

IN THE FAIR WORK COMMISSION

AM 2015/305

**FOUR YEARLY REVIEW OF MODERN AWARDS - DISTRICT
ALLOWANCES**

**SUBMISSIONS IN REPLY FILED ON BEHALF OF
NSWBC AND ABI**

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Australian Business Lawyers & Advisors
Level 10, 140 Arthur Street
NORTH SYDNEY NSW 2060



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A. BACKGROUND

1. BACKGROUND TO THE UNION APPLICATIONS

1.1 These proceedings have a complex history.

1.2 While the entirety of this background is now no longer of central relevance to the Full Bench, these submissions should be understood within the following context:

- (a) On 30 September 2014, the Australian Municipal, Administrative, Clerical and Services Union filed a substantive application for location allowances to be inserted into 11 awards (**ASU claim**).
- (b) On 17 December 2014, the Shop, Distributive and Allied Employee's Association filed a substantive application for location allowances to be inserted into in relation to 5 awards (**SDA claim**).
- (c) The ASU and SDA claims were listed to be heard on 28 and 29 May 2015 before a Full Bench comprised of Justice Boulton, Deputy President Kovacic, and Commissioner Bull (as he then was).
- (d) On 19 May 2015, the Australian Chamber of Commerce and Industry (**Australian Chamber**) sought an adjournment of the hearing of the ASU and SDA claims, pending the outcome of its application to the Federal Court of Australia for judicial review of the Full Bench's decisions in [2014] FWCFB 7767 and [2015] FWCFB 644. Such decisions had introduced a location allowance into 5 Modern Awards paid in compensation for "*the exigencies of working in Broken Hill*" (**Broken Hill Allowance**). The adjournment of these proceedings was granted on 25 May 2015.
- (e) On 14 September 2015, the Full Bench of the Federal Court of Australia (North, Buchanan and Flick JJ) dismissed the Australian Chamber's application: *Australian Chamber of Commerce and Industry v Australian Council of Trade Unions* [2015] FCAFC 131 (**Federal Court Decision**).
- (f) On 7 April 2016, Vice President Watson of a newly constituted Full Bench in these proceedings provided further directions as follows:
 - (i) The applicant unions should file any amended submissions and further evidence by no later than 4:00pm on Friday, 15 April 2016.
 - (ii) The employer parties should file any amended submissions and further evidence by no later than 4:00pm on Friday, 6 May 2016. This date was subsequently extended until 13 May 2016.
- (g) On 11 April 2016, the SDA filed updated submissions and evidence in accordance with the directions outlined above (**SDA Amended Submissions**).

1.3 These submissions respond to the SDA Amended Submissions and provide ABI's and NSWBC's position in respect of both the ASU and SDA claims as they currently understand them.

2. THE FEDERAL COURT DECISION

2.1 Given the context in which these submissions are filed, it is appropriate at the outset to address the Federal Court Decision.

2.2 The Full Bench in the Federal Court Decision determined that:

- (a) The Broken Hill Allowance was a disability allowance for a particular location within the meaning of s 139(1)(g)(iii) of the *Fair Work Act 2009* (Cth) (**FW Act**) and was accordingly a term which may, prima facie at least, be included in a modern award.¹
- (b) Section 154 of the FW Act, did not prohibit disability allowances for *particular* locations, or for *a* particular location, such as Broken Hill.²
- (c) The Broken Hill Allowance was permissible under the FW Act.³

2.3 Flick J at [53] of the Federal Court Decision noted that:

"If it can be established that there are in fact "disabilities associated with the performance of particular tasks or work in particular conditions or locations", s 139(1)(g)(iii) permits an allowance to be paid in recognition of the "disabilities" under which a worker is employed."

2.4 While the above summary is consistent with the position put by the SDA in the Amended SDA Submissions, it should be noted that mere permissibility under ss 139 or 154 of the FW Act is insufficient within the context of the 4 Yearly Review to warrant the inclusion of a proposed variation.

2.5 Accordingly, ABI and NSWBC cautions against an approach whereby the mere establishment of *"disabilities associated with the performance of particular tasks or work in particular conditions or locations"* would give rise to a successful claim in these proceedings. In fact, in the submission of ABI and NSWBC, the relevant task of the Full Bench in these proceedings is to determine whether:

- (a) the SDA and ASU have advanced a case as contemplated by the Preliminary Issues decision⁴ such as to warrant the Commission exercising its discretion pursuant to s 139 of the FW Act;
- (b) any such exercise of discretion is consistent with s 134 of the FW Act; and
- (c) the inclusion of location allowances (along with any other changes to the modern award concerned) at the conclusion of the 4 Yearly Review would be consistent with s 138.

These requirements will be expanded on below.

1 See [2015] FCAFC 131at [30] per Buchanan J

2 Ibid at [40]

3 Ibid at [41]

4 See Preliminary Issues Decision [2014] FWCFB 1788, at [60]

B. NATURE OF THE CLAIMS

The SDA and ASU claims are materially different in character.

3. ASU CLAIMS

3.1 The ASU claims, which have not been updated since the Federal Court Decision, do no more than incorporate town-based location allowances that had appeared in various pre-reform awards. Such claims seek a “*district allowance*” (of varying amounts based on amounts applied in the Australian Defence Force(ADF)) to be paid “*in compensation of the general disadvantages associated with living in such locations including climate, isolation and cost of living*” in 10 modern awards. These location allowances are to be paid to employees “employed in”:

- (a) NSW - 2 named towns/locations;
- (b) Northern Territory - 7 named towns/locations;
- (c) Queensland - 15 named towns/locations;
- (d) Western Australia - 57 named towns/locations;
- (e) Christmas Island; and
- (f) Cocos Island.

