



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

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

s.285 - Annual wage review

**Annual wage review
(C2017/1)**

Sydney

9.01 AM, MONDAY, 24 OCTOBER 2016

PN1

JUSTICE ROSS: Can I have the appearances, please - in Sydney, first?

PN2

MR A BREEN: If it pleases the Commission, my name is Adrian Breen and I appear for the Commonwealth with my colleague from the Department of Employment, Lay Swain, my Treasury colleague, Mr Stowe, and my colleague from the Department of Social Services, Mr Broadhead.

PN3

JUSTICE ROSS: Thank you.

PN4

MR T CLARKE: Trevor Clarke from the Australian Council of Trade Unions. With me is Dr Margaret McKenzie, and I may need instructions from Mr (indistinct) from the ASU at some point.

PN5

MR T LYONS: Your Honour, my name is Lyons, initial T. I appear for United Voice with Mr Mackleray.

PN6

MS A MATHESON: If the Commission pleases, Matheson, initial A, for the Australian Chamber of Commerce and Industry.

PN7

MR J ARNDT: If the Commission please, Arndt, initial J, appearing for ABI and NSW Business Chamber.

PN8

MS M ADLER: If it pleases, Adler, initial M, from the Housing Industry Association.

PN9

MR B FERGUSON: If it pleases, my name is Ferguson, initial B, for the Ai Group. With me is Ms Toth, initial J, chief economist, Ai Group.

PN10

MR B LAWRENCE: If the Commission pleases, my name is Lawrence, initial B, for the Australian Catholic Council for Employment Relations.

PN11

MR S MAXWELL: If the Commission pleases, my name is Maxwell, initial S. I appear on behalf of the CFMEU Construction and General Division.

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MR BROADHEAD: Mr Broadhead, as previously referenced by the Commonwealth rep, from the Department of Social Services.

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JUSTICE ROSS: Anyone else in Sydney? All right, who'd like to go first?

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MR BREEN: If it pleases the Commission, the Commonwealth just has a very brief opening statement.

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JUSTICE ROSS: Mm-hm.

PN16

MR BREEN: The government considers that the form of financial support for working families is a rewarding job, and the best way to improve living standards is to build a strong and prosperous economy which delivers strong job growth. However, the government also strongly believes that minimum wages play a vital role in providing a safety net for Australian workers. The setting of minimum wages is a matter for the Fair Work Commission to decide within the legislative parameters of the Fair Work Act. As discussed in the government's submission, the Fair Work Act provides for an annual wage review process which does not envisage a multi-year target. Furthermore, the panel's annual decision must be consistent with the requirements of the Fair Work Act, with particular reference to the factors laid out in the minimum wages objective and the modern award objective. If a medium term target were adopted it would need to be reassessed every year in order to comply with the requirements of the Act, taking into account the economic and social circumstances in that particular year. Given this, a target may increase uncertainty for employers and employees. We are happy to address any questions you may have on these and other issues.

PN17

JUSTICE ROSS: Can I take you to your written submission at page 2, after the heading, "Implications of the legislative framework", about the fifth line from the bottom of that paragraph? You say:

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Further, the Australian government is of the view that adopting a target range is inconsistent with the requirement to express the national minimum wage in a way that produces a monetary amount per hour.

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I can't follow that argument. Why is that? I understand the balance of the argument.

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MR BREEN: I might qualify that, your Honour. I suppose the principle point to be made at that part of the submission would be to say that the adoption of a target range wouldn't assist in the formulation of a monetary amount.

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JUSTICE ROSS: Why not?

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MR BREEN: Because the monetary amount, in our submission, your Honour, needs to be determined on a year-by-year basis.

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JUSTICE ROSS: So it's the annualised process point that you're making?

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MR BREEN: Yes, your Honour.

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PROFESSOR RICHARDSON: If I might, I was puzzled by that as well. Are you suggesting there's some difficulty in going from let's say, to use the illustration that's been used by United Voice, for example, 60 per cent of medium adult earnings, going from that percentage of something to a dollar amount, that there's some trick in that that's not obvious to me?

PN26

MR BREEN: I suppose the principle point we make at this part of the submission is merely the given - as your Honour sort of led me to the point of the annualised process - that the obligation of the Commission to arrive at that monetary amount on a year-by-year basis is inconsistent with the strictures, if you like, of a longer term parameter that dictated how that amount should be arrived at, or what that amount should be, in our submission.

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PROFESSOR RICHARDSON: So it's not really a separate point to say the monetary amount is difficult to arrive at?

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MR BREEN: That's right.

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PROFESSOR RICHARDSON: It's not a separate point?

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MR BREEN: That's right.

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PROFESSOR RICHARDSON: Okay.

PN32

JUSTICE ROSS: Can I take you to page 4 where you deal with the transitional matters, and the fifth paragraph where you say that some further consideration may need to be given to making sure that it is covered by award-derived long service leave terms, understand their rights and obligations? What sort of further considerations? And I don't really follow how that links to the last sentence, the modern award objective, because presumably we're not putting them in modern awards.

PN33

MR BREEN: Yes, that's right, your Honour. The fifth paragraph there at that part of the submission was merely to ensure - I suppose the Commission would in any event - just seek to ensure that where entitlements were determined or dictated by

what happened at a previous point in time that they continued to be made available and known to the relevant parties.

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JUSTICE ROSS: How would you suggest we do that?

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MR BREEN: I think that perhaps a way of doing that would be to perhaps provide that - well through a website or through other communications, just to make very clear that what the situation was at the commencement time would continue to apply.

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JUSTICE ROSS: And I think your point is that if those awards that contained long service leave terms, the pre-modernised awards were terminated, then those long service leave entitlements will continue to operate in any event?

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MR BREEN: That's right.

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JUSTICE ROSS: Despite the underlying instrument going, because of the operation of section 113, is that the proposition?

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MR BREEN: Yes, your Honour.

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JUSTICE ROSS: At the bottom of that page you say that some of the instruments in Appendix 1 may continue to be preserved as division 2(b) awards. Which ones?

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MR BREEN: I don't have that information with me, your Honour. I can take that on notice if that assists?

PN42

JUSTICE ROSS: Yes, that would be great. Thank you. In relation to the employment arrangements for people with disability, can I take you to page 8, just under issue 2, you say the vast majority of people with disability are employed under the same wage rates as anyone else. You have later set out some information regarding the number of people employed under SWS agreements by year. Do you make that statement that I've taken you to based on any other statistical data?

PN43

MR BREEN: I might defer to Mr Broadhead if that assists.

PN44

JUSTICE ROSS: Sure.

PN45

MR BROADHEAD: Perhaps, if I can assist. There are 2.2 million people of working age in Australia who have a disability.

PN46

JUSTICE ROSS: Right.

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MR BROADHEAD: And about a 53 per cent participation rate in the workforce. And we have in rough numbers a bit over one million people who are employed with disabilities in the workforce, around one million, but only 5000 or so who are on the supported wage system.

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JUSTICE ROSS: Yes. Okay. Thank you.

PN49

PROFESSOR RICHARDSON: Sorry, could you just help me? When you say have a disability do you mean that they're eligible for the disability support pension?

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MR BROADHEAD: No, I don't.

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PROFESSOR RICHARDSON: Or what else do you mean? Or how do you define that?

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MR BROADHEAD: Those numbers come from the survey of disability aging and care as conducted by the ABS every three years. The most recent one was in 2015, and so those figures are from the 2015 survey. It's a survey not a census.

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PROFESSOR RICHARDSON: Right.

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MR BROADHEAD: But it provides estimates of the numbers of people, amongst other things, the numbers of people who are in work, and people in work who have disability, people who are unemployed, so the unemployment rate is higher for people with disability, estimated at 10 per cent in the last survey.

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PROFESSOR RICHARDSON: So how is disability defined in that survey?

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MR BROADHEAD: I have to take that on notice. It's an ABS definition.

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PROFESSOR RICHARDSON: Yes.

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MR BROADHEAD: So I'd have to supply that to you for the hearing, I'm afraid.

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PROFESSOR RICHARDSON: Okay. But its relevance to this question about whether - - -

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MR BROADHEAD: Well, it's relevant to the question about – well, as I took your question that most people with disability as defined by the ABS who are in work are not being paid under the support, most of them. To be on DSP is a particular subset of those people; to be eligible for DSP is a particular subset of people who have disability and it's a much tighter, if you like, definition or set of eligibility criteria than it is for having a disability more generally.

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PROFESSOR RICHARDSON: And what would that number be?

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MR BROADHEAD: In rough numbers it's between 700 and 800,000 people last time I looked, but again I'll give you a precise number on notice if that's all right.

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PROFESSOR RICHARDSON: And they are of working age?

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MR BROADHEAD: I couldn't tell you off the top of my head. Many of them are of working age and because once you get to pensionable age, age pension age, you can transfer off to, go on to the age pension, and from memory you'd have to be a minimum age in order to get on to DSP. So the majority of them would be of working age.

PN65

PROFESSOR RICHARDSON: The ABS definition would include those over 65?

PN66

MR BROADHEAD: Well, the figure I referred to, 2.2 million there's actually 4 million people by their definition who have disability in Australia, in the Australian population. 2.2 million of those are people of working age, and it's essentially 15 to 64.

PN67

PROFESSOR RICHARDSON: And can you tell us of those who are eligible for the disability support pension? What proportion of those are employed?

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MR BROADHEAD: Quite a small number I believe, but I couldn't – again I can't give you an exact figure off the top of my head. I'm happy to come back to those numbers?

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PROFESSOR RICHARDSON: Well, could you provide that to us?

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MR BROADHEAD: Yes.

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PROFESSOR RICHARDSON: Good. Thank you.

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MR BROADHEAD: Thank you. Can I take you to page 10 and the second paragraph from the bottom?

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MR BREEN: I might direct a question to Mr Broadhead if that's all right?

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JUSTICE ROSS: Well, I'm not sure who it goes to at this stage.

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MR BREEN: Okay.

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JUSTICE ROSS: But it's the second sentence where it said that:

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It is known that some offers of employment are made conditional on payment of an adjusted wage.

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How is it known?

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MR BROADHEAD: That probably falls into the category of anecdotal, and so we know I administer a program called disability employment services which is a program funded by the Australian Government to help people with disability get into work and it transpires from time to time that the people that we fund, the organisation that we fund to get people with disability, assist them to get jobs, end up in negotiations with employers, and I'm aware that from time to time part of that negotiation is the availability or not of a supported wage outcome, and I'm aware that in some instances absent that the employer may not feel that it's tenable to offer employment.

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JUSTICE ROSS: All right. Thank you.

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MR BROADHEAD: So it's not a statistical outcome from time to time.

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JUSTICE ROSS: Right. That's fine. Thank you.

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PROFESSOR RICHARDSON: Look, I did have one other question of Mr Breen. You say on page 3 of your submission, at the end of the third full paragraph:

PN84

The existence of 122 modern awards incorporating a wide range of different wages would further complicate adopting a target. In some awards the lowest rate of pay is already more than double the national minimum wage.

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So just expand a bit on what the nature of the complication would be if the lowest rate in the particular award is well above the national minimum wage, why would having a medium term target for the national minimum complicate that award?

