the low paid.”(Page 36)

12. The ACTU submission supports the setting of the target proposed by United Voice and sets out in detail reasons for the target being established. The substance of the submission concerns the changing relationship between median wage levels and the NMW (including its pre-2010 predecessors).

13. The ACTU submission explains why a focus on changes in the real value of the NMW is insufficient. Since 1986 the real increase in the NMW has been 9.2%, or 0.3% per annum; since 1996 the real increase in the NMW has been 18.2%, or 0.9% per annum; and since 1996 the real increase in the NMW has been 4.0%, or 0.4% per annum (page 8). These modest increases need to be seen in the context of changes in community-wide wage levels.

14. The ACTU has drawn on data regarding median and mean average wages in Australia published by the ABS since 1983.

“Over the 33 year period since the start of comparable series’ at 1983, Average Weekly Ordinary Time Earnings (AWOTE) have grown by 4.8% per annum in nominal terms, or 1.2% per annum in real terms. This means AWOTE has grown 48.9% in real terms since 1983. At the same time median earnings have increased by 4.4% per annum in nominal terms or just under 0.9% per annum in real terms,

for a total increase of 31.8% in real terms since 1983. Real AWOTE has grown a total 17.3% over the 10 years since 2006, or 1.6% per annum, compared with real NMW with a bare 0.4% per annum over the same period. (Page 9)

15. Figure 9 of the ACTU submission, “Percentage difference of NMW from 60% of median earnings”, illustrates the dramatic change in the relativity between the NMW and median earnings.

“The NMW has fallen from 13.9% above the 60% of median at 1983, or 7.5% thirty years ago in 1986, to 11.0% below the 60% of median at 2016. The 2016 figure for the NMW of 11.0% below the median is slightly less than the 12.1% below 60% of the median in 2012. This flattening is due to a fall in the median after 2012 and then very slow growth in median earnings subsequently.” (Page 14)

“The minimum wage bite as a per cent of median earnings has fallen from 68.3% in 1983 to 53.4% in 2016. The fall in the minimum wage bite is in the context also of very low growth in the real median wage itself in recent years. The flat lining of the minimum wage bite over the last two years is due to very low growth in the median and cannot be assumed to continue; it is still at a close to record low and inadequate level in any case.” (Page 15)

16. We note that until 1992 the NMW was never less than 7.0% above the 60% of the median. By 1999 the NMW had fallen to less than 60% of the median. Since 2008, it has been at least 9.0% below 60% of the median. In the four years from 2004, a period coinciding with the *Work Choices* years, the NMW dropped by about four percentage points. In each of the three years to 2016 the NMW has been at or very close to 11.0% below 60% of the median.

17. It should also be noted that in August 1997, four months after the NMW was first set (and then called the Federal Minimum Wage), the NMW was 3.0% above 60% of the median. After 18 years it was 11.0% below 60% of the median. This illustrates the fundamental failure of minimum wage setting in recent Australian history. This downward trend has flowed through to award rates of pay. United Voice has proposed (see earlier quotation) that the adjustment to award rates not be linked to the NMW-target, but be the subject of determination in each annual wage review.

18. The ACTU argues that the proposal is flexible and consistent with the FWC’s statutory duty:

“As referred to in our response to question 1, a target effectively operates as a statement of principle. It is the expression of an aspiration or policy goal rather than a binding directive. What the target is, as well as decisions as to whether to adhere to it in any particular year, are inherently flexible.” (Page 30)

19. The major point to be made is that the loss of the relative value of the NMW, and award rates more generally, has had an impact on the living standards of minimum wage-dependent workers and those workers whose wage rates are influenced by those minimum rates. This is a particularly important consideration given the nature and purpose of a safety net and the need to take into account, among other matters, relative living standards. The improvements in the social safety net, or “social wage”, through increased family payments since the early 1980s, need to be considered in measuring the impact that the loss suffered by low paid workers and their families over this period. However, that development does not weaken the case for the proposed target of 60% of the median.