4. SDA CLAIMS

4.1 The SDA claims outlined in the Amended SDA Submissions apply to 5 Awards (**SDA Awards**).

4.2 The “*First Model*” proposed by the SDA Amended Submissions seeks the introduction of the following clause into the SDA Awards:

- (a) *An employee in a location more than 450km but less than 900km by geodesic distance from any state or territory capital will in addition to all other payments be paid an allowances per week of [x]% of the standard rate, for the disadvantages of working in that location.*
- (b) *An employee in a location more than 900km by geodesic distance from any state or territory capital will in addition to all other payments be paid an allowances per week of [x]% of the standard rate, for the disadvantages of working in that location.*
- (c) *Employees in the towns of Townsville and Cairns in the State of Queensland would not be eligible for these allowances, given that those towns are large regional centres which do not appear to be considered remote by the Australian Bureau of Statistics.*

4.3 The “*Second Model*” proposed by the SDA in the alternative, is as follows:

- (a) *An employee in a location listed in a location listed in X.1 of Schedule [X] will in addition to all other payments paid an allowances per week of [x]% of the standard rate, for the disadvantages of working in that location.*
- (b) *An employee in a location listed in a location listed in X.2 of Schedule [X] will in addition to all other payments paid an allowances per week of [x]% of the standard rate, for the disadvantages of working in that location.*

- 4.4 The SDA proposes that if the Full Bench determines there is a basis for the inclusion of location allowances, the Commission may order interested parties to form a “*Working Party*” to determine the appropriate quantum of allowances and the locations in which those allowances should be paid.
- 4.5 ABI and NSWBC oppose the ASU and SDA claims.

C. THE LEGISLATIVE FRAMEWORK APPLICABLE TO THE CLAIMS

5. THE 4 YEARLY REVIEW

- 5.1 The SDA and ASU claims are being advanced as part of the 4 Yearly Review of modern awards. The legislative requirements relevant to the 4 Yearly Review have been outlined many times during the review, including relevantly in the Australian Chamber’s reply submissions filed in these proceedings on 17 April 2015.
- 5.2 For the purposes of these submissions, it is relevant to identify the following principles:
- (a) At the commencement of the 4 Yearly Review, modern awards are prima facie taken to meet the modern awards objective (section 134 (1))⁵ and that, at the time of creation, the modern awards which are the subject of the SDA and ASU claims met the modern awards objective without the clauses sought by the unions (and in fact without any substantive district allowances clause at all).
 - (b) Section 134(1) sets out the modern awards objective. The objective requires that modern awards along with the National Employment Standards provide a “*fair and relevant minimum safety net*” of terms and conditions. What is “*fair and relevant*” is conditioned by the requirement to take into account the matters set out in section 134(1)(a) to (h) of the Act to create a “*minimum safety net*”.
 - (c) Section 138 effectively limits the content of a modern award “*only to the extent necessary*” to achieve the modern awards objective and the minimum wages objective, and must necessarily be read alongside section 134 and section 284 of the FW Act.
 - (d) The discretion conferred on the Commission to make determinations varying modern awards is expressed in general terms. However, the need for a “*stable*” modern award system suggests that parties seeking to vary a modern award must advance a merit argument in support of the proposed variation.⁶
 - (e) When considering the merit basis to make variations, the Preliminary Issues Decision held that:
 - (i) there may be cases where the need for an award variation is self-evident. In such circumstances, proposed variations can be determined with little formality;⁷ and
 - (ii) where significant award changes are proposed, they must be supported by submissions which address the legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting

⁵ See *Preliminary Issues Decision*, [2014] FWCFB 1788, at [60]

⁶ *Preliminary Issues Decision* at [60]

⁷ *Preliminary Issues Decision* at [23] and [60]

the proposed variation.⁸

- 5.3 It is an understatement to say that the SDA and ASU claims are substantial and wide ranging.
- 5.4 In such circumstances, based on the Preliminary Issues Decision, probative evidence will be required to move the Commission to grant the SDA and ASU claims.
- 5.5 Prior to an assessment of the evidence supporting the ASU and SDA claims, a number of deficiencies in the form of the proposed claims will be explored below.

D. ASU CLAIMS

6. SELECTION OF SCALE

- 6.1 The ASU have purportedly used the location allowance model of the Australian Defence Force in constructing its claim.
- 6.2 In the submission of ABI and NSWBC, the ASU's explanation of its reliance on the "*rationale of ADF district allowances in the draft determinations*" is entirely insufficient for the purposes of the 4 Yearly Review and the requirements of the FW Act noted above.
- 6.3 With respect, in order to grant the ASU claims, the Full Bench would require an evidentiary and theoretical foundation for the adoption of ADF location allowances which is exponentially stronger than a mere assertion that:

... the ADF District Allowances represent:

- *A clear and consistent rationale for recognising remote location and calculating an allowance;*
- *Not restricted by State or Territory boundaries or instruments.*⁹

- 6.4 No attempt has been made to explain the formula used, its connection to relative disadvantage or why the model for Australian servicemen and women is necessarily translatable to the industries subject to the claims. Given that the allowance is a fixed price model this is especially problematic as no attempt has been made to compare the financial situation of defence force personnel with award dependent individuals in the relevant modern awards subject to the claim. No explanation as to why these rates would be applicable in modern awards has been offered.
- 6.5 In short, the Full Bench would need to be satisfied that the claimed amounts (which in some cases are substantial) bear a sufficient relationship with the purported relative disadvantage that they are intended to cure. No evidence has been provided for this relationship and accordingly the selection of the monetary amounts for each of the ASU claims appears to be, at least in the context of the 4 Yearly Review, entirely arbitrary.