PN86

MR BREEN: I suppose in that point the Government was merely drawing to the Commission's attention or raising the issue in the context, I suppose, of the comparison or the example of what happened in the United Kingdom just with the additional complexity potentially that might exist within our system. I suppose it's just to say that the interaction of any target with minimum award wages would just be a consideration that could be relevant, and we say it, you know, should always be a matter of consideration. And it's unclear how that adoption of a target might impact on those minimum award wages. It was just that additional level of complexity or the other aspect of our system here that makes things a bit different to how the UK system works, and of course there are differences, in our submission, but that was just one of them.

PN87

PROFESSOR RICHARDSON: I don't understand the point at all, to be perfectly honest.

PN88

MR BREEN: I'm sorry, If I can assist?

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PROFESSOR RICHARDSON: I mean, let me just say - - -

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MR BREEN: If I could attempt to explain again. I suppose obviously in the UK system there's no award system.

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PROFESSOR RICHARDSON: I do understand that.

PN92

MR BREEN: There's no award minimum wages and so, in our submission, to the extent that there was an interaction between the national minimum wage in the context of a target and to the point where that started to touch on minimum award wages then that would be another significant level of complexity with the adoption of a target here, which doesn't exist there.

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PROFESSOR RICHARDSON: But that's a matter that this panel has to deal with annually.

PN94

MR BREEN: Yes.

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PROFESSOR RICHARDSON: I mean, suppose this panel chose, on this occasion, to increase the national minimum wage, to 60 per cent of median earnings then we would have to grapple with that issue as to what that meant for all other awards, wouldn't we?

PN96

MR BREEN: Yes. Yes.

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PROFESSOR RICHARDSON: So it's not peculiar at all to a medium term target is the point that I'm making.

PN98

MR BREEN: No. No, that's right. It's certainly not our key submission, but just another thing to bear in mind.

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JUSTICE ROSS: Well, the complication might rather arise where you have an award where the lowest wage aligns with the national minimum wage.

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MR BREEN: Yes.

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JUSTICE ROSS: And in that case having a disproportionate increase to the minimum wage may affect the relativities and the classifications in the award. For example, in the restaurant award, is an example of that, I think.

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MR BREEN: Yes. That's our submission, yes.

PN103

JUSTICE ROSS: That would be a better example rather than what you've referred to.

PN104

PROFESSOR RICHARDSON: And if I might take you then to the following paragraph which is saying that the Government doesn't think the minimum wage is very useful for dealing with issues of inequality. Again, this is a generic point of national minimum wages rather than a point of a medium term target, isn't it?

PN105

MR BREEN: That's right.

PN106

PROFESSOR RICHARDSON: What if the medium term target was 40 per cent of median earnings?

PN107

MR BREEN: Beg your pardon, sorry?

PN108

PROFESSOR RICHARDSON: Suppose the medium term target became 40 per cent of median earnings or to cite the audit commission of 44 per cent of average earnings would you have the same view? Would you make this same point?

PN109

MR BREEN: Yes.

PN110

PROFESSOR RICHARDSON: Okay. So this is a point somehow about a medium term target as distinct from the level of that - - -

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MR BREEN: That's right. Yes.

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PROFESSOR RICHARDSON: All right. Well, then I don't understand the point you're making.

PN113

MS WANG: If I can (Indistinct) from the Commonwealth Department as well. I think the point that we're trying to make here is that to adopt a medium term target we understand the purpose is to improving equality as advanced in other parties, so that's why we put a paragraph there in terms of how the minimum wage positions as well as the purpose of setting a medium term target interacts with the inequality situation in Australia. So that's the purpose of that paragraph.

PN114

And also going back to your previous question, yes, I think we totally agree, like a panel has to make decisions and in terms of how the minimum wage position flows on to awards, so again is we're trying – the Government submissions notes the proposals in your background paper which refers to the UK targets setting a minimum wage to the 60 per cent of the median wage. And we note, and there is a number of awards, the lowest adult wage in those awards. The awards rely on industries already close to 60 per cent and we note the increase to the minimum wage close to the 60 per cent, particularly in UK, have some potential drop this employment effect. So that further create the implication in Australia is because you've got 2000 award wages either equal or above the national minimum wage, then that's another thing, I think you're right the panel consider it every year, but that's just this employment effect and it will be probably magnified by the magnitude of the proposed increase by setting a medium term target.

PN115

PROFESSOR RICHARDSON: So the implication is that if the panel was to identify a medium term target, the assumption that you're making is that that would be higher - that would be a pressure in the direction of raising the national minimum wage.

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MS WANG: Yes, so that's the impression we got from the background paper but you are right, the panel can make a target either ways.

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PROFESSOR RICHARDSON: Thank you.

PN118

MS WANG: Thank you.

PN119

JUSTICE ROSS: Mr Clarke.

PN120

MR CLARKE: Yes, thank you. I think those questions have kind of seized on a very important point, which is that aside from some very sort of generic and not very exciting submissions about how the statutory framework works. Much of what's put against the proposition raised by United Voice, which we're supporting, is not in truth an attack on the question of whether there can be a target. It's what - it's an attack on setting minimum wages at a particular level, rather than the adoption of a target.

PN121

Some of the submissions also seized on the difference, and the commonwealth is one of them, between the nature of the United Kingdom's regulatory framework and the supposed drivers of the policy of the UK government to set the target contended for. If you look back to the resolution foundation report in 2014, that was arguing the target on its inherent merits, they set the target at 60 per cent based on striving to put the UK in the top third of OECD countries, against a background of a lack of any evidence that the minimum wage policies in that country had led to any disemployment effects.

PN122

Now the reduction of the welfare spend through the tax credit, which is something that's referred to in the commonwealth's submission, that was very much a subsidiary matter from where the policy launched off from, which was a resolution foundation work and so forth. That that may well have been something that politically was seen as desirable for a number of reasons once it got to the point of Mr Osborne endorsing the policy. But the underpinnings of the policy were not about that. A target was also seen to be desirable for their regulator, in that case the government, to cease being neutral or passive about minimum wages policy.

PN123

In the framework as it was that the resolution foundation was responding to there were terms of reference that asked the Low Pay Commission to recommend levels for minimum wage rates that help as many low paid workers as possible, without any significant adverse impact on employment for the economy. Now our framework is of course different, it's got its two objectives; minimum wages objective and modern awards objective referring to social and economic criteria. But we already have inbuilt in our framework an overriding requirement to establish fairness.

PN124

Now that requirement of fairness has led to wage fixation that is, in our submission, not quite as passive or neutral as the resolution foundation accused its regulators as being. In that sense, the adoption of a target we would say is very much a smaller step in - is taking a smaller step in our framework than it was in the UK's framework, because of this explicit requirement of fairness, which drives the adoption of policy and principle within the wage fixation framework itself.

PN125

Now I refer to some examples in page 2 of our submission about that from the 2010 decision. Our view is the low paid need the highest level of wages that is consistent with all other objectives including low unemployment, low inflation and the viability of business enterprise, at least this level of wages - - -

PN126

JUSTICE ROSS: Wasn't that passage the subject of criticism the following year by ACCR and there was an elaboration of it, I think in the following decision? Mr Lawrence might have a better recollection of this than - - -

PN127

MR CLARKE: Well, I think that's probably the second part of it, which I hadn't come to yet which is at least this level of wages should enable a full-time earner to attain a standard of living that exceeds contemporary - - -

PN128

JUSTICE ROSS: No, I don't think that was the bit that was the - it was the proposition I think that you look at it and whatever's left over type of notion that was the subject of the critique.

PN129

MR CLARKE: That may have been the critique but I think the resolution of it was that that's not what we're doing, and that's not what we intended to set out. In following this through I don't recall that the panel retreated from that principle.

PN130

JUSTICE ROSS: I'm not sure it was characterised as a retreat but it might have been a set back of the clarification. Mr Lawrence will probably be describing it in different terms but - - -

PN131

MR CLARKE: Yes.

PN132

JUSTICE ROSS: I think there was certainly some clarification about the issue in the subsequent decision.

PN133

MR CLARKE: Right. Well my apologies if I've missed that. The point of it was that embedded within that is an identification for the adoption of a position that raising wages, the lowest paid need the highest level of wages. That raising

wages under this framework, it's okay, it's a good thing. This framework that's guided by fairness. Again, 2013:

PN134

The needs of the low paid requires an examination of the extent to which low paid workers are able to purchase the essentials of a decent standard of living and to engage in community life.

PN135

Those outcomes are seen as desirable goals that come from lifting wages. Lifting wages is okay. Part of the framework imbeds in fairness is try and find a way to lift wages to meet these objectives. There are other examples given there as well. We say it points to a framework that's about trying to lift the minimum wage in the interests of fairness, and that the Commission's correctly understood the framework in those terms.

PN136

Now the target of 60 per cent for the median is really saying that in the medium term that's a fair objection, and it is also about a way of operationalising the policy in a more concrete way, and decisions can single where the minimum wage might be going. You're setting a trajectory and expectations in addition to describing the world as it is.

PN137

JUSTICE ROSS: So if the target was adopted and say after four years you reach the target, what becomes the annual wage review function after that simply to maintain the percentage without regard to other factors?

PN138

MR CLARKE: Well, I think the submission and, I mean, obviously I'll stand to be corrected about this, is to ask you to adopt this target and then review it at some point in future.

PN139

JUSTICE ROSS: Well, on United Voice submission, every four years.

PN140

MR CLARKE: Yes. And that doesn't necessarily mean that once you've read the target everyone can pack up and go home because this framework remains and still has a job to do even if a particular target is reached because the economy never stops developing. The world keeps changing, and the idea of a safety net is that it continues to evolve to reflect the contemporary circumstances. So what might be regarded as an appropriate target today might be regarded somewhat differently in the future.

PN141

But the target could be reviewed and revised, dealt with as the need arises on the social and economic criteria that guide you. Now, the target doesn't supplant the various criteria which we say are not closed criteria which guide you. It is complimentary not only to the explicit consideration of relative living standards but also the other objectives. The reduction of inequality has benefits in terms of

aggregate demand, in terms of raising productivity, in terms of pay equity. We've also got a similar observation could be made about our own level of research in Australia about the impact of Australian minimum wages on Australian unemployment as was made by the resolution foundation.

PN142

The other thing to remember is that in Australia for at least 15 years we did have a minimum wage that was at or above the level that we're contending for now. The difference is now that we're in a very low inflationary environment. Now, advocacy visiting the target has brought out the usual objections that wages can't help, the tax and transfer system helps, and this is all the welfare system's job. Now, there's no nice way to say it, but that's wrong. Wages do help and they help those most in need and we deal with that in our reply submission including funnily enough by referring to some modelling the productivity Commission did on that issue.

PN143

If you want to think of a submission that is completely inconsistent with the statutory scheme it's the submission or this sort of thinly veiled assertion that you ought to sit on your hands and let the transfer system fix everything because if that were the case this part of the Act wouldn't exist at all and we wouldn't all be here today and none of us could have the job descriptions that we currently have. It's really a submission again not about the target but about the level of minimum wages or about minimum wages at all. It's a submission that goes back to year dot that say considerations play no part in wages consideration and we say we've crossed that bridge 100 years ago and we're not interested in taking a backward step now.