C. Submissions against setting a medium-term target

20. The substance of the arguments against the setting of a medium-term target is that the FWC’s wage setting powers are limited to a year by year annual review. It is argued that the setting of such a target is not only absent from the FWC’s wage setting powers in section 285 of the *Fair Work Act* (and also from section 134 in respect of award wages), but it is inconsistent with the structure and intention of the legislation. The submissions appear to assume a firmer target than that indicated in the above-quoted passages from the United Voice and ACTU submissions. The arguments in opposition to the proposal are put in various ways:

Australian Government

“... the legislative framework ... imposes on the Expert Panel ... a requirement to determine only the next financial year’s NMW. In this process, the Panel must have regard to the minimum wages objective (as well as the objects of the Act and the modern awards objective, if relevant) and the fact that the NMW must be expressed in a way that produces a monetary amount per hour. Adopting a medium term target or a predetermined formula for arriving at the NMW is inconsistent with this annualised review process. [The] approach to each annual wage review process is a matter for the new Panel constituted in that year.” (Pages 2- 3)

Australian Industry Group

“Setting a target would result in the FWC being heavily influenced by that target in each Annual Wage Review and, as a consequence, being diverted from its duty to take into account [the relevant statutory provisions].” (Page 3)

Australian Chamber of Commerce and Industry

“A medium term target would influence each annual wage review outcome on the basis of pre-determined criteria sitting outside of the statutory criteria and there is

no statutory mechanism for the setting of such a target under the Act's provisions." (Page 5)

"'Relative living standards' is one of many considerations that the Panel is required to take into account and information directed at this consideration, while relevant, should not elevate this consideration above others and should not undermine the primary function of the Panel in establishing and maintaining a **safety net of fair minimum wages**." (Page 9, emphasis in original.)

"Doing so would see the annual wage review applied improperly as a tool for wage distribution instead of a tool for maintaining a 'safety net' having regard to the full range of considerations reflected in the statutory framework." (Page 9)

Australian Business Industrial

"... the nature of 'target' means that if a medium-term target was imposed onto the statutory framework of the Act, it would serve to inappropriately influence the conduct of the AWR by requiring focus on a factor not prescribed by the statute." (Page 5)

"[There is no]... basis for the Fair Work Commission to move the assessment of the AWR to anything other than an annual basis (which a medium term target would necessarily require)." (Page 6)

"... the Act is determinative of the relevant considerations and as such medium-term target could not be relied upon to subvert or influence the ordinary operation of the Fair Work Commissions annual AWR powers and obligations." (Page 6)

Australian Federation of Employers and Industries

"The *Fair Work Act* ... requires that the review occur once every year. The Review is a once-a-year event that adjusts minimum and award wages for the forthcoming year. It is not a process that sets a minimum wage having regard to a medium or long-term goal for reaching a particular outcome. There is no statutory remit to have a goal in mind for the medium or long term.There is no statutory power in the FW Act for consideration of a medium or long-term goal or a particular preconceived structure for a minimum wage." (Page 1)

"[The target] ... elevates the basis on which the target is set as a consideration that is an overarching notion rather than the application of the relevant criteria in a balanced way. The legal or economic basis and the relevant assumptions on which a target would be set becomes the aim to be reached compared with a fair and balanced setting of the minimum and award wages having regard to the prevailing conditions examined by the Panel for a particular year." (Pages 3-4)

"The fundamental basis on which the United Voice case is made is that changing the alleged inequality which it argues exists on the basis of the decrease in the minimum wage bite should form part of a 'target.' That proposition is not consistent with balancing the full range of considerations that the Panel must take into account in a particular year." (Page 6)

21. The submissions also argue that the emphasis on one matter, wages, is too narrow.

Australian Industry Group

"Another major problem with the concept of a medium-term target is that the FWC and its predecessors have long recognised that minimum wages are only one element of the social safety net and changes to tax transfer payments should be taken into account when determining the level of the minimum wage increase." (Page 4)