7. NONSENSICAL RESULTS

- 7.1 When considering the ASU claims as drafted, it is also important to note that such claims, if granted, will give rise to a number of nonsensical results.
- 7.2 Two examples already identified by the Full Bench¹⁰ are the allowances included in the ASU

⁸ Ibid

⁹ See ASU Submission at [18]

claims for the towns of Wittenoom and Goldsworthy in Western Australia.

- 7.3 As at June 2007, the town of Wittenoom was officially de-gazetted¹¹ meaning it is no longer a recognised town, no longer receives government services and no longer is included on maps when they are made. Similarly, Goldsworthy in Western Australia no longer exists having been disbanded in April 1993.
- 7.4 While the non-existence of these towns presumably creates an irresistible argument against the creation of allowances for employees working within them, the fact that the towns have been included in the ASU claims merely serves to demonstrate the potential risks for the Commission in proceeding to create location allowances without proper and comprehensive evidence to support such clauses.

8. PROBLEMS WITH ADJUSTMENT

- 8.1 The form of the clauses used in the ASU claim also sit uncomfortably with the standard method for setting out allowances.
- 8.2 In Award Modernisation¹² the Commission determined how it would set out work related allowances in a standard form as a fixed percentage of a standard rate in a modern award.
- 8.3 Location allowances operate by fixing many allowances as a monetary amount but these are then usually qualified in terms of whether or at what amount they are paid.
- 8.4 In Award Modernisation¹³ the Commission said about district allowances:

...if they are to be part of the modern award system, there must be a consistent and fair national basis for their fixation and adjustment.

- 8.5 This has not been addressed by the ASU.
- 8.6 The ASU claims operate in a way that is as far removed from the standard form adopted by the Commission for expressing allowances in a modern award.
- 8.7 In our submission, this adds weight to why the Commission should not exercise any discretion pursuant to s 139 in favour of the ASU claim.
- 8.8 If the intention of the ASU claim is for the allowances to be varied periodically (and it seems to be the type of allowance that would be so varied), then s 149 of the FW Act applies, which states:

If a modern award includes allowances that FWC 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.

- 8.9 Should the Commission include a location allowance within a modern award, consideration would need to be given as to how it is varied. If such an allowance was of a nature that warranted it being varied in alignment with wages then s 149 would require the inclusion of terms providing for automatic variation.

¹⁰ See Transcript of 30 October 2014 at PN1752

¹¹ See <http://www.lands.wa.gov.au/Wittenoom>

¹² [2008] AIRCFB 1000 paragraphs 74 to 78

¹³ *Ibid* paragraph 80

E. SDA CLAIM

9. THRESHOLD ISSUE: LACK OF IDENTIFICATION OF THE CLAIMS

- 9.1 A threshold issue exists in assessing both the First and Second Models of the SDA claim in that the SDA has not identified the relevant quantum of the allowances sought.
- 9.2 Instead of outlining in its application the relevant scope of its claim and seeking to support such a claim in evidence, the SDA submits as follows:
- 57. It is noted that both models above do not include proposed amounts, and the Second Model does not include a list of proposed locations.*
- 58. It is submitted that if the Commission determines there is a basis for the inclusion of location allowances, the Commission may order interested parties to form a “Working Party”, as the WAIRC did when WA location allowances were formulated, to determine the appropriate quantum of allowances, and the locations in which those should be paid.*
- 9.3 This approach is not only novel in the context of the 4 Yearly Review, but, in the submission of ABI and NSWBC:
- (a) renders impossible the task of the Full Bench in assessing the SDA claim against the requirements of the FW Act;
 - (b) fatally prejudices the position of employer parties in responding to the proposed claim.
- 9.4 In respect of the task of the Full Bench, without quantification of the claim, it is entirely impossible to assess:
- (a) whether the inclusion of the proposed clauses would result in modern awards which, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account the Modern Awards Objective outlined at s 134 of the FW Act; and/or
 - (b) whether the proposed clauses are required, only to the extent necessary, to achieve the modern awards objective in accordance with s 138 of the FW Act.
- 9.5 Without quantification of the claims, the Full Bench cannot be in a position whereby it can assess the effect that the proposed clauses will have.
- 9.6 As noted by the SDA submission, the Federal Court Decision makes clear that disability allowances for particular locations may be permissible under the FW Act. Whether a modern award should be varied to include a *particular* allowance for a particular location will be dependent however on the relevant modern award, the relevant allowance (in \$ terms), the relevant location and the evidence brought in support of a claim.
- 9.7 While the SDA claim identifies the relevant modern awards and purports to provide some evidence for a small number of locations, the lack of specificity in the SDA claim mean that it is impossible for the Full Bench to undertake the statutory task required of it under the FW Act.
- 9.8 The SDA’s proposal that a “Working Party” be formed appears to suggest that the Full Bench should delegate its functions under the FW Act. In the submission of ABI and NSWBC, this course is not only unworkable, but is unavailable under the framework of the

FW Act.

10. ISSUES WITH THE FIRST MODEL

10.1 In addition to the fundamental issues identified above, ABI and NSWBC submit as follows:

- (a) The First Model is based on a number of unsupported or erroneous premises and gives rise to arbitrary results.
- (b) Contrary to the position of the SDA, the First Model does not seek allowances of the kind identified at s 139(1)(g)(iii) of the FW Act.
- (c) The First Model is ambiguously drafted and it is unclear whether the SDA seeks to rely on the draft determinations proposed.

11. THE FIRST MODEL IS BASED ON ERRONEOUS OR UNSUPPORTED PREMISES

11.1 The First Model of the SDA claim appears to be based on the following propositions:

- (a) Costs of living are contingent on the distance of a location from a capital city.
- (b) The cost of living in regional and remote locations is higher than capital cities as a result of:
 - (i) the higher cost of ordinary household items;
 - (ii) harsher climatic conditions;
 - (iii) isolation; and
 - (iv) in some cases, education, health care and housing.
- (c) A threshold distance exists (450km from a capital city) whereby these costs crystallise into a compensable disability under s 139(1)(g)(iii);
- (d) A second threshold distance exists (900km from a capital city) whereby these costs crystallise into a larger compensable disability under s 139(1)(g)(iii).