PN144

The other matters that are before you today on transitional instruments and disability wages are probably less amenable to a summation. They're quite technical. I did note that some of the data that we thought might be useful to study as part of arriving at a longer term position on minimum wages for people with disabilities whose productivity is impacted there were some statistics given in the Commonwealth's submissions about mean wages and mean hours and mean productive capacity of people assessed under the support wage system. I mean, it occurs to me if you can figure out the means you probably know what the distribution is and I'm not sure where that data is but I think it's important to look at particularly, you know, as part of this study of incentives, because I think incentives needs to take into account not only the incentives to get into the system but what sort of happens once you're in the system.

PN145

The National Disability Services gave a figure that there's sort of only 30 per cent retention rate beyond three months in these jobs and that just happens to coincide with the time at which one becomes required under the supported wage system to actually assess people rather than pay them the minimum. So that's a factor that probably warrants some examination in the data in the fullness of time and in terms of making sure that those incentives are right. We've said quite openly that we're not experts in figuring out how the economic incentives work in this market because it is so externally facilitative, but even taking that step that we're

suggesting of looking at that data and how many people are only working for three months and then tuning off, for want of a better description, is probably something to look at.

PN146

Perhaps those same factors are being looked at in that other process because it's really something that's part of the supported wage system itself, and it's very difficult to sort of disentangle the national minimum wage for people with disabilities whose productivity is affected, and the supported wage system, because one follows the other. You can't, unless you're going to completely break a nexus, you can't sort of do something over here without challenging or making assumptions about the operation of the supported wage system in itself and that's our concern about digging into this in this forum while that other cooperative process is going on at the moment where they're actually trialling changes. Admittedly, not in open employment, but it's something. At least it's a start. It's a start at really picking into and looking at this system is working for the various participants in it.

PN147

And, the suggestion about a new modern award is really a suggestion that's based on trying to do something that's completely separate to what's happening over there in that calculation process and because if you're on national minimum wage 2 and you're assessed at 60 per cent capacity you're only getting 60 per cent capacity of the national minimum wage because you happen to be award free. But who knows what level of skill that job actually is and that's the reason for the suggestion of trying to kind of come up with, if you study where the award free people are and what they're doing, then you might be able to come up with a classification structure effectively so that when they are assessed they're paid a productive capacity percentage of value of the job rather than the wage that applies through the regulatory system because we don't know where they fit. It could be any sort of skill level. I mean, I'm award free.

PN148

There are people, a number of different skill levels in the economy that are award free and if you're going to assess it a percentage of capacity you want to try and make it reflect the percentage of productivity in the actual job itself. And so that was just a suggestion to try and do something or people dependent on national minimum wage 2 to try and get them off national minimum wage 2 but without upsetting the apple cart which is potentially the reinvention of the supported wage system through this highly cooperative process. On transitional instruments, I've brought with me the History of the World since 1996, so we're probably better to deal with it through questions rather than a summation.

PN149

DEPUTY PRESIDENT ASBURY: Mr Clarke, if I could take you to page 10 of your submission, you've got a discussion there in the first paragraph on volatility and wages and inflation.

PN150

MR CLARKE: Yes.

PN151

DEPUTY PRESIDENT ASBURY: This is in support of the argument that a medium term target would kind of smooth out volatility from year to year in changes and the real value of the national minimum wage. I think that's a correct interpretation. So I'm just a little puzzled about how that would work in practise, partly because you identify one of the sources of volatility is that inflation as it eventuates turns out to be somewhat different often from that which was expected. Now setting a medium term target, how is that going to deal with that annual volatility that you've identified here, part of which arises from variations in the rate of inflation?

PN152

MR CLARKE: Well, I think perhaps Dr McKenzie is less likely to garble this than me on the specific economic statistics.

PN153

DR McKENZIE: Presumably, if there was a target established say a four year target, or five year target, then as the sort of movement towards that's reviewed each year in the context of the inflation of the previous year, and in anticipation of - in addition to anticipating future inflation, you'd have more opportunity to adjust the nominal minimum wage each year, in the light of how real - how the real wage has sort of - minimum wage has moved from the previous year and how it's like to move. It just gives you an extra instrument, if you like, to take into account the adjustment in the real minimum wage over time.

PN154

PROFESSOR RICHARDSON: Are you suggesting that there's some evidence in prior decisions of this panel, and earlier panels, that changes and the real wage have not been taken into account?

PN155

DR McKENZIE: No, I think the panel has endeavoured to take them into account and I think we recognise that but it would just - actually if that could be viewed also in the light of some movement towards a target of say 60 per cent of median wages, that would just give the opportunity for further appropriate adjustment in the light of the other objectives.

PN156

PROFESSOR RICHARDSON: While you're on your feet, might I also ask a question about how you would deal with adjustments to the national minimum wage that take into account, for example, the changes in the superannuation guarantee. Because of course the simple assessment of changes and the real value of a national minimum wage which simply takes the nominal value and adjust it for inflation, don't incorporate those sort of variations.

PN157

DR McKENZIE: Indeed, if we were to take those into account or if the panel were to take those considerations into account, I think we need to take that question on notice. But the - we would assume though it'd be perhaps more readily factored in but this is not in the light of the full information that we probably could provide on that point.

PN158

MR CLARKE: Yes, look I might supplement that. I mean, you're talking about a situation that has actually arisen before when the superannuation guarantee policy is we all run to one side of the boat and then we all run to the other side of the boat. It's not dealt with in a mechanistic way now and it wouldn't be dealt with in a mechanistic way merely because a target's been adopted.

PN159

PROFESSOR RICHARDSON: But it would confuse the judgment about whether the target had been achieved would it not?

PN160

MR CLARKE: Well, it would not necessarily confuse the judgment. I mean part of that depends on what the end point of it is. Part of the theory from the treasurer as he then was when the last changes were mooted to the superannuation guarantee charge was that well, people are actually going to be paid more because I've reduced the amount of money that people need to pay towards super. Now if that found its way into that - found its way into reality then you'd expect a shift in median wages, which would shift where you were relative to the target. Whether or not you take the step of saying, well, look, the target itself ought to be revised or adjusted because of this development is a matter that you'd deal with at that time, but it wouldn't be a - we wouldn't predict it would be a mechanistic sort of dollar for dollar taper. Does that satisfy your - - -

PN161

PROFESSOR RICHARDSON: Yes, thank you.

PN162

COMMISSIONER HAMPTON: Mr Clarke, just on that.

PN163

MR CLARKE: Sorry.

PN164

COMMISSIONER HAMPTON: If we were establishing a target, would we be assuming that the context remain constant? In other words, would you presume that the statutory context remains constant? Would we be presuming that the tax transfer system remains constant? Would we be assuming that the level of social security support remains constant? If not, how would that play into the target?

PN165

MR CLARKE: Well, you wouldn't be assuming that because you couldn't assume that, and that's the reality of the position that's being contending for, and I think United Voice go to some pains in their submission to say well, that's a terrific bunch of criticisms for a proposition we're not putting but the proposition that we're putting is a different one. As we understand it, the job is not to sit here and make assumptions about the social security framework or the statutory framework being fixed. It's to say that as we see the trends, and as we see the state of economy - the state of the economy now, there is merit in us adopting, as we sit here today, there is merit in us adopting this particular target.

PN166

It doesn't discount the possibility that you sit in these very same chairs in a year or two's time and say as we sit here today, the Act has changed, or something else has changed, and the target needs to be revised or there is an element of it that's not appropriate, or the timeframe for reaching it is not ambitious enough or too ambitious. It doesn't lock you down. It's inherently flexible that those - that the annual exercise and a target setting can actually work together and that's a point that perhaps United Voice might expand upon but is that a fair summary.

PN167

MR GIBBS: Mr Clarke, I've got a question about the transitional instruments. The textile clothing and footwear union in their submission say that this is in relation to the long service leave transitional instrument, that its terms are less beneficial than provisions applying under state legislation, and for that reason they're not opposed to termination. That implies at least that they think that if the instrument is terminated then the state legislation provisions will apply. Whereas other submissions put to us say that even if the instruments are terminated, their terms are effectively preserved or continued by the operation of section 113 of the Act. Do you have anything to put to us about the apparent conflict between those two positions?

PN168

MR CLARKE: Well, unfortunately my contribution to that issue was one that says effectively look, somebody might run an argument one day that section 113 needs to actually have something called an award to operate on to begin with, before you ask the question of what did, say at this point in time, the first question that asks is there an award. If terminating means there isn't one then that's bad because it will affect people's entitlements and you shouldn't do it. Now I'm not saying that that argument is necessarily the most attractive one but I'm in a position of attempting to anticipate what the downsides are because people run creative arguments at times. People, you know, even say that you shouldn't pay minimum wages; the tax system should fix it. Who knows what people will say? But it's a construction point that we're a little concerned about.

PN169

We recognise the government doesn't take that view and many of the employers in this forum - I'm not going to start thinking about estoppel and all the rest of it - in this forum don't take that point, but it's something that if you were to take that step of terminating those instruments because you were convinced that the downside risk that I've raised is based on a construction argument that is just completely wrong, it would be of enormous benefit if that was stated in the decision, in my submission.

PN170

JUSTICE ROSS: The language of section 113 lends some support to the position that's been put by the Commonwealth and others, because it talks about award-derived long service leave term, so you're deriving the term from an instrument.

PN171

MR CLARKE: Yes.

PN172

JUSTICE ROSS: And it also refers to a test time.

PN173

MR CLARKE: Yes.

PN174

JUSTICE ROSS: So it's at a point in time you're deriving these entitlements and then it's the entitlement that's preserved. At least on the face of it that's what it seems to say.

PN175

MR CLARKE: Yes. I don't disagree with that. It was just that phrase, if there is an award, that pricked my ears up, and the other sort of contextual consideration in all of this that we raised in the submission was that, if you look back at the modern award, is to look at the notion of is it practicable to terminate the instrument, which I think is the way the question is put in the relevant part of the Transitional - something - Regulation Act, as soon as practicable after the award is modernised. If you take a contextual approach to what that word "practicable" means, one, you have the context of is that going to affect somebody's entitlements - if it is we shouldn't do it; and the other contextual approach is if you look back at what the intention was as, I'm not reading into things, I'm reading from the award modernisation request in the submission, the anticipation was that this arrangement would remain in place until there was something else.

PN176

JUSTICE ROSS: It doesn't look like anything else is coming.

PN177

MR CLARKE: It doesn't, but there's no other award modernisation request coming either, so if it's the end - - -

PN178

JUSTICE ROSS: So going back to where the question started, if we assume that 113 continues to operate even if awards are terminated, then how do the interaction rules of the Act operate with respect to that entitlement vis-à-vis the state long service leave legislation?

PN179

MR CLARKE: The State long service leave legislation?

PN180

JUSTICE ROSS: Yes, so if we have 113 operating to preserve an entitlement, which in the TCFUA case is less than a state long service leave act entitlement, how do the interaction rules and the Fair Work Act operate in that connection? Does the - - -?

PN181

MR CLARKE: The Commonwealth wins - awards win in terms of superiority.

PN182

JUSTICE ROSS: What if it's in a position that's positive by the TCFUA?