“A medium-term target would inhibit the Commission from taking any future changes in the broader social safety net into account. A further problem with a medium-term target is that it would be more difficult for the Panel to take into account any changes made to the superannuation guarantee in the future.” (Page 5)

Australian Chamber of Commerce and Industry

“It is also important to note that that taxation and income transfers have an important effect on the relative living standards of workers reliant on minimum wages through their effect on household disposable incomes. The notion of setting a medium-term target that is directed at the minimum wage bite oversimplifies the social considerations underpinning minimum wage setting and the important role that other measures have in impacting the living standards of low paid workers including tax and offset changes, welfare payments and subsidies.” (Pages 12-13).

Australian Federation of Employers and Industries

“In terms of addressing inequality concerns, a target based on the trajectory of the NMW relative to average or median wages takes no account of the tax and transfer payments received by low and median income earners and is measuring one variable in isolation, even if utilised with other indicators. (Pages 8-9, footnote omitted)

22. The submissions in opposition to the setting of a medium-term target do not respond to the merit of United Voice's proposal, which was essentially set out in the union's March 2016 submission. There is no reference to any case law that might assist the resolution of the legal issue. Great emphasis is placed on the requirement that there be an annual wage review. The requirement to have an annual wage review, with increases generally operating from 1 July of each year, has obvious utility for employers and employees, but this does not lead to the conclusion that the FWC cannot form a view on important matters beyond the annual review. The FWC might come to the conclusion that a substantial increase in the NMW is required, but that there are constraints upon it being fully achieved in one annual wage review. The submissions in opposition do not make out a case for the FWC being unable to express that view and the reasons for it.
23. The submissions in opposition appear to be based on the view that United Voice is proposing a "strict" target rather than the "qualified" target explained in its submission of 10 October 2016 (quoted above). The forthcoming replies in response to the target proposed by United Voice may address this aspect.

D. The wage setting provisions of the *Fair Work Act 2009*

24. For present purposes, the relevant sections of the *Fair Work Act* concerning the setting of the NMW are sections 3, 284, 285 and 577. Section 3 includes:

“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 [among others] ...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”

25. Division 2 of Part 2-6, which is entitled “Overarching provisions” includes only one section, section 284, the heading of which is “The minimum wages objective”. Section 284 (1) and (2) and the note to subsection (2) provide:

“(1) The FWC must establish and maintain a safety net of fair minimum wages, taking into account:

- (a) the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth; and
- (b) promoting social inclusion through increased workforce participation; and
- (c) relative living standards and the needs of the low paid; and
- (d) the principle of equal remuneration for work of equal or comparable value; and
- (e) providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability.

This is the *minimum wages objective*.”

“(2) The minimum wages objective applies to the performance or exercise of:

- (a) the FWC's functions or powers under this Part; and
- (b) the FWC's functions or powers under Part 2-3, so far as they relate to setting, varying or revoking 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 modern awards objective also applies (see section 134).”

26. Section 285 requires that annual wage reviews be conducted:

“(1) The FWC must conduct and complete an *annual wage review* in each financial year.

(2) In an annual wage review, the FWC:

- (a) must review:
 - (i) modern award minimum wages; and
 - (ii) the national minimum wage order; and
- (b) may make one or more determinations varying modern awards to set, vary or revoke modern award minimum wages; and
- (c) must make a national minimum wage order.”