11.2 In the submission of ABI and NSWBC the above propositions should not be accepted.

The imposition of distance thresholds from Capital Cities to determine relative living costs is entirely arbitrary and leads to nonsensical results.

11.3 The proposition that costs of living are somehow related to or necessarily contingent on distance from a capital city does not bear scrutiny.

11.4 Further, the selection of 450 km and 900 km from a capital city as the relevant thresholds is problematic on a number of levels.

11.5 Firstly, there does not appear to be a rational explanation as to why locations on either side of these thresholds are materially different. For example, no justification has been established as to why workers in Nyngan (approximately 454 km from Sydney and 451 km from Canberra¹⁴) should be entitled to a location allowance, while a worker in Warren (397 km from Sydney, 416 km from Canberra)¹⁵ should not be.¹⁶ The same argument applies

¹⁴ Straight Line Distance taken from www.distancescalc.com

¹⁵ Straight Line Distance taken from www.distancescalc.com

¹⁶ This is merely an illustrative example, regardless of the application of the SDA formula and therefore the selection of the towns, there will be an 'outer limit' where nearby included towns will receive the allowance and nearby excluded towns will not receive the allowance.

equally to those locations which are approximately 900 km from a capital city.

- 11.6 Further, some towns or cities which qualify for location allowances under the SDA claim cannot be considered remote given that they are themselves large centres such as Rockhampton (520 km to Brisbane¹⁷) and Mackay (804 km to Brisbane¹⁸), both of which have populations of over 80,000. Likewise, there are presumably a number of locations (such as the Tiwi Islands some 80 km off the coast from Darwin) which would be reasonably considered remote when compared to capital cities but would not be subject to the SDA First Model.
- 11.7 The arbitrary nature of the SDA claim is demonstrated in the carve out of Townsville and Cairns from the operation of the First Model. These cities are not considered by the SDA to be appropriate for a location allowance despite their considerable distance from a capital city. This carve out is made on the basis of the individual characteristics of Townsville and Cairns including the fact that these cities “do not appear to be considered remote by the Australian Bureau of Statistics”¹⁹. Importantly, this limitation is not universally applied by the SDA given that the locations subject to the First Model of the SDA Claim do not appear to correspond with those locations identified as remote in the Australian Bureau of Statistics’ “Australian Statistical Geography Standard (ASGS): Volume 5 - Remoteness Structure”. This document is included in the SDA’s own materials at Annexure “PO-4”.
- 11.8 In the submission of ABI and NSWBC, the individual characteristics of any location must be assessed in determining whether any disabilities arise for workers in those locations. As Cairns and Townsville demonstrate, mere distance from a capital city does not necessarily result in any compensable disability.
- 11.9 The SDA’s exclusion of Cairns and Townsville from the operation of its claims is also problematic at a technical level. Are workers just outside the borders of Cairns and Townsville entitled to a remote area allowance equivalent to a worker who lives 900+km away from the nearest capital city? If so, an example of a town outside Cairns which would qualify under the SDA claim is Port Douglas, a resort town which boasts over 50 hotels.
- 11.10 Finally, the selection of locations subject to the ASU claim sits uncomfortably with the SDA’s First Model. For example, Argyle in Western Australia is named in the ASU claim (having historically been subject to a district allowance under a previous legislative regime) despite Argyle being only 177 km from Perth and less than 30 km from Bunbury, the third largest city in Western Australia.
- 11.11 Similarly, of the two locations in NSW subject to the ASU claims, one of those, Bogan Gate, is a mere 327 km from Sydney. While ABI and NSWBC acknowledge that there is no onus on the applicant parties to present consistent claims, there is a clear controversy as to whether distance to capital cities is a relevant factor when assessing suitability for a location allowance.

The cost of living in regional and remote locations is not uniformly higher than capital cities

- 11.12 The proposition that the cost of living in regional and remote locations is uniformly higher than capital cities is not correct.

¹⁷ Straight Line Distance taken from www.distancescalc.com

¹⁸ Straight Line Distance taken from www.distancescalc.com

¹⁹ See SDA Amended Submissions at [54]

11.13 While a comprehensive comparative analysis of regional and remote locations versus capital cities is not within the scope of these submissions, a number of factors provide cause to seriously question the SDA's central assertion that the cost of living in capital cities is lower than in regional areas.

Cost of housing

11.14 The cost of living evidence provided by the SDA largely focuses on an apparent disparity in the costs of some consumer goods, petrol and air-conditioning between capital cities and some regional/remote areas. Peripheral to the SDA's evidentiary position is any analysis of housing costs.

11.15 In the submission of ABI and NSWBC, the costs of housing must be central to any assessment of comparative living costs between regional/remote areas and capital cities.

11.16 Annexed and marked "A" (**Housing Comparison Table**) is a table identifying a comparison between the housing costs of various locations in Australia including:

- (a) capital cities;
- (b) larger regional centres less than 450 km away from capital cities; and
- (c) locations specifically listed in the ASU claims for which housing information is available.

11.17 The Housing Comparison Table identifies the distance of each location from its nearest capital city, the median house price of that location and (where available) the median rent for that location.

11.18 The Housing Comparison Table discloses the following, perhaps unsurprising, findings:

- (a) as a general proposition, capital and major regional cities have higher housing costs than regional and remote areas. For example, 8 of the 10 highest median house prices in the Housing Comparison Table are capital cities or large regional towns; and
- (b) there does not appear to be any meaningful relationship between housing costs and distance from a capital city.

