



Restaurant
& Catering

**FAIR WORK COMMISSION
ANNUAL WAGE REVIEW 2017-2018**

13 April 2018

1. Restaurant and Catering Industrial (RCI) relies on its submission filed on 13 March 2018.
2. RCI makes this submission in response to the questions on notice from the Expert Panel issued on 29 March 2018, as detailed below.
3. **Decision-making process**

1.1 Question to all parties

In Chapter 7 of its submission, ACCER deals with wage setting under the *Fair Work Act 2009* and addresses some aspects of the Panel's 2016–2017 decision, in particular:

(i) ACCER submits that the Panel's construction of s.284(1) was erroneous and should be reconsidered (see especially [214], [234]–[237], [240], [249] and [253] of ACCER's submission).

(ii) ACCER maintains its contention that the Panel has adopted a 'wages relativities policy' which it submits is contrary to law and also asks that the Panel reconsider its decision in respect of this issue (see especially [255]–[272] and [287] of ACCER's submission)

(iii) ACCER makes a number of observations about 'equal remuneration' and the consideration in s.284(1)(d), noting that the gender pay gap is caused by factors outside the modern award system and is not relevant to the matter in s.284(1)(d) (see especially [275]–[281] of ACCER's submission).

All parties (especially the Australian Government, ACTU, ACCI and Ai Group) are asked to comment on these aspects of ACCER's submission.

RCI response to 1.1(i):

RCI does not agree with ACCER's assertion that the Expert Panel's construction of s284(1) is erroneous.

ACCER's main argument is that, in the context of the national wage review, the Panel's consideration of employees' interests should take precedence over the interests of employers, which it says is supported by parliamentary intent. For example, ACCER states at paragraph 236 of its submission that '*It is not necessary to frame the setting of the safety net wage in terms of fairness to employers and employees in order to take into account the interests, or perspectives, of employers.*' as the interests of employers are given consideration under s284(1) and (b).

Further, a proposition advanced by ACCER in last year's review was, legislation should be given a 'beneficial construction'. This term is identified as '*one that gives some benefit to a person and thereby remedies some injustice.*' Whilst the Expert Panel, in its decision, accepted this characterisation of legislation,¹ referring to relevant authority (below), it noted

¹ [2018] FWCFB [134].

that the beneficial function of the provision may be limited by other competing interests, as noted by Gleeson CJ in *Carr v Western Australia*:

‘Another general consideration relevant to statutory construction is one to which I referred in *Nicholls v The Queen*. It was also discussed, in relation to a similar legislative scheme, in *Kelly v The Queen*. It concerns the matter of purposive construction. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose or object. As to federal legislation, that approach is required by s 15AA of the *Acts Interpretation Act 1901* (Cth) ("the Acts Interpretation Act"). It is also required by corresponding State legislation, including, so far as presently relevant, s 18 of the *Interpretation Act 1984* (WA). That general rule of interpretation, however, may be of little assistance where a statutory provision strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act. Legislation rarely pursues a single purpose at all costs. Where the problem is one of doubt about the extent to which the legislation pursues a purpose, stating the purpose is unlikely to solve the problem. For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation and a purported exercise of judicial power for a legislative purpose.’²

Following consideration of relevant authority (as outlined above), the Expert Panel correctly concluded in its 2018 decision that the legislative provisions in respect of the national minimum wage ‘plainly seek to strike a balance between competing interests’ and consideration of ‘fairness’ in the context of s284(1) should be assessed from the perspective of employees and employers alike.³

It would appear that consideration of ‘fairness’ from the perspective of employees and employers in the context of the modern awards objective (s134) and national minimum wage (s284(1)) has been uniformly applied by the Fair Work Commission. This consideration has similarly been applied to the various matters which formed part of the Four Yearly Review of Modern Awards.

In relation to s134, the Full Bench, in the recent penalty rates decision, questioned *whether the modern award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions*. In considering the proper construction of the term ‘a fair and relevant minimum safety net of terms and conditions,’ the Full Bench noted as follows:

‘[117] **First, fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.** So much is clear from the s.134 considerations, a number of which focus on the perspective of the employees (e.g. s.134(1)(a) and (da)) and others on the interests of the employers (e.g. s.134(1)(d) and (f)). Such a construction is also consistent with authority. In *Shop Distributive and Allied Employees Association v \$2 and Under* (No. 2)39 Giudice J considered the meaning of the expression ‘a safety net of fair minimum wages and conditions of employment’ in s.88B(2) of the *Workplace Relations Act 1996* (Cth) (the WR Act). That section read as follows: ‘88B Performance of Commission’s functions under this Part ... (2) In performing its functions under this Part, the Commission must ensure that a safety net of fair minimum wages and

² Ibid at [139].