PN183

MR CLARKE: Okay, so you're saying that characterising the NES as a minimum standard - - -

PN184

JUSTICE ROSS: Is it covering the field or can you meet both by proposition?

PN185

MR CLARKE: I don't know how many times I've had to run that argument about different aspects of this framework in this place, but I haven't had to run it in relation to long service leave, so I'd have to take that on notice, your Honour, I'm afraid. I haven't - there is the covering the field inconsistency and there's direct collision. This is probably closer to direct collision than it is to covering the field, but I'm not doing anyone a great service to try and sort that one on my feet, I suspect.

PN186

JUSTICE ROSS: Yes. That's all right, Mr Clarke. If you want to come back and take it on notice, that's fine.

PN187

MR CLARKE: Yes, I think that beggars some reflection.

PN188

JUSTICE ROSS: Yes, I wouldn't race you to try to deal with that question. Anything else?

PN189

PROFESSOR RICHARDSON: If I might take Mr Clarke back, sorry, to the medium term target issue, on page 20 of your submission, you have section 1.3.1(c), Introduce predictability?

PN190

JUSTICE ROSS: It's in the reply.

PN191

PROFESSOR RICHARDSON: That's in the reply, is it, sorry.

PN192

MR CLARKE: Yes?

PN193

PROFESSOR RICHARDSON: The medium term target -

PN194

The medium term target for the national minimum wage would also avail the decision of the benefits that many agencies recognise in their processes.

PN195

Have you got that?

PN196

MR CLARKE: Yes.

PN197

PROFESSOR RICHARDSON: Good, thank you. I just wonder if you could sharpen that a little, because when I read those examples I found them completely unconvincing as a connection to what's being asked for in this case - just to illustrate. I mean, the Reserve Bank sets a medium-term inflation target, as we know, or a band, but part of the reason for that is to influence expectations, so for example, the ACTU doesn't put in a claim for a 20 per cent wage rise because they're anticipating inflation might be, you know, 18 per cent. So that's just an illustration and of course the Department of Employment makes its own projections for its own reasons, but the projection is very different from having a target, and as I've illustrated, the Reserve Bank has a target but for a different purpose from the one that we're being asked to deal with. So can you give us any reasons, apart from the ones you've written down, why the behaviour of these agencies that you refer to has any relevance to this case?

PN198

MR CLARKE: Before I get to that, and I might defer that to Dr McKenzie, I just say that one of the many benefits identified when the UK went down this particular path was that it does, although the target remains amenable to being adjusted and reviewed, that there is some broader benefit in setting a signal - in setting an expectation - that this is the trajectory that things are likely to take in future, not only in terms of this sort of rather remote point but complementary government policy, but also in terms of the short, lean time between a decision and implementation date of the decision. In this case I think we make decisions in June and they take effect from 1 July. That's just setting some expectation about the likely direction that these decisions are likely to go - you know, even at the firm level that can have implications in terms of the way people choose to manage productivity and multiskill, ensure that labour's being deployed in a way that is of greatest benefit in terms of multiskilling, collaborating with the employees and getting the most out of the employees that you have. It sends the right signal for that kind of functional flexibility of increased productivity.

PN199

JUSTICE ROSS: Thank you. What order of increases would be necessary over four or five years to achieve the target? Assuming inflation stays low, for example, and wage growth continues on its current trajectory, what sort of increases are we talking about?

PN200

MR CLARKE: There is a figure quoted in United Voice's submission, and they're perhaps better to take you through the modelling on that than I am.

PN201

JUSTICE ROSS: It's, what, close to \$200, I think, or just slightly less over the four years?

PN202

MR CLARKE: Yes - sorry, it's dealt with in paragraph 123 of United Voice's submission.

PN203

JUSTICE ROSS: The point you make about signalling, it seems to me, highlights a bit of a tension in the way both you put it and United Voice put the proposition. On the one hand - well United Voice uses a different language - it talks about predictability. So on the one hand it's sending signals and it's predictable, and on the other it's not a hard target and can be varied from year to year and depending on the range of circumstances. I don't quite see how you can be both. You're not going to be predictable if you can vary from year to year based on the range of circumstances, or indeed if you can vary the target from year to year based on, as you put it, if there are shifts in the tax transfer system or if there is a change in the statutory framework - that's less likely but - - -

PN204

MR CLARKE: It's predictable not in the sense of being predictable down to rounding the nearest 10 cents. It's predictable in terms of the trajectory. If those policy makers and employers take no other signal than that the trajectory of modern wages is to rise at a different proportional level to market wages than it is now and to increase that relatively, that that in itself, that clear broadcasting of that intention - - -

PN205

JUSTICE ROSS: Well, they could probably look at increases over the last four or five years and make a prediction about what the outcome might be, in the same way.

PN206

MR CLARKE: Yes.

PN207

JUSTICE ROSS: If it's not - I mean I follow the argument but if it was a hard target then yes, you could - it would be predictable, as in say the UK type scenario then the outcomes are foreseeable et cetera, albeit they might be the subject of some adjustment but there's a clear statement. But I'm not sure how to characterise what you're putting is the target.

PN208

MR CLARKE: Well, just as your Honour - - -

PN209

JUSTICE ROSS: Is it more of a guidance, is it - if it's not a hard target, what is it? Don't say soft target.

PN210

MR CLARKE: No, that's what I am.

PN211

JUSTICE ROSS: Only at the moment, Mr Clarke.

PN212

MR CLARKE: Look, I think that the point that you made about well, couldn't you say that the decisions of the panel are kind of predictable as they are now, and that you - - -

PN213

JUSTICE ROSS: Now I'm the soft target.

PN214

MR CLARKE: That you can set an expectation - or that sets an expectation about the level that things are likely to happen at. You know, that raises the point about - that was made I think - and it may well be made in this submission by United Voice but it was certainly made in their initial submission to the previous panel. That you're kind of dealing with a de facto target. There's a question of whether there's a sort of de facto unspoken target now and us adopting the position that that's the wrong one, that we should be striving for something else.

PN215

Now I don't think it needs to be expressed as a hard target with fixed sort of KPIs but it is - - -

PN216

JUSTICE ROSS: I understand the dilemma because as soon as you say it's a hard target, you bump up against the statutory proposition and that one panel can't bind another.

PN217

MR CLARKE: Well, that's one of the reasons that it can't be a hard target is because one panel can't bind the other.

PN218

JUSTICE ROSS: I mean that seems to be the only thing you all agree on, that you probably can't have a fixed position that's immutable.

PN219

MR CLARKE: Yes, reasonable panels will differ but again if it needs to be a contextual - we agree that you need to have a contextual assessment of what's happening year to year but that doesn't necessarily come at the expense of adopting policy positions about the direction and what's desirable, and what is a good outcome.

PN220

PROFESSOR RICHARDSON: Mr Clarke, if I might - I mean you have the perhaps advantage or disadvantage of being the first of the advocates speaking on behalf of this proposition, so you get the hardest questions I guess. But this is relevant for - this proposition is relevant for United Voice, ACCR and so on, the supporters of the medium term target. Would it be fair to say that its fundamental purpose is to increase the weighting given by the panel to the fairness, living standards, needs of the low paid component of the set or criteria that the panel has to take into account?

PN221

MR CLARKE: Well, it would certainly have that effect.

PN222

PROFESSOR RICHARDSON: Yes. Is that its purpose? Basically.

PN223

MR CLARKE: Well, its purpose is to raise the relative living standards of minimum wage workers.

PN224

PROFESSOR RICHARDSON: So you're assuming the nature of the target when you say that?

PN225

MR CLARKE: Yes.

PN226

PROFESSOR RICHARDSON: Well, that seems an important point.

PN227

MR COLE: Previous panels have found - stated their view that a modest increase of the minimum wages don't have a noticeable effect on employment. I wonder whether from where we are now to where you are envisaging we might be in four years' time, I'm wondering whether we can still define that a modest increases and at the last annual hearings, there was a focus on the longer term cumulative effects of decisions were if you signal or if the Commission signals that it anticipates that wages are going to go to 6 per cent medium - minimum wages are going to go to 6 per cent minimum wages, business people looking at that can have a degree of certainty that they'll get a payoff for replacing labour with some capital equipment. Isn't that a risk?

PN228

MR CLARKE: Well, that's a risk that makes assumptions about an employer's behaviour we're not sure is one that's open at least in the Australian context based on the balance of the research, but that's a matter that is really - Dr McKenzie is better to address you on than I am.

PN229

DR McKENZIE: In the long term, productive activity's been increasingly capital intensive anyway but that's a trend process. It'd be hard to say that any particular raising of minimum wages any particular or any particular target set for that would necessarily impact on that process in a way that actually reduces the level of employment. If it increases - if it happens to increase productivity and so on which is another part to our argument, then in fact it may well increase employment. So any of these other parts of the objective like the state of the economy and so on, are actually also served in our view by having a target over the next four years.

PN230

Raising a wage may well increase, we don't know, it's very difficult to get any definitive answer to that, it may actually increase capital intensity but even in that act it doesn't - or even in that process, it doesn't actually necessarily and in fact manifestly has been shown not to, reduce employment or increase unemployment, which is more of a year to year thing itself. It certainly hasn't been shown to reduce employment in any of those economies that have become more capital intensive. So I - yes, I actually wouldn't put - yes, that's a view.

PN231

MR CLARKE: Sorry, can I just add, Mr Breen is also able to instruct me from the ASU if there are any questions about the equal remuneration order.

PN232

MR LYONS: If the panel pleases, on behalf of United Voice we thank the panel for the opportunity to advance the proposition that we do. We filed a lengthy submission which goes to each of the questions which were posed in the discussion paper and in reply to certain aspects of the original submissions filed by other parties. I don't intend to go through that entirely but having had the advantage of hearing the exchanges with Mr Clarke and with the Commonwealth we did want to make some opening which characterises and, in one respect I think, clarifies what we ask the panel to do. We do ask that the panel take a different approach than the one that it has been taken to the setting of the level of the minimum wage since the current statute was adopted. But we say that the approach we propose, while different, is an evolutionary one from the current approach, so that while it is different we say it is a logical extension of both the statutory obligations and the evolving jurisprudence of the panel in relation to its task.

PN233

We say that setting a target is not just allowed by the Act, not just appropriate, having regard to the statutory obligations, but in our submission necessary for the panel to properly discharge in the way we suggest its obligations to fix this very important instrument of social policy and the economic policy which is the national minimum wage.

PN234

If I could go to, cutting to the chase I think, the question that Professor Richardson last asked Mr Clarke, which is, what is the purpose of the target that we're proposing? The target we are proposing is an effort to properly balance the competing considerations the panel is required to have regard to, and, in particular, to give proper focus over an appropriate period on what I might term the fairness considerations which are contained within the objects which direct the exercise of the panel's discretion.

PN235

JUSTICE ROSS: It must follow from that submission that in past years the panel has not properly weighed the relevant considerations, because in your submission it hasn't come to the right answer.

PN236

MR LYONS: Yes, I respectfully – I think that is right. And that is no – sorry, I withdraw that. So much is clear I think from the point of view of this end of the Bar table from the fact that larger levels of increase in the national minimum wage are being proposed by the ACTU and its affiliates for many years and have been awarded, so there has been a view from organised labour, if you like, that larger levels of increase in the minimum wage than have been awarded by the panel or contended for by employers to the extent any precision is given by governance.

