

Fair Work Commission

Fair Work Act 2009

Annual Wage Review 2017-18

Submission in Reply

and

Response to Questions on Notice

by the

Australian Catholic Council for Employment Relations

9 April 2018

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1. This submission by the Australian Catholic Council for Employment Relations (ACCER) covers replies to some of the submissions filed in March 2018 in the Annual Wage Review 2017-18 and responds to Questions on Notice published by the Fair Work Commission (FWC) on 29 March 2018.

A. REPLY SUBMISSIONS

A.1. The ACTU's claim and award relativities

2. For seven years in succession the Australian Council of Trade Unions (ACTU) has made claims for tiered wage increases: flat dollar increases up to the C10 award rate (for trade-qualified workers and those at an equivalent level) and uniform percentage increases above the C10 level.
3. Prior to 2011 the ACTU had made flat dollar claims in successive annual wage reviews conducted by the Australian Industrial Relations Commission, the Australian Fair Pay Commission and (in 2010) the FWC, with the intention of providing the greatest support to the lowest paid, i.e. to those workers most in need. The tribunals increased wage rates on a similar basis, with the effect that, over a number of years, award relativities were compressed and, especially, disconnected the rates set for higher paid classifications from community-wide wage levels. Despite giving the greatest support to low paid workers, the National Minimum Wage (NMW) and low paid award rates also lagged behind rising community-wide increases. The tiered claims from 2011 were designed to assist both low paid and higher paid workers.
4. The ACTU's tiered claims since 2011 were designed to provide relatively more to those most in need. The relatively greater support for those most in need would, if granted, compress wage relativities within the bands of low paid classifications and between higher paid classifications and low paid classifications, but, significantly would still leave relativities within the higher classifications unchanged.
5. For seven years the ACTU's claims have failed in the face of the FWC's wages relativities policy, by which the FWC has awarded uniform percentage increases to all minimum wage rates. This policy has locked the NMW and award rates into the relativities set in the Annual Wage Review 2009-10. For seven years not one extra dollar was received by the lowest paid and neediest workers.
6. It is a fair inference from the ACTU's submission that it has concluded that another

claim for relatively more for low paid workers would be futile; and that increases will be awarded in 2018 on some global assessment across all wage classification. It has not contested the wage relativities policy. Its submission includes the following:

“16. Since 2011, the Panel has awarded percentage increases in the NMW and award minimum wages at each Review. The considerations that have led the Panel to adopt percentage increases are important. Award relativities were compressed quite substantially in the 1990s and 2000s. Percentage increases have prevented further erosion in these relativities, by maintaining them at their July 2010 levels.

17. We believe that hybrid increases of the type we have contended for in the past balance the various considerations that the Panel must take into account by ensuring that the largest wage increases, in percentage terms, go to the lowest paid workers. However, we also consider that uniform percentage increases, if significant enough, are capable of ensuring meaningful wage rises at the lower end without the risk of any further erosion of the skill-based wage relativities above the C10 tradespersons’ rate. (ACTU submission, March 2018, emphasis added)

7. The ACTU’s claim recognises that over the past seven years preserving relativities has been given a higher priority than providing support for those most in need. The claim for an increase of \$50 per week, or 7.2%, in the NMW is made on the basis that it is needed to move the NMW towards it being a living wage: workers are living in poverty and do not have a decent standard of living. The ACTU’s claim recognises that the wages relativities policy will only allow the NMW and low paid rates to provide a decent standard of living for the low paid as long as the minimum wage rates for the better-off sections of the workforce, who receive a wage in excess of the living wage, are awarded the same percentage increase.
8. The wages relativities policy has been unfair to low income workers, with an inherent bias against them. This inherent bias against low paid workers, and low paid working families, inhibits, and effectively prevents, the NMW from being set as a fair safety net wage upon which award rates can be set so as to reflect margins for skills and responsibilities.
9. The ACTU claim accepts this inherent bias against the low paid when it should be challenging it. It accepts the expected inevitability of a further application of the wages relativities policy and is driven to claiming a 7.2% increase in the wages of those who are relatively well-off compared to the low paid.
10. The wages relativities policy, which sets a uniform annual percentage increase for the least skilled worker right through to a captain of an A380 aircraft (at \$171,315 per

annum, plus the ability to obtain more through collective bargaining), who is on the highest award wage rate, does not reflect relative needs. On the basis of the ACTU's claim, and the continued application of the wages relativities policy, the A380 captain would have to receive an award increase of \$12,849.00 per year or \$246.20 per week (at 52.18 weeks per year) in order for the most marginal full time workers in Australia to receive \$50.00 per week.

