

Ai GROUP REPLY SUBMISSION

Fair Work Commission

Annual Wage Review 2017-2018

9 April 2018



About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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1. Introduction

On 13 March 2018, the Australian Industry Group (**Ai Group**) filed its main submission in the *Annual Wage Review 2017-2018 (Ai Group's March 2018 submission)*. In our submission, we urged the Expert Panel of the Fair Work Commission to adopt a cautious approach when determining the level of any minimum wage increase in this year's Annual Wage Review.

In our March 2018 submission, we highlighted the following factors:

1. Despite some improvements in GDP and employment growth, national disposable income growth remains weak, and unemployment and underemployment rates continue to indicate considerable spare capacity in the national labour market.
2. Businesses are facing significant input cost pressures from a range of sources but especially from energy. Steep energy price rises are proving difficult to pass on to customers and are squeezing margins across a wide range of industries.
3. Australian productivity growth has been exceedingly weak over the past decade and over the current productivity growth cycle, across a range of market-sector industries and across a range of productivity measurement indicators, including labour productivity and multi-factor productivity. This lack of productivity improvement significantly hampers Australia's ability to generate real incomes growth per capita, nationally and in industries.
4. Global competitiveness is a key risk for Australian businesses. Australia already has one of the highest national minimum wage rates in the world, and most Australian workers are entitled to minimum award wage rates that are higher than the National Minimum Wage.
5. Currently background inflation in Australia has been weak over an extended period. This reduces inflationary pressures on wages but more positively, it means that a smaller minimum wage increase will generate real wage increases for workers, including those in low-wage jobs. Now is not the time to take risks with minimum wage setting.
6. The 3.3 per cent minimum wage increase awarded by the Panel last year was exceptionally high, relative to prevailing Australian inflation, living cost and wage growth rates. It is essential that the increase awarded by the Panel this year is much more modest.

In the circumstances, we submitted that, when all the relevant factors are weighed up, a modest wage increase of **1.8 per cent** is warranted in this year's Annual Wage Review. This equates to an increase of about \$12.50 per week in the National Minimum Wage and about \$14.60 per week at the base trade level.

We have considered the submissions of other parties and none have led us to change the views expressed in our March 2018 submission.

In this Reply Submission, we address some of the issues raised by other parties. We have not sought to address all the issues covered in the submissions of other parties, as Ai Group's position on most issues will be evident from our March 2018 submission.

The level of wage increase proposed by the ACTU (i.e. \$50 per week or 7.2 per cent) is manifestly excessive and completely unrealistic. The proposed increase is nearly four times the rate of inflation. Such an increase would inflict significant harm on businesses. As a consequence, significant harm would be inflicted on low paid workers, the unemployed and the underemployed, because their job security and employment prospects would be substantially reduced.

2. Decision-making process

Ai Group's March 2018 submission includes our views on the appropriate interpretation of the relevant minimum wage setting provisions under the *Fair Work Act 2009* (Cth) (**FW Act**) and key considerations that should guide the Expert Panel's decision.

Ai Group's responses to Questions 1.1 and 1.3 of the Expert Panel's Questions on Notice for Reply Submissions is set out below.

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.

Ai Group's Response to Question 1.1(i)

At pages 15 to 26 in [Ai Group's reply submission](#) in the *Annual Wage Review 2016-2017*, we addressed in detail the relevant authorities and principles relating to the interpretation of legislative provisions that are properly regarded as remedial or beneficial provisions. These submissions were made in reply to ACCER's contention that s.284(1) should be construed beneficially for Australian workers.

In its *Annual Wage Review 2016-2017 Decision*, the Expert Panel's characterised the provisions of s.284(1) as "beneficial" provisions but, consistent with the judgment of Gleeson CJ of the High Court of Australia in *Carr v Western Australia*,¹ the Panel decided that the provisions are intended to strike a balance between competing interests and, therefore, the "extent to which they are to be given 'a fair, large and liberal' interpretation in pursuit of that broad purpose is constrained".