11.19 While it is accepted that the cost of housing is not the sole determiner of living costs in Australia, it should be beyond argument that housing costs represent a significant proportion of household spending²⁰. In such circumstances, given the significant disparity between housing costs in many regional and remote locations when compared to capital cities, a mere assertion that living costs in regional and remote locations are higher than those in capital cities should not be accepted.

There is no basis to suggest that climatic conditions are necessarily linked with comparative distance from capital cities

11.20 It should not be in dispute that the climatic conditions of a location are unrelated to the distance of that location to a capital city. Accordingly, no finding can or should be made that workers in a location over 450 km or 900 km away from a capital city necessarily suffer a disability as a result of climatic conditions. In so far that the First Model of the SDA claim

²⁰ ABC News Article, Australians spend a third of monthly income on mortgage repayments: Housing affordability report, Justine Parker 15 December 2015

makes such an assumption, it should be rejected.

11.21 In order to demonstrate that workers should be paid an allowance in compensation for climatic conditions suffered in a particular location, evidence would need to be brought establishing that the location experiences climatic conditions requiring a compensatory allowance. In the submission of ABI and NSWBC, no such evidence has been brought.

12. SDA ALLOWANCE AND S 139(1)(G) OF THE FW ACT

12.1 Section 139(1) of the FW Act relevantly provides as follows:

(1) A modern award may include terms about any of the following matters:

....

(g) allowances, including for any of the following:

(i) expenses incurred in the course of employment;

(ii) responsibilities or skills that are not taken into account in rates of pay;

(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

12.2 Paragraphs [3]-[7] of the SDA Amended Submissions make clear that the allowances sought by the SDA claim are sought as allowances for “*disabilities associated with the performance of particular tasks or work in particular locations*” within the meaning of s 139(1)(g) of the FW Act.

12.3 In the submission of ABI and NSWBC, the allowances sought by the SDA are not consistent with s 139(1)(g) of the FW Act as they do not appear to compensate employees for factors related to the “*performance of work*” but rather seek to compensate employees in relation to their place of residence.

12.4 At [14] of the SDA Amended Submissions, the SDA submit that “*the primary purpose of location allowances is to provide compensation to employees in remote areas for the disadvantages of living in those locations....*”. This characterisation is clearly at odds with an allowance identified at s 139(1)(g)(iii) of the FW Act which requires a relationship between the allowance and the performance of work or tasks.

12.5 None of the evidence filed by the SDA relates to the performance of particular tasks or work in particular locations. The SDA’s evidentiary position (such as it is) seeks to establish that:

- (a) “*the cost of living (and thereby the costs of maintaining a living standard relative to employees in metropolitan centres) is significantly higher in remote or regional areas*” (see [18] of the SDA Amended Submissions).
- (b) Remote or regional areas experience the “*considerable burden of the extreme climate and the consequent increase to cost of living*” (see [21] of the SDA Amended Submissions).
- (c) Remote or regional areas experience “*lower quality and higher costs associated with education, health care and housing*” (see [22] of the SDA Amended

Submissions).

- 12.6 This evidence, and indeed the force of the SDA Amended Submissions, does not direct itself to an assessment of disabilities associated with the performance of particular tasks or work in particular conditions or locations.
- 12.7 In the submission of ABI and NSWBC, the true character of the SDA claims does not relate to the performance of work at all, or for that matter the operation of modern awards. Rather, it is a claim directed at compensating the residents of regional and rural areas.
- 12.8 A number of other parties have identified the various government initiatives specifically directed to alleviating some of the apparent difficulties of living in some regional and remote areas.
- 12.9 Further, the Annual Wage Review proceedings also presents itself as a potentially appropriate forum to pursue such arguments. By way of example, as noted at [123] of Annual Wage Review Decision of [2015] FWCFB 3500, in conducting the Annual Wage Review:

“The Panel takes into account the circumstances of different regions, industries and sectors as part of its broader consideration of the national economy.”

- 12.10 No sufficient case has been made out as to why the Full Bench should exercise its discretion as part of the 4 Yearly Review to introduce into a small number of modern awards, an allowance which has no relationship to the performance of work.

13. AMBIGUITY IN DRAFTING

- 13.1 The draft determinations filed on 11 April 2016 by the SDA relies on the reference point of *“geodesic distance from any state or capital territory”*.
- 13.2 This measurement scale had been used by the SDA in the draft determinations annexed to its Outline of Submissions dated 6 March 2015.
- 13.3 As was identified by a number of parties in reply to the SDA’s submission of 6 March 2015, the phrase *“geodesic distance from any state or capital territory”* does not make sense. This was acknowledged in the SDA’s Outline of Submissions in Reply dated 1 May 2015 at [26] as a drafting error.
- 13.4 For the purposes of these submissions, ABI and NSWBC have been left to assume that the proposal of the SDA seeks location allowances based on a scale of measurement of either *“geodesic distance from any state or territory capital”* (see [54] of the SDA Amended Submissions) or *“geodesic distance from capital cities”* (see [11] of SDA’s Outline of Submissions in Reply dated 1 May 2015).
- 13.5 A similar difficulty exists in that the SDA’s draft determinations now seek a location allowance *“per week”*, without any modification for casual or part-time workers. In reply to a previous submission, at [32]-[38] of the SDA’s Outline of Submissions in Reply dated 1 May 2015, the SDA proposed a *“per hour”* system which is now no longer reflected in its proposed Draft Determinations.
- 13.6 These discrepancies are unexplained and parties have been required to make a number of assumptions in making these submissions. The SDA should clarify its position as a matter of urgency.