11. The ACTU submission, at pages 200-2, refers to the spread of award reliant workers across a number of income ranges. Data presented by the ACTU (Annexure, at Table 16) show that 28.9% of award reliant workers are paid at or above the NMW/C14 rate and below the C9 rate and that juniors and others who are paid at less than the adult NMW/C14 rate comprise 13.2% of the total. (The C10 rate is \$809.10 per week and the C9 rate is \$834.40 per week.) We can expect that the overwhelming proportion of those paid less than the NMW/C14 rate would be employed in a wage classification below the C9 classification. The data also show that 30.0% of award reliant workers are paid in excess of the C2(b) award rate, which is currently \$1094.10 per week. That is, amongst adults who are only paid the prescribed minimum wage rate, there are more earning over \$1,094 per week than there are earning less than \$834.40 per week. Paragraph 35 of the Annexure notes that the proportion of higher income earners among the award reliant category, i.e. those above the C2(b) award rate, includes 135,400 Education professionals and 105,000 Health professionals. Figure 91 indicates that about half of the highest paid 30.0%, or about 15% of the total award reliant workforce, are paid in excess of \$40.00 per hour, or \$1,520.00 per week.
12. Under the wages relativities policy, wage increases for the lowest paid depend on the same amount flowing to the highest paid sectors of the award reliant workforce. If the ACTU were to achieve a 7.2% increase in the NMW, it would mean, by application of the wages relativities policy, an increase of at least \$109.40 per week for the highest paid 15% of award reliant workforce. That is, in order for low paid workers who are living in poverty or who do not have a decent standard of living to receive a wage increase of \$50.00 per week, it would be necessary for a large number of higher paid workers to receive more than double that amount.
13. ACCER accepts that the relativities in, for example, the *Manufacturing and Associated Industries and Occupations Awards* need to be examined for their fairness and

relevance, both in regard to the level of remuneration for the acquisition of skills and responsibilities and the adequacy of current internal relativities. However, it has not been demonstrated that, for example, the rates set for the 135,400 Education professionals and the 105,000 Health professionals suffer from the same long term compression of relativities. It has not been demonstrated that the public sector employees across Australia, for example in the *Local Government Award 2010* or the *Victorian Public Service Award 2016*, suffer from the same historical compression of relativities shown in the manufacturing award. There is no apparent reason to believe that, for example, the wage rates set for Legal Officers under the *Victorian State Government Agencies Award*, made in 2015, is afflicted by the earlier compression of relativities in some other awards and are not reflective of a fair balancing of relative work values. There is no reason to believe that the highest paid 30% of award reliant workers would be treated unfairly by a wage outcome that gave relatively more to the most in need.

14. A sole parent working half time (19 hours per week) on the NMW and living in poverty, as shown by the FWC's own figures in Table 8.6 of the *Statistical Report* of 3 April 2018, may be heartened to know that the ACTU is seeking what would be a much needed \$25.00 per week increase; but she or he would be disappointed, at least, to know that the increase will only come if the FWC awards pay increase of 7.2% to workers whose living standards are nowhere near poverty and who have, by contemporary Australian standards, a decent standard of living for themselves and their families. If known, this would add significantly to the disillusionment and the lack of confidence in the wage setting system. They would be entitled to conclude that the wages system is working against them.
15. The ACTU's claim presents a compelling case for a very substantial increase in the NMW and the award rates set for low paid workers. Its acceptance of the wages relativities policy has caused it to seek a 7.2% increase for relatively well paid award reliant workers so that it can achieve a much needed wage increase for the lowest paid workers.
16. The ACTU's case for increases of 7.2% for higher paid classifications does not rest on the same kind of arguments used in respect of low paid workers: rather, it is based on the view that primacy that will be given to maintaining existing relativities between low

paid and higher paid wage classifications regardless of relative needs and unmet needs of those who depend on them. However, the wages relativities policy will not deliver wage increases of this kind to higher paid workers; rather it will compromise the ability of the lowest paid workers to get the wage increases that they need.