The Panel said: (emphasis added)

[141] It seems to us that the statutory provisions relevant to the fixation of the NMW plainly seek to strike a balance between competing interests. So much is clear from the range of considerations the Panel is required to take into account in giving effect to the minimum wages objective (for example compare s.284(1)(a) and (c)). It is also clear from the minimum wages objective itself—to "establish and maintain a safety net of fair minimum wages". Fairness in this context is to be assessed from the perspective of the employees and employers covered by the NMW order. The object of the Act also speaks to multiple legislative purposes. Section 3 provides that the object of the Act 'is to provide a balanced framework for cooperative and productive workplace relations that promotes national prosperity and social inclusion for all Australians' (emphasis added), by the means specified in sections 3(a) to (g).

[142] It follows that while the statutory provisions relating to the Review and to NMW orders are properly characterised as remedial or beneficial provisions, the extent to which they are to be given 'a fair, large and liberal' interpretation in pursuit of that broad purpose is constrained by the fact that the relevant provisions seek to strike a balance between competing interests.

The conclusions reached by the Expert Panel are consistent with the relevant authorities of the High Court and other Courts. In contrast, ACCER's arguments regarding the interpretation of s.284 conflict with Court authorities and are not correct.

There is no doubt that s.284 and various other provisions of relevance to Annual Wage Reviews are intended to strike a balance between the competing interests of employees and employers. On this point, in our reply submission in the *Annual Wage Review 2016-2017*, we stated (at pp. 24-26):

The Objects of the FW Act in s.3, the Minimum Wages Objective in s.284 and the Modern Awards Objective in s.134 are directed at the fulfilment of multiple purposes. These objects clearly highlight the compromise of purposes and the balance between competing interests which is sought to be achieved. Issues of prime concern to employees and those of prime concern to employers are expressly addressed in ss.3, 134 and 284. Therefore, the correct construction must depend on the words used within the relevant context.

¹ (2007) 232 CLR 138 at 143.

The overarching objective of s.3 is “*to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians*”. There is nothing in this objective which gives the slightest indication that the interests of employees are to be elevated ahead of the interests of employers. Instead the objective emphasises a balanced approach.

Similarly, the overarching objective in s.134 is the achievement of a “*fair and relevant minimum safety net*”. Again, there is nothing in this objective which gives any indication that the interests of employees are to be elevated ahead of the interests of employers. The objective emphasis fairness to employees and employers.

Further, the overarching objective in s.284 is to “*establish and maintain a safety net of fair minimum wages*”. Once again, there is nothing in this objective which gives any indication that the interests of employees are to be elevated ahead of the interests of employers. The objective emphasis fairness to employees and employers.

The notion of ‘fairness’ is to be assessed from the perspective of employers and employees. This was confirmed by a recent Full Bench decision of the Commission regarding the annual leave common issues:

[109] ... It should be constantly borne in mind that the legislative direction is that the Commission must ensure that modern awards, together with the NES provide ‘a fair and relevant minimum safety set of terms and conditions’. Fairness is to be assessed from the perspective of both employers and employees.²

A similar point was made by Justice Giudice in *Shop, Distributive and Allied Employees’ Association – Victorian Shops Interim (Roping-in No 1) Award 2003*, in respect of the provision in the former *Workplace Relations Act 1996* which required the AIRC to “*ensure a safety net of fair minimum wages and conditions of employment...*”:

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....³

Similarly, the approach to beneficial construction that ACCER appears to be urging the Expert Panel to adopt would lead to the needs of the low paid being elevated ahead of other considerations. Such an approach is inconsistent with relevant Court authorities and decisions of the Commission.

Whether beneficial provisions or not, all of the relevant considerations in ss.284 and 134 need to be considered in the current social and economic context, without placing the interests of employees, ahead of the interests of employers and the broader community.

Ai Group’s Response to Question 1.1(ii)

In respect of ACCER’s submission regarding the Panel’s alleged ‘wages relativities policy’, Ai Group supports the Panel’s rejection of the ACCER’s submission in its *Annual Wage Review 2016-2017 Decision* for the reasons identified in that decision.

² 4 yearly review of modern awards [2015] FWCFB 3177, at [109].