27. Section 577 of the *Fair Work Act* states that the FWC "must perform its functions and exercise its powers in a manner that...is fair and just...and...is open and transparent..." This provision has the effect of drawing out of the FWC its views on the current and ongoing capacity to establish and maintain a safety net of fair minimum wages.
28. The discretion conferred on the FWC is a constrained discretionary power. Its discretion in establishing and maintaining a safety net of fair minimum wages is constrained by the requirement to take into account the nominated matters. While the legislation requires the FWC to take into account a range of factors, it does not prescribe how it is to be done and the relative weighting to be given to the identified factors.
29. The way in which the kind of discretion conferred on the FWC is to be exercised was considered in *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* [2011] FCAFC 59. The case was a review by a Full Court of the Federal Court of Australia under the *Administrative Decisions (Judicial Review) Act 1977* of a decision made under the *Environment Protection and Biodiversity Conservation Act 1999*. The following appears under the heading "Relevant Legal Principles":
- "44. The obligation of a decision-maker to consider mandatory relevant matters requires a decision-maker to engage in an active intellectual process, in which each relevant matter receives his or her genuine consideration (see *Tickner v Chapman* (1995) 57 FCR 451 at 462 and *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 at [105]). However, in the absence of any statutory or contextual indication of the weight to be given to factors to which a decision-maker must have regard, it is generally for the decision maker to determine the appropriate weight to be given to them.
45. Once a matter has been identified as a mandatory relevant consideration, it is the salient facts that give shape and substance to the matter that must be brought to mind. These are the facts which are of such importance that, if they are not considered, it could not be said that the matter has been properly considered (see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 61).
30. These principles establish make it clear that the FWC has a substantial capacity to identify and consider a range of factors that it regards as pertinent to the setting of a safety net of fair minimum wages. Section 577 emphasises the need for decision-making of this kind to be transparent. The FWC may come to the conclusion that the proper consideration of "relative living standards and the needs of the low paid" are especially important , and justify substantial wage increases, but may feel constrained to adjust wage rates accordingly because of the prevailing economic circumstances. In these circumstances it would be permissible and desirable (at the least) for the FWC to

express that view and propose a way in which future cases could address the matter. There is nothing in the legislation that would support the view that annual wage reviews are meant to be a series of disconnected decisions with no connection to past and future wage reviews.

31. The essential purpose of these provisions in the *Fair Work Act* is to establish and maintain a safety net of fair minimum wages. The wage safety net is the major way in which the Act's intent to promote social inclusion is to be realised. The FWC has a continuing obligation to maintain the NMW so that it complies with the minimum wages objective. The discretion conferred on the FWC is for these purposes and is conferred in a way that enables the FWC to make decisions as to how it is to be achieved.
32. The annual wage reviews operate to provide a regular and timely adjustment to minimum wage rates by reference to the overarching provisions. The FWC's obligation establish and maintain a safety net of fair minimum wages , in particular the NMW, and to promote social inclusion, is ongoing and is not exercised by *unrelated* annual wage reviews. Given this, it would be open to the FWC to consider and set principles and policies regarding the conduct of the annual wage reviews, subject to its ability to review the appropriateness of these principles and policies according to the prevailing circumstances at each annual review.

E. The adoption of principles and policies in Australian wage fixing

33. The history of wage fixation in Australia demonstrates that the exercise of a discretion to set wages can be based on the formulation and application of principles and policies. The awarding more than a century ago of the *Harvester Basic Wage* across a range of industrial disputes demonstrates that the exercise of a discretionary power may be based on the application of principles and policies. Various forms of wage fixing in the past century have reflected the application of changing principles and policies. This has been consistent with general legal principles. There is a natural desire for people to know how decisions are connected and to be assured that decisions are not made *ad hoc*. The provision by legislation of a list of factors to be taken into account by decision makers does not provide sufficient connection between various decisions.
34. The application of principles and policies is acceptable, and may be very desirable, even when a decision-maker is provided with a range of considerations that must be

taken into account. A convenient introduction to this topic is in the judgment of Tracey J in *Gbojueh v Minister for Immigration and Border Protection* [2014] FCA 883, at 39:

“At both common law and under statutory judicial review a decision-maker will not commit jurisdictional error merely by having regard to a principle or policy when exercising a statutory discretion. Error, may, however, occur if the decision-maker considers him or herself bound to apply the policy without regard to countervailing considerations and acts accordingly. In *Elias v Commissioner of Taxation* [2002] FCA 845; (2002) 123 FCR 499 at 506-7 Hely J summarised the position as follows:

“The Commissioner is entitled to adopt a policy to provide guidance as to the exercise of the discretion, provided the policy is consistent with the statute by which the discretion is conferred. Thus if the statute gives a discretion in general terms, the discretion cannot be truncated or confined by an inflexible policy that it shall only be exercised in a limited range of circumstances. A general policy as to how a discretion will ‘normally’ be exercised does not infringe these principles, so long as the applicant is able to put forward reasons why the policy should be changed, or should not be applied in the circumstances of the particular case.”

See also: *R v Moore; Ex parte Australian Telephone and Phonogram Officers’ Association* [1982] HCA 5, (1982) 148 CLR 600 at 612; *Tang v Minister for Immigration and Ethnic Affairs* (1986) 67 ALR 177 at 189-190 (Pincus J); *Madafferi v Minister for Immigration and Multicultural Affairs* [2002] FCAFC 220, (2002) 118 FCR 326 at 358.”

35. The High Court judgment in *R v Moore; Ex parte Australian Telephone and Phonogram Officers’ Association* referred to in this extract was a case where the general principle was applied to wage setting by the Australian Industrial Relations Commission (AIRC).
36. The matters before the High Court included the return of an order nisi seeking mandamus to require that Commissioner Clarkson hear and determine the matters raised in an industrial dispute without binding himself to determine the dispute in accordance with any "Indexation Guidelines" or "Wage Fixing Principles" which had been determined by a Full Bench of the AIRC and which applied to the hearing of future wage cases. The relevant facts and issues concerning this aspect of the case appear in the judgment of Gibbs CJ.

“The two matters arose out of an industrial dispute between the prosecutor and Australian Telecommunications Commission ("Telecom") as to the salaries to be paid to members of the prosecutor who were employed by Telecom. The details of the course which the dispute took need not be set out in full. It appeared at an early stage that Telecom opposed any increase sought by the prosecutor which was outside the Wage Fixing Principles, or as they are sometime called, the Indexation Guidelines, adopted by the Commission, whereas the prosecutor contended that the Commission should not regard itself as bound by those

principles but should settle the dispute on the merits of the case before it. The Wage Fixing Principles were first formulated by the Commission in the reasons given for its decision in the National Wage Case - April 1975. At the times material to the present case they were in the form in which they were stated in the Wage Fixing Principles Case of 14 September 1978. The principles provided for wage indexation, i.e. for the periodic adjustment by the Commission of award wages and salaries in relation to the movement of the Consumer Price Index. They further provided that the Commission would each year consider what increase in the total wage or changes in conditions of employment should be awarded on account of productivity. However, the only other grounds that would justify increases in wages and salaries were those stated in principle 7, which included changes in work value (principle 7 (a)), catch-up of community movements (cases in which awards had not been considered in the light of community movements in 1974) but applications under this principle had to be lodged before 31 December 1978 (principle 7 (b)) and inequities (cases where employees performing similar work were paid dissimilar rates of pay without good reason) (principle 7 (d))." (Paragraph 2)

"... the main argument presented on behalf of the prosecutor, which was that Mr. Commissioner Clarkson did not perform his duty to determine that part of the dispute which had been referred to him, because he decided it by reference to the Wage Fixing Principles, which were rules of policy determined by the Full Bench in cases involving other parties, rather than by reference to the individual merits of the case before him. It was conceded that the Commissioner was entitled to take the Wage Fixing Principles into account, but it was submitted that they did not bind him and that he had the right to depart from them when the circumstances of the particular case required or justified it. This argument rested on two foundations - the first the principle that the Commission has no power to make a common rule for an industry, and the second the doctrine that a tribunal entrusted with a discretion must not, by the adoption of a fixed rule of policy, disable itself from exercising its discretion in individual cases." (Paragraph 11)