17. We regret that the ACTU does not contest the wages relativities policy. For so long as the policy is applied, low paid workers will not make significant progress towards a living wage that provides them and their families with a decent standard of living. Australian workers are fortunate to have an award system designed to provide them with wage increases to reward them for the acquisition of skills and responsibilities, but the wages relativities policy compromises the capacity of the NMW to be a living wage.
18. Despite the ACTU's failure to challenge the wages relativities policy, ACCER presses its submissions in Chapter 7C of its March 2018 submission to the effect that the wages relativities policy is contrary to the terms of the *Fair Work Act*.

A.2. Submissions by the Victorian and Queensland Governments

19. As the base upon which awards and collective agreements provide further payments for skills and responsibilities, the NMW should be set independently of considerations about award relativities and changes in them. In this regard we note the March 2018 submissions by each of the Victorian and Queensland Governments. Each submission treats the setting of the NMW and award rates as separate functions, consistent with the terms of the legislation. Both governments seek an increase of \$27.00 per week in the NMW and a "fair and reasonable increase" in the award rates of pay: see the Victorian Government's submission at paragraph 28 and Queensland Government's submission at paragraph 14. This equates to a 3.9% increase in the NMW. The submissions, which emphasise the greater relative needs of the low paid, implicitly suggest that a fair and reasonable increase in award rates would be less than 3.9%.

A.3. The ACTU on "competing interests" and "unitary interest" in wage setting

20. The ACTU's submission opens with a commentary on what it sees as two approaches to wage setting: the promotion of the "unitary interest" of those in need of minimum wage protection and the balancing of "competing interests"; see paragraphs 1 to 11 and 212. The former is said to be illustrated in the *Harvester* decision of 1907 and in the 1919

Constitution of the International Labour Organisation, while the latter is said to be evident in recent decisions by the FWC under the *Fair Work Act* and in the ILO's *Minimum Wage Fixing Convention, 1970*. Nevertheless, the ACTU submits that there is scope for the FWC to "question challenge and reject assumptions embedded in" the wage setting provisions of the *Fair Work Act*. However, it does not directly challenge the FWC's construction of the legislation, which operates (as ACCER has argued) in a way that restricts, rather than gives proper effect to, the protection of low paid workers.

21. We reply to two aspects of the ACTU's submission: the construction of the wage setting provisions of the legislation and the ACTU's references to the ILO's position on minimum wage setting.
22. The ACTU's submission adopts the view (found in past annual wage review decisions) that minimum wages are set by the balancing of the competing interests in regard to social and economic factors specified in sections 134(1) and 284(1) of the Act. It is on this basis that, under the heading "Competing interests vs. unitary interest", the submission states that the "structure" of those sections "embeds assumptions intrinsic to the past orthodoxy of economic theory around minimum wages" (paragraph 5).
23. The submission claims that Article 3 of the *Minimum Wage Fixing Convention, 1970* also embeds the "balancing of interests" (paragraph 6). The submission continues:

"This bifurcation of 'social interests vs. economic interests' in wage fixation policy at the international level was a departure from the more laudable references in the ILO Constitution (settled in the aftermath of WWI) to the need for an 'adequate living wage' as an improvement that was 'urgently required' as part of package of measures to ensure 'peace and harmony of the world'.
The departure from the unitary objective of social justice since that time no doubt reflects the world order and dominant ideologies that ascended in the intervening period between when the ILO was formed and when Convention 131 was adopted. (Paragraph 7)
24. The changes in the "world order" over the past century and the "dominant ideologies" of that period are not explained. However, the fundamental issue in regard to the ILO is whether there been a change in the international understanding of the right of workers to a living wage. We will return to this issue, but it must be said that, regardless of economic and ideological changes over the past century, there has been great progress made in the recognition of the human rights of workers: for example, the *Universal Declaration of Human Rights* and the *International Covenant on Economic Social and*

Cultural Rights, both of which we have discussed in Chapter 2 of our March 2018 submission. We have explained how the wage setting provisions of the *Fair Work Act* are consistent with these recognised rights.

25. The ACTU's submission assumes that the *Fair Work Act* reflects these international developments and limits the earlier commitment to the living wage. We say "assumes" because it does not question the construction of the wage setting provisions of the Act that has been previously adopted by the FWC. However, it proposes a way out of the limitation introduced by the contrarian forces and the construction adopted by the FWC:

"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." (Paragraph 8)

26. The submission urges the FWC to go beyond the contest of social and economic considerations and recognise the fundamental importance of the common good.