PN237

So we do say that the long-term fall in the relative value of the minimum wage, and we obviously accept that that has not all occurred on the panel's watch under the current framework, and in fact the panel has in more recent years arrested that decline and flattened out or modestly increased depending on the year, but the reason we took a much longer term trajectory in the targets was to indicate that we're looking – or our submission is to restore a much longer term value of the minimum wage as it existed previously.

PN238

So our submission is not to privilege the fairness considerations over the other things which the panel is required to take account of but rather to more appropriately balance those. We do say that that will, turning also to another matter that there was an exchange with Mr Clarke about, this notion of what the role a target will play in relation to predictability or certainty, we chose to use the term "predictability" carefully. There is no sense in which, given the necessity of the matter being the subject of annual discretion by the panel as is constituted, for there to be a hard target.

PN239

In our submission, the exact value in respect of predictability will depend very much on the target that is adopted and the language the panel would choose to adopt in relation to its level of confidence in respect of that and the way the panel chooses to describe the function and operation of the target itself, so in essence what we'd say is the firmer the language in which the panel would express any target, the greater benefit it would have in respect of predictability. It would be conceivable to imagine a target expressed in such vague or uncertain terms that I think we would accept that the predictability benefits would be reduced, but that is not the sort of target we would urge on the panel. If it were to be adopted the firmness and strength of conviction that would go behind the criteria that's adopted and the specific obligation, if you like, or the specific target which is adopted would have the effect of increasing those predictability benefits.

PN240

Also, in our submission, there is a collateral benefit to that predictability which is a, what I might term, a transparency benefit which is I think that we have all, at various time, examined the data about the trajectory of this instrument measured against other parts of the wage distribution, and it is possible to identify patterns or trends over periods of time; whether or not such trends has been ever the subject of, if you like, official acknowledgement, and the tool that we propose would be the panel expressing an in principle view, which will assist in the transparency, and, in our submission, integrity of decision making. And it does that by ensuring that the annual process where we, as the contending parties and

the panel itself, bury ourselves in the annual data and the current and most current information that we all have to contribute to the decision, but as we bury ourselves in the data the function of the target is to allow the cumulative effect of that annual focus on data to be the subject of proper attention and consideration and the longer term consequences of those cumulative decisions to be the subject of discussion, submission, debate, and, in the end, decision by the panel.

PN241

JUSTICE ROSS: Does that mean the target is beneficial no matter what it's set at? Would you be advocating these benefits if the target was, say, 50 per cent and not 60 per cent?

PN242

MR LYONS: In respect of the submission that we make in respect of predictability, transparency, utility of decision making, I would have to concede that. They are points about the function of a target per se. Now, obviously we make a specific submission about the level of the target, but it is inherent in our submission that there is something valuable and useful about a target per se.

PN243

In respect of the Commonwealth's submissions, I just make two observations. The first is, as Mr Clarke said, the majority of their material appears to be, in fact, a level of in principle objection to minimum wages, or minimum wage fixation in the manner affixed by the statute. It's a curious submission for the Commonwealth to put in one sense in that it's alone among the parties to the proceedings. It's open to them to do something about that if they wish which is to introduce a Bill.

PN244

VICE PRESIDENT HATCHER: To introduce what?

PN245

MR LYONS: To introduce a Bill to change either the manner or direction of the minimum wage fixation. And so to the extent that those submissions amount to little more than a criticism of minimum wages more generally we say they're not relevant to the position or particular position we put.

PN246

In respect to the submission that somehow the obligation for the panel to issue an order which reduces the minimum wage to a dollar value somehow prohibits the setting of a target, to the extent we understood that submission, we'd say it misunderstands the obligation to conduct an annual view and conflates it with the obligation to issue an order which reduces the level of the wage to a dollar figure so it's understandable by workers and employers. If what the Commonwealth put in their submission was literally true it would prevent, for example, the panel determining to increase wages by a percentage amount and then go away and do the calculation to reflect it in the order. So we say it conflates the two obligations between the obligation to conduct a review and the obligation to issue an order which reduces to a dollar value.

PN247

In respect of the panel's power to adopt a medium term target, as your Honour, the President, I think correctly indicated there is common ground that the panel can't bind future panels, and therefore, as a result, the target we propose has a particular form. We do say that the panel can, as a matter of discretion, for the reasons we set out, adopt a medium term target and that it should. And we say that that is consistent with the approach that was taken in respect of the casual loading matters which we set out in some detail in our submission. We say that if it was - essentially if I might characterise that as being the panel determining that there is a rebuttable proposition that this will happen. All right. So indicating that all other things being equal and subject to review of available data at the time and submissions that might be put at the time, this is the intention, this is the intended direction.

PN248

JUSTICE ROSS: And is that how you put the target? It's, you said, a rebuttable proposition that this will happen.

PN249

MR LYONS: Well, it needs to be a rebuttable proposition to the extent that it would be - - -

PN250

JUSTICE ROSS: It's the default position all other things being equal, is it?

PN251

MR LYONS: Yes. And on an annual basis subject to a review of the data about progress towards that target. So it's easy to imagine and perhaps likely, your Honour, a circumstance where if you had a four year target that there was not linear progress towards that target over each of the four years, that is, there might be a differential level of progress towards that target over each of the four years consistent with macro-economic conditions and other things. And indeed that's part of why we suggest that it needs to be done over an appropriate period of time such as four years which gives some level of flexibility within that to take account of different circumstances over the life of that target.

PN252

And so while each year's review stands alone and would continue to stand alone, it is clear that each year's review is conducted in a context. That context has a very complicated set of considerations, and a range of, what we've described in our submissions as, analytical tools are useful and have been employed by the panel and what we propose is another one.

PN253

In respect of the consideration supporting a target, I'm content I think to rely on the matters that we set out at paragraph 55 and following. But again we would focus on the fact that the panel is required to balance a variety of considerations that are complicated and, in one sense, somewhat contradictory, even under some circumstances. And that the narrow annual focus and a longer term focus is a complementary way of approaching the panel's task and is consistent, for example, with the fact that we have a multi-year research program; the fact that all of the parties rely on longitudinal data in respect of the economy and the labour

market and patterns of award dependence and spill over effects and other things that, as well as taking a retrospective look at data and its effects and a prospective look using, for example, modelling and predictions and extrapolations from research, that that is usefully combined in the form of a target for the level of the wage over a medium term period.

PN254

In respect of the international trends in low pay many of the submissions in response I think misunderstand the purpose for which we take the panel to those international examples. We clearly don't advance them on the basis that the legislative arrangements of all mechanical administrative mechanisms are analogous strictly to this proceeding, but only to indicate that in a range of jurisdictions, whether at a national level, a prefecture of State level or, in some cases, large urban areas in the United States there has been a trend in the developed world to have recognising that the minimum is in essence a fairly long-term instrument in terms of its effects, to have a longer term perspective on the level of that. And that that is an approach that is seen in respect, most obviously of course, in the United Kingdom but also in respect of the longer term movement in Germany, in respect of actions of the Abe Government in respect of the approach foreshadowed by the European Parliament in respect of developments in the United States.

PN255

And crucially I think, in terms of the in principle position that we put, the approach set out in the ILO minimum wage policy guide, which we refer to at paragraph 86 of our submissions, where the ILO recommended minimum wage setting authorities and bearing in mind that could be administrative or judicial or political in some cases. Bear in mind quite longer term perspectives in setting minimum wages, and not concentrate overly on short-term indicators, and, in particular, indicating that a one year period is likely to admit an unduly restrictive set of factors, and that is a preponderance of focus on, in particular, the level of inflation and GDP growth, and stresses that the minimum wage policy needs to be contextualised within a broader economic perspective in which economic factors are affected by structural changes. We think that in principle our system and the competing considerations set out in the panel's task better reflect that approach already some other jurisdictions, but the logical consequence of that approach is to formally adopt an approach which explicitly and transparently admits multi-year considerations.

PN256

PROFESSOR RICHARDSON: Mr Lyons, could I just stop you at that point?

PN257

MR LYONS: Yes.

PN258

PROFESSOR RICHARDSON: Because you would be aware having led the ACTU submissions in the past that the ACTU routinely brings to the attention of the panel changes in the wage bite and compares it with what's going on in other OECD countries.

PN259

MR LYONS: Yes.

PN260

PROFESSOR RICHARDSON: So it's not that we're unaware of this.

PN261

MR LYONS: No.

PN262

PROFESSOR RICHARDSON: And in addition to that, the panel itself in its statistical report routinely provides data on a 10-year basis as well as an annual basis. That's a deliberate decision to take a longer term perspective looking back as to what the trends are. So with those two points in mind, can you just sharpen up again what the additional benefit would be, apart from increasing the weighting to be given implicitly on standard of living questions, from some sort of a target?

PN263

MR LYONS: Professor, I'd make two points. The first is that the explicit migration of those considerations from the matters routinely put by the parties, the statistical report and some level of observation and the panel's decision, to a formal and explicit part of the decision-making framework which would need to be addressed forming, if you like, a principle that the panel had determined to adopt gives it considerable additional strength. So it becomes then not just, if you like, one more data point to be addressed and analysed but a focal point for both the structure of submissions by the parties and the decision-making of the panel itself. Certainly I apologise if we even implied this indicate that the level of the bite et cetera was not a subject of panel consideration. It's a matter of how that is then incorporated into the decision-making framework with what strength and robustness, and really I think, to go back to the first question of yours, Professor, that I referred to that you put to Mr Clarke, it is inherent in our submission that the fairness considerations to the extent they're reflected in a level of the minimum wage - which is too low having regard to median wages in our submission - is the core of what we put. I hope I've answered that.

PN264

I do want to make one observation about what we say about analogy to other areas of public policy. Again, we don't suggest these are perfect analogies, but we do say there are a range of other circumstances where discretionary decision-makers are required to balance a competing set of considerations that have found it useful for internal decision-making and public certainty to express a medium-term approach. Again, we advanced the monetary policy example on that basis, but also on the basis that in one sense there's analogy to what the panel does in another way, which is you've got a process that involves a backward-looking look at data and statistical analysis and a forward-looking approach at forecasts, and dealing with those things over a cycle has been considered useful in respect of monetary policy.

PN265

On page 36, paragraph 118 onward, we indicate our approach to the criteria, consistent with our view that the need for a target emerges from the nature of the

panel's obligations. We submit that the target itself and what target should be adopted should take account of all of the factors that the panel considers in respect of setting the wage more generally, so that is, it's not separate from the obligations about the minimum wage more generally but part of that process, but we do propose headline criteria that are set out at paragraph 120 which might be used to set or inform the level of a target.

PN266

At page 37 and paragraph 123, we indicate the indicative effect of the proposal we make, which is a target over four years of 60 per cent of medium adult full-time earnings. That table includes - and obviously this changes the effect, depending on what assumptions are put in respect of the first two numbers, which is the average inflation - we've presumed average inflation of 2 and a half per cent for indicative purposes - and annual real medium wage growth of 1.6, simply for indicative effect. Again, we've then expressed in the scenario a compound annual growth rate which, for the purposes of this exercise only, we've indicated would be linear. So just to do a calculation to express it, we've assumed it was a quarter, a quarter, a quarter, a quarter. Again, we offer that just so it is clear in broad terms what the quantum of effect would be.

