Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submissions in Reply

District Allowances

(AM2014/190)

4 April 2018

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/190 DISTRICT ALLOWANCES

1. INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this reply submission with respect to claims made by the Shop, Distributive and Allied Employees' Association (**SDA**) and the Australian Municipal, Administrative, Clerical and Services Union (**ASU**) (collectively, **Unions**) to insert new district allowances in 12 modern awards. These submissions are filed pursuant to Amended Directions issued by the Fair Work Commission (**Commission**) on 22 February 2018.

2. These submissions are made in the context of the long and complex procedural history preceding these claims. Our submissions, therefore, are to be understood in light of the attempt made by the Australian Council of Trade Unions (**ACTU**) and several of its affiliates to seek the deletion of the sunset provision from transitional district allowance clauses. With one exception, the claim was unsuccessful and such provisions ceased to operate on 31 December 2014. We hereafter refer to the Commission's decisions in respect of these proceedings as the **Transitional Provisions Decisions**[1]. We note in passing that it was followed shortly afterward by calls for interim relief in the form of pre-emptive take-home pay orders, pursuant to the model provision found at clause 2 in all modern awards, which were refused by the Full Bench.[2]

3. Four modern awards [3] previously contained a transitional Broken Hill allowance. In the Transitional Provisions Decision, the Commission ruled that it could not conclude that those provisions should be deleted on the same bases as its decision to remove other transitional district allowances.[4] As a result, those four modern awards, which are the subject of the SDA claim now

[1] *4 yearly review of modern awards – transitional provisions* [2014] FWCFB 7767 and *4 yearly review of modern awards – transitional provisions* [2015] FWCFB 644.

[2] *4 yearly review of modern awards – transitional provisions* [2014] FWCFB 9429 and 4 *yearly review of modern awards – transitional provisions* [2015] FWCFB 2575.

[3] *Fast Food Industry Award 2010*, clause 19.9(c); *General Retail Industry Award 2010*, clause 20.13(c); *Hair and Beauty Industry Award 2010*, clause 22.3; and *Pharmacy Industry Award 2010*, clause 19.7(c).

[4] *4 yearly review of modern awards – transitional provisions* [2015] FWCFB 644 at [63].

before the Commission, presently require the payment of an allowance to an employee in the County of Yancowinna in New South Wales.

4. The Transitional Provisions Decision was also the subject of an application for judicial review, made by the Australian Chamber of Commerce and Industry (**ACCI**). ACCI contended that the Broken Hill allowance in the relevant four awards falls within the ambit of s.154(1)(b) of the *Fair Work Act 2009* (**Act**) and therefore, those provisions are prohibited by s.136(2)(a). ACCI's application was dismissed by a Full Court of the Federal Court of Australia.[5]

5. In formulating these submissions in response to the Unions' claims now before the Full Bench, we have of course had regard to each of the aforementioned decisions.[6]

6. Ai Group opposes the claims made by the Unions on the basis that the Unions have failed to establish that the proposed clauses are necessary to ensure that each of the relevant awards achieve the modern awards objective.

[5] *Australian Chamber of Commerce and Industry v Australian Council of Trade Unions* [2015] FCAFC 131.

[6] *4 yearly review of modern awards – transitional provisions* [2014] FWCFB 7767, *4 yearly review of modern awards – transitional provisions* [2015] FWCFB 644, *4 yearly review of modern awards – transitional provisions* [2014] FWCFB 9429, *4 yearly review of modern awards – transitional provisions* [2015] FWCFB 2575, *4 yearly review of modern awards – transitional provisions* [2015] FWCFB 2835 and *Australian Chamber of Commerce and Industry v Australian Council of Trade Unions* [2015] FCAFC 131.

2. THE SDA'S CLAIM

7. The SDA seeks the insertion of what it calls a new district allowance in five modern awards:

    a) The *General Retail Industry Award 2010* (**Retail Award**)*;*

    b) The *Fast Food Industry Award 2010* (**Fast Food Award**)*;*

    c) The *Pharmacy Industry Award 2010;*

    d) The *Hair and Beauty Industry Award 2010* (**Hair and Beauty Award**)*;* and

    e) The *Vehicle Manufacturing, Repair, Services, and Retail Award 2010* (**Vehicle Award**)*.*[7]

8. Ai Group has a significant interest in the Retail Award, the Fast Food Award and the Vehicle Award. Further, Ai Group also appears for Hair and Beauty Australia in these proceedings, which represents employers covered by the Hair and Beauty Award. These submissions are filed in opposition to the SDA's claim in relation to each of those awards (collectively, **SDA Awards**).

9. The effect of the proposed variations to the SDA Awards is to:

    a) Preserve the current entitlement to an allowance for employees who work in Broken Hill in the Retail Award, Fast Food Award and Hair and Beauty Award; and

    b) Create a new entitlement to an hourly allowance for employees in the following 12 locations in Western Australia for the exigencies of working in those locations:

        i. The Shire of Ashburton;

        ii. The Shire of Broome;

[7] SDA's Outline of Submissions dated 16 February 2018 at paragraph 3.

iii. The Shire of Carnarvon;

iv. The Shire of Derby-West Kimberley;

v. The Shire of East Pilbara;

vi. The Shire of Exmouth;

vii. The Shire of Halls Creek;

viii. The City of Karratha;

ix. The Town of Port Headland;

x. The Shire of Shark Bay;

xi. The Shire of Upper Gascoyne; and

xii. The Shire of Wyndham-East Kimberley.[8]

(Collectively, **SDA Locations**)

10. The quantum of the allowance payable would be that which is currently payable in respect of Broken Hill; $34.63 per week or $0.91 per hour.

11. Because it is proposed that the quantum of the allowance be derived by reference to the 'standard rate' as defined in the SDA Awards, the quantum of the allowance would increase each year.

2.1 THE SDA'S CASE

12. The SDA's case is based on the following key propositions.

13. **First**, employees covered by the SDA Awards and working in the SDA Locations face a higher cost of living.[9]

[8] Draft determinations filed on 8 December 2018.

[9] SDA Outline of Submissions dated 16 February 2018 at paragraphs 47 – 58.

14. **Second**, employees covered by the SDA Awards and working in the SDA Locations face particular challenges due to climatic conditions.[10]

15. **Third**, employees covered by the SDA Awards and working in the SDA Locations face particular challenges because the relevant locations are isolated.[11]

16. **Fourth**, there are practical impediments to collective bargaining in the SDA Locations.[12]

17. **Fifth**, the SDA's proposal does not represent a "significant change"[13] having regard to the "history of district allowances in the SDA [Locations]"[14] and because it "replicates a system of district allowances in the SDA [Locations] that was only recently removed"[15].

18. **Sixth,** employees covered by the SDA Awards are low paid and in order to "maintain a standard of living that is relative to that experienced by employees in less remote regions, employees in the SDA Locations are required to incur significantly greater costs".[16]

19. **Seventh**, the impact of the SDA's claim on employers is "likely to be marginal".[17]

20. **Eighth**, the quantum of the allowance sought is the same as that which has "already [been] adopted by the Commission in relation to the Broken Hill

[10] SDA Outline of Submissions dated 16 February 2018 at paragraphs 59 – 71.
[11] SDA Outline of Submissions dated 16 February 2018 at paragraphs 72 – 83.
[12] SDA Outline of Submissions dated 16 February 2018 at paragraphs 98 – 101.
[13] SDA Outline of Submissions dated 16 February 2018 at paragraph 36(a).
[14] SDA Outline of Submissions dated 16 February 2018 at paragraphs 36(b) and 38 – 45.
[15] SDA Outline of Submissions dated 16 February 2018 at paragraph 36(a)(iii).
[16] SDA Outline of Submissions dated 16 February 2018 at paragraphs 86 – 97.
[17] SDA Outline of Submissions dated 16 February 2018 at paragraphs 112 – 114.

allowance"[18] and "falls within the range of location allowances that are awarded by the WAIRC for work in the SDA [Locations]"[19].

21. For the reasons later explained in these submissions, Ai Group contests each of these propositions.

2.2 THE PROCESS PROPOSED BY THE SDA

22. In its written submissions, the SDA states:

> In the event that the FWC is satisfied that district allowances are necessary to achieve the modern awards objective, but seeks a more precise method of fixing and varying the rate, it would be appropriate for the FWC to seek further assistance from the parties or consider commissioning research at that time.[20]

23. To the extent that the SDA is seeking a decision from the Commission that, as a matter of principle, employees covered by the SDA Awards in the SDA Locations should receive an allowance each week, with a subsequent process to determine how that allowance is to be fixed and/or varied, such an approach is opposed by Ai Group.

24. The SDA has been afforded every opportunity to mount a case in support of the payment of district allowances in the current 4 yearly review of modern awards (**Review**). The claim currently before the Commission represents the fourth instance in which employer organisations have been called upon to respond to such a claim during the Review. If the Commission adopts the process proposed by the SDA, employer organisations will be put to the task of responding to yet another iteration of this case.

25. As the Commission is aware, this Review has placed a significant strain on the resources of organisations such as Ai Group, as well as those of the Commission. It is in the interests of all stakeholders that a time and resource-efficient process is adopted for determining any claims that are made. Respondent parties should not be required to repeatedly answer to multiple

[18] SDA Outline of Submissions dated 16 February 2018 at paragraph 137.

[19] SDA Outline of Submissions dated 16 February 2018 at paragraph 138.

[20] SDA Outline of Submissions dated 16 February 2018 at paragraph 148.

derivatives of a particular claim, noting that each time the SDA is effectively provided with an opportunity to refine and improve its case.

26. The process proposed by the SDA is at odds with the manner in which "common issues" claims made by various organisations have been dealt with in this Review. Typically, the proponent of a "common issues" claim has been directed to file draft determinations specifying the precise terms of the variations sought. This was a process that was discussed and supported by employer and union parties in the early stages of the Review. Such a process ensures that respondent parties are aware of and understand the case that they are in fact required to defend. It is both fair and transparent. It also enables the Commission and the parties to efficiently deal with the case presented by the proponents in its totality.

27. In the interests of ensuring that this case is finally heard and determined efficiently and fairly, the process proposed by the SDA should not be adopted.

28. It is the SDA's submission that the Commission may first determine whether district allowances, in general terms, are necessary to achieve the modern awards objective. The statute dictates that such a basis only exists if the Commission decides that the relevant award term is necessary to ensure that an award, together with the NES, provides a fair and relevant minimum safety net of terms and conditions, taking into account each of the matters listed at s.134(1). In making this assessment, each modern award is to be reviewed in its own right.[21]

29. It seems to us that the task put to the Commission by the SDA is an impossibility. This is because a consideration of the factors listed at s.134(1) cannot properly be undertaken absent an identification of two critical features of the award term sought by the SDA: the manner in which the allowance is to be fixed (and consequently, the quantum of the allowance) and how it will be varied. We address the following limbs of s.134(1) by way of example.

[21] Section 156(5) of the Act.

30. Section 134(1)(a) requires the Commission to take into account the relative living standards and needs of the low paid. It is also incumbent upon the Commission to assess whether the remedy proposed by the SDA addresses the "relative living standards and needs of the low paid", if it is found that employees covered by the SDA Awards are in fact low paid. This cannot properly be done where the quantum of the allowance and how it will be varied is not known.

31. Section 134(1)(b) requires the Commission to take into account the need to encourage collective bargaining. An assessment of the extent to which this factor is relevant to the SDA's claim and if so, the impact it would have, cannot be made if the quantum of the allowance is not known. For instance, the Commission would, respectfully, be unable to properly assess the extent to which the inclusion (or absence) of location allowances is likely to incentivise enterprise bargaining. The SDA's proposal erroneously assumes that such conclusions can and should be reached in the abstract.

32. Section 134(1)(f) requires the Commission to take into account the likely impact of any exercise of modern award powers on business. The requisite assessment is self-evidently difficult to undertake where the quantum of the allowance is not known, as the Commission (and employer representatives) would be unable to assess the potential financial impost of the claim on businesses.

33. For all of the reasons here stated, the SDA's claim should be considered on the basis of the proposal currently before the Commission. The iterative process proposed by the union should not be adopted.

3. THE ASU'S CLAIM

34. The ASU seeks the insertion of a new provision in the following seven modern awards:

    a) The *Airline Operations – Ground Staff Award 2010* (**Ground Staff Award**);

    b) The *Clerks – Private Sector Award 2010* (**Clerks Award**);

    c) The *Legal Services Award 2010* (**Legal Services Award**);

    d) The *Local Government Industry Award 2010*;

    e) The *Rail Industry Award 2010* (**Rail Award**);

    f) The *Social, Community, Home Care and Disability Services Award 2010* (**SACS Award**); and

    g) The *Electrical Power Industry Award 2010* (**Electrical Power Award**).

35. Ai Group represents the interests of employers covered by the Ground Staff Award, the Clerks Award, the Legal Services Award, the Rail Award, the SACS Award and the Electrical Power Award (**ASU Awards**). The ASU's claims in respect of each of those awards is strongly opposed.

36. The proposed clause would introduce an entitlement to a district allowance for an employee required to work in any of the 33 remote locations specifically nominated by the clause in New South Wales, the Northern Territory, Queensland or Western Australia (**ASU Locations**).

37. The monetary amount payable is stipulated by the clause itself, by reference to the specific town/location. The rate is expressed as a weekly amount ranging from $17.69 - $101.35. We note however that, of the 33 locations:

    a) Almost half would attract an allowance of $101.35 per week;

    b) 21 would attract an allowance of over $50 per week; and

c) It is proposed that in 12 of the named locations, an allowance of $17.69 would be payable. Per the ASU's submissions, this would amount to an annual payment of $920 to a full-time employee.[22]

38. Accordingly, the potential employment costs associated with the claim are by no means insignificant; a matter that we subsequently return to in these submissions.

39. In addition to specifying the actual allowance payable, the proposed clause also:

a) Requires the payment of a higher amount where an employee has a "dependent" or "partial dependent" as defined.

b) Mandates the payment of the allowance during a period of annual leave or where an employee "receives payment in lieu of annual leave".

c) Purports to require the payment of the allowance during long service leave or other approved paid leave if the employee "remains in the district in which the employee is employed".

d) Requires that "each location allowance shall be varied" from the beginning of the first pay period commencing on or after 1 July each year, however does not provide for how this would occur.

3.2 THE ASU'S CASE

40. The ASU's case is based on the following key propositions.

41. **First**, employees covered by the ASU Awards and working in the ASU Locations should be compensated for "disabilities associated with the performance of work in harsh climatic conditions".[23]

[22] ASU Submission dated 26 February 2018 at paragraph 16.

[23] ASU Submission dated 26 February 2018 at paragraph 12.

42. **Second**, employees covered by the ASU Awards and working in the ASU Locations should be compensated for "disabilities associated with the performance of work in … remote locations".[24]

43. **Third**, employees covered by the ASU Awards and working in the ASU Locations face a higher cost of living than those living in less remote areas.[25]

44. **Fourth**, the SDA Locations and the specific amounts proposed are appropriate because they reflect the allowances paid to the Australian Defence Force (**ADF**).[26] Further, locations that are as remote or more remote than Broken Hill should attract district allowances.[27]

45. **Fifth**, the history of district allowances is "inextricably linked to the award safety net" and "has been to (sic) encourage settlement in regional and remote locations, for permanent work".[28]

46. For the reasons later explained in these submissions, Ai Group contests each of these propositions.

3.3 PRELIMINARY ISSUES ARISING FROM THE DRAFT DETERMINATIONS

47. Whilst we deal with the claim in greater detail throughout this submission, we note at the outset that the terms of the ASU's proposed provision are inherently problematic for various reasons, some of which we here address.