"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 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. (Paragraph 9)

27. The submission returns to this aspect in the context of a discussion of the degree and extent of poverty among workers and working families, with the apparent intention of having the FWC view this issue without the limitation of having to balance conflicting interests.

"We submit that our Introduction to this submission, which invites the Panel to question, challenge and reject the assumptions embedded in the modern awards objective and minimum wages objective, are particularly relevant to the consideration of poverty and relative living standards." (Paragraph 212)

28. The ACTU's submission is based on an uncritical acceptance of a view of the *Fair Work Act* that restricts the rights of workers to a decent and living wage. ACCER's position on these matters is set out in Chapter 7B of its March 2018 submission. If the

ACTU were persuaded to the construction outlined in that section there would be no need for it to urge the FWC to “question, challenge and reject” the embedded assumptions in the wage setting provisions.

The ILO, social justice and the living wage

29. The ACTU’s acceptance of a narrow view of the legislation is, surprisingly, reinforced by its submission that the rights of workers have been downgraded at the ILO over the past century. It is surprising because we do not expect unions to be recognising this kind of trend; and using it to explain a less beneficial approach in Australia to minimum wage setting. The ACTU’s brief recitation of ILO developments is, we submit, erroneous and needs correction.

30. The ACTU submission claims (at paragraph 6) that the “balancing of interests” is manifested in Article 3 of the *Minimum Wage Fixing Convention, 1970*, which provides:

"The elements to be taken into consideration in determining the level of minimum wages shall, so far as possible and appropriate in relation to national practice and conditions, include--

(a) the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups;

(b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment."

31. The commentary on the ILO and the 1970 Convention confuses wage setting based on resolving conflicts between competing interests and wage setting that takes into account social and economic factors. The ILO Convention does not refer to the setting of minimum wages by reference to the resolution of conflicts between competing interests; rather, it recognises that the living wage has to be set in an economic context as well as a social context. Article 3 of the Convention is concerned with the setting of a minimum wage, such as the NMW, and is not concerned with the kind of wages set by the Australian award system. ACCER has already commented on the article 3 of the Convention in its March 2018 submission:

“It is important to understand the purpose of this provision. The process intended by this provision is not a mere transactional process of balancing the specified matters, but balancing them for the purpose of promoting and securing the human

right to a wage that will provide a decent standard of living for workers and their families.” (ACCER submission, March 2018, paragraph 25)

32. It should also be noted that the economic factors include matters that could enhance the level of the minimum wage: high levels of productivity, strong economic growth, average wages and the like are economic factors favourable to a more substantial living wage. Other factors will constrain minimum wage setting, but that does not qualify or detract from the purpose of wage setting, which is to provide a living wage. The recognition that an excessively high minimum wage rate can impact on the ability of the economy to support high levels of employment is not recognition that the setting of minimum wages is an exercise in reconciling competing interests. Within the Australian award system, where awards may be made on a wide range of matters on an enterprise level, there may be occasions when a “competing interests” conception of the FWC’s statutory function may be appropriate, but that does not apply in relation to the setting of the NMW.

33. The ACTU submission claims that the Convention was a departure from the ILO’s constitution:

“This bifurcation of “social interests vs. economic interests” in wage fixation policy at the international level was a departure from the more laudable references in the ILO Constitution (settled in the aftermath of WWI) to the need for an “adequate living wage” as an improvement that was “urgently required” as part of package of measures to ensure “peace and harmony of the world”. Indeed, the ILO Constitution described

“policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection” (Paragraph 7)

as one of the programmes that the ILO would be obliged to promote, without qualification. In addition, the ILO Constitution expressly stipulates that “economic and financial policies” should be accepted only if they promote and do not hinder the achievement of social justice. The departure from the unitary objective of social justice since that time no doubt reflects the world order and dominant ideologies that ascended in the intervening period between when the ILO was formed and when Convention 131 was adopted.” (Paragraph 7)

34. The ACTU’s claim that there has been a change internationally rests on two instruments, the 1919 Constitution and the Minimum Wage Fixing Convention of 1970; and nothing else.

35. The first point to be made about paragraph 7 of the ACTU’s submission is that the quote

which is said to be found in the 1919 Constitution is actually from the Declaration of Philadelphia in 1944.