37. It is the second of the two points in the concluding sentence that is relevant to the issues now raised in the FWC. After referring to several High Court precedents on the exercise of the power to make an award in settlement of an industrial dispute, Gibbs CJ said:

"It is clear from these authorities that the Commission, in the course of settling particular disputes, was entitled to formulate the Wage Fixing Principles and, having done so, was entitled to apply those principles consistently in the settlement of other disputes. It was submitted on behalf of the prosecutor that it was nevertheless the duty of the Commission in each matter before it where the question was raised to consider whether the circumstances of the case warranted a departure from the Wage Fixing Principles. There is a general principle that a tribunal which is called upon to exercise a discretion does not perform its duty if it acts in blind obedience to a rule or policy that it had previously adopted." (Paragraph 12)

"When the Commission has formulated a principle, such as that a particular figure should be adopted as a basic or minimum or total wage, or that wages should be increased only in accordance with particular guidelines, it may apply

that principle consistently from case to case. If an application is made to it to depart from any such principle, it should hear the application. That of course does not mean that it must embark upon a full scale hearing on each occasion on which a disputant seeks a departure from the principle.” (Paragraph 13)

38. Stephen J agreed with the Chief Justice. Aickin J (with whom Wilson J agreed) came to a similar conclusion on these matters.

“There is no doubt the Full Bench of the Commission may adopt general policies or principles in accordance with which it will act in the making of awards for the settlement of industrial disputes.” (Paragraph 28)

39. The setting of a medium-term target as proposed by United Voice would be consistent with past Australian wage fixing practices, based on articulated principles and policies, and the laws that have underpinned those practices. The opposition to the setting of a medium-term target for the adjustment of the NMW is inconsistent those practices. The arguments in opposition to the target would be well-founded if the terms of the *Fair Work Act* required such a departure past practices. However, there is nothing in the legislation that displaces the legal principle that permits the adoption of a principles or policies to provide guidance as to the future exercise of the FWC's discretion subject to the obligation to take into account the full range of statutory factors at a future time. There is nothing in the *Fair Work Act* that would prevent the FWC adopting the medium-term target proposed by United Voice.

F. Conclusion

40. ACCER's submission of 10 October 2016 supported the setting of a medium-term target (over five years) and proposed that it set by reference to the relative living standards and poverty levels at December 2007, as identified by the Australian Fair Pay Commission in its July 2008 decision. For example, the single breadwinner NMW-dependent family of a couple and two children was 7.0% below the 60% of median poverty line. ACCER focussed on the poverty line of 60% of median equivalised household disposable income, while United Voice has focussed on 60% of median wages.
41. As noted earlier, in late 2015 the proposed target for the NMW of 60% of median wages was the equivalent of an increase in the NMW of \$81.10 per week. This represents an increase of \$65.69 per week after tax (and before the Medicare Levy, if applicable). Applying that increase to the NMW-dependent family at Table 28 of ACCER's March 2016 submission, disposable income would increase to \$1,046.47 per

week, lifting the family from 11.0% below the poverty line to 5.1% below the poverty line. With the removal of the Schoolkids Bonus from 1 January 2017 this family will suffer a cut in its disposable income of \$24.65 per week. This will have an effect on the prospective effect of the medium-term target. To illustrate, if it was applied to the calculated impact of the target being achieved in late 2015, it would reduce disposable income to \$1,021.82 per week or 7.3% below the poverty line. The outcome under the proposal advanced by United Voice is broadly similar to that proposed by ACCER. The medium-term target proposed by United Voice, like that proposed by ACCER, will not address the longer term need to improve relative living standards and poverty rates among low income wage-dependent families, but it would be an important step in that direction.

42. For the reasons set out above, the medium-term target proposed by United Voice has substantial merit and there is no impediment arising from the terms of the *Fair Work Act*, or otherwise, which would support its rejection. The proposal should be accepted.