The Application of the Clause

48. The circumstances in which an employee is to be paid the allowance is ambiguous. At clause X.1, the proposed provision states that "employees *required to work* in remote locations" are to be paid a district allowance.

[24] ASU Submission dated 26 February 2018 at paragraph 12.
[25] ASU Submission dated 26 February 2018 at paragraphs 27 – 28.
[26] ASU Submission dated 26 February 2018 at paragraphs 14 – 16.
[27] ASU Submission dated 26 February 2018 at paragraphs 19 – 20.
[28] ASU Outline of Submission dated 26 February 2018 at paragraph 22.

However, clause X.2 requires the payment of the allowances prescribed to an employee "when *employed in* the towns/locations".

49. A tension emerges from these two provisions as the application of clause X.1 is potentially broader. An employee may be *required to work* in a particular location for a limited period of time (for example, for just one day). Clause X.1 in isolation would require the payment of the allowance in such circumstances. However, clause X.2 speaks of circumstances in which an employee is *employed in* the relevant town/location. This is obviously a different concept, which connotes some degree of permanency or ongoing connection. That provision, on its own, would not require an employer to pay the allowance if they require an employee to work in one of the remote locations listed in the clause on an ad hoc basis.

50. It is unclear to us how these two provisions are to be reconciled. We note that although this concern was first raised by Ai Group as early as April 2015[29], it remains unaddressed by the ASU in the most recent iteration of its claim.

The Requirement to Pay the Allowance during certain Periods of Leave

51. At clause X.7, the ASU's proposal seeks to impose an obligation to pay the district allowances while an employee is on approved paid leave (other than annual leave), for the period of such leave during which the employee "remains in the district in which the employee is employed".

52. The practical application and enforceability of this clause is clearly problematic. The potential for a contest between an employer and an employee as to whether the employee in fact remained within the district is not at all improbable. The provision does not require an employee to provide any evidence that they remained within the geographical area specified. For the purposes of a minimum safety net, it is clearly inappropriate that an employee could simply assert that they remained within the district and upon such an assertion, the employer is required to pay the allowance.

[29] Ai Group Submissions in Reply dated 17 April 2015 at paragraphs 24 – 26.

53. The interpretation of the provision itself is also unclear. The allowance must be paid where the employee "remains in" the district. The application of the provision in circumstances where the employee leaves the district for a day trip, but returns by night, may be contentious.

54. An additional issue to flow from this provision is the calculation of the allowance. Putting to one side issues pertaining to the ability of an employer to ascertain the time spent by an employee outside the district or otherwise, it is not clear how the amount payable is to be calculated where an employee does not remain in the district for a day or part-day. The allowance is expressed as a weekly amount. It is not referrable to the employee's ordinary hours or otherwise. For this reason, the basis upon which the allowance is to be calculated pursuant to X.7 is entirely unclear.

55. We again note that although this concern was first raised by Ai Group as early as April 2015[30], it remains unaddressed by the ASU in the most recent iteration of its claim.

The Requirement to Pay the Allowance during Long Service Leave

56. Clause X.7 also requires the payment of the allowances during long service leave in the circumstances described. By virtue of s.155 of the Act, however, a modern award must not include terms dealing with long service leave. Such a clause, which purports to deal with an amount payable to an employee during long service leave, falls foul of this provision and therefore, has no effect (ss.136 and 137).

57. This submission is consistent with the Commission's recent decision that proposed award provisions listing entitlements that do not apply to a casual employee, including long service leave, are terms that "deal with" long service leave and therefore, are contrary to s.155. The Commission has proposed that such clauses be deleted from several modern awards.[31]

[30] Ai Group Submissions in Reply dated 17 April 2015 at paragraphs 27 – 30.

[31] *4 yearly review of modern awards* [2014] FWCFB 9412 at [104] – [105].

58. Further, the amount payable to an employee during a period of long service leave is usually regulated by State and Territory legislation. Thus, regard must be had to the terms of the specific legislation in order to determine which, if any, allowances are payable during long service leave.

59. Section 29 of the Act determines the interaction between State and Territory legislation and modern awards. Should the award purport to require the payment of an allowance during a period of long service leave, to the extent that this is inconsistent with the relevant legislation, the award term will operate subject to long service leave legislation (s.29(2)(b)). This is because such legislation is covered by ss.27(1)(c) and 27(2)(g).

60. It is readily apparent that an award term cannot, as proposed by the ASU, regulate the amount payable for a period of long service leave.

The Requirement to Pay a Higher Amount where the Employee has a Dependent or Partial Dependent

61. The ASU's proposal makes special provision for an employee who has a "dependent" or a "partial dependent". Those terms are defined in the proposed clause as follows:

a) A "dependent" means a spouse, de facto spouse, or a child (where there is no spouse/de facto spouse), who does not receive a district or location allowance.

b) A "partial dependent" is a dependent (as defined above) who receives a district or location allowance which is less than the allowance prescribed by the proposed clause.

62. The clause requires an additional payment to be made to an employee with a dependent or partial dependent:

a) An employee with a dependent is to be paid double the allowance prescribed by the clause.

b) An employee with a partial dependent is to be paid the allowance prescribed by the clause plus the difference between the amount received by the partial dependent by way of a district/location allowance and the allowance to which the employee is entitled under the proposed clause.

63. The ASU has provided no justification or rationale for the inclusion of such an entitlement. We are not aware of any existing modern award terms that impose an obligation on an employer to make an additional payment to an employee based upon whether that employee has a family member that does or does not receive the same entitlement.

64. In circumstances where the employee has a "dependent", the proposed provision essentially introduces a financial obligation on an employer that should be borne by the social welfare system. It cannot be the role of an employer to provide additional financial assistance to an employee who has a family member who does not receive a location allowance, remembering of course that that may be because the "dependent" is not employed. It is entirely inappropriate to introduce an award derived entitlement that is applicable to such circumstances.

65. We acknowledge that such provisions appeared in certain pre-modern awards, however that was at a time when a greater proportion of employees were entitled to such an allowance under awards or other instruments. It is fair to assume that in relative terms, the number of employees with a "dependent" (as defined) would have been far less than what would now be the case. The obvious consequence flowing from this is a significant cost impost on employers. Having regard to the fact that, even if the Unions claims before the Full Bench were successful, there would remain 110 modern awards without

an entitlement to district allowances, the impact of such a provision is extraordinary.

66. We note that the operation of the provision where an employee has a "dependent" *and* a "partial dependent" or more than one "dependent"/more than one "partial dependent", is unclear.

67. Further, the clause does not require the employee to provide any evidence of whether their spouse, de facto spouse or child is in fact receiving a district allowance or otherwise. The obvious concerns regarding an employer's ability to properly ascertain whether the employee is in fact entitled to the additional payments are self-explanatory.

4. AI GROUP'S CASE

68. Ai Group opposes the Unions' claims for the following key reasons.

69. **First**, the Unions have not established that the cost of living in the SDA Locations or the ASU Locations warrants the introduction of the allowances proposed.

70. **Second**, the Unions have not established that the climatic conditions in the SDA Locations or the ASU Locations warrant the introduction of the allowances proposed.

71. **Third**, the Unions have not established that the alleged isolation of the SDA Locations or the ASU Locations warrant the introduction of the allowances proposed.

72. **Fourth**, the history of district allowances does not lend support to the grant of the claim. It rather suggests that district allowances are no longer relevant, appropriate or necessary.

73. **Fifth**, the Unions have failed to propose a fair, rational and consistent basis for fixing and adjusting the allowances proposed.

74. **Sixth,** the evidence advanced by the Unions falls well short of establishing the factual propositions on which they seek to rely.

75. **Seventh**, the grant of the allowance would be unfair to employers.

76. **Eighth**, the grant of the claim will increase employment costs.

77. **Ninth**, the grant of the claim would be inconsistent with the maintenance of a stable awards system.

78. **Tenth**, the provisions proposed are not necessary to ensure that the SDA Awards or the SDA Awards provide a fair and relevant minimum safety net of terms and conditions.

5. THE STATUTORY FRAMEWORK

79. The Unions' claims are made in the context of the Review, which is being conducted by the Commission pursuant to s.156 of the Act.

80. Section 156(5) provides that each modern award is to be reviewed in its own right, however, this does not prevent the Commission from reviewing two or more modern awards at the same time.

81. In determining whether to exercise its power to vary a modern award, the Commission must be satisfied that each award includes terms only to the extent necessary to achieve the modern awards objective (s.138).

82. The modern awards objective is set out at s.134(1) of the Act. It requires the Commission to ensure that modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions. In doing so, the Commission is to take into account a range of factors listed at ss.134(1)(a) – (h).

83. By virtue of s.136, a modern award must only include terms that it is permitted or required to include by those parts of the Act listed at s.136(1). To the extent that an award term is not permitted or required, it will have no effect (s.137).

84. Section 139 contains a list of matters about which an award term may be included in a modern award. This includes allowances for disabilities associated with the performance of particular tasks or work in particular conditions or locations (s.139(1)(g)(iii)). Section 139(2) requires that any allowance must be separately and clearly identified in the award. In addition, s.149 provides that if the Commission considers that an award contains an allowance of the kind that should be varied when wage rates in the award are varied, the award must include terms providing for the automatic variation of those allowances when wage rates in the award are varied.

85. Ai Group submits that the Unions have failed to overcome the relevant statutory hurdles outlined above.

6. THE COMMISSION'S APPROACH TO THE REVIEW

6.1 PRELIMINARY ISSUES

86. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's decision provides the framework within which the Review is to proceed (the **Preliminary Issues Decision**).[32]

87. Importantly, the Full Bench emphasised the need for a party to mount a merit based case in support of its claim, accompanied by probative evidence:

> **[23]** The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.[33]

88. The Commission indicated that the Review will proceed on the basis that the relevant modern award achieved the modern awards objective at the time that it was made.[34]

89. The decision confirms that the Commission should generally follow previous Full Bench decisions that are relevant to a contested issue:

> **[25]** Although the Commission is not bound by principles of *stare decisis* it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in *Nguyen v Nguyen*:
>
> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see *Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq*."

[32] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[33] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23].

[34] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24].

[26] While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in *Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin)*:

> "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."

[27] These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[35]

90. As earlier stated, s.138 of the Act imposes a significant hurdle. This was recognised by the Full Bench in the following terms:

[36] … Relevantly, s.138 provides that such terms only be included in a modern award 'to the extent necessary to achieve the modern awards objective'. To comply with s.138 the formulation of terms which must be included in modern award or terms which are permitted to be included in modern awards must be in terms 'necessary to achieve the modern awards objective'. What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations. In the Review the proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective."[36]

[35] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [25] – [27].

[36] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [36].

91. The frequently cited passage from Tracey J's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)*[37] was adopted by the Full Bench.[38] It was thus accepted that:

> … a distinction must be drawn between that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.[39]

92. The following observations were also made with respect to the modern awards objective: (underlining added)

> **[31]** The modern awards objective is directed at ensuring that modern awards, together with the NES, provide a 'fair and relevant minimum safety net of terms and conditions' *taking into account* the particular considerations identified in paragraphs 134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed. 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."
>
> **[32]** No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.
>
> **[33]** There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.
>
> **[34]** Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.[40]

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[37] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227.

[38] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [39].

[39] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at 46.

[40] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [31] – [34].

93. Accordingly, the Preliminary Issues Decision establishes the following key threshold principles:

a) A proposal to vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence;

b) The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;

c) Relevant previous Full Bench decisions will be taken into account and generally followed, unless there are cogent reasons for not doing so;

d) The proponent of a variation must demonstrate that if the relevant modern award is varied as proposed, it would only include terms to the extent necessary to achieve the modern awards objective; and

e) No particular primacy is attached to any of the matters listed at s.134(1)(a) – (h). It is the Commission's task to balance the competing considerations arising from those factors. Different permutations and combinations of provisions in different awards may meet the modern awards objective.

94. As considered in greater detail below, the Unions have failed to meet each of these threshold requirements.

95. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010*, a Full Bench made the following comments, which we respectfully commend to the Commission as presently constituted: (underlining added)

> **[8]** While this may be the first opportunity to seek significant changes to the terms of modern awards, a substantive case for change is nevertheless required. The more significant the change, in terms of impact or a lengthy history of particular award provisions, the more detailed the case must be. Variations to awards have rarely been made merely on the basis of bare requests or strongly contested submissions. In order to found a case for an award variation it is usually necessary to advance detailed evidence of the operation of the award, the impact of the current provisions

> on employers and employees covered by it and the likely impact of the proposed changes. Such evidence should be combined with sound and balanced reasoning supporting a change. Ultimately the Commission must assess the evidence and submissions against the statutory tests set out above, principally whether the award provides a fair and relevant minimum safety net of terms and conditions and whether the proposed variations are necessary to achieve the modern awards objective. These tests encompass many traditional merit considerations regarding proposed award variations.[41]

96. As we later set out, the relevant approach articulated by the Commission in the above decision tells strongly against the adoption of the proposed variations.

6.2 CONSIDERATIONS ASSOCIATED WITH PROCEDURAL FAIRNESS

97. We are of course mindful of the nature of the Review and the Commission's repeated observation that it is not bound by the terms of a proponent's claim. It is relevant to note, however, that a respondent party at this stage of the proceedings can deal only with that which has been put before us. That is, these submissions only relate to the variations sought and the material filed by the Unions in support of them. It is not incumbent upon us to provide a response (or a hypothetical response) to any potential derivative of the clauses sought. Such an approach would render the task here before us virtually impossible to undertake, particularly within the timeframes imposed upon us by the Commission and the resource constraints we face due to the conduct of the Review generally.

98. Should the Unions or the Commission during these proceedings propose that modern awards be varied in terms that differ to those which have been proposed as at the time of drafting these submissions, notions of fairness dictate that respondent parties such as Ai Group be afforded an opportunity to address the Full Bench in relation to whether such a course of action should be permitted or taken in the context of these proceedings. If such a course is to be adopted, then a further opportunity to make submissions and/or call evidence in response to any such new proposal should be granted. Absent such a process, it may be argued that procedural fairness has not been

[41] *Re Security Services Industry Award 2010* [2015] FWCFB 620 at [8].

afforded to those who oppose the claim because, for instance, such parties have not had an opportunity to be properly heard in relation to the variations ultimately sought to be made, which may well have potential implications that have not otherwise been put before the Full Bench.

7. THE INCIDENCE OF DISTRICT ALLOWANCES IN PRE-MODERN AWARDS

99. There was no universal entitlement to district or location allowances arising from pre-modern awards, which applied to all employees employed in all of the relevant locations in each of the industries that are affected by the Unions' claims. This in and of itself means that the allowances now sought are a new entitlement and not a mere extension of one that previously existed.

100. The existence of district allowances, their specific terms and their application varied significantly between pre-modern awards. It appears that there was no uniform approach. Many pre-modern awards did not contain any such entitlement. Those that did often provided an entitlement for employees permanently located in only a few select locations.