36. The ILO Constitution of 1919 was mainly concerned with structural and organisational matters, but the Preamble to the Constitution set out a range of objectives:

“Whereas universal and lasting peace can be established only if it is based upon social justice

And whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example, by the regulation of the hours of work, including the establishment of a maximum working day and week, the regulation of the labour supply, the prevention of unemployment, the provision of an adequate living wage, the protection of the worker against sickness, disease and injury arising out of his employment, the protection of children, young persons and women, provision for old age and injury, protection of the interests of workers when employed in countries other than their own, recognition of the principle of equal remuneration for work of equal value, recognition of the principle of freedom of association, the organization of vocational and technical education and other measures;”

(http://www.ilo.org/public/libdoc/ilo/1920/20B09_18_engl.pdf, emphasis added.)

37. Contrary to the ACTU’s submission, the ILO has not downgraded social justice as an objective of minimum wage and other protections. The ILO’s Declaration of Philadelphia, formally known as “Declaration concerning the aims and purposes of the International Labour Organisation”, included:

Article II

“Believing that experience has fully demonstrated the truth of the statement in the Constitution of the International Labour Organisation that lasting peace can be established only if it is based on social justice, the Conference affirms that:”

Article III

“The Conference recognizes the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve:

- (a) full employment and the raising of standards of living;
- (b) the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being;
- (c) the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labour, including migration for employment and settlement;

(d) policies in regard to wages and earnings, hours and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection;

(e) the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures;

(f) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;

(g) adequate protection for the life and health of workers in all occupations;

(h) provision for child welfare and maternity protection;

(i) the provision of adequate nutrition, housing and facilities for recreation and culture;

(j) the assurance of equality of educational and vocational opportunity.”
(Emphasis added)

38. The ILO Constitution and the Declaration of Philadelphia are available at http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO

39. The continuity of the ILO’s position in regard to social justice and the living wage can be seen in terms found in its *Declaration on Social Justice for a Fair Globalization*, which was adopted on 10 June 2008.

“The Conference recognizes and declares that:

A. In the context of accelerating change, the commitments and efforts of Members and the Organization to implement the ILO’s constitutional mandate, including through international labour standards, and to place full and productive employment and decent work at the centre of economic and social policies, should be based on the four equally important strategic objectives of the ILO, through which the Decent Work Agenda is expressed and which can be summarized as follows:

(i) promoting employment by creating a sustainable institutional and economic environment in which:

– individuals can develop and update the necessary capacities and skills they need to enable them to be productively occupied for their personal fulfilment and the common well-being;

– all enterprises, public or private, are sustainable to enable growth and the generation of greater employment and income opportunities and prospects for all; and

– societies can achieve their goals of economic development, good living standards and social progress;

(ii) developing and enhancing measures of social protection

– social security and labour protection – which are sustainable and adapted to national circumstances, including:

- the extension of social security to all, including measures to provide basic income to all in need of such protection, and adapting its scope and coverage to meet the new needs and uncertainties generated by the rapidity of technological, societal, demographic and economic changes;
- healthy and safe working conditions; and
- policies in regard to wages and earnings, hours and other conditions of work, designed to ensure a just share of the fruits of progress to all and a minimum living wage to all employed and in need of such protection;[Editorial note]

(iii) promoting social dialogue and tripartism as the most appropriate methods for:

- adapting the implementation of the strategic objectives to the needs and circumstances of each country;
- translating economic development into social progress, and social progress into economic development;
- facilitating consensus building on relevant national and international policies that impact on employment and decent work strategies and programmes; and
- making labour law and institutions effective, including in respect of the recognition of the employment relationship, the promotion of good industrial relations and the building of effective labour inspection systems; and

(iv) respecting, promoting and realizing the fundamental principles and rights at work, which are of particular significance, as both rights and enabling conditions that are necessary for the full realization of all of the strategic objectives, noting:

- that freedom of association and the effective recognition of the right to collective bargaining are particularly important to enable the attainment of the four strategic objectives; and
- that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standards should not be used for protectionist trade purposes.”

40. The editorial note in the ILO’s publication of the Declaration states:

“In drafting this text, priority was given in each language to concordance with the corresponding official version of article III(d) of the Declaration of Philadelphia adopted by the International Labour Conference in 1944.” (*ILO Declaration on Social Justice for a Fair Globalization*, ISBN 978-92-2-121617-9, 2008, at page 10.)