³ Ibid at [140] and [141].

conditions of employment is established and maintained, having regard to the following: (a) the need to provide fair minimum standards for employees in the context of living standards generally prevailing in the Australian community; (b) economic factors, including levels of productivity and inflation, and the desirability of attaining a high level of employment; (c) when adjusting the safety net, the needs of the low paid.'

[118] As to the assessment of fairness in this context his Honour said:

'In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. This must be done in the context of any broader economic or other considerations which might affect the public interest.' 40⁴ (emphasis added).'

RCI therefore submits that it is fundamental that the Expert Panel maintains its approach in balancing the competing interests of employees and employers alike, on the question of 'fairness', together with other relevant considerations in the minimum wages objective (s284) and modern awards objective (s134).

RCI response to 1.1(ii):

RCI does not agree with ACCER's claim relating to the Expert Panel's adoption of 'wages relativities policy' contrary to law. RCI agrees with the decision of the Expert Panel in this regard.

RCI response to 1.1(iii):

RCI agrees with the Expert Panel's observations and approach in dealing with the equal remuneration principle.

1.2 Question to all parties

The method for adjusting wages in copied State awards was the subject of a decision by the Panel issued on 4 January 2018.¹ In that decision the Panel expressed the following provisional view:

'[43] ... It is our provisional view that AWR adjustments should generally apply to copied State awards, subject to a different outcome being determined in respect of particular copied State awards. In other words, rather than seeking to apply a tiered approach as a decision rule to mitigate 'double dipping' we propose to address any 'double dipping' on a case by case basis. We invite submissions on our provisional view in the context of the 2017–18 Review proceedings.'²

The ACTU invites the Panel to confirm its provisional view. Does any other party take a different view?

⁴ [2017] FWCFB 1001.

RCI response to (1.2):

RCI agrees with the Expert Panel that any occurrence of 'double dipping' should be dealt with by the Fair Work Commission on a case by case basis.

1.3 Question to the ACTU and all parties

The ACTU submission comments on the Panel's observation in last year's Review decision that the considerations we are required to take into account in reaching a judgment as to what constitutes 'fair and relevant' minimum wages require us to balance 'competing interests'.⁵ The ACTU juxtaposes the notion of competing interests with a unitary interest. The ACTU submits:

'The growing body of empirical research studying the employment effects of minimum wages (discussed in Chapter 5), the new economic orthodoxy regarding the economic risks of inequality (discussed in Chapter 4) and other prominent schools of economic thought (such as dynamic monopsony (only one buyer) and post-Keynesian economics) provide sound support for moving away from a position whereby deciding "fair and relevant" minimum wages necessarily involves a contest between "social" versus "economic" considerations, towards a position where the assessment is fundamentally about the common good.'⁶

The ACTU also submits:

'We do not raise the above to suggest that the Panel can or should adopt some criteria other than that which it is directed to. But we do submit that the Panel should recognise that the criteria it is asked to apply embed certain assumptions which the Panel is free to question, challenge and reject. Indeed, it has taken some steps towards this approach already. For example, the Panel has recognised that its obligation to set "fair and relevant" minimum wages does not limit it to an exclusive consideration of the particular matters referred to in the paragraphs below subsections 134(1) and 284(1) of the Act, as its consideration of social inclusion and the gender pay gap demonstrates. In addition, it has been willing to accept some limits about the rigidity of the assumptions embedded in the criteria it is compelled to consider – most notably last year's statement that:

"we have greater confidence in our view that modest and regular wage increases do not result in disemployment effects. Further, this research suggests that the Panel's past assessment of what constitutes a 'modest' increase may have been overly cautious, in terms of its assessed disemployment effects."⁷

The above seems to suggest that the various statutory considerations in ss.134 and 284 are not in conflict, but rather are all pointing in the directions of an increase in minimum wages. Is that what is being put?

Is the proposition simply that increasing minimum wages will be good for the economy, therefore the social and economic considerations are not in conflict?

⁵ ACTU submission, 13 March 2018 at para. 4.

⁶ ACTU submission, 13 March 2018 at para. 9.

⁷ ACTU submission, 13 March 2018 at para. 8; [2017] FWCFB 3500 at para. 523.

What of the consideration in s.134(1)(f), in particular the impact of an increase in minimum wages on 'employment costs'?

The ACTU and all parties are invited to respond to the above questions.