101. The SDA submits that "district allowances applicable in the SDA [Locations] were prescribed by" the six pre-modern awards identified at paragraph 26 of its submissions[42]. However:

a) None of those awards applied in the vehicle manufacturing, repair, services and/or retail sectors. Therefore, on the SDA's material it would appear that district allowances were not payable under the pre-modern award regime in Western Australia in the industries now covered by the **Vehicle Award**.

b) As for the **Retail Award** and **Fast Food Award**; whilst the *Shop and Warehouse (Wholesale and Retail Establishments) State Award 1977*[43], the *Licensed Establishments (Retail and Wholesale) Award 1979*[44] and the *Fast Food Outlets Award 1990*[45] required the payment of an allowance to an employee employed in the towns identified by

[42] SDA Outline of Submissions dated 16 February 2018 at paragraph 26.

[43] SDA Outline of Submissions dated 16 February 2018 at paragraph 26(a).

[44] SDA Outline of Submissions dated 16 February 2018 at paragraph 26(d).

[45] SDA Outline of Submissions dated 16 February 2018 at paragraph 26(c).

the awards, it is not clear that an allowance was necessarily payable in respect of each of the SDA Locations.

c) The same can be said of the *Hairdressers Award 1989*[46] and in addition we note that it does not cover the beauty services industry. Nor does any other award identified by the SDA. Accordingly, a significant proportion of employers covered by the **Hair and Beauty Award** have not previously been required to pay a location allowance.

d) It at appears that, for the purposes of the Part 10A Award Modernisation process, the *Supermarkets and Chain Stores (Western Australia) Warehouse Award 1982*[47] did not underpin any of the SDA Awards. Rather, its terms were considered when the Australian Industrial Relations Commission (**AIRC**) made the *Storage Services and Wholesale Award 2010*.[48] Therefore, although it is identified by the SDA in its submissions, we do not consider that it is relevant for present purposes.

102. Accordingly, the SDA's submission that its proposal "is not a significant change in that it … replicates a system of district allowances in the SDA Regions that was only recently removed from the transitional provisions"[49] is clearly inaccurate.

103. Similarly, in relation to the ASU's claim we note that, for example:

a) The majority of awards underpinning the **Ground Staff Award** did not contain any entitlement to district allowances. Three pre-modern awards[50] required the payment of the rate prevailing under the appropriate Public Service Regulations from time to time, however there is no material before the Commission that establishes whether

[46] SDA Outline of Submissions dated 16 February 2018 at paragraph 26(f).

[47] SDA Outline of Submissions dated 16 February 2018 at paragraph 26(e).

[48] *Award Modernisation* [2009] AIRCFB 100 at page 87.

[49] SDA Outline of Submissions dated 16 February 2018 at paragraph 36(a)(iii).

[50] The *Overseas Airlines (Interim) Award 1999* (AP791898) and the *Airline Operations (Transport Workers') Award 1998* (AP768308).

the relevant regulations in fact contained such allowances, the circumstances in which they were payable or the amounts payable.

b) In relation to the **Clerks Award**, the *Clerical and Administrative Employees (State) Award*[51], which was the primary occupational clerical award applying to the majority of clerks employed in New South Wales did not contain any entitlement to a district allowance. Further, whilst the state clerical awards operating in Queensland[52] and the Northern Territory[53] contained an entitlement to a district allowance, the amounts due were smaller than that which is now sought (e.g. in Queensland, the prescribed quantum was a nominal $0.90 - $2.20 per week) and there was no obligation to pay a higher amount where the employee had a "dependent" or "partial dependent", however described.

c) The **Electrical Power Award** was created having particular reliance upon the relevant Victorian non-enterprise awards.[54] Neither of those contained an entitlement to district allowances.[55]

d) We understand from Attachment B to the ASU's submissions[56] that none of the pre-modern instruments underpinning the **Legal Services Award** contained an entitlement to district allowances.

e) The ASU identifies six pre-modern awards at Attachment B to its submissions[57] underpinning the **Rail Award** and contends that each contained an entitlement to district allowances. However, three of

[51] AN120664.

[52] *Clerical Employees Award - State 2002* (AN140067**).**

[53] *Clerical and Administrative Employees (Northern Territory) Award 2000* (AP839196).

[54] *Award Modernisation* [2009] AIRCFB 826 at [63].

[55] The *Power and Energy Industry Electrical, Electronic & Engineering Employees Award 1998* (AP793302) and the *Victorian Electricity Industry (Mining & Energy Workers) Award 1998* (AP802098).

[56] ASU Submission dated 26 February 2018 at Attachment B.

[57] ASU Submission dated 26 February 2018 at Attachment B.

those awards[58] required the payment of an allowance to employees located in Alice Springs and Kalgoorlie only and the remaining three[59] required the payment of an allowance to employees in certain parts of New South Wales. None of the identified instruments required the payment of an allowance in all of the places and circumstances required by the proposed provision.

104. Further, to the extent that district allowances existed, comments made by the AIRC during the Part 10A Award Modernisation Process (extracted in the following section of our submission) reveal that they applied largely in Western Australia and the Northern Territory. In fact, when determining whether district allowances should form part of the modern awards system, the Full Bench only explicitly considered those two States/Territories as they were "not aware of any allowances in other States which [were] of significant magnitude overall to require consideration".[60]

105. In addition, the AIRC noted that:

a) A mere 4% of pre-reform awards applying in Western Australia included location allowances and therefore, they were "not a common feature of federal awards applying in that State"; and

b) The Northern Territory allowance was frozen in 1984 by a decision which noted that "the allowance was outmoded and should not be adjusted again". [61]

106. Accordingly, the Unions' claims should be considered in the same light as any other claim for a new entitlement. The Unions must be put to the task of mounting a merit case that establishes that the introduction of a benefit not

[58] The *Locomotive Operations Award 2002* (AP822080), the *Railway Traffic Operating, Workshops and Miscellaneous Grades Award 2003* (AP832844), the *Railways Salaried Employees Award 2003* (AP830364).

[59] The *Railways Miscellaneous Grades Award [1960]* (AP794728), the *Railways Traffic, Permanent Way and Signalling Wages Award 2002* (AP817741) and the *Salaried Officers' (Railways – New South Wales) Award 200* (AP818510).

[60] *Award Modernisation* [2008] AIRCFB 1000 at [80].

[61] *Award Modernisation* [2008] AIRCFB 1000 at [81].

previously payable is now necessary to ensure that each of the relevant instruments achieve the modern awards objective.

107. In any event, the fact that an entitlement to district allowances was contained in some relevant pre-modern awards does not, in and of itself, provide a proper basis for an award variation in this Review. The power to include a term in an award is constrained by s.138 of the Act, which requires that it be necessary to achieve the modern awards objective. The requisite assessment is to be made having regard to the considerations listed at s.134(1) in the current context.

108. Further, despite the prior existence of an entitlement to district allowances in some instances, there is no evidence of any material disadvantage to employees arising during the intervening period since that entitlement ceased to apply.

109. We also consider that it can reasonably be inferred that, firstly, there may be new employers who have entered the relevant industries and have not previously been covered by an industrial instrument that contained such an entitlement. For any such employer, the introduction of the clause sought by the Unions would amount to a substantial change to the minimum safety net to which they have not previously been exposed. The prior existence of such an entitlement in pre-modern awards is not of any relevance to such an employer.

110. The same can be said of employers not covered by the pre-modern awards identified by the Unions because, for example, the relevant award applied only to named respondents not including said employers. The application of modern awards is significantly different from such a model and accordingly, any variation to a modern award can potentially impact upon a large number of employers covered by it. Accordingly, the SDA's assertion that "the payment

of district allowances in the SDA Regions is familiar to national system employers and employees"[62] cannot be accepted.

111. Secondly, in relation to those employers who were previously required, by virtue of a pre-modern award to afford their employees the relevant entitlement, at least three years have lapsed since the cessation of the transitional district allowance provisions in modern awards. Such businesses may during that time have altered the constitution of their workforce and/or their enterprise agreements in light of the fact that the relevant modern awards no longer require the payment of a district allowance. The grant of the Unions' claim may significantly impact any such business.

112. For all of the reasons here stated, the existence of an entitlement to district allowances in some pre-modern awards underpinning the ASU Awards and SDA Awards does not warrant or justify the grant of the Unions' claims.

[62] SDA Outline of Submission dated 16 February 2018 at paragraph 36(b).

8. PRIOR CONSIDERTION OF THE RELEVANT ISSUES

113. District and location allowances have been the subject of prior consideration by the Commission, its predecessors and state/territory tribunals. We here propose to deal with such decisions that are of relevance to these proceedings.

114. It was observed by the Commission in the Preliminary Issues Decision that it should take into account previous decisions that are relevant to a contested issue and that previous Full Bench decisions "should generally be followed, in the absence of cogent reasons for not doing so": (emphasis added)

> **[25]** Although the Commission is not bound by principles of stare decisis it has generally followed previous Full Bench decisions. In another context three members of the High Court observed in Nguyen v Nguyen:
>
> > "When a court of appeal holds itself free to depart from an earlier decision it should do so cautiously and only when compelled to the conclusion that the earlier decision is wrong. The occasion upon which the departure from previous authority is warranted are infrequent and exceptional and pose no real threat to the doctrine of precedent and the predictability of the law: see Queensland v The Commonwealth (1977) 139 CLR 585 per Aickin J at 620 et seq."
>
> **[26]** While the Commission is not a court, the public interest considerations underlying these observations have been applied with similar, if not equal, force to appeal proceedings in the Commission. As a Full Bench of the Australian Industrial Relations Commission observed in Cetin v Ripon Pty Ltd (T/as Parkview Hotel) (Cetin):
>
> > "Although the Commission is not, as a non-judicial body, bound by principles of stare decisis, as a matter of policy and sound administration it has generally followed previous Full Bench decisions relating to the issue to be determined, in the absence of cogent reasons for not doing so."
>
> **[27]** These policy considerations tell strongly against the proposition that the Review should proceed in isolation unencumbered by previous Commission decisions. In conducting the Review it is appropriate that the Commission take into account previous decisions relevant to any contested issue. The particular context in which those decisions were made will also need to be considered. Previous Full Bench decisions should generally be followed, in the absence of cogent reasons for not doing so.[63]

[63] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24] – [27].

115. The Commission's recent decision regarding its review of penalty rates in various modern awards (**Penalty Rates Decision**) provides examples of cogent reasons for *not* following previous Full Bench decisions: (emphasis added)

> **[255]** As observed by the Full Bench in the *Preliminary Jurisdictional Issues decision,* while it is appropriate to take account of previous decisions relevant to a contested issue arising in the Review it is necessary to consider the context in which those decisions were made. The particular context may be a cogent reason for *not* following a previous Full Bench decision, for example:
>
> - the legislative context which pertained at that time may be materially different from the FW Act;
> - the extent to which the relevant issue was contested, and, in particular, the extent of the evidence and submissions put in the previous proceeding will be relevant to the weight to be accorded to the previous decision; or
> - the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision may be a factor in considering the weight to be accorded to the decision.[64]

116. In our respectful submission, the passage of time may also present a cogent reason for departing from a previous Full Bench decision, where the Commission cannot be satisfied that the specific contextual circumstances relied upon still prevail.

117. For the reasons that follow, some of the decisions relied upon by the Unions are of little weight and should not be followed by the Full Bench.

8.1 DISTRICT AND LOCATION ALLOWANCES IN WESTERN AUSTRALIA (1923 and 1958)

118. As submitted by the SDA, the relevant decisions[65] of 1923 when district allowances were first introduced to the Western Australian system (**1923 Decisions**) do not set out any reasoning that explains why they were introduced or the basis upon which they were derived. They are, as a result, not instructive for present purposes.

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[64] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [255].

[65] *Engineering Awards of 1923* (1923) 3 WAIG 98 and *Engineering Awards of 1923* (1923) 3 WAIG 111.

119. In 1958, consideration was given to an application to increase district allowances in an award. For the reasons set out in the following passage, Justice Neville was not assisted by prior consideration given to district allowances in the Western Australian system. In our submission the Commission is not assisted by those decisions for the same reasons.

> District allowances were first granted in the North-West and Kimberleys in the Engineering Awards of 1923, …
>
> The only reasons for the decision … refer to the minimum wage and hours of work and although I have searched the Court files, I have been unable to find any transcript of the reasons actuating the Court in prescribing the District Allowances. The decision therefore is not very helpful in these proceedings …
>
> The allowances prescribed by that Award were paid to all Government workers until 1930 when the Government employers applied to amend eight separate Awards covering those of its then workers employed under conditions prescribed by the Court. … On those applications the Court heard certain evidence as to cost of living figures in the North-West ports … and on that evidence decided that the offer made by the Government departments was a fair and reasonable one and reduced the allowances …
>
> …
>
> It has been suggested that we should take these 1930 and 1931 decisions as a base, for any amendment, making allowance for the change in the purchasing power of money and also for any decreases in isolation factor brought about by improved means of transport and communication since that time and the growth in population and establishment of certain amenities in the North-West towns. However a perusal of the evidence in the 1930 proceedings shows how scanty and unsatisfactory was the evidence produced before the Court and with all respect to the then Court, it is difficult to appreciate how the decision was founded on any sort of analysis of what evidence was submitted to it but appears rather to have been the result of a general opinion that in the then difficult economic conditions and the Government's offer was a reasonable one … For those reasons I am of the opinion that the 1930 decision cannot be used by us as a base or starting point for our present consideration.[66]

120. Justice Neville's assessment of the appropriate allowances was ultimately based on:

a) The case presented by the parties which His Honour described as including "everything possible to help us in our difficult task"[67]. His Honour considered that "the evidence placed before [the Court was] sufficient for [it] to approach the fixation of allowances in a much more

[66] *AWU v Minister for Workers and others* (1958) 38 WAIG 684 at 685.

[67] *AWU v Minister for Workers and others* (1958) 38 WAIG 684 at 685.

exact way than what has been possible for the Court in the past"[68]. Despite this, the Commission cannot properly rely on the Court's conclusions. There is no material before the Commission that might establish that the Court's findings regarding the cost of living, isolation or climate are applicable to the current context. The decision was issued over 60 years ago.

b) The *increased* cost of living.[69] As we explain in chapter 10 of this submission, the material here before the Commission instead establishes that the relative cost of living in the SDA Locations has *fallen* in recent times.

c) The points system adopted under the Commonwealth Public Service Regulations for the purposes of the district allowances there prescribed as payable to "a single man in the Commonwealth service" in relation to climatic disabilities and isolation.[70] That is a basis that is clearly of no relevance to the current modern awards context.

121. The Commission cannot rely on the outcome of Justice Neville's decision or the 1923 Decisions in this matter for the reasons here explained.