41. Apart from the use of “designed”, rather than “calculated” (on which nothing turns) the 2008 formulation concerning the right to a living wage is in the same form as Article III(d) of the Declaration of Philadelphia. The key statement by the ILO in 2008 on globalisation shows that there has been no retreat from the ILO’s earlier position in respect of social justice and the right to a living wage.

42. The passages from all three ILO instruments, in 1919, 1944 and 2008, show that the ACTU's claim that the ILO has moved away from its earlier position on the setting of minimum wages is without foundation. It has not moved from what the ACTU describes as a "unitary interest" position to a "binary interests" position. In particular, there is a consistency in the treatment of the living wage as a fundamental human right of workers. The living wage is not intended to be, nor is it, the result of the interplay of the competing economic interests of employers and employees. It is not based on a "competing interests" model of wage setting as claimed by the ACTU.
43. The ACTU asks the FWC to "question, challenge and reject" the embedded assumptions in the wage setting provisions, so that it can move "towards a position where the assessment is fundamentally about the common good" and not confine its decisions on the basis of a contest between social and economic considerations. The concept of the common good is a useful and fundamental one in the context of the setting of social safety nets. The common good refers to the proper objective of social organizations and social policies: structures and policies that are designed to guarantee all citizens the ability to participate actively in the economic, political, and cultural life of society. It is reflected in the social inclusion objective in section 3 of the *Fair Work Act*: social inclusion is one of the two principal objects of the Act. So understood, the purpose of the wage safety net is to promote the common good; and it does not have to be found indirectly by way of the questioning, challenging and rejecting of embedded assumptions in the legislation.

A.4. Reply to the Australian Government's submission

44. Once again, the Australian Government's submission is bereft of any attempt to cast light on the costs of the essentials for a decent standard of living and any attempt to identify the standard of living that should be afforded to low paid workers and their families by the wages safety net required by Commonwealth legislation. As in past years the Australian Government has failed to provide any evidence or submissions on the needs of the low paid. It does not address the nature and purpose of the NMW and award safety nets. Nor does it address the statutory criteria of relative living standards and the needs of the low paid in any meaningful way. It neglects, for example, the budget standards research by the Social Policy Research Centre even though the way in

which the research might be considered has already been raised by the FWC earlier in the current wage review; see the *Statement* of 25 August 2017 ([2017] FWC 4403) and the *Statement* of 20 September 2017 ([2017] FWCFB 4885).

45. Our criticisms of the Government's participation in successive annual wage reviews have been made under both Labor and Coalition Governments. We first made comment about the paucity of the Australian Government's contribution to the annual wage review in our Reply of April 2011 following the then Government's submissions to the first and second annual wage reviews under the *Fair Work Act 2009*.

"We are particularly concerned that the Commonwealth does not attempt to deal with the vital issue of the needs of the low paid. By way of introduction to this matter, we set out two paragraphs from its submissions to last year's inaugural wage review under the *Fair Work Act 2009*:

"There is little up-to-date data currently available that enables in-depth analysis of the adequacy of minimum wages in providing for the needs of the low paid. In this regard, the Government supports the research currently being undertaken by FWA for the 2010-11 Annual Wage Review looking at approaches to defining and measuring relative living standards and the needs of the low paid."(Paragraph 5.2)

"In submissions to future FWA wage reviews the Government will provide a more detailed analysis of the needs of the low paid. The Government will also investigate whether there is a need to undertake further research in this area to compliment (sic) the work of FWA." (Paragraph 5.3)

The Commonwealth has again failed to make any submissions on the needs of the low paid, despite its advice last year. The FWA research was finished and released early this year (*Relative living standards and needs of the low paid: definitions and measurement*) and there could be no excuse for inaction by the Commonwealth.

46. The FWC will see from these passages that the Government had told the tribunal in 2010 that in future reviews it would "provide a more detailed analysis of the needs of the low paid" and would "investigate whether there is a need to undertake further research in this area". It has failed to do so in the all of the years since and, moreover, has shown no sign that it was prepared to provide relevant assistance to the FWC.
47. The Australian Government has access to a wide range of data that is relevant to the assessment of the relative living standards and needs of low paid workers and their families. The inaction of successive Governments to provide this kind of information means, we submit, that the FWC should be more demanding of the Government to produce it.