³ Re *Shop, Distributive and Allied Employees’ Association* (2003) 135 IR 1, at [11].

Ai Group's Response to Question 1.1(iii)

In respect of the principle of equal remuneration for work of equal or comparable value, that the Panel must consider under s.284(1)(d), Ai Group has not identified any problems with the approach taken by the Panel in its *Annual Wage Review 2016-2017 Decision*.

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'.⁴ 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 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.'⁵

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.'"⁶

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?

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

⁵ ACTU submission, 13 March 2018 at para. 9.

⁶ ACTU submission, 13 March 2018 at para. 8; [2017] FWCFB 3500, at [523].

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

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.

Ai Group response to Question 1.3

Ai Group does not agree with the suggestion that in considerations relating to changes in minimum wage rates there is an unambiguous "common good" that is free of the tensions, complications and competing interests that characterise the rest of reality.

We do however agree that simple dichotomies such as between the "social" and the "economic" dimensions of existence are often misleading.

The ACTU puts considerable store in what it describes as a "growing body of empirical research" and a "new economic orthodoxy". It would be dangerous to assume that either the growth in a particular strain of research or a new orthodoxy represents a point of arrival at a destination in what have been a series of long-running debates. Experience suggests that academic research develops in complex dialectical processes rather than in a linear fashion.

There are, in addition, questions of interpretation and selection of research by advocates of one view or another that should be brought into play when considering these issues. They point to the importance of remaining open to competing and at times minority views in order to obtain fuller insights into the issues at hand.

Ai Group does not subscribe to the view that the tensions that surface in Australia's minimum wage considerations are any closer to resolution than they have ever been. The reality is that the Australian economy is complex and inter-connected. A parameter change here or there will require accommodation elsewhere. Often this accommodation can be unexpected. The complexity is magnified because economic relationships can shift significantly over the course of the business cycle.

Ai Group respects the complexity of the task of adjusting minimum wage rates. It is far from straightforward and we maintain our view that in framing our arguments we are bringing to the table perspectives that are relevant and that should be taken into account.

Ai Group notes that some of the concerns about income and wealth inequality that are raised in the ACTU submission are not easily or obviously amenable to policy responses via the national minimum wage. That is, the national minimum wage is not the best policy mechanism for addressing these concerns.

For example, concerns about wealth inequality – and especially wealth ownership at the top 1% or 10% of the population - reflect factors such as the mining investment boom (to the benefit of incumbent mine owners), real estate prices (to the benefit of incumbent property owners) and the ageing population (older people have had more time to accumulate and hold on to their life savings and wealth). In recent decades, our ageing population has coincided with an extended period of rising real estate prices. This confluence has meant that wealth accumulation in the form of home ownership has become something of a generational issue in Australia, with a growing share of the value of residential property being held by older Australians (including by retirees) and a smaller share being held by younger working households compared to the last century. As noted in our March 2018 submission, an increasing share of Australia’ national income is being derived from exactly this source; the ABS *National Accounts* indicate that as of Dec 2017, 8.5% of total factor income was being derived from ‘dwellings owned by persons’, up from around 6% of total factor income in the 1980s and less than 5% in the 1970s (pp. 18-19 of our March 2018 submission).

Among the very wealthiest 1% of households that are highlighted in the ACTU’s submission, little or no income tends to be derived directly from salaries and wages. Instead, it comes from property, company shares and other assets. This wealth is often held and built up over multiple generations. Even a very radical change in the national minimum wage will not affect these very largest wealth accumulations and related non-wage income sources.

Similarly, many of the households at the very lowest levels of wealth and income in our community are known to be not working due to age, disability, illness or other circumstances. These households tend to rely on welfare transfers as their main source of income and not wages. Policy measures designed to boost the incomes of low-wage working people will not help to alleviate poverty among these non-working low-income households. It is possible that outsized increases in the national minimum wage (as advocated by the ACTU) could exacerbate non-working poverty by adding to the number of non-working low-income households (e.g. if minimum wage workers lose their job as a result of an increase in their wage).