8.2 DISTRICT AND LOCATION ALLOWANCES IN WESTERN AUSTRALIA (1980)

122. In 1980, the Western Australian Industrial Relations Commission (**WAIRC**) dealt with a number of applications to vary district allowances.[71] For the purposes of the proceedings, the WAIRC constituted a "working party" which comprised of representatives of the parties and interveners.[72] It had the task of "amassing all of the relevant documentary material which would ultimately be put before the [WAIRC]"[73]. Some 43 such exhibits were ultimately

[68] *AWU v Minister for Workers and others* (1958) 38 WAIG 684 at 685.
[69] *AWU v Minister for Workers and others* (1958) 38 WAIG 684 at 686.
[70] *AWU v Minister for Workers and others* (1958) 38 WAIG 684 at 689.
[71] *District and Location Allowances* (1980) 60 WAIG 1141.
[72] *District and Location Allowances* (1980) 60 WAIG 1141 at 1141.
[73] *District and Location Allowances* (1980) 60 WAIG 1141 at 1141.

tendered.[74] The paucity of the material here before the Commission is highlighted by the WAIRC's observations about the material that was put before it:

> The material collected by the working party was extensive and probably includes all of the types of documents that could be hoped to be assembled on the subject of district allowances.[75]

123. For present purposes it is also relevant to note that:

a) The quantum of the allowances arrived at do not assist the Commission in its consideration of the present matter. This is so for two reasons:

i. The WAIRC was not constrained by the need to ensure that the relevant instruments contained only terms that were necessary to ensure that they provided a fair and relevant minimum safety net of terms and conditions, taking into account the matters now listed at s.134(1) of the Act. The legislative context in which the matters were determined was therefore materially different.

ii. Almost 40 years have passed since the decision was issued. There is no material before the Commission that might satisfy it that the WAIRC's conclusions regarding the cost of living, isolation or climate are still relevant. For instance, there can be no doubt that means of communication and transportation have increased and improved during that time, thus reducing the levels of any isolation and/or minimising the consequences of it.

b) There is a greater degree of contest between the parties in this matter than that which presented itself before the WAIRC.[76]

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[74] *District and Location Allowances* (1980) 60 WAIG 1141 at 1142.

[75] *District and Location Allowances* (1980) 60 WAIG 1141 at 1142.

[76] *District and Location Allowances* (1980) 60 WAIG 1141 at 1142.

124. Despite the significant amount of material before it, including prior consideration given to the fixation and adjustment of district allowances, the WAIRC highlighted the difficulties associated with determining the appropriate quantum of any district allowance. It undertook a detailed analysis of the disadvantages allegedly suffered by persons in various locations, observing that in some instances there were marked differences between, for example, towns within the same areas. As a result, it concluded as follows: (emphasis added)

> The Commission's scale tends therefore to support the view that broad districts are not the most appropriate line of demarcation and that given the information to enable it to be done, reference to individual towns is the method to be preferred to avoid over and under compensation.[77]

125. This is an issue that, we say, is relevant to the Commission's consideration of the SDA's claim, which adopts the approach of referring to 'shires' without consideration for whether the circumstances affecting employees in individual locations within those shires warrant the grant of the same allowance.

8.3 DISTRICT ALLOWANCES IN THE NORTHERN TERRITORY (1984)

126. The irrelevance of district allowances in the Northern Territory was highlighted by a decision of the Australian Conciliation and Arbitration Commission (**ACAC**) almost 35 years ago, when it dealt with 14 applications to delete district allowances and cross-applications to increase the allowances in the Northern Territory.[78]

127. The ACAC cited decisions that explain the underlying rationale for introducing district allowances or higher rates of pay for employees in the Northern Territory: (emphasis added)

> District or zone allowances were raised as an issue by various unions and The Commonwealth Railways Commissioner in proceedings before Drake-Brockman J in 1932. In his Honour's decision he said:
>
> > "… Zone, district, isolation or climatic allowances as they are variously called, have for many years been granted in Australia. Historically they appear to have

[77] *District and Location Allowances* (1980) 60 WAIG 1141 at 1148.

[78] *District Allowance Clauses – Northern Territory Awards,* Print F4832.

been granted for the purpose of inducing labour to go to remote localities during the pioneering period. The tendency appears to have been for them to diminish in amount as the localities concerned became more settled and the social amenities increased and improved …" [(1932) 31 CAR 815 at 820]

He also made the following comment, which expressed a view similar to that expressed by Powers J in 1924:

> "If it be accepted – as I think it must be – that the purpose of district allowances is to induce labour to go to and remain at localities still at the pioneering stage of development or otherwise devoid of the amenities of civilisation, then it obviously is a matter of how much must be offered by the employers for that purpose. … Any additional inducement that is necessary to obtain labour is a matter which must vary infinitely with the locality and circumstances and is a matter usually best determined by the individuals concerned." [(1932) 31 CAR 815 at 820][79]

128. It is relevant to note that the Unions' claims do not appear to be premised on the notion that the allowances proposed are necessary to encourage employees to work in the SDA Locations and/or ASU Locations.

129. The ACAC concluded that:

a) Residents of Darwin and other parts of the Northern Territory should no longer be compensated for factors going to isolation and climate.[80]

b) Industrial activity and employment opportunities had grown much faster in Darwin than the national average. Increasing numbers of Darwin residents lived there by choice and it was not isolated in a physical sense; nor was it deprived in terms of access to health and educational facilities.[81]

c) Although Darwin suffered from hot summer conditions, most offices were air-conditioned. Different considerations may arise under those awards that relate to work performed outdoors. In any event, if it was accepted that for some two-thirds of the year, living in Darwin was as comfortable as other cities, it was unclear why an allowance should be paid on this basis.[82]

[79] *District Allowance Clauses – Northern Territory Awards,* Print F4832 at page 8.

[80] *District Allowance Clauses – Northern Territory Awards,* Print F4832 at page 24.

[81] *District Allowance Clauses – Northern Territory Awards,* Print F4832 at pages 17 – 18.

[82] *District Allowance Clauses – Northern Territory Awards,* Print F4832 at pages 18 – 20.

d) The Northern Territory should not be differentiated from other States and Territories based on the cost of living. Wage fixation principles were based upon national movements in consumer prices.[83]

130. The ACAC ultimately found that:

> On the basis of the conclusions we have reached, it could be argued that we should simply abolish or phase out the current allowances. In all the circumstances we consider the first course to be too drastic. The second course would prolong the implementation of our decision over many years bringing a degree of uncertainty and instability to wage determination in the Northern Territory. We are therefore not prepared to take either of these courses. We have decided that the proper course in the circumstances is to retain the district allowances at their existing levels but without further adjustment by indexation or otherwise. In this way the allowances will lose their significance over time.[84]

131. If this was the conclusion reached regarding the relevance of district allowances in the Northern Territory as long ago as 1984, it is difficult to understand how it could be argued that such allowances are relevant today. We note that despite the above decision, the ASU's claim requires the payment of an allowance to employees in Darwin and Alice Springs.

132. The Unions has not explained how or why, in light of the above decision, such allowances are relevant in any State or Territory in this day and age.

8.4 THE PART 10A AWARD MODERNISATION PROCESS (2008 – 2010)

133. The Part 10A Award Modernisation process was undertaken by the AIRC pursuant to the Award Modernisation Request (**Request**) issued by the Hon Julia Gillard, the then Minister for Employment and Workplace Relations. The Request stated that the creation of modern awards was not intended to disadvantage employees or increase costs for employers[85]. It went on to note that the AIRC could include transitional arrangements in modern awards to ensure it complied with the objects and principles of award modernisation set out in the Request.

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[83] *District Allowance Clauses – Northern Territory Awards,* Print F4832 at page 24.

[84] *District Allowance Clauses – Northern Territory Awards,* Print F4832 at page 27.

[85] Paragraphs 2(c) and 2(d) of the consolidated version of the Request.

134. The issue of whether district allowances should be included in modern awards and the terms in which such provisions should be expressed, was expressly dealt with by the AIRC during the Part 10A Process.

135. In its Statement regarding the exposure drafts of the 'priority' modern awards, the AIRC expressed its concern regarding the inclusion of district allowances in modern awards. It stated: (emphasis added)

> **[28]** There is an unresolved issue concerning allowances variously described as district, locality or remote area. A number of pre-reform awards and NAPSAs contain such allowances. Questions arise about such allowances. They are by nature confined to particular locations. In that connection it is relevant that modern awards will apply throughout Australia. If it is appropriate that these allowances be included in modern awards, which is a matter for discussion, there must be a consistent and fair national basis for their fixation and adjustment. Without a rational system the inclusion of these allowances in modern awards could lead to inconsistency and consequent unfairness. We would welcome views and proposals on these questions. The allowances have not been included in the exposure drafts.[86]

136. Subsequently, when the 'priority' modern awards were made, the AIRC decided to include district allowances in awards on the following basis: (emphasis added)

> **[80]** While it may be that historically the allowances in question are related to the cost of living in the relevant geographic areas, as indicated already, if they are to be a part of the modern award system, there must be a consistent and fair national basis for their fixation and adjustment. We should indicate that we are concerned at this point only with allowances applying in Western Australia and the Northern Territory. We are not aware of any allowances in other States which are of significant magnitude overall to require consideration. The Western Australian Industrial Relations Commission has regularly adjusted the district allowances applying in Western Australian awards for many years. The allowances are of course reflected in the Western Australian NAPSAs. As we understand the position, allowances in NAPSAs remain at the level they were in the relevant State award on 27 March 2006. Approximately 4 per cent of pre-reform awards applying in Western Australia include the location allowances and are therefore not a common feature of federal awards applying in that State. The Northern Territory allowance, contained in all pre-reform awards which apply in the Territory, was frozen at its current level some years ago by decision of a Full Bench. In that decision it was indicated that the allowance was outmoded and should not be adjusted again. There are also other allowances of this kind in the Northern Territory.
>
> **[81]** In relation to the allowances in NAPSAs and pre-reform awards operating in Western Australia, it is appropriate that those should be maintained in modern awards until there is a proper opportunity to consider whether they should be a permanent feature of the awards and, if so, the basis for their fixation and adjustment. We do not

[86] *Award Modernisation* [2008] AIRCFB 717.

intend to provide for any automatic adjustment at this stage. Because of the nature of the Northern Territory allowance, it cannot be maintained for more than five years and, because of the decision of the Full Bench, it should not be adjusted during that period. We shall provide that the district, locality or remote area allowances, described generally as district allowances, applying in Western Australia and the Northern Territory be preserved for a period of five years in a transitional provision. Most of the modern awards contain the following standard clause:

"**1.1 Northern Territory**

An employee in the Northern Territory is entitled to payment of a district allowance in accordance with the terms of an award made under the *Workplace Relations Act 1996* (Cth):

(a) that would have applied to the employee immediately prior to 1 January 2010, if the employee had at that time been in their current circumstances of employment and no agreement made under that Act had applied to the employee; and

(b) that would have entitled the employee to payment of a district allowance.

1.2 Western Australia

An employee in Western Australia is entitled to payment of a district allowance in accordance with the terms of a NAPSA or an award made under the *Workplace Relations Act 1996* (Cth):

(a) that would have applied to the employee immediately prior to 1 January 2010, if the employee had at that time been in their current circumstances of employment and no agreement made under that Act had applied to the employee; and

(b) that would have entitled the employee to payment of a district allowance.

1.3 This clause ceases to operate on 31 December 2014."

[82] In order to assist those covered by the award, administrative arrangements will be made to prepare and publish a list of the relevant allowances. There can be a full examination of all the matters relevant to the allowances sometime after 1 January 2010 either on application or as part of the review contemplated by the Fair Work Bill.[87]

[87] *Award Modernisation* [2008] AIRCFB 1000 at [80] – [82].

137. The AIRC's reservations regarding the inclusion of district allowances is clear from the above passages. In particular:

a) The decision noted the national application of modern awards as a matter of relevance to the potential inclusion of provisions that only operate in particular towns.

b) The importance of a rational, consistent and fair basis for their fixation and adjustment was emphasised, so as to avoid inconsistency and unfairness. This concern was expressed despite the AIRC's acknowledgement of the fact that such allowances historically, related to the cost of living in a particular area.

138. The AIRC's decision at paragraph [81] makes clear that the Full Bench determined that it should insert a transitional district allowance with respect to an employee in Western Australia and the Northern Territory on the following bases:

a) **Western Australia**: the clause was to operate only until a proper opportunity arose "to consider whether [the allowances in NAPSAs and pre-reform awards operating in Western Australia] should be a permanent feature of the awards and, if so, the basis for their fixation and adjustment". The AIRC did not intend for the allowance to necessarily become an ongoing fixture of the modern award system. Rather, it envisaged that the issue would be reconsidered at a later time, such as the Review currently being undertaken by the Commission.

b) The **Northern Territory**: the clause could not be maintained for more than five years. This was based on the ACAC decision cited above to retain district allowances in awards applying in the Northern Territory but without further adjustment such that they "lose their significance over time".[88]

[88] *District Allowance Clauses – Northern Territory Awards,* Print F4832 at page 27.

139. Having determined that district allowances would be dealt with on a transitional basis, the AIRC then stated:

> **[106]** We have received many submissions and suggestions concerning the way in which modern awards should deal with the multitude of transitional issues which may arise in the establishment of a safety net based predominately on modern awards and the NES. Transitional provisions must be developed, that, in a practical way, take account of the intention of the consolidated request that modern awards not disadvantage employees or increase costs for employers. In the case of some conditions of employment we have decided to include a specific transitional provision in the priority awards. These conditions are redundancy pay, accident pay and district allowances in Western Australia and the Northern Territory. There are also a small number of transitional provisions of limited application. In general, however, we are convinced that, as many contended, transitional provisions are best dealt with after the terms of the priority awards have been published, if it is practical to do so. There are a number of reasons. The first and obvious reason is that it is difficult to know what the effect of the award will be until those affected have had an opportunity to consider the impact in detail. The second reason is that in many cases the effect of the award upon employees and employers is not uniform and depends upon the terms of the NAPSA or pre-reform award which applied previously. More debate will be needed as to how the differing situations of employers and employees are to be viewed and dealt with. In some cases an aggregate or overall approach may be the appropriate one. Finally, it follows that the representatives of employers and employees will be in a better position to assess the overall effect of the awards, taking potential gains and losses into account and will be in a position to give practical assistance to the Commission.
>
> **[107]** There is an additional consideration. It is desirable that transitional provisions, including supersession provisions, take account of the legislative scheme in which they will operate. For that reason it is our intention not to deal with transitional provisions until the legislation, including the foreshadowed transitional legislation, has been passed by the Parliament. At that time we shall be in a position to assess the overall economic impact and to give consideration to how transitional provisions are to be finalised for the remaining stages of the modernisation process. On current indications we would expect to address these matters towards the middle of 2009.[89]

140. The AIRC's decision to insert district allowances in Western Australia and Northern Territory on a transitional basis cannot be interpreted as a finding that the ongoing provision of such allowances is necessary to ensure that the minimum safety net is maintained. This is made clear by the Commission's consideration of the basis upon which the Western Australian and Northern Territory transitional allowances were to be inserted. Further, the clauses must be seen in light of the Request, which stated that the intention of the Award Modernisation Process was not to disadvantage employees or increase costs

[89] *Award Modernisation* [2008] AIRCFB 1000.

for employers. The legislative considerations that apply in this Review are materially different.

141. Each of these factors lend support for our argument that district allowances are not necessary in the sense contemplated by s.138 of the Act, nor were they envisaged by the AIRC as entitlements that would continue indefinitely without a full and proper consideration of the merits of including provisions such as those proposed by the Unions. Rather the AIRC decided that the modern awards objective would be met by the insertion of transitional district allowance provisions which generally only applied in Western Australia and the Northern Territory, and would cease to operate on 31 December 2014.