PN267

VICE PRESIDENT HATCHER: How does that integrate with the adjustment of award wages generally, particularly, for example, in awards which have lower paid classifications, for example, the Restaurant Award?

PN268

MR LYONS: Yes.

PN269

VICE PRESIDENT HATCHER: I mean, I think the bottom classification actually aligns with the national minimum wage, and then you have classifications which go up from there. So on this approach the bottom classification would be going up 6 and a half per cent a year, but what's happening to the other classifications and how does that affect the structure and the relativities?

PN270

MR LYONS: In our submission we indicate that the effect on the balance of award rates would need to be dealt with annually when it is determined what the progress towards the target is, and that's in the same way and no different, and in our submission no more complicated than the position that is in front of the panel now when it determines to adjust the minimum wage on an annual basis. It must then determine - so the statutory obligation is it must review, it must issue an order in respect of minimum wages, and it may alter other award wages, and so we accept that a larger than recently historical increase in the minimum wage will have effects in respect of raising that rate above other award rates, and that would need to be considered and the subject of submission and decision as part of the annual case. But the effect of raising the minimum wage above the level of those rates would have the effect of requiring those to be adjusted up. In respect of the relativities we say in our submission, I think this is consistent with what the ACTU put, that those matters are appropriately dealt with and most effectively dealt with as part of the annual case.

PN271

JUSTICE ROSS: No, I understand that answer but the practical effect of that is that if you're adjusting that minimum wage by 6.5 per cent in an award like the restaurant award, that couldn't work without effectively flowing on that same increase to people who are at levels above the national minimum wage. Otherwise you just destroy the structure of the award.

PN272

MR LYONS: Well, the exact relationship between different classifications has altered over a long period of time, depending on the nature of decisions of this panel and previous iterations, whether they were percentage and flat dollar.

PN273

JUSTICE ROSS: It might not be the relationship, it might actually subsume whole classifications at the bottom end of a classification structure.

PN274

MR LYONS: If they were not adjusted, that's right. In fact - - -

PN275

JUSTICE ROSS: Well, if they were adjusted up to the level of the increase in the national minimum wage then you would just have a - instead of, well depending on far it goes, instead of C14, C13 and C12, you might just have a - - -

PN276

MR LYONS: A concertina effect.

PN277

JUSTICE ROSS: Yes.

PN278

MR LYONS: Well, that may be the case but that is a set of problems which exists anyway with the adjustment of the minimum wage, it's only a matter of scale and -
- -

PN279

JUSTICE ROSS: Well, it exists with the adjustment of the minimum if it's on a flat dollar amount or if it's a flat dollar and a percentage it gives rise to those points.

PN280

MR LYONS: Yes.

PN281

JUSTICE ROSS: But the order of magnitude of the issue seems to be significantly more here.

PN282

MR LYONS: Yes, and we acknowledge that there are significant issues that would need to be dealt with in respect of that, but we say until you get to the point of determining what the quantum is, it's difficult to wrestle with those because you're dealing in abstract. Which is why we say it's appropriate to be dealt with as

part of the annual case, and can I absolutely stress that complications - yes, I'll call them complications. Complications in respect of the higher levels in the classification structure are not a reason to not increase the level of the minimum wage. If the level of the minimum wage, if a justifiable claim is made for an adjustment in that, it is not a reason not to do it that it would cause some measure of complication or administrative difficulty higher up the classification structure.

PN283

JUSTICE ROSS: Well, it's simply a case of exposing what the practical effect would be, and that is that increases of the order you're talking about would have to flow through persons other than those on the national minimum wage, in order for the thing to work. That is, you'd have to start increasing other award classification by similar amounts that are above the national minimum wage, and that in turn would have consequences for enterprise bargaining.

PN284

MR LYONS: Yes, I think all I can say, your Honour, is that we acknowledge there will be some knock on effects but it's important they are not dealt with in abstract and we have suggested how they are appropriately dealt with. I might leave that there because there are matters that go to classification structures I think that bear on unions other than ours, perhaps more so for other unions than ours, and I am conscious of not wishing to trespass on - Mr Clarke may wish to say something at the conclusion but I might leave those matters there.

PN285

PROFESSOR RICHARDSON: Sorry, Mr Lyons, before you move on, I'm just struggling to fully understand the table on page 123. I can understand the first panel but the second one, it has "Annual bite increase (POTS) NMW change". What does that mean?

PN286

MR LYONS: I don't know - I've managed to get a bug in there with POTS, my apologies. That was a calculation that we'd done if there was a static no increase in the minimum wage and the presumptions in respect of annual real median wage growth above. So if no action was taken -

PN287

PROFESSOR RICHARDSON: So no nominal or no real change in the national minimum wage?

PN288

MR LYONS: No change full-stop.

PN289

PROFESSOR RICHARDSON: No nominal. No change on the nominal value - -
-

PN290

MR LYONS: Yes. It's probably in retrospect not a useful figure and I would have deleted it.

PN291

PROFESSOR RICHARDSON: Good, can I delete that from mine?

PN292

MR LYONS: Yes.

PN293

PROFESSOR RICHARDSON: Right. Now what's CAGR?

PN294

MR LYONS: Compound annual growth rate.

PN295

PROFESSOR RICHARDSON: Right. So would you just take me through then how you got compound annual growth rate of 6.5 per cent, that's in nominal terms I take it?

PN296

MR LYONS: Yes.

PN297

PROFESSOR RICHARDSON: You're assuming an inflation rate of 2.5 per cent?

PN298

MR LYONS: Yes, and annual real median wage growth of 1.6. It may be the easiest, Professor, if - I'm happy to provide you with the spreadsheet that's got the calculation in then you can see exactly what we did.

PN299

PROFESSOR RICHARDSON: Right.

PN300

MR LYONS: If that's convenient to the panel. The last thing I wish to address was about the assessment and review of the target and its role this year. We do suggest, consistent with the approach on award reviews a period of four years, which appropriately balances in our submission longevity and functionality with not having these matters the subject of appropriate reconsideration within a reasonable period. While, in our submission, it would be necessarily open for the panel or indeed any party to contend for that target to be the subject of review each year, we would envisage that it is more likely simply one of the matters which is addressed in the course of submissions, and unless a party could indicate that something fundamental had changed which meant that any decision the panel had made to fix a target was no longer logically available to the panel, that the target would continue in operation and simply be addressed in respect of the annual adjustment of the wage rather than generally reviewed.

PN301

We'd finally note that I think all parties who put submissions, with the exception of the Australian Industry Group did indicate a preference for having this matter determined both in principle and any target that was adopted prior to the balance

of these proceedings in the first have of calendar 2017. That's what I put, your Honour, subject to any questions that the panel has.

PN302

JUSTICE ROSS: Thank you, Mr Lyons.

PN303

MR LYONS: Thank you.

PN304

JUSTICE ROSS: Ms Matheson.

PN305

MS MATHESON: Thank you, your Honour, and expert panel members. We appear today primarily in opposition to the United Voice proposal for the median wage target. We do rely on our written submissions in this regard but if it helps or it please the expert panel, we might proceed to outline some of core fundamental concerns with the proposal.

PN306

It can be broadly categorised in under three categorised. So first we submit that the notion of a median wage target itself is not supported by the statutory framework, which does contemplate an annual process. From what I'm hearing from the union parties present in these proceedings today, there are some serious issues around the efficiency of the process that arise on the basis of these submissions, which I'll return to. Secondly, we submit that the proposal focuses narrowly on particular considerations within the Act, to the exclusion perhaps of others or at the very least and as consented by the ACTU it does elevate some considerations we would say above others, and improperly.

PN307

Thirdly, while we propose to address the quantum of wage increase during the substantive annual wage review hearings, it goes without saying that there is a proposal for a significant increase on the table and we do submit that that proposal risks negative employment impacts, will significantly increase employment costs I'm hearing by at least \$100 but as we turn to the reality that this could have some flow on implications across award classifications, it could even be higher than that. In that regard we submit that it's not compatible with other considerations in the Act the panel is required to take into consideration, such as performance and competitiveness of the national economy including productivity, business competitiveness and viability, inflation, employment growth and promoting social inclusion through workforce participation.

PN308

Now I don't propose to traverse all of the provisions of the statute in depth but the Act's provisions do make it very clear that the wage review process is an annual event, with outcomes generally intended to come into effect in the coming financial year, and it has been historically administered in this way by the Commission. I think that's without controversy. In previous decisions the expert panel has explained that it is required to exercise broad judgment in a review of minimum wages, and we appreciate that broad judgment is required and

reconciling the sometimes competing objects, as contained within sections 284, 134 and section 3 of the Act. In the absence of a mechanistic formula for wage setting, we also appreciate that that task is not a straight forward one.

PN309

In our view that is why it's really important to have or to reflect upon the important procedural fairness requirements that are administered on an annual basis. Now a medium term target couldn't be imposed as a means of circumventing the ordinary operation of the Commission's powers as they apply to this annual wage review. So each year, and this turns to the efficiency considerations I referred to, parties would still need to make submissions and comment on submissions made by other parties, for consideration of each annual review process. What purpose a medium term wage target would serve in that context is therefore questionable, in our submission.

PN310

However, United Voice and those supporting the proposal for a medium term wage target are in effect asking the Commission to look outside the complex considerations contained within the Act, and its annual processes to establish a target to guide its wage setting, that really has no basis and statute. Submissions have been made that it's not inconsistent to the Act - with the considerations in the Act and that it does, I think - the term I think was balancing up those objectives. We do not share that view in terms of the overall balancing tasks that the expert panel needs to turn its attention to. So in essence, United Voice do place a lot of reliance on relative living standards and the needs of the low paid as a consideration under section 284(1)(c) of the Act.

PN311

The practical effect of the proposal is that that consideration, relative living standards in particular is elevated over others. So with respect we consider that the proposition that this somehow reflects a balancing exercise or appropriately balances the considerations that the expert panel is required to take into consideration as flawed. It also in our submission, relative living standards and the needs to the low paid is a consideration that can't be in our submission addressed in the form of a target that links merely to median earnings. It's a much more complex consideration because as we've noted, the operation of the tax transfer system does impact on things like relative living standards and the Australian government's submissions also pointed out that many low wage earners are not within low income households and that's a submission that we have continued to put before this Commission in prior reviews.

PN312

It's also worth asking the question that if the United Voice proposal is to be adopted, what is to prevent other parties from submitting proposals to the Commission, to have regard to other mechanistic criteria or targets in the context of the annual wage review, such as a wage linked to inflation, for example, or an approach that perhaps recognises that Australia's minimum wage is high by international standards and sought to slow growth in wage increases to enhance Australia's competitiveness is another consideration that's relevant under the statutory context.

PN313

So to be clear, the Australian Chamber doesn't currently have any intention to put a proposal of that nature before this submission, and we're not advocating for a target to be set on the basis of those examples, but it does raise questions around why the proposal for a target directed at one aspect or a more limited number of considerations in the minimum wage objective should be embraced any more favourably than a target directed at other aspects of the minimum wage objective.

