Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submissions in Reply

District Allowances

(AM2014/296 & AM2014/303)

13 May 2016

4 YEARLY REVIEW OF MODERN AWARDS

AM2014/296 & AM2014/303 – DISTRICT ALLOWANCES

1. INTRODUCTION

1. The Australian Industry Group (Ai Group) makes 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 16 modern awards. These submissions are filed pursuant to Amended Directions[1] issued by the Fair Work Commission (Commission) on 7 April 2016.

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 decision in respect of these proceedings as the 'Transitional Provisions Decision'. 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.

3. Four modern awards[2] 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.[3] As a result, those four modern awards, which are the subject of the SDA claim now before the

[1] PR559256.

[2] *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).

[3] *4 yearly review of modern awards – transitional provisions* [2014] FWCFB 644 at [63].

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* (the 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. 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.[4]

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 meet the modern awards objective.

[4] *4 yearly review of modern awards – transitional provisions* [2014] FWCFB 7767, *4 yearly review of modern awards – transitional provisions* [2014] FWCFB 9492, *4 yearly review of modern awards – transitional provisions* [2015] FWCFB 644, [2015] FWCFB 2575 and *ACCI v ACTU* [2015] FCAFC 131.

2. THE UNIONS' CLAIMS

7. Various unions have filed "applications" to introduce new district allowances in modern awards for the first time since they were made.

8. The following claims were made:

	Matter No	Claimant	Modern Award
1	~~AM2014/294~~	~~CFMEU~~	~~*Building and Construction General On-Site Award 2010*~~
2	~~AM2014/294~~	~~CFMEU~~	~~*Joinery and Building Trades Award 2010*~~
3	~~AM2014/294~~	~~CFMEU~~	~~*Mobile Crane Hiring Award 2010*~~
4	AM2014/296	ASU	*Airline Operations - Ground Staff Award 2010*
5	AM2014/296	ASU	*Business Equipment Award 2010*
6	AM2014/296	ASU	*Clerks - Private Sector Award 2010*
7	AM2014/296	ASU	*Contract Call Centres Award 2010*
8	AM2014/296	ASU	*Electrical Power Industry Award 2010*
9	AM2014/296	ASU	*Labour Market Assistance Industry Award 2010*
10	AM2014/296	ASU	*Legal Services Award 2010*
11	AM2014/296	ASU	*Local Government Industry Award 2010*
12	AM2014/296	ASU	*Rail Industry Award 2010*
13	AM2014/296	ASU	*Social, Community, Home Care and - Disability Services Industry Award 2010*
14	AM2014/296	ASU	*Water Industry Award 2010*
15	~~AM2014/298~~	~~ANMF~~	~~*Nurses Award 2010*~~
16	AM2014/303	SDA	*General Retail Industry Award 2010*
17	AM2014/303	SDA	*Fast Food Industry Award 2010*
18	AM2014/303	SDA	*Pharmacy Industry Award 2010*
19	AM2014/303	SDA	*Hair and Beauty Industry Award 2010*
20	AM2014/303	SDA	*Vehicle Manufacturing, Repair, Services, and Retail Award 2010*

9. Of the above, claims by the CFMEU[5] and the ANMF[6] have been withdrawn. They have accordingly been struck out in the table above.

[5] See correspondence dated 4 March 2015.

[6] See correspondence dated 18 February 2015.

3. THE SDA'S CLAIM

10. The SDA seeks the insertion of what it calls a new "location allowance" in five modern awards as listed in the table above:

    - *General Retail Industry Award 2010;*
    - *Fast Food Industry Award 2010;*
    - *Pharmacy Industry Award 2010;*
    - *Hair and Beauty Industry Award 2010; and*
    - *Vehicle Manufacturing, Repair, Services, and Retail Award 2010.*

11. The SDA has filed two sets of draft determinations in respect of these five awards, which reflect the two different 'models' that it has proposed.[7]

The First Model

12. The first model requires the payment of a weekly allowance, expressed as a percentage of the standard rate as defined by the award. An employee's eligibility for the allowance and the quantum payable is determined by the "geodesic distance" of the employee's location "from any state or capital territory".

13. According to the terms of the proposal:

    - "An employee in a location more than 450km but less than 900km by geodesic distance from any state or capital territory" would be paid [X]% of the standard rate per week.
    - "An employee in a location more than 900km by geodesic distance from any state or capital territory" would be paid [X]% of the standard rate per week.

[7] Annexures A – J to the SDA's submissions dated 11 April 2016.

- Employees located in Cairns or Townsville in the State of Queensland are not eligible to receive this allowance.

14. The quantum of the allowance sought by the SDA has not been identified. The relevant percentage is expressed as an "X" in each subclause. Whilst this is not clear on the SDA's material, we proceed on the basis that the quantum sought in respect of an employee in a location more than 900km by geodesic distance from any state or capital territory is higher than in respect of an employee more than 450km but less than 900km away.