142. As we develop further below, there is insufficient material before the Commission in this Review in order for it to undertake the type of consideration envisaged by the AIRC and therefore, it cannot come to the view that the proposed provisions are necessary to ensure that each of the relevant awards achieve the modern awards objective.

8.5 THE FOUR YEARLY REVIEW OF MODERN AWARDS (2014 – 2015)

143. Earlier in this Review, the ACTU sought the deletion of the 'sunset' provisions in all modern awards that had the effect of bringing the application of the transitional district allowance provisions determined by the AIRC during the Part 10A Award Modernisation Process to an end on 31 December 2014. Those provisions related to Western Australia, the Northern Territory and Broken Hill.

144. The Commission decided to reject the ACTU's claim so far as it related to Western Australia and the Northern Territory: (emphasis added)

> **[53]** The main reason for this decision is simply that the current transitional district allowances provisions cannot be retained in awards consistent with s.154 of the Act. By the terms of those provisions, they operate only in respect of Western Australia and the Northern Territory. Subsection 154(1)(b) provides that a modern award must not include terms that "are expressed to operate in one or more, but not every, State or Territory." In these circumstances, it would be inappropriate to remove the sunset provisions and thereby purport to continue in operation the current district allowance provisions.

[54] Apart from this, we do not consider that those provisions can be retained in awards consistent with the modern awards objective (ss.134 and 138). In particular, we consider that the provisions in their present form are complex, difficult to understand and apply and contrary to what is sought to be achieved through the modern award system (see s.134(1)(f) and (g)).

[55] Further, we do not consider that a proper case has been made out in the present matter for this Full Bench to depart from the decision taken by the Award Modernisation Full Bench in 2008, namely that the district allowances operating in Western Australia should be preserved in modern awards for a transitional period only and "until there is a proper opportunity to consider whether they should be a permanent feature of the awards and, if so, the basis for their fixation and adjustment." As we noted in our decision, no substantive case was advanced in the proceedings before us for the retention of the allowances applying in Western Australia. In this regard, it has been indicated that the ACTU and affiliated unions will seek to have provisions inserted into various modern awards which provide compensation for employees working in remote localities and/or under harsh conditions and which are drafted having regard to the relevant provisions of the Act. This may provide the opportunity for the "full examination of all matters relevant to the allowances" to be undertaken, as contemplated by the Award Modernisation Full Bench.

[56] The position regarding the Northern Territory allowances is somewhat different. We note that there were very limited submissions put to us which specifically addressed these allowances. Given the history of the allowances and the decisions taken by industrial tribunals regarding their nature and continuing relevance, we do not envisage that these allowances could be retained in modern awards.[90]

145. As can be seen, the Commission's decision to delete the Western Australian district allowances was based on:

a) Matters associated with jurisdictional considerations;

b) The manner in which such allowances were required to be derived; and

c) The Commission not being satisfied that it should depart from the AIRC's decision during the Part 10A Award Modernisation process

146. Whilst the Commission raised the prospect of consideration later being given to the insertion of substantive Western Australian district allowance provisions involving a "full consideration of all matters relevant to the allowances", the material filed by the Unions in these proceedings does not enable such a consideration of the relevant issues.

[90] *4 yearly review of modern awards – transitional provisions* [2015] FWCFB 644 at [53] – [56].

147. The position stated regarding the Northern Territory by the Commission was different. It ruled that "given the history of the allowances and the decisions taken by industrial tribunals regarding their nature and continuing relevance, [it did] not envisage that [those] allowances could be retained in modern awards"[91]. No proper basis has been presented by the ASU for departing from this clearly articulated view of the Commission.

148. The Commission also determined that the Broken Hill allowance in four modern awards that are now the subject of the SDA's claim would remain and the sunset clause would be deleted. It is important, however, to understand the basis upon which the Commission so concluded: (emphasis added)

> **[59]** There was little put by way of submission in the proceedings as to what should be the position regarding the Broken Hill allowance. …
>
> **[60]** Little or no attention was given to this matter by most parties to the proceedings. …
>
> …
>
> **[62]** We note that the Broken Hill allowance is in different terms to the transitional provisions relating to district allowances in Western Australia and the Northern Territory. The entitlement to the allowance is specified in the four awards and is expressed as a percentage figure of the standard rate under the award. It does not require reference to any other instruments. The calculation of the allowance is therefore straightforward and the allowance is not a term or condition of employment determined by reference to State or Territory boundaries.
>
> **[63]** In these circumstances, we cannot conclude on a similar basis as in relation to the district allowances in Western Australia and the Northern Territory that the Broken Hill allowance should not be maintained as part of the safety net for workers covered by the relevant awards. On the basis of the limited material before us, we are satisfied that the maintenance of the Broken Hill allowance in the awards is appropriate having regard to the modern awards objective (ss.134 and 138) and other relevant considerations. The allowance will therefore be retained in the awards.[92]

149. The proceedings there before the Commission did not call upon or enable the Full Bench to consider whether, as a matter of merit, the Broken Hill allowance should be retained in the relevant awards. There were virtually no submissions or evidence filed about the *necessity* of the allowance in those awards. Accordingly, the Commission's decision to retain it in its terms cannot be relied

[91] *4 yearly review of modern awards – transitional provisions* [2015] FWCFB 644 at [56].

[92] *4 yearly review of modern awards – transitional provisions* [2015] FWCFB 644 at [59] – [63].

upon as a decision that demonstrates an acceptance that it or any such allowance is necessary in the sense contemplated by s.138 of the Act or an endorsement of the quantum of the allowance. The same can be said of ACCI's challenge of the decision, which was determined by the Federal Court.[93]

150. Rather, the Transitional Provisions Decisions reflect nothing more than the limited conclusion that the bases upon which the Commission had decided to delete the Northern Territory and Western Australian district allowances did not prevail in relation to Broken Hill and so, on that basis alone, the ACTU's claim to delete the subset provision was granted.

8.6 THE UNIONS' SUBMISSIONS REGARDING PRIOR CONSIDERATION GIVEN TO THE RELEVANT ISSUES

151. The Unions variously submit that:

i. The Western Australian decisions relied upon by the SDA demonstrate that "the basic need [for district allowances] has remained consistent"[94] and that the "greatest need [for them] has always existed in the SDA [Locations]"[95].

ii. District allowances were "improperly excluded from being permanent features of the [SDA Awards] during both the modernisation and transitional processes largely by reason of the FWC's misapprehension about the scope of s 154(1)(b) [of the Act]"[96].

iii. The Commission and its predecessors "have never made a decision on the merits of inserting, or even maintaining, district allowances in modern awards by reason of its misapprehension about the scope of

[93] *Australian Chamber of Commerce and Industry v Australian Council of Trade Unions* [2015] FCAFC 131.

[94] SDA Outline of Submissions dated 16 February 2018 at paragraph 45.

[95] SDA Outline of Submissions dated 16 February 2018 at paragraph 44.

[96] SDA Outline of Submissions dated 16 February 2018 at paragraph 36(c).

s 154(1)(b)" and therefore, the Commission is "not constrained by any of its earlier decisions"[97].

iv. The continuing existence of the Broken Hill allowance "is clearly in recognition of the need to provide compensation for employees working remotely and the often harsh conditions that put oppressive demands on remote workers"[98].

v. Given the continuing existence of the Broken Hill allowance, "locations Australia-wide that are at least as remote, if not more remote, than Broken Hill (and Yancowinna County) should be able to continue to attract a District Allowance as a minimum award entitlement"[99].

vi. The history of district allowances is "inextricably linked to the award safety net"[100].

vii. The history of district allowances "has been to encourage settlement in regional and remote locations, for permanent work"[101].

152. We deal with each proposition in turn.

153. **First,** for the reasons earlier explained, the Western Australian decisions of 1923 and 1958 cannot properly be relied upon in the context of the current proceedings.

154. **Second**, whether the Commission's interpretation and application of s.154 of the Act in related proceedings was correct is not a matter that properly arises for consideration in this case and should not colour the Commission's consideration of the Unions' claims. If the Unions considered that the Commission had "misapprehended" the scope of s.154 in its earlier decisions, it was open to them to seek a judicial review of such decisions. It elected not

[97] SDA Outline of Submissions dated 16 February 2018 at paragraph 35(e).

[98] ASU Submission dated 26 February 2018 at paragraph 19.

[99] ASU Submission dated 26 February 2018 at paragraph 20.

[100] ASU Submission dated 26 February 2018 at paragraph 22.

[101] ASU Submission dated 26 February 2018 at paragraph 22.

to do so. A suggested error of law in a prior Commission decision does not provide a proper basis for now granting the Unions claims.

155. **Third,** the assertion that the Commission and its predecessors "have never made a decision on the merits of inserting, or even maintaining, district allowances in modern awards"[102] is incorrect.

a) The Commission's decision earlier in this Review expressed a clear view regarding the merits of including district allowances applying in the Northern Territory.[103]

b) The AIRC's decision to include *transitional* district allowances clauses (and to not include allowances with ongoing application) *was* based on its the relevant merits. The decision was *not* based on a consideration of s.154 of the Act. The AIRC expressed various reservations about including district allowances as an ongoing feature of the modern awards system and accordingly, introduced such clauses on a transitional basis until interested parties and the Commission had a proper opportunity to consider their ongoing inclusion. Specifically, the AIRC referred to the following merit-based considerations, that are each relevant to the current proceedings:

i. The need for a rational basis for their inclusion for the purposes of ensuring that neither unfairness nor inconsistency arises;

ii. The appropriateness of including allowances payable in only some locations in the context of a national modern awards system;

iii. The need for a consistent, national, rational and fair basis for fixation and adjustment of any allowances; and

[102] SDA Outline of Submissions dated 16 February 2018 at paragraph 35(e).

[103] *4 yearly review of modern awards – transitional provisions* [2015] FWCFB 644 at [56].

iv. The Northern Territory allowance was frozen some years prior to the Part 10A process by decision of a Full Bench, which also indicated that the allowance was outmoded and should not be adjusted again. Therefore, the allowance could not be maintained for more than five years.

156. We contest the **fourth** and **fifth** propositions for the reasons outlined above regarding the Commission's decision to retain the Broken Hill allowance earlier in this Review. We note that in any event, despite the ASU's submissions in this regard, it has not in fact established that the locations in which it seeks the introduction of an allowance are "as remote, if not more remote, than Broken Hill".

157. **Sixth**, contrary to the Unions' submissions, the history of district allowances is <u>not</u> "inextricably linked" to the award safety net. The relevance and necessity for district allowances, particularly in certain regions, has been questioned by the Commission, the AIRC and ACAC over the years. Further, it is trite to note that since the commencement of 2015 (i.e. for more than three years), there has been no award entitlement to district allowances save for the entitlement to a Broken Hill allowance in just four modern awards.

158. **Seventh,** we agree that the history of district allowances "has been to encourage settlement in regional and remote locations, for permanent work"[104]. There is no evidence that an inducement of that nature is necessary in the current context in any of the SDA Locations and/or the ASU Locations. This further calls into question the merits of the Unions' claims.

[104] ASU Submission dated 26 February 2018 at paragraph 22.

9. FIXATION AND ADJUSTMENT

159. A key issue arising from these proceedings is the need to determine an appropriate method of fixing and adjusting location allowances. In our submission, there are three aspects to this issue:

a) The locations in which an allowance is payable;

b) The quantum of the allowance payable; and

c) The manner in which that quantum is (or is not) adjusted over time.

160. As outline above, when considering the issue during the Award Modernisation Process, the AIRC made the following observation: (underlining added)

> Questions arise about such allowances. They are by nature confined to particular locations. In that connection it is relevant that modern awards will apply throughout Australia. If it is appropriate that these allowances be included in modern awards, which is a matter for discussion, there must be a consistent and fair national basis for their fixation and adjustment. Without a rational system the inclusion of these allowances in modern awards could lead to inconsistency and consequent unfairness.[105]

161. These concerns were repeated by the Full Bench when it decided to insert transitional district allowance clauses in modern awards: (underlining added)

> While it may be that historically the allowances in question are related to the cost of living in the relevant geographic areas, as indicated already, if they are to be a part of the modern award system, there must be a consistent and fair national basis for their fixation and adjustment.[106]

162. Despite being on notice of these relevant considerations, the Unions have failed to propose a fair, relevant and appropriate method for fixing and adjusting the allowances sought.

[105] *Award Modernisation* [2008] AIRCFB 717 at [28].

[106] *Award Modernisation* [2008] AIRCFB 1000 at [80].

The SDA's Claim

163. In relation to the SDA's claim, we make the following submissions.

164. **First,** we refer to the observations made by the WAIRC in 1980 regarding the appropriateness of setting an allowance for a geographic area within which there are several towns or locations that in fact experience considerably different circumstances.[107] The SDA's claim proceeds on the assumption that all individual towns / locations within the 'shires' it has identified warrant the payment of a district allowance and the quantum of the allowance should be the same. For the reasons explained by the WAIRC, the evidence does not establish that such an approach is appropriate.

165. **Second,** the SDA virtually concedes in its submissions that the quantum of the allowance that it has selected is somewhat arbitrary. In our submission, the "impossibility" [108] or the "resource intensive" [109] process required to properly assess the appropriate quantum of an allowance does not render it appropriate to arbitrarily determine what may or may not be an appropriate amount. Indeed, without undertaking the "complex process" [110] previously undertaken by state/territory tribunals when determining the appropriate amount for an allowance, the Commission cannot be satisfied that a randomly selected amount for an allowance is *necessary* to achieve the modern awards objective. The threshold requirement imposed by s.138 of the Act necessarily involves a consideration of the quantum of the proposed allowance. In circumstances where that quantum has been arbitrarily selected, absent any forensic examination of the basis upon which it was derived, the Commission cannot be satisfied that the proposed award term is necessary and accordingly, its jurisdiction to grant the claim is not enlivened.

[107] *District and Location Allowances* (1980) WAIG 1141 at 1148.

[108] SDA Outline of Submission dated 16 February 2018 at paragraph 135.

[109] SDA Outline of Submission dated 16 February 2018 at paragraph 135.

[110] SDA Outline of Submission dated 16 February 2018 at paragraph 134.

166. **Third**, even if it were accepted that "there is likely to be an acceptable range within which the rate may fall"[111] and that it is "not necessary for the rate of a district allowance to be precisely or quantitatively determined"[112], there is no basis for concluding that 4.28% of the standard rate falls within the appropriate range. The SDA simplistically asserts that the amount proposed is appropriate because it reflects the Broken Hill allowance[113] however the SDA has not taken the Commission to any consideration given to how that amount was originally derived or established that those same bases are relevant to each of the SDA Locations.

167. **Fourth**, that the amount proposed "falls within the range of location allowances that were awarded by the WAIRC" does not advance the SDA's claim.[114] For the reasons we have earlier explained, the Commission cannot be satisfied that the amounts derived by the WAIRC decades ago remain appropriate or relevant.

168. **Fifth**, we shortly turn to consider the evidence filed by the Unions in these proceedings. For the reasons there set out, whilst the SDA relies on the cost of living, climatic conditions and isolation as the reasons for which district allowances should be introduced, the evidence filed is not probative in nature and does not enable the Commission to properly assess:

    a) The cost of living in each of the SDA Locations;

    b) How that compares to other locations;

    c) Whether the cost of living warrants the introduction of an allowance;

    d) If so, the quantum of that allowance;

    e) The climatic conditions in each of the SDA Locations;

[111] SDA Outline of Submission dated 16 February 2018 at paragraph 136.