PN314

The setting of a target in our view would clearly be intended to influence the decisions made by future expert panels, which doesn't sit well with the rationale adopted by the panel in previous decisions where it indicates that the approach to each annual wage review is a matter for the new panel constituted in each year. It's also worth noting that the proposal put forward by United Voice appears to be primarily using, I suppose, the annual wage review process as a tool for addressing inequality.

PN315

Now we do maintain our view as we've put in prior years that yes, we acknowledge that relative living standards are a part of the consideration that the panel's required to take on board, but policies for addressing inequality or pursuing economic redistribution, if I can put it that way, are best found in the more targeted tax transfer system, and that also aligns I think with the views of the other employer parties and Australian government.

PN316

So I'd probably make the note too that the union parties to these proceedings have seemingly sought to downplay the potential impact of target setting. So to take you to some of the submissions, United Voice describes the imposition of the medium term target as a tool for the Fair Work Commission to meet its obligations under the framework. Page 1 of the ACTU submissions also saying it's important to distinguish as United Voice has between a binding target and the setting of an expectation or express of support of the merits in favour toward a particular goal. That it would be passing as strange and erroneously nave - or erroneously nave construction of the legislative purpose, that led to a conclusion that the Commission was precluded from adopting, developing or reviewing policy positions that informed its evaluation of the highly variable and granular detail that it properly has to year to year.

PN317

So with respect to those submissions, a target by its nature does go to beyond a mere thing that needs to be taken into consideration. In our submission, it would set an outcome to be worked toward, and in this regard it would serve to influence the conduct of the panel and outcome of the wage review, in a significant manner. For the reasons described including the fact that the median term target would be inconsistent with the annual nature of the review, it would require consideration of a target or let's call it may be an objective, not prescribed by the statute, and it would clearly preference one or potentially two considerations in the Act to the exclusion of others. We would submit that that approach is inappropriate, and the panel on previous years has been cautious to note that it does not attach any primary over particular considered in the Act as well.

PN318

So it's uncontroversial that the panel may examine various sources of data in considering things like relative living standards, including considering how minimum wages might sit relative to other wages in the economy. But we don't think it's appropriate for the panel to adopt an approach that would see it favour an outcome linked to that consideration alone or in preference to the balance of considerations. We also have concerns that the medium wage target is also unlikely to have the effect that perhaps United Voice intends. We would submit the setting of a target of the nature proposed by United Voice would in fact exacerbate inequality by resulting in negative employment impacts, and it could have the effect of vulnerable groups, such as the long term unemployed, and youth become less competitive in and unable to participate in the labour market.

PN319

As such, we do oppose the proposal for a medium wage target, both of the nature sought by United Voice and in the general context of the statutory framework. We also note that the Commission has released a background paper on a review of transitional instruments, and parties within our membership have raised that as an issue in prior submissions, which is represented here today in the New South Wales Business Chamber who made collectively submissions with ABI.

PN320

We have had the opportunity to review the submissions made by the employer parties and are broadly supportive of those views. There's perhaps one area of perhaps conflict or non-alignment in the views, and that relates to the termination of long service leave provisions and the operation of section 113. So we, as noted by the New South Wales Business chamber and ABI, we also hold the view that section 113 operates to preserve an employee's entitlement to long service leave, and that will not be affected by - all those entitlements will not be affected by the termination of the transitional instruments containing long service leave. And in theory, if that view was accepted we wouldn't have any problem or objection with the termination of the long service awards but we're also sympathetic to the view of the Ai Group in that if that is contested territory or there is doubt about this, there is some caution to be applied in dealing with those instruments so as to not disturb existing arrangements. So if it please the Commission.

PN321

JUSTICE ROSS: Thanks, Ms Matheson. Mr Ferguson?

PN322

MR FERGUSON: Yes. Thank you. The Ai Group has filed submissions and reply submissions in the context of these proceedings and we rely on that material. I don't propose to move from it or to repeat the detail of it. What I do propose to do though before Ai Group addresses any of the questions from the panel, is just touch upon some of the key arguments that we've advanced in relation to the proposed target, and then turn over to my colleague, Ms Toth, who will address some of the broader economic considerations and the international comparisons.

PN323

In broad terms one of the key bases for our opposition to the target is that it's inconsistent with the statutory duty to undertake the review on an annual basis, and I think that's consistent with what is put by some of the other employer parties.

PN324

JUSTICE ROSS: It might be more convenient if we adjourn for five minutes just to allow you to come to the front.

PN325

MR FERGUSON: Yes.

PN326

JUSTICE ROSS: We have a tag team arrangement because I'm conscious the microphones may not pick you up for transcription purposes and whereas Ms Matheson was in front of a microphone so that wasn't a problem.

PN327

MR FERGUSON: No, right.

PN328

JUSTICE ROSS: And for those who are following you it might be a convenient time to do a bit of a reshuffle if that's all right.

PN329

MR FERGUSON: Yes.

PN330

JUSTICE ROSS: All right.

SHORT ADJOURNMENT

[11.02 AM]

RESUMED

[11.12 AM]

PN331

JUSTICE ROSS: Yes, Mr Ferguson?

PN332

MR FERGUSON: Yes. Thank you. Just to recap, I was saying that one of our key bases for opposition is the view that there's a statutory compulsion to undertake the review on an annual basis and that seemed to accord with the view of others. Our second key concern is that the proposal would distract the Commission from the statutory mandated considerations of the modern awards objective and the minimum wages objective, and I suppose the corollary of that is that, at the very least, it would inappropriately shift the balance in favour of certain mandatory considerations over others and we say that is an irrelevant consideration and inappropriate.

PN333

And then the other, I suppose, major argument that we've advanced is that adopting this approach would hamper or make it difficult for this panel to, or the Commission, to take into consideration changes such as major events that may

occur and dictate a different approach being adopted, or take into account changes in the broader social safety net. And they're all reasons that we say would mitigate against this proposal being adopted.

PN334

But I didn't propose to elaborate in any other great detail on the reasons but I would just touch briefly upon the transitional instruments issue, so that I don't see that there's any particularly great conflict between ACCI's position and ours in that we don't see that there is a barrier necessarily to the removal of those instruments but we did express some caution or the need for some caution if there was any doubt about that. And that's the basis for the submissions as they're advanced. Now, with that, I'll hand over to Ms Toth.

PN335

JUSTICE ROSS: Yes, Ms Toth?

PN336

MS TOTH: Good morning, panel. We didn't put in much information in our submission. I think when I was putting this together I was sort of thinking that the international story was relevant to considerations because that appeared to me to be where the idea for such a target had come from and that's why, in the submission on page 7, I focused mainly on the UK introduction and why that had happened. And it really struck me that the reasons why it was introduced in the UK was really to address pulling the average up in the context of quite severe shocks to the economy there, and, in particular, outright falls in real wages that have occurred in the UK and that's happened also in the US. That hasn't been the situation in Australia, so that sort of leads me to question whether the circumstances that arose in those countries and particularly in the UK that led them to this decision haven't happened here, and we have a different set of circumstances, and we haven't seen real wages fall either for, you know, in average terms and the minimum in real terms.

PN337

VICE PRESIDENT HATCHER: But the UK situation seemed to reflect the Government policy to move towards remedying poverty and lower wages by using the minimum wage system as distinct from the tax transfer system.

PN338

MS TOTH: Yes.

PN339

VICE PRESIDENT HATCHER: That is part of it was to reduce expenditure on the tax transfer system and remedy it by the minimum wage. So how does that approach fit with some of the submissions we've heard that the tax transfer system is a better way of dealing with low living standards?

PN340

MS TOTH: Yes. That's a really interesting question, because what's really struck me this morning is that we're actually talking about a lot more than just raising the minimum. It is also going to the heart of questions about wage inequality but also income inequality and earnings inequality and as we've already noted they're not

the same thing. You know, wage rates are one component of incomes, tax and transfers are another. But I think some of the other things that you might want to consider are things like work hours have also been changing and that's affecting income inequality as well, as has the structure of the economy, so we know that, you know, some industries are growing, others are shrinking. We know, for example, that manufacturing has shed large numbers of jobs, and then at the other end of the scale we've seen growth in things like health care professional services, a little bit of growth in mining, and a little bit of growth in finance sector jobs. So, you know, the structure of the economy is possibly pushing up the average in ways that are not being reflected in the minimum, so it's quite possible that some of the gap that we're seeing grow is due to structural reasons.

PN341

Hours of work are something - - -

PN342

PROFESSOR RICHARDSON: Sorry, could you just explain the relevance of your point about hours?

PN343

MS TOTH: Yes. I was just going to get to that. It's just it seems to me that we've talked a lot about wage differentials and the wage gap, and we've talked a little bit about the interaction with the tax and welfare system which also has an effect on, of course, evening that out and addressing income inequality, income inequality as opposed to wage rate differences. Incomes are affected by the hours of work that people do and that's been changing as well. We've seen just last week the latest labour force estimates show that we've got a record high of 32 per cent of the workforce in part-time work. There are large groups that are working reduced hours. So that affects people's incomes as well as their wage rates, so I'm just thinking that conflating the wage rate with earnings inequality and income inequality there's a bit more going on than just the tax and welfare system. There's also the structural issues, and even the work hours changes that we're seeing. But that - - -

PN344

PROFESSOR RICHARDSON: But if we could just be precise about this, I don't think anybody has proposed that we use average earnings or median earnings.

PN345

MS TOTH: Yes.

PN346

PROFESSOR RICHARDSON: It's always median earnings of adult full-time employees.

PN347

MS TOTH: Yes. That's right.

PN348

PROFESSOR RICHARDSON: To remove the effect of the part-time work.

PN349

MS TOTH: Yes.

PN350

PROFESSOR RICHARDSON: So I'm just wondering what's being added by the point that you're making?

PN351

MS TOTH: Well, I guess I'm just suggesting that the objective sounds like it's really an equity argument rather than lifting the minimum up and there's lots going on that affect equity of earnings across the workforce as well as the wage rates.

PN352

PROFESSOR RICHARDSON: Thank you.

PN353

JUSTICE ROSS: Any other employer submissions?

PN354

MR ARNDT: Thank you, your Honour. I appear for Australian Business Industrial and the New South Wales Business Chamber. Those parties filed submissions on the 10th and the 17th. They canvass a number of issues in relation to the various categories. I seek to rely on them. I don't want to canvass them again. For my part I'll just direct some comments to the matters raised this morning.

PN355

I think the first and critical point is the nature of the target proposed, or what is a target and how would it be adopted. These submissions have been cut considerably short by the comments made from His Honour Justice Ross earlier this morning. As was put, and as is ABI and New South Wales Business Chambers' position, a hard target is obviously inconsistent with a legislative regime and for that reason it hasn't been proposed by the parties moving the target approach. There would be an obvious inherent inconsistency with the Act.

PN356

We move then to what's been described as the soft target and then we run into really issues as to what utility that kind of target would have if it is indeed applicable or appropriate under the Act. We've had various iterations or descriptions of how soft that target might be; how it might be framed. You know, it's been described as inherently flexible, subject to ongoing change and something that doesn't lock you down. The question is what would it actually be and how would it actually affect the panel's determination of what is the issue which is subject to a considerable legislative structure already.