15. Before we proceed to deal with the process by which the SDA's claim is to be heard and determined, we here pause to observe various issues that arise from the drafting of the proposed provision.

16. Firstly, the words "in a location", as found at the commencement of subclauses (a) and (b) are ambiguous. We assume that the provisions are only intended to operate where an employee *works* in a location that is more than the nominated distance from any state or capital territory, or that is identified in one of the schedules. The concluding words of the provision ("for the disadvantages of working in that location") lend support to this interpretation. On a plain reading of the first part of the clause however, this is not immediately clear. The clause could be interpreted to apply where an employee resides in such a location, but does not work in a location that is captured by the clause. The same can be said of subclause (c), which refers to employees "located in" Cairns and Townsville.

17. Secondly, the proposed clause would operate by reference to the "geodesic distance" between the employee's location and "any state or capital territory". The Macquarie Dictionary defines "geodesic" as an adjective "relating to the geometry of curved surfaces, in which geodesic lines take the place of the straight lines of plane geometry".[8] A geodesic line is defined as "the shortest

[8] Macquarie Dictionary, revised third edition (2001).

line lying on a given surface, curved or plane, and connecting two given points".[9]

18. It is trite to observe that the notion of "geodesic distance" is not one that otherwise appears in the modern awards system. It is a concept that the very vast majority of employers and employees would be unfamiliar with. Its usage would not only be at odds with the modern awards objective but also with the Commission's focus in this 4 Yearly Review of modern awards (Review) on simplifying modern awards and increasing their accessibility and comprehensibility to its users.

19. Thirdly, we do not understand the meaning of the phrase "from any state or capital territory", or its practical application. It is not at all clear how the distance "from any state or capital territory" to the employee's location is to be calculated. For example, the provision could be interpreted to mean that the distance is to be calculated from the *border* of a state or territory to the employee's location. The obvious question then arises as to what point on the border is to be used for this measurement. It is also unclear *which* State or Territory border should be used from a particular location. If the intention is that the relevant distance be measured from a capital city, then the proposed provision should articulate this.

20. The effect of the current drafting of the proposed clause is that it does not enable an assessment of the areas or locations in which an employee would in fact be entitled to a location allowance.

21. Fourthly, the second subclause of the proposed provision contains no limitation as to a maximum distance. That is to say, the allowance is payable where an employee is in a location more than 900km "by geodesic distance from any state or capital territory". There is no outer limit on the application of this provision. We are concerned that an employee in a metropolitan area that is more than 900km "by geodesic distance from any state or capital territory" and

[9] Macquarie Dictionary, revised third edition (2001).

who does not suffer any of the alleged disabilities cited by the SDA would nonetheless be entitled to the allowance.

22. For example, Melbourne is located more than 900km from certain points along the northern border of New South Wales. The proposed clause, as presently drafted, would appear to entitle an employee located in Melbourne to the allowance. This difficulty subsists even if we were to assume that distance is to be measured from the capital city of a state or territory (notwithstanding that this is not made clear by the clause). For example, Brisbane is located more than 900km from Adelaide.

23. Fifthly, the provision does not deal separately with part-time or casual employees. We take this to mean that such employees are to be paid the entire amount specified by the clause, subject to any other provision of the relevant awards that state otherwise. The SDA has not addressed why the total quantum payable should be due to an employee who could be engaged to work as little as three hours in a week.

24. As we later develop, each of the matters identified above run contrary to the need to ensure a simple and easy to understand modern awards system (s.134(1)(g)) and would adversely impact business due to the imposition of a regulatory burden on employers (s.134(1)(f)).

25. Should the SDA, in light of our observations, seek to amend its claim, Ai Group may thereafter seek an opportunity to respond.

The Second Model

26. The second model contemplates the creation of a schedule that lists specific locations. Employees in a location identified in the first part of the schedule would be entitled to "[X]% of the standard rate" and employees in a location in the second part of the schedule would be entitled to "[X]% of the standard rate". Proposed schedules that identify the relevant locations have not been filed by the SDA.

27. Whilst the relevant percentage is represented by an "X" in each of the above instances, we proceed on the basis that the intention is that the quantum sought by the SDA would differ in each instance.

28. The observations we have made above regarding the use of the phrase "employees in a location" and the application of the clause to part-time and casual employees are also apposite to the second model.

The Process to be Adopted

29. We refer to paragraphs 57 – 58 of the SDA's submissions dated 11 April 2016, which state as follows: (emphasis added)

> 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, [footnote omitted] to determine the appropriate quantum of allowances, and the locations in which those should be paid.

30. At paragraph 61 the union submits:

> 61. For the reasons outlined above, it is submitted the Full Bench should exercise that power here, and vary the Relevant Awards in accordance with the proposed determinations attached as Annexures A to E, or alternatively Annexures F to I, to these submissions.