2. The Economy

Ai Group’s March 2018 submission provides an analysis of economic factors including relevant trends and the outlook for growth, jobs and wages. Our conclusions about the current economy and the outlook have not altered. Indeed, more recent labour market data from the ABS and other sources have confirmed our opinion that:

1. considerable spare capacity is available in the labour market. We note that the unemployment and underemployment rates did not shift in February 2018, despite a reasonably solid rate of jobs growth (the most recent month for which data are now available); and
2. more people are being attracted into actively participating in the labour market, with the national participation rate rising in March 2018 and rising especially strongly for women.

New IMF Research

In March 2018, the IMF released a new Working Paper entitled: [More Slack than Meets the Eye? Recent Wage Dynamics in Advanced Economies](#). Australia was included in the analysis.

The IMF Working Paper reports that as of 2018, nominal wage growth in most advanced economies remains markedly slower than it was before the GFC. Based on their detailed analysis of a large number of possible contributing factors, the IMF research staff conclude that the bulk of the global wage deceleration is accounted for by labor market slack (ongoing spare capacity), lower inflation expectations, and weak trends in productivity growth. The Working Paper comments that there appears to be greater labour market slack than meets the eye and that involuntary part-time employment appears to have slowed nominal wage growth, even in economies where headline unemployment rates are now at, or below, their averages in the years leading up to the GFC.

The following findings are relevant for Australia (and a handful of other similar countries):

“In economies where unemployment rates are below their averages before the Great Recession, slow productivity growth can account for most—about two-thirds—of the slowdown in nominal wage growth since 2007. However, even here, involuntary part-time employment appears to be weighing on wage growth, suggesting greater slack in the labor market than captured by headline unemployment rates.

Involuntary part-time employment has risen more in countries where output is estimated to fall short of its potential. Once the influence of slack is taken into account, involuntary part time employment has increased more where medium-term growth expectations have fallen more, automation has progressed faster, and the importance of services in the economy has increased.

The analysis suggests that while accommodative policies can help lift demand and lower headline unemployment rates, wage growth may continue to remain subdued until involuntary part-time employment diminishes or trend productivity growth picks up. Inflation rates will also likely remain low unless wage growth accelerates beyond productivity growth in a sustained manner. Assessing the true degree of slack beyond measured headline unemployment rates will be important when judging the appropriate pace of exit from accommodative monetary policies.” (pp. 6-7).

The following findings by the IMF research staff show that productivity is a stronger influence on wages growth than the unemployment or inflation rates:

- “A 1 percentage point increase in the unemployment rate is associated with a 0.3 to 0.4 percentage point decline in nominal wage growth, while a 1 percentage point increase in lagged inflation is associated with a 0.2 percentage point increase in nominal wage growth.” (p. 18).
- “A 1 percentage point increase in trend productivity growth is associated with a 0.7 percentage point increase in nominal wage growth.” (p. 19).
- “in countries where the unemployment rate is below pre–Great Recession averages. Within this group of countries, a 1 percentage point increase in the involuntary part-time employment share is associated with a 0.7 percentage point decline in wage growth.” (p. 23)

Responses to Questions on Notice about the Economy

Ai Group's responses to Questions 2.2, 2.6 and 2.8 of the Expert Panel's Questions on Notice for Reply Submissions are set out below.

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.⁷

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.

Ai Group's response to Question 2.2:

Ai Group's views on productivity trends and their impact upon minimum wage setting are discussed on pages 22-25 of Ai Group's March 2018 submission.

Productivity growth has been exceedingly weak over the past decade and over the current productivity growth cycle. Volatility and time lags in the quarterly proxy measures of productivity growth (such as those calculated from the ABS *National Accounts* each quarter) means that the long-term and cyclical measures of productivity growth are a better guide to the likely effects of productivity growth on output and incomes, at a national level and for individual industries.

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.'⁸

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?

Ai Group's response to Question 2.6:

The impacts of increased minimum wage rates on aggregate demand are much more complex than suggested by the ACTU and cast doubt on its argument. We list below a number of offsetting considerations which in practice could be expected to impede the impact on aggregate demand of an increase in minimum wage rates. These complications are difficult to quantify individually (or in total) but could be expected to substantially lower the effects of a minimum wage rise.