F. THE EVIDENCE

14. THE EVIDENTIARY CASE OF THE UNIONS

- 14.1 As noted above, the ASU and SDA claims seek significant award changes which must be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.
- 14.2 On any reasonable assessment, the evidentiary case put forward by the SDA and ASU to support their claims falls well short of this standard.
- 14.3 We note from the outset that much of the evidence brought by the SDA and ASU is objectionable on the basis of opinion, hearsay or relevance and if admitted, such evidence should be given limited weight.
- 14.4 Notwithstanding the above, in summary, the evidence filed by the SDA and the ASU is as follows:

Statements from Union Officials

- 14.5 Three Statements have been filed by union officials:
- (a) Rosslyn Ann Ferry, General Secretary at the Broken Hill Town Employees' Union provides for the SDA evidence of the industrial history of district allowances in Broken Hill and a reference to higher fuel and travel costs in Broken Hill.
 - (b) Peter Gunsberger, AWU Organiser and District Secretary gives his views in respect of Far Northern Queensland and Cape York and provides photos of a fuel price and grocery prices in Bamaga and grocery prices on Thursday Island.
 - (c) Peter O'Keeffe, Secretary of the WA SDA provides details of SDA membership and attaches various extrinsic materials relating to some of the locations subject to the union claims. The relevant sections of these materials have not been identified in any meaningful way.

Statements from Employees

- 14.6 Four statements have been filed by employees who have experience working and living in certain areas subject to the ASU and SDA Applications. Of the four employee statements:
- (a) one statement gives information in relation to South Hedland and Port Hedland²¹;
 - (b) one statement gives information in relation to Carnarvon and Derby in WA. This statement also refers to Port Hedland²²;
 - (c) one statement gives information in relation to Alice Springs²³; and
 - (d) one statement gives information in relation to Broken Hill²⁴.
- 14.7 These statements provide information as to costs of living in six locations including material as to the costs associated with groceries, fuel, travel and climate.
- 14.8 Importantly, three of these statements are made by employees who are covered by Enterprise Agreements and accordingly do not rely on the terms of a modern award. These

²¹ See Statutory Declaration of Lee-Ann Hughes-Gage

²² See Statutory Declaration of Robert Bassett

²³ See Statutory Declaration of Malcolm Crowley

²⁴ See Statutory Declaration of Mandie Miller

employees will not be affected by the Applications now before the Full Bench and accordingly their evidence can be of little probative value. Indeed, two such employees, Robert Bassett and Lee-Ann Hughes-Gage provide evidence that they already receive a location allowance through their Enterprise Agreements.

- 14.9 There is a single statement before the Full Bench from an employee who will be directly affected by the Union Applications, that of Mandie Miller who provides information in respect of her circumstances in Broken Hill under the *Pharmacy Award 2010*. Given that Broken Hill is already subject to a location allowance as a result of the Federal Court Decision, the value of this evidence in making a case for an increase to the minimum safety net is extremely limited.

Assessment of the Union Evidence in relation to the Union Claims

- 14.10 The ASU claim applies to over 80 localities while construction of the SDA claim means it applies to an undefined amount of locations which could be in the hundreds. The scale of the claims stand in stark contrast to the evidence filed to support them.
- 14.11 It is immediately apparent that the material filed by the unions does not go close to addressing the full scope of the union claims. In so far as it provides direct evidence from employees (both award covered and enterprise agreement covered), the evidence filed goes only to the conditions of six localities: Broken Hill, Port Hedland, South Hedland, Canarvon, Derby and Alice Springs. The evidence of Peter Gunsberger also provides some general information in respect of some areas in Northern Queensland.
- 14.12 Even having regard to the very general information provided by the witness statements of union officials filed in these proceedings, the evidence before the Full Bench simply does not extend to each locality for which a claim is sought. In the vast majority of locations, **no evidence** has been filed. In these circumstances, at a threshold level, the claims cannot succeed.
- 14.13 With respect, given:
- (a) the unreliability of the propositions on which the SDA claims are based; and
 - (b) the lack of any compelling or unifying principle by which to determine the relevant locations under the ASU claim;

the Full Bench requires an evidentiary case for each location subject to the claims before it could be satisfied that a location allowance is a required element of the minimum safety net arising out of s 134 of the FW Act. In the absence of such evidence, the claims of the SDA and ASU must fail.

- 14.14 In addition to the above, even for the localities to which it referred, the evidence brought by the ASU and the SDA is insufficient to justify their respective claims given such evidence does not provide the Full Bench with a comprehensive comparative position in respect cost of living for the relevant localities.
- 14.15 The SDA submit that the statement of Ms Hughes-Gage states that she has had recent experience living between South Hedland and Melbourne, and is accordingly in a position to assess that the cost of living in South Hedland is higher than that in metropolitan centres such as Perth or Melbourne. Likewise, the SDA seeks to rely on Mr Gunsberger's and Mr Crowley's observations in respect of Queensland and the Northern Territory. With respect, the Full Bench cannot accept a proposition that the cost of living in all regional and remote

areas is uniformly higher than metropolitan centres on the basis of this evidence.

- 14.16 It is apparent to ABI and NSWBC that the economic reality of living in Australia is far more nuanced than the position put by the unions. Depending on a myriad of factors including size, population, type and extent of industry, housing, industrial history, climate and social factors, some regional locations in Australia will have higher costs of living than other regional locations. Each regional location will experience different conditions which will affect pricing in different ways. In order to establish a comparative disadvantage for a regional location, the unions would need to provide evidence, not assertion, that such disadvantage exists.
- 14.17 Simply put, the case presented by the ASU and the SDA does not approach a level of comprehensiveness or complexity which could justify the granting of the claims.