[112] SDA Outline of Submission dated 16 February 2018 at paragraph 136.

[113] SDA Outline of Submission dated 16 February 2018 at paragraphs 137 and 141(c).

[114] SDA Outline of Submission dated 16 February 2018 at paragraphs 138 – 140.

f) How they compare to other locations;

g) The consequences for employees covered by the SDA Awards as a result of such climatic conditions;

h) Whether such consequences warrant the introduction of an allowance;

i) If so, the quantum of that allowance;

j) The isolation (if at all) faced by persons in each of the SDA Locations;

k) How that isolation compares to other locations;

l) The consequences for employees covered by the SDA Awards as a result of any such isolation;

m) Whether such consequences warrant the introduction of an allowance; and

n) If so, the quantum of that allowance.

169. Accordingly, the Commission cannot properly assess the basis upon which any district allowance should be fixed.

170. **Sixth,** the absence of a proper evidentiary base for the SDA's claim also renders it impossible to determine whether it is appropriate that the same quantum should be payable in relation to each of the SDA Locations.

171. **Seventh**, we refer to the submissions made below regarding the differing bases for fixing allowances proposed by the ASU and SDA.

172. The SDA has failed to propose a fair and rational basis for fixing the district allowances that it has proposed. Its claim gives rise to the very concerns that the AIRC had expressed during the Part 10A Award Modernisation Process. On this basis alone, its claim should fail.

The ASU's Claim

173. In relation to the ASU's claim, we make the following submissions.

174. **First,** the ASU's reliance on the ADF Pay and Conditions Manual for the purposes of identifying the relevant locations in which an allowance should be payable and the quantum of such an allowance[115] is entirely misplaced. It self-evidently does not provide a sound basis upon which it can be concluded that the allowances sought are necessary for the purposes of ensuring that the ASU Awards achieve the modern awards objective. There is absolutely no material before the Commission that explains how the amounts prescribed for the ADF were derived or the factors that were taken into account when arriving at the relevant figures. The Commission cannot be satisfied that the ADF allowances provide a proper basis for developing a minimum term or condition in the modern awards system.

175. **Second**, the ASU has not proposed any method for adjusting the allowances. It instead simply submits that "the Commission should have the discretion to vary allowances and add or remove locations on a regular basis, through minimum wage reviews"[116]. This submission, however, is of little assistance.

176. Section 149 of the Act states that "if a modern award includes allowances that the [Commission] considers are of a kind that should be varied when wage rates in the award are varied, the award must include terms providing for the automatic variation of those allowances when wage rates in the award are varied" (our emphasis). Despite the submission made by the ASU, it has not proposed a term consistent with section 149 of the Act.

177. **Third,** the ASU's draft determination identifies various locations in Western Australia which are also identified in the SDA's draft determinations. There is a difference of almost $70 dollars per week in the amounts proposed by the ASU and the SDA in respect of the same locations. This inconsistency highlights the absence of any clear basis upon which the Unions' claims have

[115] ASU Submissions dated 26 February 2018 at paragraphs 14 – 16.

[116] ASU Submissions dated 26 February 2018 at paragraph 17.

been developed and their adoption would give rise to the very inconsistency and potential unfairness (to employers and employees) that the AIRC had foreshadowed during the Part 10A Award Modernisation process.

178. The ASU has also failed to propose a fair and rationale basis for fixing the district allowances that it has proposed. On this basis, its claim too should fail.

10. THE COST OF LIVING

179. The Unions allege that the cost of living in regional and remote parts of Australia is higher and therefore, a district allowance should be included in awards to compensate employees for this.

10.1 THE COST OF LIVING IN THE SDA LOCATIONS

180. The SDA relies heavily on the *Regional Price Index 2017*[117] (**RPI 2017**), which is published by the Western Australian Department of Primary Industries and Regional Development. The SDA contends that the RPI 2017 establishes that employees living in the SDA Locations face a higher cost of living.

181. We do not accept that higher prices for a basket of goods in part of the country renders the provision of an additional allowance necessary in the sense contemplated by s.138 of the Act. We return to our reasons for this contention at chapter 12 of our submission.

182. Nonetheless, having reviewed the RPI 2017, it appears that the overall cost of living relative to Perth between 2015 – 2017 has *fallen* in most of the locations identified in the publication and in each of the SDA Locations.[118] In some of the SDA Locations, the decrease would appear to be sizable.[119]

183. We also note that in the three 'regions' (as defined by the RPI 2017) in which the SDA Locations fall[120]; the relative cost of food[121], household equipment

[117] Government of Western Australia, Department of Primary Industries and Regional Development, Regional Price Index 2017 (accessed 2 April 2018).

[118] Government of Western Australia, Department of Primary Industries and Regional Development, Regional Price Index 2017 at page 7. See Kimberley, Broome, Halls Creek, Pilbara, Karratha, Port Hedland, Gascoyne, Carnarvon and Exmouth.

[119] Government of Western Australia, Department of Primary Industries and Regional Development, Regional Price Index 2017 at page 7. See for example Broome, Halls Creek, Pilbara, Karratha, Newman and Esperance.

[120] That is, Kimberley, Pilbara and Gascoyne.

[121] Government of Western Australia, Department of Primary Industries and Regional Development, Regional Price Index 2017 at page 8.

and operation commodities [122], health and personal care [123] and transportation[124] has fallen. The relative cost of clothing[125] and housing[126] has fallen in two of the three regions. Only the "recreation commodity group"[127] has seen an increase in the relative cost in the majority of those regions, however we note that:

a) The recreation commodity group is a collection of various forms of discretionary spending including newspapers, magazines, audio, visual and computing equipment, sporting goods, toys and pets.[128]

b) The 2017 and 2015 results are not directly comparable because unlike the 2015 relative price index, the RPI 2017 excludes the cost of education.[129]

184. As can be seen, the RPI 2017 demonstrates a downward trend in the cost of living in the SDA Locations, which does not lend support to the SDA's claim. The introduction of a monetary entitlement on the basis that employees face a higher cost of living in circumstances where the only objective material before the Commission in this regard highlights that the cost of living is in fact *falling*, cannot be justified as being *necessary* for the purposes of ensuring that the SDA Awards provide a fair and relevant minimum safety net. To the extent that the cost of living in certain parts of Australia has "historically been

[122] Government of Western Australia, Department of Primary Industries and Regional Development, Regional Price Index 2017 at page 9.

[123] Government of Western Australia, Department of Primary Industries and Regional Development, Regional Price Index 2017 at page 13.

[124] Government of Western Australia, Department of Primary Industries and Regional Development, Regional Price Index 2017 at page 14.

[125] Government of Western Australia, Department of Primary Industries and Regional Development, Regional Price Index 2017 at page 10.

[126] Government of Western Australia, Department of Primary Industries and Regional Development, Regional Price Index 2017 at page 11.

[127] Government of Western Australia, Department of Primary Industries and Regional Development, Regional Price Index 2017 at page 15.

[128] Government of Western Australia, Department of Primary Industries and Regional Development, Regional Price Index 2017 at page 4.

[129] Government of Western Australia, Department of Primary Industries and Regional Development, Regional Price Index 2017at page 4.

the primary justification for district allowances"[130], it would appear that that justification may now be waning.

185. It is trite to observe that the downward trend may well continue, thus resulting in a further reduction to the cost of living in the SDA Locations. If that were to occur, the necessity of any district allowance would be called into further question. That the downward trend seen between 2015 and 2017 is merely a "short term variation"[131] or that the current trend will be reversed has not been established. The SDA has not called any evidence that goes to the expected trajectory of the cost of living in the SDA Locations.

186. Once it is established that the relative cost of living in the SDA Locations has fallen in recent times, the Commission must give careful consideration to whether, in those circumstances, the union's claim is *necessary* to ensure that the SDA Awards achieve the modern awards objective. If the current trend continues, the SDA's proposed clause may shortly be rendered *unnecessary* for the purposes of s.138. It is contrary to the needs of ensuring a stable and sustainable modern awards system (s.134(1)(g) of the Act) to introduce a new award clause that imposes a financial obligation on employers in circumstances where the basis upon which the union seeks its introduction is diminishing and it is reasonably foreseeable that it may continue to so diminish.

187. To the extent that the SDA relies on the evidence of its witnesses to establish that employees employed in the SDA Locations face a higher cost of living, we deal with such evidence in the following section of our submissions.

[130] SDA Outline of Submissions dated 16 February 2018 at paragraph 47.

[131] SDA Outline of Submission dated 16 February 2018 at paragraph 50.

10.2 THE COST OF LIVING IN THE ASU LOCATIONS

188. To the extent that the ASU also relies on the RPI 2017[132], we refer to the submissions we have made above, which are also apposite to the ASU's claim.

189. The ASU's claim, however, is not limited to Western Australia. The provision it has proposed also purports to require the payment of an allowance to employees required to work in certain locations in New South Wales, the Northern Territory and Queensland. Save for a witness statement from one employee employed to work in Broken Hill[133], there is no evidence before the Commission regarding the cost of living in any of the locations in those states/territories named in the ASU's draft determinations. As a result, the Commission cannot be satisfied that employees in those locations do in fact face a higher cost of living.

190. As for the evidence of Mr Mark Lenton[134] in relation to Broken Hill; we deal with his witness statement in the following section of our submissions. For present purposes it is sufficient to note that the evidence carries little probative value and does not establish that employees living in Broken Hill face a higher cost of living.

191. The ASU has comprehensively failed to establish one of the basic propositions that it advances in support of its case.

10.3 OTHER FORMS OF ASSISTANCE

192. Putting to one side whether the Unions have established that employees in the relevant locations face a higher cost of living, we note that in any event, various government schemes and policies are already in place to assist those who live in regional and remote areas across Australia.

[132] ASU Submission dated 26 February 2018 at paragraph 28 and Attachment D.

[133] Statement of Mark Lenton dated 23 February 2018.

[134] Statement of Mark Lenton dated 23 February 2018.

193. For instance:

a) Persons whose usual place of residence is in a remote or isolated area can claim a "zone tax offset". The Australian Taxation Office (**ATO**) has prepared a list of remote areas that are each classed as one of certain "zones".[135] The extent of the offset that can be claimed is determined by the zone in which the person lives/works and whether the person maintains a dependent child or full-time student under the age of 25.[136]

b) A person who will stay longer than 12 months in certain "zones" (as described above" is also entitled to a Remote Area Allowance from the Department of Human Services. No income or asset test is applied to determine whether a person is eligible and a higher allowance is paid in circumstances where a person has a dependent child.[137]

c) Patient assistance travel schemes are offered by the Western Australian[138], Northern Territory[139], Queensland[140] and New South Wales [141] state governments. These schemes enable patients in certain circumstances to claim travel and accommodation subsidies where they travel due to a medical illness/injury (e.g. to receive treatment).

194. For completeness we note that the ATO determined "zones" in which persons are eligible for a tax offset and/or allowance appear to include numerous ASU Locations and/or SDA Locations including (but not limited to) Alice Springs,

[135] Australian Taxation Office, Australian Zone List (accessed 1 April 2018).

[136] Australian Taxation Office, Zone and Overseas Forces Offsets and Zone and Overseas Forces Offsets Calculator (accessed 1 April 2018).

[137] Department of Human Services, Remote Area Allowance (accessed 1 April 2018).

[138] Government of Western Australia, WA Country Health Service, Patient Assisted Travel Scheme (accessed 1 April 2018).

[139] Northern Territory Government, Patient Assistance Travel Scheme (accessed 1 April 2018).

[140] Queensland Government, Patient Travel Subsidy Scheme (accessed 1 April 2018).

[141] NSW Government, Enable Health, Travel Assistance (IPTAAS) (accessed 1 April 2018).

Darwin, Jabiru, Katherine, Nhulunbuy, Karratha, Asburton, Broome, Carnarvon, Port Hedland, Shark Bay, Halls Creek and Wepia.[142]

195. It should not be the role of an employer to provide financial assistance to its employees on account of a higher cost of living in a particular geographic area. This is a matter for governments and social assistance/welfare schemes. As set out above, such assistance is readily available. It is not appropriate to place additional financial obligations on employers in this regard, remembering of course that those employers are facing the same higher costs as their employees.

196. To the extent that the Unions believe that the available schemes and subsidies are insufficient, that is a matter for other forums. The introduction of new financial obligations on employers by way of an allowance is not a fair or appropriate way of addressing any such concern. It is unfair to place a greater financial burden on individual, potentially small businesses because of a perceived deficiency in the level of government support available to persons living in the relevant locations.

[142] Australian Taxation Office, Australian Zone List (accessed 1 April 2018).

11. THE EVIDENCE

197. The Unions rely on the witnesses called to give evidence for the purposes of establishing the following factual propositions in support of their respective claims:

a) That the employees in the SDA Locations and ASU Locations face a high cost of living;

b) That the employees covered by the SDA Awards and ASU Awards are low paid workers;

c) That employees working in the SDA Locations and ASU Locations face harsh climatic conditions and suffer certain consequences as a result; and

d) That employees working in the SDA Locations and ASU Locations suffer various consequences flowing from the isolated nature of the location in which they work.

198. The evidence called by the Unions is far from probative. We note the following obvious shortfalls in their evidentiary case.

199. The Unions' evidence does not provide so much as an indication as to the number of employers and employees covered by the SDA Awards and/or the ASU Awards in the SDA Locations and/or the ASU Locations. This is a matter that is clearly relevant to the potential impact of the claim. The paucity of the material before the Commission renders it impossible for it to assess the implications of the claim on business or the national economy with any degree of precision. It also renders any assertion by the Unions that the grant of their claim will have little impact on business and/or the national economy[143] baseless.

[143] See for example SDA Outline of Submissions dated 16 February 2018 at paragraphs 112 – 115 and 123 – 125.

200. The evidence called by the Unions does not represent a robust, comprehensive or objective assessment of the cost of living, the climatic conditions or the alleged isolation suffered by employees living in the relevant locations at large. The Unions have not filed any statistically sound or reliable material that makes good the fundamental propositions that it relies on. That is:

a) employees living in each of the relevant locations do in fact face a higher cost of living than those who live in other locations;

b) the employees covered by the ASU Awards and SDA Awards are "low paid" for the purposes of s.134(1)(a) of the Act;

c) the relative living standards and needs of any such low paid employees warrant the introduction of a new monetary entitlement in the relevant awards;

d) employees living in each of the relevant locations face harsher climatic conditions than those who live in other locations;

e) any such harsher climatic conditions result in material consequences for the relevant group of employees that warrant the introduction of a new monetary entitlement in the relevant awards;

f) employees living in each of the relevant locations are isolated as compared to those who live in other locations;

g) any such isolation results in material consequences for the relevant group of employees that warrant the introduction of a new monetary entitlement in the relevant awards.

201. The Unions have instead sought to rely on the inherently self-serving evidence of just nine employees who give evidence regarding their *perception* of the cost of living, the climatic conditions and its consequences, the isolation and its consequences. Such evidence is self-evidently insufficient to ground a new entitlement to district allowances in the minimum safety net.