31. The SDA's submissions do not explicitly set out the process which, in its view, the Commission should adopt in determining whether to grant its claim. We infer from the extract above, however, that it is seeking a decision from the Commission that, as a matter of principle, employees covered by the five awards relevant to the SDA's claim, who perform work in certain unknown or unidentifiable locations, should receive an allowance each week, the quantum of which is also unknown. The SDA proposes that if the Commission reaches this conclusion, it may order interested parties to form a "working party" to determine the appropriate locations and the quantum of the allowance payable.

32. The SDA's submissions of 11 April 2016 represent the first time that the union has proposed this course of action. Earlier iterations of its case[10] proposed only the first model and specified the percentages of the standard rate that would be payable.

33. After that earlier material was filed, the matter was adjourned indefinitely in light of the Federal Court proceedings instituted by ACCI to which we have earlier referred. It is our understanding that the SDA subsequently sought an opportunity to file updated submissions and evidence for two reasons:

- To consider and have regard to the Federal Court's decision, to the extent that it was relevant to the SDA's claim; and
- To update any details contained in the witness evidence filed by the SDA given the passage of time since it had first filed that material.

34. A review of the material filed by the SDA on 11 April 2016 reveals that in fact the union has utilised this opportunity to present what is effectively a new claim. The case that the SDA now seeks to run differs from that which was previously mounted in the following ways:

- It has now proposed a second alternate model, which it had not initially sought; and
- Fewer details regarding the variations that it seeks are known; those being the quantum of the allowance that would be payable and in the case of the second model, the relevant locations.

35. Accordingly, this is the first opportunity Ai Group has had to respond to the SDA's new claim and proposed process for determining it, both of which are opposed for the reasons that follow.

36. Firstly, the material filed by the SDA on 11 April 2016 is the third instance in which employer organisations have been called upon to respond to a claim regarding the payment of district allowances during this Review. If the

[10] See submissions of 6 March 2015 and reply submissions of 1 May 2015.

Commission adopts the process proposed by the SDA, by virtue of which it first makes a decision as to whether, as a matter of principle, location allowances should be introduced in the relevant awards and thereafter a separate process is implemented for determining the quantum and locations, employer organisations will be put to the task of responding to yet another iteration of this claim.

37. 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 in determining any claims that are made. Respondent parties should not be required to repeatedly answer to multiple derivatives of a particular claim, noting that each time the SDA is effectively provided with an opportunity to refine and improve its case.

38. 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 at an earlier time than the date when submissions and evidence in support of their claim are due. 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. Such a process 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.

39. The unions' proposal is analogous to employer organisations seeking a decision from the Commission that penalty rates in a particular award should be reduced, without identifying *which* penalty rates they seek to have varied and the quantum of the reduction sought. We can only imagine the opposition with which such a proposition would be met.

40. 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 embraced.

41. Secondly, we do not consider that the material currently before the Commission will enable it to determine whether the provisions proposed are necessary in order to achieve the modern awards objective. Absent such a finding, however, the Commission is not empowered to make the variations sought by the SDA.

42. It is the SDA's proposition that the Commission should first determine whether "there is a basis for the inclusion of location allowances". 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.[11]

43. 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 locations and the quantum of the allowance. We address the following limbs of s.134(1) by way of example.

44. Section 134(1)(a) requires the Commission to take into account relative living standards and needs of the low paid. The *Annual Wage Review 2014 – 2015* decision dealt with the interpretation this provision:

> [310] The assessment of relative living standards requires a comparison of the living standards of workers reliant on the [national minimum wage] and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.
>
> [311] 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.[12]

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

[12] [2015] FWCFB 3500 at [310] – [311]

45. As can be seen, the analysis required by s.134(1)(a) necessarily involves an identification of the relevant group of employees to whom the entitlement would be afforded. The relative living standards of those employees would then be compared to those of other groups deemed to be relevant.

46. Additionally, consideration must be given to the needs of the low paid. This must first involve an assessment as to whether the employees to whom this entitlement would be afforded are "low paid" and subsequently, whether those employees "are able to purchase the essentials for a 'decent standard of living' and to engage in community life". The term "low paid" has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

> [362] There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award. Nothing put in these proceedings has persuaded us to depart from this approach.[13]

47. Self-evidently, the requisite inquiry cannot be undertaken in circumstances where the location of the employees, and therefore the group of employees who would be affected, is not known.

48. If relevant, 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". This cannot properly be done where the quantum of the allowance sought is not known.

49. 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 presently be made. For instance, we are unable to determine the extent to which the relevant employees might already be covered by an enterprise agreement and if so, whether those agreements provide for the payment of a location allowance. Of those to whom the award applies, we are unable to

[13] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

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.