RCI response to (1.3):

In response to Question 1.3, RCI argues that an increase in the minimum wage cannot be considered as a unitary good as there is no guarantee that the businesses will be able to earn the additional revenue required to cover the increased cost of the higher wages. In this respect, increased wage costs will not result in net benefits for the economy as businesses may not be able to sustain the higher operating costs associated with increases in the minimum wage. Any increases in wage costs are directly sourced from the businesses' earnings which of course do not proportionally increase in line with wage costs. An increase in wage costs places businesses in a less favourable position to be able to take on additional employees and allocate additional hours to existing employees.

2.2 Question to all parties

In previous Reviews, the Panel has noted that productivity growth is best measured over the business cycle. The Panel has also highlighted that since the length of the business cycle is not aligned with the statutory task of an annual wage review; the Panel pays more attention to longer term trends and treats recent changes in productivity with some caution.⁸

In that context, all parties are invited to comment upon what significance, if any, should be given to the 2017 productivity growth figures in Tables 2.1 and 2.2 of the Statistical report.

RCI response to (2.2):

RCI argues that the 2017 productivity growth figures in Tables 2.1 and 2.2 of the Statistical report should be given significance, the trends present in these Tables and reflected in the data cannot be viewed in isolation. Greater significance should be given towards the long-term trends present in the data, rather than analysis of a one-year movement. RCI argues that the differences evident as part of a one-year trend must be viewed in the context of longer-term trends and patterns to accurately inform the decision-making around the minimum wage.

2. The Economy

2.6 Question to the ACTU and all parties

The ACTU submitted that '[i]ncreased wages for the low paid raise aggregate demand disproportionately because low paid people spend most or all of any increase to their incomes. We attempt to estimate this effect in section 3.1.15.3 below.'¹²

What is the ACTU's estimate of the effect referred to in the above submission?

What is the response of the other parties to this submission?

⁸ [2017] FWCFB 3500 at para. 228.

RCI response to (2.6):

RCI disagrees with the ACTU's narrow view that an increase in minimum wages will likely result in a longer-term benefit to the economy as a whole, by reducing inequality and raising aggregate demand. Factors such as, the likely effect of disproportionate increases in minimum wages on the sustainability of businesses must be taken into consideration. For example, a high increase in minimum wages may result in a business not having the ability to maintain its labour expenditure, resulting in a decrease in available work. This would have the opposite effect of what the ACTU is trying to achieve.

2.8 Question to the ACTU and all parties

The ACTU submitted concern regarding the extent to which the measure of underemployment captures workers searching for more work 'due to the inadequacy of wages'. The ACTU stated that:

'... excluding those who were "available and not looking" (that is did not request longer hours) underestimates the relative lack of power of the employee in the employment relationship particularly for women and other vulnerable groups, and also the risk and costs of changing jobs. Many employees do not find themselves in a position to request anything from employers. It is well understood that requesting more hours is unlikely to have the result that the worker seeks and may even be negatively interpreted by employers and have adverse consequences for the employee.'¹⁴

Does the ACTU have any evidence to support this statement? All other parties are invited to comment.

RCI response to (2.8):

In the absence of supporting evidence, ACTU's statement is merely hypothetical. Importantly, it misconceives the working relationship of employers and employees as being generally adversarial. In so far as RCI's members are concerned, to date, we are not aware of any issues or concerns arising out of an employee requesting to work more hours. Generally open communication regarding staff availability and rostering, between managers and staff is encouraged. It is also the case that the seasonal nature of the restaurant, café and catering industry influence employers' ability to offer more work and more hours during peak seasons and less hours during quieter times.

3.1 Question to the ACTU and all parties

The minimum wage bite is calculated as the weekly national minimum wage as a proportion of full-time median earnings of employees and owner managers of incorporated enterprises. A chart showing the trends in the minimum wage bite is presented in Chart 8.3 of the Statistical report.

The Australian Bureau of Statistics also collects median hourly earnings which include earnings of both full-time and part-time employees.

Do any parties have a view as to the preferred measure of median earnings to be used for calculation of the minimum wage bite?

RCI response to (3.1):

RCI sees the status quo methodology as described in Question 3.1 as an appropriate measure to use for the purposes of calculating the minimum wage bite.

5 Equal remuneration

5.1 Question to all parties

The ACTU submission suggests that the ‘principle of equal remuneration for work of equal or comparable value’, as referenced in ss.134(1)(e) and 284(1)(d), is not relevant to the Panel’s functions in an Annual Wage Review.²¹

Does any party take a contrary view?

RCI response to (5.1):

RCI does not agree that the ‘principle of equal remuneration for work of equal or comparable value’ pursuant to s134(1)(e) and s284(1)(d) is not relevant to the Expert Panel’s role in conducting the Annual Wage Review. The Panel is required to consider this principle, together with other requirements mentioned in the relevant statutory provisions.