202. The evidence of those nine employees is not representative of employees covered by the relevant awards or in the relevant locations. Therefore, the evidence cannot be relied upon to establish any general propositions regarding employees or employers covered by the SDA Awards or ASU Awards, or about the SDA or ASU locations. As a Full Bench of the Commission recently stated in its decision regarding the ACTU's 'family friendly work arrangements' claim:

> **[361]** … But, importantly, lay witness evidence – whether led by the ACTU or the Employers – is *not* intended to be representative of the experience of *all* employees or employers covered by modern awards and it is not put forward on that basis.
>
> **[362]** The lay witness evidence puts a human face on the data and provides an individual perspective on the issues before us. It reflects the experience of the particular employees in seeking flexible working arrangements and of the particular employers in dealing with such requests. Such evidence is qualitative in character and is illustrative of the experience of employees and employers. By its nature, the evidence is *not* amenable to extrapolation and hence it cannot be said to be representative of the experience of all national system employees and employers.[144]

203. The fundamental difference between the case run by the union movement in the proceedings referenced above and the one here before the Commission is that in the former, some data was put before the Commission that went to the various matters there in issue. Whilst that material was not without its own difficulties, it provided the Commission with some generalised information based on a far greater number of employees than the lay witnesses called. In those circumstances, the Commission concluded that the evidence of the lay witnesses "put a human face" on the relevant data and provided an "individual perspective" on the issues. The lay witness evidence was *not*, however, relied upon to extrapolate any general propositions about employees or employers at large.

204. In the absence of any material that might enable the Commission to make general findings about any of the matters here in issue, the Commission should not rely upon the statements of individual lay witnesses to fill that void.

[144] *Family Friendly Working Arrangements* [2018] FWCFB 1692 at [361] – [362].

205. The evidence filed is limited to witnesses who are covered by only two of the five SDA Awards and two[145] of the seven ASU Awards. There is apparently no evidence before the Commission in relation to:

a) The Hair and Beauty Award;

b) The Vehicle Award;

c) The Ground Staff Award;

d) The Clerks Award;

e) The Legal Services Award;

f) The Rail Award; and

g) The SACS Award.

206. As a result, the Commission is unable to make any assessment as to whether:

a) There are in fact *any* employees covered by the aforementioned awards in the SDA and/or ASU Locations;

b) The employment arrangements of any such employees; or

c) The impact of an absence of an entitlement to district allowances in on employees covered by the relevant awards.

207. There is no evidence before the Commission in support of the Unions' contention that the above seven modern awards that are the subject of the Unions' claims should be varied as proposed in order to ensure that the relevant awards achieve the modern awards objective.

208. The testimony is also limited in terms of the specific locations to which it relates. For instance, the ASU's evidentiary case consists only of one witness

[145] We are unable to identify which modern award (if any) covers Jessica Rankin.

from Broken Hill[146], one from South Hedland[147] and one from Port Hedland[148]. There is no evidence before the Commission regarding the cost of living, climatic conditions, isolation or any other factor relied upon by the ASU in relation to *any* of the remaining 30 ASU Locations. No evidence has been called about any of the ASU Locations in Queensland or the Northern Territory.

209. Similar observations can be made about the SDA's evidentiary case. The provision proposed by the SDA variously describes the SDA Locations as shires, cities or towns. It appears to us that some of the 'shires' identified are large geographic regions, that include a number of smaller towns or cities. This is consistent with the SDA's characterisation of the SDA Locations.[149] Nonetheless, the evidence given by individual witnesses relates to the specific places in which they reside and/or work. By extension, the evidence that they give does not deal with an entire shire or region in which the SDA is seeking the introduction of an allowance. Such evidence does not establish any purported factual proposition about the relevant 'shire' at large and therefore, does not enable the Commission to assess whether any of the characteristics described by the witness about their place of residence/work are also relevant to the remainder of the area.

210. Further, it appears that none of the witnesses called by the SDA give evidence regarding the cost of living, climatic conditions, isolation or any other factor relied upon by the SDA in relation to any location within the Shire of Ashburton, the Shire of Derby-West Kimberley, the Shire of East Pilbara, the Shire of Exmouth, the Shire of Halls Creek, the Shire of Shark Bay, the Shire of Upper Gascoyne and the Shire of Wyndham-East Kimberley.

[146] Statement of Mark Lenton dated 23 February 2018.

[147] Statement of Malcolm Parker dated 23 February 2018.

[148] Statement of Jessica Rankin dated 23 February 2018.

[149] SDA Outline of Submissions dated 16 February 2018 at paragraph 13.

211. If the Unions seek to frame their claim by reference to the higher cost of living, climatic conditions and isolation faced in certain locations, it is incumbent upon them to bring evidence that goes to each of those alleged characteristics in each of the SDA Locations and ASU Locations. Whilst some of the witnesses tell of certain difficulties they face living in particular geographic locations, there is by no means sufficient evidence for the Commission to conclude that the insertion of the allowances proposed is necessary, in the sense contemplated by s.138, for each of the towns, locations or areas where they would be payable.

12. SECTION 138 AND THE MODERN AWARDS OBJECTIVE

212. In exercising its modern award powers, the Commission must ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net of terms and conditions taking into account each of the matters listed at ss.134(1)(a) – (h).

213. Additionally, the critical principle to flow from the operation of s.138 is that a modern award can only include such terms as are necessary to achieve the modern awards objective. The requirement imposed by s.138 is an ongoing one. That is, at any time, an award must only include terms that are necessary in the relevant sense. It is not a legislative precondition that arises only at the time that a variation to an award is sought.

214. We also note that each of the SDA Awards and ASU Awards, considered in isolation, must satisfy s.138. The statute requires that the Commission ensure that each award includes terms only to the extent necessary to ensure that the award, together with the NES, provides a fair and relevant minimum safety net. This necessarily requires an award-by-award analysis. An overarching determination as to whether district allowances should form part of the safety net is insufficient and does not amount to the Commission discharging its statutory function in this Review.

215. As we have earlier stated, the need for this approach is supported by s.156(5), which requires that the Commission review each award in its own right. We again note the following observations made by the Commission in its Preliminary Issues Decision: (emphasis added)

> **[33]** There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. <u>The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.</u>
>
> **[34]** Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be *no one set* of provisions in a particular award which can be said to provide a fair

and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.[150]

216. That the variations proposed by the Unions may not adversely affect all employers in an industry is not the test to be applied in determining whether the variations should be made. By virtue of s.3(g), the object of the Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by, amongst other matters, acknowledging the special circumstances of small and medium sized enterprises.

217. The respondent parties in these proceedings do not bear any onus to demonstrate that the claims will result in increased employment costs or otherwise adversely impact business in a certain industry or for employers covered by the relevant awards. No adverse inference can or should be drawn from the absence of evidence called by employer parties with respect to a particular award or from the absence of evidence that establishes that the claim will affect all or most employers in an industry.

218. The conduct of the Review differs from an inter-party dispute. Those responding to a claim do not bear an onus. Rather, it is for the proponent of a claim to establish that the variation proposed is necessary in order to ensure that an award is achieving the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions. In determining whether a proponent has in fact established as much, the Commission will have regard to material before it that addresses the various elements of the modern awards objective, including those that go to employment costs, the regulatory burden, flexible work practices and productivity. These considerations are both microeconomic and macroeconomic; they require evaluation with respect to the practices of different types of businesses as well as industry at large.

[150] *4 yearly review of modern awards: Preliminary jurisdictional issues* [2014] FWCFB 1788 at [33] – [34].

219. As the Full Bench stated in the Preliminary Issues Decision: (emphasis added)

> The proponent of a variation to a modern award must demonstrate that if the modern award is varied in the manner proposed then it would only include terms to the extent necessary to achieve the modern awards objective (see s.138). What is 'necessary' in a particular case is a value judgment based on an assessment of the considerations in s.134(1)(a) to (h), having regard to the submissions and evidence directed to those considerations[151]

220. It is therefore for the proponents to overcome the legislative threshold established by ss.138 and 134(1), which includes a consideration of the impact upon different types of businesses and industry at large.

221. For all the reasons we have set out in this submission, the SDA and the ASU have *not* overcome that threshold. They have failed to mount a case that establishes that the provisions proposed are necessary to ensure that each of the ASU and SDA Awards meet the modern awards objective.

222. In the submissions that follow, we consider the elements that comprise s.134(1) of the Act.

A Fair Safety Net

223. The notion of 'fairness' in s.134(1) is not confined in its application to employees. Consideration should also be given to the fairness or otherwise of an award obligation on employers. So much was confirmed by the Commission in its Penalty Rates Decision:

> **[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)* 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:

[151] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

> ‘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 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.’

[119] While made in a different (albeit similar) statutory context the above observation is apposite to our consideration of what constitutes a ‘*fair* … safety net’ in giving effect to the modern awards objective. …[152]

224. The imposition of the new obligation sought on employers to pay the proposed allowances is unfair to employers for the reasons that follow.

225. **First**, the claim, if granted, will impose an ongoing unjustifiable cost and regulatory burden on employers, which is unfair. This is particularly relevant in circumstances where transitional district allowances were inserted in modern awards on the basis that they would be retained only for a limited period of time, giving interested parties and the Commission an opportunity to consider whether they should become an ongoing feature of the modern awards system. In the matter here before the Commission, due to the scarce material before it, respectfully, the Commission is not able to undertake the fulsome review envisaged by the AIRC for the purposes make making the requisite assessment. The grant of the claim in those circumstances would be unfair to employers.

[152] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [117] – [119].

226. **Second**, there is some ambiguity that arises from the Unions' cases as to whether the allowances are sought on the basis that employees should be compensated for "disabilities associated with the performance of particular tasks or work in particular conditions or locations" (per s.139(1)(g)) or whether, as their submissions and evidence generally tend to suggest, the allowances are sought on the basis that employees should be compensated for the cost of living, climatic conditions and isolation they allegedly face in their day-to-day lives by virtue of the fact that they live in the relevant locations.

227. If it is the former; there is clearly insufficient evidence before the Commission in order for it to draw any reliable conclusions regarding the disabilities associated with the performance of particular tasks or work that is undertaken by employees covered by the ASU or the SDA Awards in the ASU or SDA Locations.

228. Further, an obligation to pay a district allowance which addresses factors that are, in part, already compensated for by other allowances directed towards disabilities associated with the performance of particular tasks/work in particular conditions/locations is not a fair outcome for employers. For instance, the SACS Award contains an obligation to pay a 'heat allowance'[153].

229. If it the latter, (i.e. the allowances are sought by the Unions on the basis that employees should be compensated for the cost of living, climatic conditions and isolation they allegedly face in their day-to-day lives by virtue of the fact that they live in the relevant locations) the inclusion of such an allowance in the minimum safety net would be unfair to employers. There is no evidence that employees covered by the ASU or the SDA Awards are *required* by their employers to work or reside in the ASU or SDA Locations.

230. It is unfair to introduce a financial obligation on employers to pay an additional allowance to employees who elect to reside and work in a particular location, despite the allegedly higher cost of living, harsh climate and isolation. Indeed, such employees may be choosing to reside in the relevant locations for any

[153] Clause 20.7 of the SACS Award.

number of personal reasons including the employment arrangements of their spouse/partner, the area in which their extended family resides or simply a personal preference.

231. **Third,** as we have stated earlier in our submissions, there are already government-funded forms of assistance in place for persons living in regional and remote areas. It is not fair that the role of such schemes is shifted to employers. To the extent that the Unions consider that such forms of assistance are insufficient, that is a matter for another forum. It is unfair to place the burden of any such perceived deficiencies on individual employers.

232. **Fourth,** if the Unions' assertions regarding the alleged cost of living, climatic conditions and isolation are accepted, it must necessarily follow that employers operating in the SDA and ASU Locations also face the same challenges. For example, employers would be facing:

a) higher delivery-related costs in respect of the goods that they sell;

b) higher costs in respect of any goods locally purchased to provide their services; and

c) higher electricity prices due the climatic conditions.

233. In such circumstances, it is not fair to impose an additional financial obligation on employers who themselves are suffering from many of the consequences that allegedly flow from being located in one of the SDA or ASU Locations.

234. **Fifth,** if district allowances are to be included in awards, a uniform and transparent method for setting and adjusting district allowances must be developed in order to ensure fairness and consistency between employees vis-à-vis employers; employees vis-à-vis employees and employers vis-à-vis employers. This concern was raised by the AIRC when modern awards were made.[154]

[154] *Award Modernisation* [2008] AIRCFB 717 at [28] and *Award Modernisation* [2008] AIRCFB 1000 at [180].

235. We provide the following example of an unfairness that can arise where district allowances are introduced without a proper basis for their fixation. The cost of living has arguably increased in Sydney over recent years. This is due in large part due to the real estate market. Further, some might argue that the climate has become hotter and electricity prices have also increased which, combined, have further increased the cost of living. It might simplistically be asserted that on these bases, employees in Sydney should therefore be entitled to a special allowance and that it is *unfair* that they do not receive such an entitlement in circumstances where an employee in facing the same or a lower cost of living *does* receive a special allowance.

236. We have earlier dealt with concerns arising from the method of fixation and adjustment proposed by the Unions in detail. In our view, they have failed to develop a fair, relevant, consistent or appropriate method of fixation or adjustment.

237. **Sixth,** the Commission has taken into account the "circumstances of different regions"[155] including "challenges currently facing certain regions and sectors as a result of the transition taking place in the economy and other factors including natural disasters"[156] when reviewing the minimum wage in 2017. The Commission also takes into account the rate of inflation, which is necessarily a national measure and therefore includes the changing price of a 'basket of goods' across Australia including the SDA and ASU Locations.[157]

238. The introduction of an allowance that effectively compensates employees for the cost of living which is already taken into account when setting the minimum award wage amounts to double-dipping and is blatantly unfair.

239. **Seventh,** issues pertaining to fairness also arise from the specific terms of the proposed clauses. For instance, we refer to the submissions we have earlier made regarding the ASU's proposal that employees with "dependents" or

[155] *Annual Wage Review 2016 – 2017* [2017] FWCFB 3500 at [94].

[156] *Annual Wage Review 2016 – 2017* [2017] FWCFB 3500 at [94].

[157] *Annual Wage Review 2016 – 2017* [2017] FWCFB 3500 at [274] – [275].

"partial dependents" must be paid additional amounts. The imposition of such a requirement is self-evidently unfair and unjustifiable. The modern awards system is not a social welfare system.

A Relevant Safety Net

240. We respectfully adopt the Full Bench's conclusion as to the meaning of 'relevant' in the Penalty Rates Decision:

> **[120]** … In the context of s.134(1) we think the word 'relevant' is intended to convey that a modern award should be suited to contemporary circumstances. …[158]

241. The introduction of district allowances is not suited to contemporary circumstances for the reasons that follow.

242. **First,** the irrelevance of district allowances in the Northern Territory was clearly accepted by the ACAC in 1984[159], by the AIRC in 2008[160] and by the Commission in 2015[161]. The ASU has not provided any explanation as to why the Full Bench as presently constituted should depart from those decisions in this regard.

243. **Second,** to the extent that the Unions rely on arguments regarding the cost of living, we point to our submissions at chapter 10. The introduction of a new allowance in circumstances where the only relevant material before this Commission demonstrates that the cost of living in the SDA Locations has *fallen* in recent times and may continue to do so, cannot be said to form part of a 'relevant' safety net.