PN357

Mr Clarke noted this morning that the effect of the minimum wage target would be to increase the weighting of the relative living standards, the fairness-type aspects of the panel's determination. This appears on its face to be problematic under the terms of the Act, but even if it wasn't, how much should that weighting

be increased, and it appears the position put is that the panel should make that determination and the utility of the predictability of the target, and basically all the utility that would be derived from a target would depend on how the panel expressed it. It's unclear as to exactly how it's intended or proposed that the panel expresses the target, and for that reason I think the panel has been placed in quite a difficult position by the proposal.

PN358

It can't be hard and soft, as your Honour put this morning. The softer it is the less useful it becomes, and, in short, it's ABI and NSW Business Chamber's position basically that the target can't be soft enough to be inconsistent with the Act but also to be of some utility. We have made submissions about the aspects of the traditional transitional provisions as well as the disability aspects of this case. I wouldn't cavil with Mr Clarke's statement earlier that it's a very technical area which probably isn't assisted by my summation. If there's any questions I'm happy to take it on board.

PN359

JUSTICE ROSS: Thank you.

PN360

MR ARNDT: Thank you.

PN361

MS ADLER: Thank you, your Honour and members of the expert panel. We appear today on a very discrete issue that we've outlined in our correspondence dated 10 October. This relates to some transitional instruments that operate in Queensland in relation to apprentice and training wages, competency-based progression and the tools order that only operate in Queensland. We appear and make these submissions just to highlight the status of those instruments is a live issue currently. It's the subject of a decision and is the subject on appeal at the moment, and our respectful submission is that until those matters are determined that this panel not deal with those issues at this time.

PN362

JUSTICE ROSS: Is that the appeal next week?

PN363

MS ADLER: It is, your Honour. That was all, thank you.

PN364

JUSTICE ROSS: Thank you. Any other employer submissions? Any individual union submissions? Mr Maxwell?

PN365

MR MAXWELL: Thank you, your Honour. Your Honour and members of the expert panel, similar to the HIA we appear in regards to the transitional instruments only. We have filed a written submission in regard to those matters. Other than the written submission I don't think I've anything to add today, unless there's any questions from the expert panel.

PN366

JUSTICE ROSS: Both of you are in next week's appeal, aren't you?

PN367

MS ADLER: I am appearing, your Honour.

PN368

MR ARNDT: I'm not appearing, your Honour.

PN369

JUSTICE ROSS: No, but your organisation is?

PN370

MR ARNDT: Our organisation is, yes.

PN371

JUSTICE ROSS: See you then. Nothing further? Mr Lawrence? Do you want to - - -?

PN372

MR LAWRENCE: I'm comfortable here if the Bench is happy with me being back here.

PN373

JUSTICE ROSS: You're all right? Okay.

PN374

MR LAWRENCE: Could I just start with what we've distilled from past decisions of the Commission on the nature of the minimum wage, the national minimum wage in particular, and the Commission would have seen this in our submission, the first submission of 10 October, and we've pulled together some passages - or two passages - from past decisions and we've come up with this. Using the Commission's words:

PN375

Full-time workers have a reasonable expectation of a standard of living that will be in excess of poverty and one which will enable them to purchase the essentials for a decent standard of living and engage in community life assessed in the context of contemporary norms.

PN376

If that is not the fundamental rationale for a minimum wage-setting system then what is? We say that has to be the rationale; that's why the Parliament of Australia and other bodies throughout the world set minimum wages. They don't set it to constrain wages out in the community; they've set it there to protect people and to give so far as possible workers and their families that sort of standard of living and that ability to live a decent life. What we do recognise is that there are constraints on the ability to do that and the constraints will vary from year-to-year, from time-to-time, depending on a number of factors. So we say when we approach this question of whether there should be a target or some view as to where we're going with wage-setting in Australia, we say given that

we've found that there is an unacceptable level of poverty and inequality in Australia at the moment, the fundamental projection of future wage decisions should be to lift more workers and their families out of poverty and provide them with a decent standard of living. So we've picked up on the words that have been used by the Commission, and we see the United Voice medium-term target as an appropriate means of working towards that objective. Wonderful if the target was adopted; it wouldn't achieve it as we see it, but it's an appropriate way of working towards the subjective.

PN377

There's a question in this matter of hard targets and soft targets. It seems to us that the way in which this should be approached is to go back to the authorities on wage-fixing principles, and in the reply submission from the Australian Catholic Council for Employment Relations we refer to - - -

PN378

JUSTICE ROSS: Is that the R v *Clarkson*; Ex parte Australian Telephone and *Phonogram Officers*' Association [1982] HCA 5; (1982) 148 CLR 600 (11 February 1982) case?

PN379

MR LAWRENCE: Yes, that's right. It's sometimes called Clarkson's case.

PN380

JUSTICE ROSS: Yes.

PN381

MR LAWRENCE: And there's an extract from the judgment of Chief Justice Gibbs about how you can deal with principles and where they work and where they can't work, and it's worth reading just part of that judgment.

PN382

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.

PN383

And I'll skip a sentence -

PN384

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.

PN385

And then in another paragraph the Chief Justice said:

PN386

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.

PN387

So what we've got there is a statement from the High Court, which other Justices agreed with, or agreed with a similar expression, that would enable a departure from a position to be available on grounds to be demonstrated at some stage in the future. In this particular case, if we take the target that's proposed by United Voice, if the Commission were minded to adopt that as a target, as an aspiration or a point at which it hopes to arrive at at some stage in the future, four years or otherwise, it would be open to any party to put forward reasons why that path should not be trodden at a particular point in time, and make out the case by reference to the terms of the statute. There's a question about disemployment effects. If it was said at some stage that the increase in the national minimum wage by the amount that was suggested by the target would cause disemployment effects, then it would be up to the organisations that were making that argument to lead evidence on the matter, that is, evidence that could be lead to show that the target should not be pursued for matters that were relevant to that particular year or perhaps more generally, but certainly it would be available.

PN388

JUSTICE ROSS: Sorry, Mr Lawrence - implicit in that is that - is it the proposition that the target becomes the default position and those who want to argue against its implementation of a year bear the onus of putting material forward to say it shouldn't be met?

PN389

MR LAWRENCE: I think that's probably the best way you to describe it, your Honour. There are difficulties sometimes in the use of the term "default" but it's
- - -

PN390

JUSTICE ROSS: Yes, sure. Yes.

PN391

MR LAWRENCE: Yes, I think it's probably better to put that. That is, the default position is we're going down that path but if there are reasons why we shouldn't then any party can bring forward reasons why we shouldn't at that time. And the argument might be specific to the particular circumstances. For example, if there's a catastrophic change in the terms of trade and we have a GFC in two years' time, well, obviously that would be a relevant figure, or development, I should say.

PN392

Because the Fair Pay Commission did this in 2009 and froze wages, unwisely, but it did it. But you could see how the exigencies of the moment that the year can lead to that sort of outcome. So that seems to be the way to go as far as we put it. And there was reference earlier today about precedents; whether the Reserve Bank

target raises a precedent or not. Our point is you don't have to look outside the Australian wage fixing system or the history of wage fixing in Australia to find a precedent. The precedent has been there right from the word go, because even before the first World War, as a matter of policy, the Harvester living wage was used to settle industrial disputes. Moving on we had automatic indexation, that is, quarterly indexation based on price changes up until 1953, and all of this was, in effect, locking in or putting in a default position for future wage adjustments. And then we got through to the wage fixing principles established in the early 1970s and variations afterwards.

PN393

So there's always been a sense of looking forward in wage fixing. That's important matters it's been said of – well, it can help businesses plan. But it's also important from the point of view of ordinary workers who need to have some sense of where things are going, need to have some sense of confidence and need to believe in the system. And if it's just a series of disconnected annual decisions that don't seem to be directed to an objective or a goal, then it will not be a system that will attract people.

PN394

Now, the employer organisations of the Commonwealth Government have argued that there should be separate annual disconnected wage adjustments, but yet they're the very organisations that have supported the Australia history. If you go back just the wage fixing principles as they were developed in the seventies and eighties and into the nineties it served the purposes of business. Business had an input into it and they were quite content to have a longer or medium term perspective. They signed up to wages systems that went beyond the particular resolution of an industrial dispute. And there's really no difference between the exercise of discretionary power for the resolving of the industrial dispute and the exercise of a statutory authority here under the Fair Work Act. They're both the same kinds of – the Tribunal has the same kinds of discretions, and you come back to the inhibition that's pointed to by the Chief Justice. The Chief Justice said well, you can't bind yourself. And in effect he says you can have a default position, if I can use the term, but that's the substance of it.

PN395

So what we're saying is that it's perfectly open to the Commission to have a forward view. It's perfectly open to the Commission to say, in any particular year, look, we understand people are going to be left in poverty. We'd like to have poverty removed in more cases. We'd like to have a high standard of living, but we're constrained this year, but we think something needs to be done. And on the basis of that finding, the Commission can look forward to set a medium term target in the sense that the Chief Justice talked about in Clarkson's case. And that, we submit, is the appropriate way to go.

PN396

Now, as far as the 60 per cent of the median is concerned we've shown in our reply submission that it would work in a similar way, or have a similar outcome to what we'd put in our submissions of 10 October. The Commission may come to the view that over a four year period 60 per cent is too much. Fifty-five per cent might be a target. But that's really a matter of detail. The fundamental question is

whether the Commission can shine a light on a path that's available and if the Commission is prepared to accept the idea of a medium term target we would submit that it should indicate this before the substantive submissions are due in March. And in those cases – well, there'd be three options: one would be you'd reject it; secondly, you would accept the 60 per cent; and the other one might be that you would accept a target but you want to hear more submissions on what the target should be.

PN397

And just in relation to that can I say this, which might appear to go against what we've been urging as our primary position, the difference between the 60 per cent of median earnings back in August 2015 and the national minimum wage was \$81 a week. I forget the exact figure but it was about \$81 a week. And, in effect, what United Voice is saying, and we're supporting as our primary position, is that over four years there should be an extra \$81 a week added to the national minimum wage. Now, some might say, over such a short period, that's too much. So that could be the third option, that is, the Commission would say, we're prepared to adopt a target, but the amount of it, or what the target is, is a matter for further submissions in March.

PN398

Could I just say one thing in relation to that issue about the passage in the 2010 decision? The passage in the 2010 decision was explained in, I'll put it that way, explained in the 2011 decision to our satisfaction. It came up again subsequently and again explained to our satisfaction. We were happy with the way it was explained later on, so I think the 2010 passage needs to be understood in that context.

PN399

JUSTICE ROSS: Yes.

PN400

MR LAWRENCE: Unless there's anything else they're the matters I'd like to put on behalf of the organisation.

PN401

JUSTICE ROSS: Thank you, Mr Lawrence.

PN402

MR LAWRENCE: Thank you.

PN403

JUSTICE ROSS: Any further oral submissions? No. In relation to those parties who have taken some questions on notice, I was going to propose that those responses be filed by 4 pm Friday, 28 October, and any replies be filed by 4 pm Friday, 4 November subject to liberty to apply. Does that create any problems for anyone who is taking a question on notice? If it does you can always let us know if, for some reason, more time is required. But does anyone have a problem with that at the moment? No. All right. Thanks. We will adjourn.

ADJOURNED INDEFINITELY

[11.40 AM]