A.5. Budget standards evidence

48. The budget standards research published in August 2017 is the best evidence available in regard to the needs of low paid Australian workers and their families. However, a number of issues about the research have been raised in several submissions.
49. The ACTU has argued that “the budget standards research should be given no special status in the array of material for evaluating relative living standards and the needs of the low paid” (paragraph 286) because, in its view, the research is “far too modest to in fact reflect the needs of a person or a household” (paragraph 287) and “has failed to enumerate or address the many costs of working that are not immediately apparent” (paragraph 290).

50. The Australian Council of Social Services has identified a number of matters that are not included in the budgets:

“The new budgets are more stringent than the previous version. The authors note that: ‘They are extremely tight and leave no room for even the most modest of special treats.’ For example, in the low paid families budgets are calculated on the basis of:

- no allowance for saving
- buying generic brands of food and clothing (with a 5% discount for ‘shopping around’ for food),
- no allowance for one-off costs (eg. rental bonds)
- no allowance for repairs of household items
- an assumption of good health
- low child care budgets due to the ages of children in hypothetical families (school age)
- very small recreation budgets, with no tobacco and little alcohol.

Thus, the new budgets would support only a very frugal living standard, arguably below that which the National Minimum Wage should support.” (Pages 27-8)

51. The submission by the Australian Chamber of Commerce and Industry contains a number of observations about the utility of the research in the current wage review and its consideration at a later stage:

“As set out below, employers argue for a cautious, iterative approach to this material which is new to this annual wage review process. To the extent the Panel is attracted to the Budget Standards material and wishes to accord weight to it in its decision making, we suggest the Panel advance any conclusions tentatively or provide suggestions of its thinking at this point which can be responded to and engaged with in 2019 and beyond. This material is new and a conversation needs to be started around it, which may not be assisted by too definitive an approach to

its relevance or reliability in this first instance of minimum wage uprating.” (Paragraph 168)

“However, the current material is no game changer or revelation in this which would warrant a marked change of approach to minimum wage setting or a radical uprating of levels of increase that have already consistently exceeded inflation.” (Paragraph 209)

“The cautions of the Budget Standards authors and the observations above favour a cautious approach to this material by the Panel. The panel should weigh the consideration of relative living standards and the needs of the low paid essentially as it has on previous occasions. It is difficult to conclude based on the budget standards materials that there is any case for even higher levels of increase in 2018.” (Paragraph 210)

52. Ai Group recognised that the research “provides important insights into the needs of low paid households“, but that it “reveals a wealth of contestable methodological and measurement issues that deserve close examination” (page 39).
53. The budget standards research presents the FWC and the parties to annual wage reviews with a very valuable resource that needs to be considered over a period of time. We see this process continuing for five or more years. Supplementary research may be needed to improve its maximum utility for wage setting purposes. In order to facilitate this process, and engage interested parties, ACCER proposes that there be an investigation and report procedure instituted under section 290 of the *Fair Work Act*.
54. ACCER submits that there is no need in the current annual wage review for the FWC to resolve the contentious issues raised in the March 2018 submissions. The FWC has accepted that the 60% of median disposable income measure of living standards provides the measure of the standard of living that those in full time employment are entitled to expect. As we have explained in Chapter 4 of the March 2018 submissions the budget standards research shows that the 60% of median disposable income is a conservative measure of the appropriate living standard for minimum wage-dependent workers and their families. The FWC should, we submit, treat the research as validating that measure of living standards, without prejudice to its potential uprating in the future.

A.6. Ai Group on child care funding changes

55. Ai Group has referred to the commencement of new child care funding arrangements from July 2018; see pages 41-2. It refers to a media release from the Minister for Education and Training, the Hon. Senator Birmingham, but, apart from claiming that the new child care package will provide a significant benefit to most low income workers, it provides

no assessment of its financial impact.

“The changes to child care support arrangements will provide a significant benefit to most low income workers who are currently receiving childcare assistance from the Federal Government. Accordingly, it is appropriate for the Panel to award a lower minimum wage increase in this year’s Annual Wage Review than the increase that would have otherwise been awarded.” (Page 42)

56. ACCER accepts that child care costs, and changes in them, are relevant matters to be taken into account when assessing the living and working costs of workers with family responsibilities. However, there is insufficient data on the current costs of child care and the impact that the new arrangements will have on net child care costs cannot be calculated at this stage. Ai Group does not present any estimates of current costs and future costs. This is an important issue for workers with family responsibilities and future wage setting decisions. ACCER will undertake its own research on this matter, but proposes that it is a matter that the research section of the FWC could usefully undertake.