244. **Third,** the Unions rely on the climatic conditions in the SDA and ASU Locations as a basis for their claims. The SDA relies on the *Relative Strain Index* which is produced by the Bureau of Meteorology. As we understand the

[158] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [120].

[159] *District Allowance Clauses – Northern Territory Awards,* Print F4832.

[160] *Award Modernisation* [2008] AIRCFB 1000 at [81].

[161] *4 yearly review of modern awards – transitional provisions* [2015] FWCFB 644 at [56].

SDA's submission, the SDA Locations experience approximately 50 days or more of relative discomfort per year.[162]

245. Fifty days represents only 14% of the calendar year. No reliable information regarding the climatic conditions in the specific SDA Locations is available on the material. Furthermore, the material certainly does not establish the subsistence of consequences flowing from any "harsh" climatic conditions that might justify the introduction of an allowance. Even if the Commission were to accept that the 36 year old map attached to the SDA's submissions[163] should be relied upon, it says nothing of the extent to which persons in the SDA Locations can more readily deal with hotter conditions than they might previously have been able to. There is no basis for proceeding on the assumption that any historical justification for district allowances that was premised on the consequences of the then climatic conditions is still relevant.

246. **Fourth,** the same can be said of the alleged isolation. There is no objective analysis of the extent to which persons in the SDA or ASU Locations do or do not have access to basic goods, services and amenities. Rather, the Unions rely solely on the evidence of their witnesses, which we have previously addressed.

247. To the extent that the Unions complaints relate to employees having access to fewer options for "clothes shopping"[164], an internet connection that does not enable one to "watch movies over the internet"[165], the absence of a "squash court or ten pin bowling"[166], that the relevant area "doesn't have a lot of events to go on in town"[167] and so on; these are matters that are self-evidently not relevant to the maintenance of a safety net. The creation of a financial

[162] SDA Outline of Submission dated 16 February 2018 at paragraphs 60 – 63.

[163] SDA Outline of Submission dated 16 February 2018 at paragraphs 62 – 63 and Attachment SDA-3

[164] Witness statement of Foon Meng Cheng at paragraph 38.

[165] Witness statement of Foon Meng Cheng at paragraph 43.

[166] Witness statement of David Carter at paragraph 24.

[167] Witness statement of Shania Simons at paragraph 24.

obligation on employers in order to facilitate employees undertaking recreational activities is entirely inappropriate and unfair.

248. Further, as we have earlier observed, we consider that the Commission can take it on notice that means of communication and transportation have improved over the decades in Australia. It necessarily follows that reliance historically placed on factors associated with any perceived isolation of the relevant locations cannot be assumed to still prevail.

249. As the SDA appropriately concedes: (our emphasis)

> In the circumstances, it would be open to the FWC to be satisfied that the SDA's proposal is necessary in order to achieve the modern awards objective **if** the FWC is satisfied of the **continued** existence of the disabilities that have historically justified district allowances in the SDA Regions, particularly by cost of living, climate and isolation.[168]

A Minimum Safety Net

250. Modern awards are intended to afford employees with a minimum safety net, which includes the very basic entitlements to be provided to employees covered by the SDA and ASU Awards, noting that the system underpins an enterprise bargaining regime that is to be encouraged (s.134(1)(b)). The very notion of a minimum safety net suggests that the relevant set of terms and conditions represent the essential rights and protections that must be afforded to all employees and employers.

251. A minimum safety net is *not* intended to reflect the union movement's wish list for any number of additional terms and conditions that it considers desirable, such as the provisions here sought by the SDA and ASU. Matters such as these are more appropriately dealt through enterprise bargaining.

252. We again note that any assertion that an entitlement to district allowances has been or is already part of the minimum safety net is disputed. We have dealt with this earlier in our submission and need not repeat the arguments we have made in support of the proposition that district allowances, to the extent that

[168] SDA Outline of Submission dated 16 February 2018 at paragraph 37.

they existed in pre-modern awards, were not universal in their application. What is now sought by the Unions' is a new entitlement.

Section 134(1)(a) – The Relative Living Standards and Needs of the Low Paid

253. The Unions assert that the absence of district allowances will have a significant impact on low paid employees. We note that the proposed allowances are not, however, limited in their application to those that could be categorised as low paid.

254. The *Annual Wage Review 2016 - 2017* decision dealt with the interpretation this provision:

> **[361]** The assessment of relative living standards requires a comparison of the living standards of workers reliant on the NMW and minimum award rates determined by the Review with those of other groups that are deemed to be relevant and focuses on the comparison between low-paid workers (including NMW and award-reliant workers) and other employed workers, especially non-managerial workers.
>
> **[362]** The assessment of the needs of the low paid requires an examination of the extent to which low-paid workers are able to purchase the essentials for a 'decent standard of living' and to engage in community life, assessed in the context of contemporary norms.[169]

255. The Unions have failed to undertake the requisite analysis that might otherwise permit them to rely on s.134(1)(a). That is, they have not:

a) Established that the relevant group of employees to whom the district allowances would be payable are "low paid" in the sense described above. Indeed we note that one of the witnesses called by the ASU receives an annual salary of $100,000[170];

b) Assessed the needs of those low paid employees by way of an examination of the extent to which those employees are able to purchase the <u>essentials</u> for a "decent standard of living" and to engage in community life; or

[169] *Annual Wage Review 2016 – 2017* [2017] FWCFB 3500 at [361] – [362].

[170] Statement of Mark Lenton at paragraph 6.

c) Assessed relative living standards by comparing the living standards of employees reliant on minimum award rates with other groups that are deemed relevant.

256. The absence of material before the Commission going to the above factors does not enable it to reach the conclusion that location allowances proposed are warranted by virtue of s.134(1).

257. The Unions rely upon the higher cost of living in remote and regional areas in support of their contention that the variations proposed are necessary to maintain the relative living standards and needs of the low paid. We have dealt with these arguments earlier in our submissions and do not repeat them here.

258. We also note that to the extent that the Unions rely on the payment of district allowances to state-system employees[171] or the ADF[172], such matters are entirely irrelevant to the Commission's consideration of its claim.

Section 134(1)(b) – The Need to Encourage Collective Bargaining

259. We note first and foremost that s.134(1)(b) requires the Commission to take into account the need to encourage collective bargaining. It does not require the Commission to consider the likely outcomes of such bargaining. Whether enterprise bargaining is likely to result in the inclusion or otherwise of district allowances is besides the point. This provision requires the Commission to turn its mind to whether parties will be encouraged to engage in a process of collective bargaining. Complaints made by the Unions that the absence of such allowances will reduce the incidence of district allowances in enterprise agreements[173] are of no relevance to these proceedings.

260. The absence of an award provision requiring the payment of district allowances will leave greater room for bargaining and may incentivise employers and employees to negotiate terms and conditions that are specific

[171] SDA Outline of Submissions dated 16 February 2018 at paragraph 36(a)(i).

[172] SDA Outline of Submissions dated 16 February 2018 at paragraphs 95 – 97.

[173] Witness statement of Peter O'Keefe dated 16 February 2018 at paragraphs 20 – 27.

to their location and conditions of employment. On the SDA's own evidence, it is apparent that district allowances are a matter commonly negotiated between an employer, its employees and the union. Further, Mr O'Keeffe has testified that "the vast majority" of the SDA's Western Australian members working in the relevant locations are covered by enterprise agreements.[174] Indeed, of the 549 such members, only 6 are reliant on the relevant modern award.[175] The SDA appears to have successfully overcome any alleged "difficulties for unions to organise workers in the SDA Locations"[176].

261. The development of terms and conditions that address circumstances inherent to a particular geographic area should be determined at the enterprise level between an employer and its employees. This is particularly relevant in a federal system where modern awards apply nationally, as acknowledged by the AIRC during the Part 10A Award Modernisation Process.

262. The need to pay a district allowance to encourage employees to work in remote locations (if at all) may vary between enterprises. For instance, it may be that the employees of a certain business are pre-existing residents of the area and therefore, an incentive payment is not necessary. This is most likely to be the case in industries such as the retail and fast food industries. In other circumstances, such as major construction projects where labour is required from interstate, the employer and employees may negotiate the inclusion of an allowance in an enterprise agreement. Alternatively, an employer may consider negotiating an alternate means of attracting and retaining employees, such as through other above award payments, or fly-in, fly-out arrangements.

[174] Witness statement of Peter O'Keefe dated 16 February 2018 at paragraph 11.

[175] Witness statement of Peter O'Keefe dated 16 February 2018 at paragraph 11.

[176] SDA Outline of Submissions dated 16 February 2018 at paragraph 99.

263. The determination of whether an allowance is paid to encourage employee participation and if so, the quantum of such an allowance, should be left to enterprise-level negotiations as this encourages collective bargaining.

264. The significance of this element of the modern awards objective is reinforced by s.3(f) of the FW Act, which emphasises the importance of enterprise bargaining.

Section 134(1)(c) – The Need to Promote Social Inclusion through Increased Workforce Participation

265. In the Penalty Rates Decision, the Commission dealt with the proper interpretation of s.134(1)(c) of the Act: (emphasis added)

> **[179]** Section 134(1)(c) requires that we take into account 'the need to promote social inclusion through increased workforce participation'. The use of the conjunctive 'through' makes it clear that in the context of s.134(1)(c), social inclusion is a concept to be promoted exclusively 'through increased workforce participation', that is obtaining employment is the focus of s.134(1)(c).[177]

266. There is no material before the Commission to suggest that the proposed clause would promote increased employment. Similarly, the Commission cannot be satisfied that its absence is having an adverse effect on the need to increase workforce participation.

267. The Unions assert that the payment of the various district allowances proposed will encourage employees to seek and remain in employment in regional and remote areas. There is no probative evidence in support of this contention before the Commission in these proceedings. The relevance of a study regarding Queensland school teachers employed by the State Government, upon which the SDA relies, is of little relevance.[178]

268. There is no evidence before the Commission that the payment of such allowances acts as an incentive and enables recruitment and retention of employees in those locations where the allowance was payable until the

[177] *4 yearly review of modern awards – Penalty rates* [2017] FWCFB 1001 at [179].

[178] SDA Outline of Submission dated 16 February 2018 at paragraph 107.

cessation of the transitional district allowance clause. Similarly, the Unions have not provided any evidence that suggests that in the absence of a district allowance, workforce participation will decrease or indeed has decreased. Rather, to the extent that the additional expense incurred by an employer discourages it from engaging employees in such areas, this will clearly adversely affect workforce participation.

Section 134(1)(d) – The Need to Promote Flexible Modern Work practices and the Efficient and Effective Performance of Work

269. The grant of the claims is not consistent with this element of the modern awards objective. To the extent that the payment of an allowance, which differs in quantum from location to location, creates unfairness and inequality between work performed in different towns/locations, this may impact on labour mobility, which is contrary to the need to promote flexible work practices. It is not unforeseeable that an employee may, for instance, be unwilling to relocate or work at a different location at which no district allowance is payable, or a lesser amount is payable.

Section 134(1)(da) – The Need to Provide Additional Remuneration

270. This is a neutral consideration in this matter.

Section 134(1)(e) – The Principle of Equal Remuneration for Work of Equal or Comparable Value

271. This is a neutral consideration in this matter.

Section 134(1)(f) – The Likely impact on Business, including on Productivity, Employment Costs and the Regulatory Burden

<u>Employment Costs</u>

272. The claims, if granted, will self-evidently impose additional employment costs on employers. This is not a matter than can be trivialised. The quantum proposed by the ASU is as high as $101 per week in many locations in

Western Australia. Where that employee has a dependent, they would be paid an additional $202 per week.

273. It must also be remembered that the proposed allowance will give rise to an additional expense in relation to *each* employee employed by an employer in the relevant locations. A small business in a regional area with five employees, each of whom have a "dependent", would cost the business an additional $1,000 per week. Submissions regarding the significant financial impact upon such an employer, particularly a small business, cannot be ignored.

274. Further, if the Unions' evidence and arguments regarding the higher cost of living in locations such as those specified is accepted, then the same must conversely apply to employers operating in such locations too. They are also faced with higher costs, making any addition to their employment expenses more difficult to absorb.

275. We refer the Commission to a research report that was published in the context of the 2013 – 2014 annual wage review regarding levels of award reliance.[179] For the purposes of the report, an "award-reliant employee" is defined as an "employee who has their pay set according to the relevant award rate specified for their classification and not above that relevant rate". At page 18, the report shows that a much higher proportion of non-public sector organisations in regional/rural locations were award-reliant compared to organisations in metropolitan areas. This was the case across all organisation sizes. Importantly, Table 3.26 demonstrates that award-reliant businesses face a relatively high proportion of costs as labour costs. It follows that a new award obligation that applies to employers in regional/rural areas will necessarily increase employment costs incurred by those employers. Given the high level of award-reliance amongst businesses in regional/rural areas, it cannot be assumed that those costs will be subsumed by over-award payments already due to an employee.

[179] Wright S and Buchanan J, *Research Report 6/2013: Award Reliance,* Workplace Research Centre, University of Sydney Business School (December 2013).

Regulatory Burden

276. The provisions proposed also impose a new and significant regulatory burden on employers. This is particularly so in relation to the ASU's claim. We have previously dealt with the additional obligations the proposed clause imposes on employers regarding the payment of the allowance where an employee has a dependent/partial dependent and in certain circumstances where the employee is on leave, which would have the effect of increasing the regulatory burden on employers.

Section 134(1)(g) – The Need to Ensure a Simple, Easy to Understand, Stable and Sustainable Modern Award System for Australia that Avoids Unnecessary Overlap of Modern Awards

Simple and Easy to Understand

277. The purpose of the Award Modernisation Process was to simplify the award system. So much is made clear by the Award Modernisation Request and s.576A(2)(a) of the *Workplace Relations Act 1996*, which stated that modern awards must be simple to understand and easy to apply, and must reduce the regulatory burden on business.

278. We have dealt with some of difficulties that arise from the terms of the proposed provisions earlier in these submissions. Our submissions there demonstrate that the clauses are by no means simple or easy to understand. Various ambiguities and potential anomalies arise from the draft clauses. Their introduction to the award system is contrary to s.134(1)(g).

Stable System

279. The need to maintain a stable modern award system runs contrary to the Unions' claims. This element of s.134(1) must be seen in light of the history of such allowances, the decision of the AIRC during the Award Modernisation Process to include district allowances on a transitional basis, and the absence of a proper evidentiary case before the Commission in these proceedings.

280. Whilst the AIRC contemplated a full and proper review of district allowances at a later date,[180] the material filed by the Unions is not sufficient to enable the Commission to make such an assessment in this Review. The submissions and evidence relied upon in these proceedings do not constitute a "full examination" of such allowances, as envisaged by the Full Bench when the awards were made.

281. The Unions have failed to mount a case that can or should move the Commission to adopt its proposals. The need to maintain a stable award system tells against granting the Unions' claims in the complete absence of a proper and convincing evidentiary case.

Section 134(1)(h) – The Likely Impact of any Exercise of Modern Award Powers on Employment Growth, Inflation and the Sustainability, Performance and Competitiveness of the National Economy

282. To the extent that the insertion of the provisions proposed is inconsistent with ss.134(1)(b), (d), (f) and (g), the Unions' claims are also likely to adversely impact employment growth, inflation and the sustainability, performance and competitiveness of the national economy**.**

[180] *Award Modernisation* [2008] AIRCFB 1000 at [82].