⁷ [2017] FWCFB 3500, at [228].

⁸ ACTU submission, 13 March 2018 at para. 62.

For households with a propensity to spend all of any additional income, the impact on household spending of an increase in wage rates may be severely diluted to the extent that income tax paid by households rises and/or the withdrawal of income transfers reduces payments to households. If the effective marginal tax rate for the household was 50 per cent for example, only 50 cents would be added to household disposable income for every additional dollar in wage income.

The ACTU submission generalises about the spending propensities of low income individuals putting to one side the fact that many low-paid individuals are members of middle and higher income households for which spending propensities may be lower than assumed by the ACTU. For instance, an increase in minimum wage rates for a second income earner in a middle-income household may be used to pay down the family mortgage (or put in a mortgage offset or other savings account) or to top up superannuation. This would not result directly in an increase in aggregate demand in the short to medium term, although it might add to household consumption at a later point in time (e.g. upon retirement).

Aggregate demand includes spending and investment by employers. A small business owner paying more in wages may, for instance, experience a commensurate decline in his or her household or business income substantially offsetting the impact on economy-wide demand from the higher spending of his or her employees. Given the higher multiplier that is associated with investment expenditure, if the decline in business income translated into lower investment by that business, the impact on business aggregate demand of the higher wage rates may be negative.

Wage rate increases may be accompanied by a reduction in the quantity of work offered by a business (relative to what would otherwise be the case). Where this occurs, the total wages received by employees of the business would not rise by the extent of the increase in minimum wage rates and the impact on aggregate demand would be correspondingly lower.

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.’⁹

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

⁹ ACTU submission, 13 March 2018 at para. 360.

Ai Group's response to Question 2.8:

We admit to confusion over this extract from the ACTU's interesting if exploratory discussion of underemployment.

The picture painted by the ACTU of repressive and perhaps vindictive workplaces in which employees are vulnerable and hesitant to approach managers or business owners does not accord with the considerable familiarity that Ai Group has with Australian workplaces.

A feature of part-time work is the flexibility in hours worked. For women, young people and older members of the workforce, who are over-represented among part-time workers, there are constant discussions in workplaces about the availability and suitability of work hours. For many workplaces, these issues dominate employee-employer interactions which can be described as a constant juggling of employee availability and the availability of hours of work.

In Ai Group's experience, overwhelmingly managers and business owners welcome expressions of interest in additional working hours. It helps them manage changes in availability for other employees – for example during school and university holidays and during after-school hours. The greater the number of options known by the employer or manager, the greater their ability to manage the desire for flexibility on the part of other employees.

Another dimension of this issue that employers and HR managers frequently raise is the independence and desire for greater flexibility over hours worked among younger people. This relates not just to the need to factor in their changing study requirements and their desire for extended and frequent travel breaks but also their desire to build a portfolio of jobs rather than with a single employer. It is far easier to accommodate employee preferences for flexibility if other employees are available to work additional hours.

Moreover, individual employees appreciate that their desires for flexibility are more likely to be met if they make known to their employer or manager their own availability for additional hours of work.

As to the ACTU suggestion that counts of underemployment may include people who are looking for extra hours of work at current wage rates, while conceptually possible we know of no evidence that this is the case or that it is a material portion of total underemployment.

Indeed, the increase in the participation rate in recent years suggests there is a strong willingness of people to work at present wage rates notwithstanding the generally slow pace of increase in real wage rates over the same period.

We agree with the ACTU that the rate of underemployment has become an increasingly important feature of the Australian labour market. The suggestion that minimum wage rates are too low to entice additional labour supply does not seem a likely explanation for the structural increase in underemployment. Rather, it is clearly related to prevalence of part-time work and indeed the preference by employees for part-time work. Our experience is that many employees value flexibility of hours worked and many value this flexibility more than security over hours worked.