G. ASSESSMENT AGAINST THE MODERN AWARDS OBJECTIVE

15. 134(1)(A) - RELATIVE LIVING STANDARDS AND THE NEEDS OF THE LOW PAID

- 15.1 The ASU and SDA have advanced very little probative evidence as to the relevance of location allowances to the issue of “*relative living standards*” or the “*needs of the low paid*”.
- 15.2 In summary it is sufficient to state that:
- (a) There is no evidence before the Commission of the degree of award reliance for persons eligible for a location allowance. Given the scope of the ASU and SDA claims, it is difficult to quantify how many people will be entitled to the location allowances arising under the union claims and whether they will be “*low paid*”.
 - (b) There is a paucity of evidence in relation to the “*relative living standards*” of the vast majority of locations which are subject to the claims.
 - (c) With respect to the ASU claim, no explanation (or evidence) has been provided as to how the quantum of the proposed allowance relates to living standards or living costs of the low paid.
 - (d) With respect to the SDA claim, given that the relevant allowances have not been quantified, it is impossible to determine a relationship between those allowances and the living standards or living costs of the low paid. In short, without quantification, the Full Bench is not in a position to assess the SDA claims against this limb.

16. 134(1)(B) - THE NEED TO ENCOURAGE COLLECTIVE BARGAINING

- 16.1 The ASU and SDA have advanced no probative evidence as to how the ASU and SDA claims “*encourage*” enterprise bargaining. In fact, as noted above, statements have been made by employees who are currently covered by enterprise agreements and who already receive location allowances pursuant to those agreements.
- 16.2 Adding new matters such as location allowances to the minimum safety net cannot on any proper basis be said to “*encourage*” enterprise bargaining, indeed the inclusion of additional entitlements in modern awards raises the level at which the BOOT operates and also means that there is one less matter to be on the bargaining table.

17. 134(1)(C) - THE NEED TO PROMOTE SOCIAL INCLUSION THROUGH INCREASED WORKFORCE PARTICIPATION

17.1 The SDA and ASU have advanced no evidence as to how their claims “*promote*” social inclusion through workforce participation. While the material in support of the ASU and SDA claims deal primarily in assertions, no evidence has been filed which demonstrates a link between location allowances and increased workforce participation. Further, while the materials in support of the ASU and SDA claims seek to identify the cost of living in a small number of remote locations, the evidentiary case has not been sufficiently made out to justify:

- (a) the allowances sought under the ASU claim; or
- (b) the locations in which they are sought for either the ASU or SDA claims.

18. 134(1)(F) - THE LIKELY IMPACT ON EXERCISING MODERN AWARD POWERS ON BUSINESS INCLUDING ON PRODUCTIVITY, EMPLOYMENT COSTS AND THE REGULATORY BURDEN

18.1 The ASU and SDA has not advanced sufficient evidence as to the likely “*impact*” of the Commission exercising its modern award powers in its favour.

18.2 In respect of the ASU claim, the allowances sought are substantial (particularly in circumstances where dependents are involved) and will have substantial effect on employers.

18.3 In the case of the SDA, no rational assessment of the likely impact on business can be made given that:

- (a) the allowances have not been quantified;
- (b) the locations to which the allowances would apply have not been named.

18.4 As noted above, this also means that employer parties opposing the claims have not been able to bring evidence as to its effects.

18.5 It is relevant to note that the cost of living indicia cited by the SDA in support of its claims, including air conditioning, petrol and product costs are also relevant to employers. Should any disability be experienced by regional and remote employees, it follows that such disability is also experienced by their employers, potentially on a larger scale.

18.6 The assertions at [41]-[45] of the SDA Amended Submissions that:

- (a) the inclusion of location allowances *may* increase employment costs but that such effects are “*likely to be negligible*”;
- (b) the model proposed by the SDA is “*relatively modest*”; and
- (c) any regulatory burden is likely to be “*minimal*”;

must be rejected outright. In circumstances where the SDA have not quantified its claims, such assertions are simply not available.

19. 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

19.1 The ASU and SDA have advanced no evidence as to their claims ensuring a simple, easy to understand stable and sustainable modern award system.

- 19.2 As to the ASU claim, the listing of 83 localities containing different rates which will require periodic updating can hardly be described as simple and easy to understand.
- 19.3 The SDA claim is even more complex and give rise to a litany of questions for businesses and employees. How does one ascertain the method by which to determine distance from a capital city, i.e. is the distance determined from a centre point of the city or is it from the city's outlying border? By what standard is the relevant distance measured (online calculators, certified maps)? How far does the exclusion for Cairns and Townsville extend? What does "*geodesic*" mean? These questions and others demonstrate that the SDA claim clearly does not provide "*clear and consistent basis for delineating areas which employees would receive location allowances*"²⁵.

20. 134(1)(H) - THE LIKELY IMPACT OF EXERCISING MODERN AWARD POWERS ON EMPLOYMENT GROWTH, INFLATION AND THE SUSTAINABILITY PERFORMANCE AND COMPETITIVENESS OF THE NATIONAL ECONOMY

- 20.1 The ASU and SDA have advanced no evidence as to the likely "*impact*" of the Commission exercising its modern award powers in their favour on any of the matters relevant to s 134(1)(h).
- 20.2 In respect of the claims of the ASU, the allowances sought are substantial (particularly in circumstances where dependents are involved) and will have substantial effect on employers.
- 20.3 In the case of the SDA, no rational assessment of the likely impact on business can be made given that:
- (a) the allowances have not been quantified;
 - (b) the locations to which the allowances would apply have not been named.
- 20.4 As noted above, this also means that employer parties opposing the claims have not been able to bring evidence as to its effects.

21. CONCLUSION

- 21.1 In light of the above, the SDA and ASU claims should be dismissed.