B. RESPONSES TO QUESTIONS ON NOTICE

57. Questions on Notice were published by the FWC on 29 March 2018. None of the questions was specifically directed to ACCER, but some were directed to the parties generally. The following paragraphs respond to those questions.
58. **Question 1.1** concerns submissions made by ACCER in regard to the decision making processes under the *Fair Work Act*. ACCER has nothing further to put at this time and will consider and respond to the matters raised by other parties.
59. **Question 1.2** concerns adjustments to copied State awards and the FWC’s provisional view concerning the potential for ‘double dipping’ when applying annual wage review adjustments. ACCER does not have a contrary view to the FWC’s provisional view.
60. **Question 1.3** concerns submissions made by the ACTU in its March 2018 submission. We have already responded to the substance of those submissions in section A.3., above. On the particular matter raised, ACCER accepts that economic matters of the kind specified in section 134(1)(f) may, in some circumstances, operate as a constraint on the setting of the terms and conditions of an award safety net.
61. **Question 2.2** concerns the measurement of productivity changes over the business cycle and the utility of annual productivity measurements for annual wage review decisions.

“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. [[2017] FWCFB 3500 at para. 228.

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”

62. The Australian Government’s submission of March 2018 (at paragraph 13) notes that the current cycle, which is not yet concluded) started in 2011-12 and that the previous cycle commenced in 2003-04. The FWC’s *Statistical Report* refers to variations from year to year over these cycles. This is compounded by the fact that estimates are revised after their initial publication. On previous occasions we have referred to the decision of the Australian Industrial Relations Commission in 2005 (near the start of the previous cycle), when productivity for the previous 12 months had been recorded as negative; see *Safety Net Review, 2005*, Print PR002005, paragraphs 420-1. As later figures showed, over the year to December 2004, GDP per hour worked increased by 1.2%. ACCER proposes that a moving average over the past five to eight years be used, with the effect that short term variations will be modified and revised estimates can be taken into account. There is, in our view, no legal impediment to this process being undertaken in the context of a requirement to carry out a wage review each year.
63. **Questions 2.6, 2.8 and 3.1** cover matters where the ACTU is asked to provide further information about matters raised by it and invites other parties to comment on those matters. ACCER may provide a response to that further information at a later date.
64. **Question 5.1** refers to the ACTU’s submission which

“...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. [ACTU submission, 13 March 2018 at paras 478–483]

Does any party take a contrary view?”
65. The matters raised by the ACTU include the making of Equal Remuneration Orders under Part 2-7 of the *Fair Work Act*. It is important to distinguish between the process for the making of equal remuneration orders and taking into account the principle of equal remuneration for work of equal or comparable value in sections 134(1)(e) and 284(1)(d).

66. Equal remuneration orders are specifically limited to situations concerning “equal remuneration for men and women workers for work of equal or comparable value”; section 302(2). The principle referred to in the two sections is not limited to the differential treatment of male and female workers. The setting of different wage rates, or other terms and conditions of employment on the basis of, say, race or social origin would be contrary to this principle. The principle could be breached either directly or indirectly. The principle has been enshrined in international instruments; for example, in the 1919 Constitution of the ILO (to which we referred earlier, at paragraph 36), one of the matters referred to is “the principle of equal remuneration for work of equal value”. The FWC’s duty under sections 134(1) and 284(1) is not limited to the setting of minimum wage rates. It extends to non-wage award provisions that provide “remuneration”, but, it seems, does not apply to award provisions that do not provide for remuneration.
67. The ACTU has argued that annual wage reviews do not have the capacity to consider gender-based undervaluation of modern award minimum rates and to address systemic undervaluing of female dominated occupations and industries (see paragraphs 482-3). We agree.
68. The practical application of the equal remuneration principle is to be found in the making and reviewing of awards. The fact that gender-based breaches of the principle may be pursued under Part 2-7 of the *Fair Work Act* does not exclude this process: Part 2-7 is not a code for the correction of award provisions that do not provide equal remuneration for men and women.