The increase in employee willingness and indeed preferences for flexibility, and the diversity of the reasons employees have for their preferences, is an important factor in the higher rates of underemployment at any point in time. Accommodating diverse availability is more challenging for employers.

Ironically, given the conclusions drawn by some that less flexibility is a solution to these challenges, the reality is that employers and managers would be more readily able to accommodate employee preferences if there was more flexibility rather than less. This in turn would assist in reducing the extent of underemployment.

3. Equal remuneration

Ai Group has not identified any problems with the approach taken by the Expert Panel in its *Annual Wage Review 2016-2017 Decision* concerning its consideration of the principle of equal remuneration for work of equal or comparable value. This is one of a number of factors that the Panel is required to consider in its minimum wage setting, in accordance with ss.284(1)(d) and 134(1)(e).

Under s.281(1) the Panel is required to “take into account” the principle of equal remuneration for work of equal or comparable value, not to conduct a substantive inquiry into gender undervaluation, being a process more appropriately dealt with through Part 2-7 – Equal Remuneration, of the FW Act. A Full Bench of the Commission considered the phrase “take into account” in its Four Yearly Award Review – Preliminary Jurisdictional Issues Decision:¹⁰ (emphasis added)

The obligation to take into account the matters set out in paragraphs 134(1)(a) to (h) means that each of these matters must be treated as a matter of significance in the decision making process. As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:

“To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously discarded as irrelevant.”

Section 284(1)(d) is one of a number of factors that the Panel must treat as a matter of significance in its decision-making process.

As the Panel appropriately observed in its *Annual Wage Review 2016-2017 Decision*:

- A moderate increase in minimum wages would be likely to have a relatively small effect on the gender pay gap; and
- Other mechanisms are available under the FW Act, such as bargaining and equal remuneration orders, that provide a more direct means of addressing the gender pay gap or gender undervaluation.¹¹

¹⁰ 4 Yearly Review of Modern Awards - Preliminary Jurisdictional Issues [2014] FWCFB 788 at [31].

¹¹ *Annual Wage Review 2016-2017 Decision*, at [677].

The ACTU's submission argues that serious flaws may exist in the architecture of the wage fixation framework because the framework "does not permit the Panel to meaningfully consider gender-based undervaluation of modern award minimum rates". The ACTU's contention that modern award rates of pay may provide for an unreliable male comparator due to notions of bias in determining minimum rates of pay for men under work value principles would necessarily require substantial and lengthy examination to determine whether the contention is correct. Any assessment of that contention goes far beyond the Panel's role to "take into account" the equal remuneration principle, and would be better addressed through other available mechanisms in the FW Act, including those referred to above.

With regard to Question 5.1 of the Questions on Notice for Reply Submissions, we do not agree 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. Clearly, the principle is relevant, but it is only one of a number of relevant factors that the Expert Panel is required to take into account.

4. Penalty rates

In its submission, the ACTU argues that a higher increase should be awarded in the Annual Wage Review to mitigate the impact of the Commission's 2017 *Penalty Rates Decision* on affected employees.

In its *Annual Wage Review Decision 2016-2017*, the Panel observed that the *Penalty Rates Decision* should not be considered "in some quantifiable or mechanistic way to support a particular level of increase to the National Minimum Wage or in modern award minimum wages."¹²

As stated in our March 2018 Submission, the *Penalty Rates Decision* only applies to a small number of awards in the hospitality and retail industries. In its decision, the Full Bench determined that the existing Sunday penalty rates in the four relevant modern awards did not achieve the modern awards objective, as they did not provide for a fair and relevant safety net. The statutory considerations required of the Expert Panel in the current proceedings were considered by the Full Bench in the *Penalty Rates Decision*, including: the objects of the FW Act (s.3); the modern awards objective (s.134); and the minimum wages objective (s.284).

It would be inappropriate for the quantum of any minimum wage increase to be any higher as a result of the *Penalty Rates Decision*. This would negate the intended beneficial effects of the *Penalty Rates Decision* in the relevant industries. This would also be unfair to businesses in other industries that have not received the benefit of adjusted penalty rates.

¹² *Annual Wage Review 2016-2017 Decision*, at [29].