²⁵ See SDA Amended Submissions at [42]

ANNEXURE A

State/Territory	Town/Location	Distance from Capital City (km)**	Median house price*	Median rent*
New South Wales	Sydney (Greater Sydney) #	0	1,000,616.00	^ 405.00
Queensland	Thursday Island	1258	800,000.00	-
New South Wales	Wollongong	68	780,000.00	-
Western Australia	Tom Price	1048	715,000.00	500.00
Victoria	Melbourne #	0	668,030.00	-
Queensland	Townsville	1112	665,000.00	390.00
Northern Territory	Darwin #	0	654,270.00	620.00
ACT	Canberra #	0	616,313.00	-
Western Australia	Perth #	0	605,089.00	-
Queensland	Sunshine Coast (Noosa)	162	580,000.00	-
Western Australia	Denham	500	570,000.00	-
Northern Territory	Alice Springs	1330	550,000.00	550.00
Western Australia	Argyle	177	535,000.00	-
Victoria	Geelong	64	524,000.00	-
New South Wales	Albury	219	510,000.00	-
Tasmania	Launceston	138	505,000.00	-
Western Australia	Dampier	1260	505,000.00	800.00
Western Australia	Kununurra ~	434	502,500.00	455.00
Queensland	Brisbane #	0	490,855.00	-
Western Australia	Fitzroy Crossing	853	480,000.00	-
Western Australia	Exmouth	1129	480,000.00	480.00
South Australia	Adelaide #	0	479,285.00	-
New South Wales	Port Macquarie	314	479,000.00	-
New South Wales	Coffs Harbour	314	475,750.00	-
Western Australia	Broome	1108	475,000.00	530.00
Western Australia	Onslow	1151	430,000.00	1,300.00
Western Australia	Carnarvon	816	395,000.00	-
New South Wales	Wagga Wagga	378	391,000.00	-
Queensland	Toowoomba	106	390,000.00	-
Other Territories	Christmas Island	2613	367,000.00	-
Northern Territory	Tennant Creek	877	365,000.00	-
Victoria	Bendigo	135	357,500.00	-
Western Australia	Esperance	602	355,000.00	330.00
Western Australia	Halls Creek	726	355,000.00	-

Western Australia	Karratha	1253	347,500.00	-
Western Australia	Shark Bay	717	345,000.00	-
Queensland	Bowen	962	340,500.00	270.00
Victoria	Ballarat	103	340,000.00	-
Tasmania	Hobart #	0	325,972.00	-
Western Australia	Paraburdoo	990	310,000.00	-
Western Australia	Kalgoorlie	550	300,000.00	350.00
Western Australia	Roebourne	1252	300,000.00	490.00
Queensland	Mount Isa	1682	291,500.00	-
Western Australia	Bunbury	154	290,000.00	-
Queensland	Cairns	1391	290,000.00	373.00
Western Australia	Ravensthorpe	432	285,000.00	260.00
Western Australia	Wickham	1262	280,000.00	350.00
Queensland	Innisfail	1319	279,000.00	268.00
Victoria	Shepparton	167	275,000.00	-
Queensland	Ayr	1049	270,000.00	300.00
Queensland	Gladstone	441	250,000.00	-
Queensland	Mackay	1378	250,000.00	-
Western Australia	Meekatharra	650	240,000.00	-
Victoria	Mildura	479	237,500.00	-
Western Australia	Kalbarri	500	235,000.00	273.00
Western Australia	Kambalda	557	231,000.00	-
Queensland	Rockhampton^	521	220,000.00	-
Queensland	Ingham	1207	218,000.00	250.00
Western Australia	Southern Cross ~	339	200,000.00	-
Western Australia	Boulder	551	192,500.00	330.00
Western Australia	Wiluna	732	170,000.00	-
Western Australia	Wittenoom	1109	170,000.00	-
Western Australia	Newman	1030	162,500.00	350.00
Western Australia	Port Hedland	1324	155,000.00	-
Queensland	Atherton	1375	150,000.00	310.00
Queensland	Roma	432	145,000.00	300.00
Western Australia	Laverton	730	140,000.00	-

<i>Queensland</i>	<i>Charters Towers</i>	1073	130,000.00	280.00
Western Australia	Norseman	729	125,000.00	-
<i>Queensland</i>	<i>Macrossan</i>	1067	120,000.00	-
<i>Queensland</i>	<i>Tully</i>	1287	120,000.00	290.00
<i>Western Australia</i>	<i>Eucla</i>	974	117,000.00	-
<i>New South Wales</i>	<i>Broken Hill</i>	935	110,000.00	240.00
<i>Western Australia</i>	<i>Derby</i>	944	100,000.00	350.00
<i>Western Australia</i>	<i>Marble Bar</i>	1261	95,000.00	-
<i>Western Australia</i>	<i>Nullagine</i>	1197	75,000.00	-
New South Wales	Bogan Gate	327	72,000.00	440.00
Northern Territory	Katherine	271	67,000.00	450.00
Western Australia	Mount Magnet	474	55,000.00	-
Western Australia	Sandstone	552	50,000.00	-
Western Australia	Leonora	627	45,000.00	-
Western Australia	Leinster	648	44,000.00	-
Western Australia	Cue	541	33,906.00	-
Western Australia	Wyndham	447	30,000.00	300.00
Western Australia	Bullfinch	327	20,000.00	-
Western Australia	Coolgardie	516	15,000.00	265.00
Where Bold the location would be subject to the SDA 450km-900km claim				
Where Bold and Italicised the location would be subject to the SDA 900km+ claim				
* Unless otherwise stated, data obtained from RP Data (March 2016)				
** Straight line distance from freemaptools.com				
# Data obtained from Domain Capital City Report				
~ Straight line distance from daftlogic.com				
^ Data obtained from realestate.com.au				
Where yellow, ABI and NSWBC understands that location is not subject to both the ASU and SDA claims (this includes capital cities which, with the exception of Darwin, are not subject to either claim.)				