50. Section 134(1)(c) requires the Commission to take into account the need to promote social inclusion through increased workforce participation. The SDA argues that a location allowance operates as an incentive to attract and retain employees to work in certain locations, thereby increasing workforce participation. We do not consider that this conclusion is open to the Commission in circumstances where the quantum of the allowance is not known. For instance, an allowance of $5 each week might be less likely to so incentivise employees than an allowance of $105 each week, even though the higher allowance might conflict with other elements of the modern awards objective.

51. Further, the Commission cannot determine the extent to which this provision is relevant to the SDA's claim where the locations cannot be identified. That is, it cannot be assumed that the necessity (if any) of an award entitlement to encourage employees to work in location A is the same as location B. Where these locations are unknown, it is impracticable for the Commission to determine whether s.134(1)(c) lends support to the SDA's claim or how it measures against the other relevant factors listed at s.134(1).

52. Section 134(1)(f) requires the Commission to take into account the likely impact of any exercise of modern award powers on business. The manner in which the SDA now seeks to run its case places employer representatives in an unfair predicament. The primary basis for opposition from employer representatives in response to a claim for an additional monetary benefit is most often the financial impost that it will introduce for employers covered by the relevant award(s). Employer organisations will often seek to call evidence that establishes the cost implications of the claim for the purposes of establishing the adverse impact it will have on employers.

53. In circumstances where neither the application nor the quantum of the proposed provision is known, such evidence cannot be called. Indeed we are

unable to identify precisely which of our members will be impacted by the claim. Even if this could be done, member companies would be unable to provide details of the financial impact that a new monetary obligation would have on their business where the quantum of that obligation has not been identified. In such circumstances, we are unable to assist the Commission in assessing the extent to which the SDA's claim runs contrary to s.134(1)(f).

54. This should not, however, unfairly prejudice employer interests. That is, the Commission should not conclude that an absence of evidence regarding the cost of the claim confirms that the claim will not adversely impact upon business. Rather, the manner in which the SDA seeks to run its case has rendered it impossible for employer associations to present evidence as to the cost impact of the claim. This in and of itself provides a sound basis upon which the Commission should decline to permit the SDA to conduct its case in the manner proposed.

55. Section 134(1)(h) requires the Commission to take into account the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy. In light of the various difficulties we have highlighted above, the Commission cannot reach a concluded view in respect of this provision.

56. As can be seen, the Commission cannot sensibly proceed in the manner sought by the SDA. It is not in a position to determine whether the proposed provisions are necessary in the sense contemplated by s.138. Indeed the only conclusion that may be reached based on the material before the Commission is that the claim must fail. On this basis, our primary contention is that the SDA's claim should be dismissed.

57. In the alternate, the Full Bench should proceed as follows. The SDA should be directed to file draft determinations that identify the quantum of the allowance that is sought and, in respect of its alternate model, the locations to be listed in the schedule. To the extent that the SDA seeks to provide any justification for the basis upon which it has selected the relevant percentages and locations, we would not oppose the Commission granting it a brief window to do so.

Respondent parties should thereafter be permitted a reasonable period of time to gather evidence and file reply submissions and evidence. The matter should then proceed by way of a hearing before the Full Bench.

58. We note that such a process would be consistent with that adopted in respect of the ASU's claim. We cannot identify any reason the SDA's application should follow a different procedural path.

4. THE ASU'S CLAIM

59. The ASU seeks the insertion of a new provision in 11 modern awards which would introduce an entitlement to a district allowance for an employee required to work in a remote location specifically nominated by the clause, in New South Wales, Northern Territory, Queensland, Western Australia, Christmas Island and Cocos Islands.

60. The monetary amount payable is stipulated by the clause itself, by reference to the State/Territory and the specific town/location. The rate is prescribed as a weekly amount of up to $96.

61. The proposed clause appears to be based on similar provisions contained in some pre-modern awards. In addition to specifying the actual allowance payable, it also:

    - Requires the payment of a higher amount where an employee has a dependent or partial dependent.

    - Mandates the payment of the allowance during a period of annual leave and deals with the circumstances in which the allowance is payable during other periods of paid leave.

    - Purports to require the payment of the allowance during long service leave if the employee remains in the district in which the employee is employed during the period of leave.

    - Provides a method by which the allowance is to be adjusted, by reference to the "schedule of ADF district allowances published by the Federal Government".

62. Whilst we deal with these issues and others regarding the claim in greater detail below, we note at the outset that the terms of the proposed provision are problematic for various reasons, such as those we here address.

The application of the clause

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

64. 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.

65. It is unclear to us how these two provisions are to be reconciled.

The requirement to pay the allowance during certain periods of leave

66. At clause X.7, the ASU's proposal seeks to impose an obligation to pay the district allowance 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.

67. 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. The effect and purpose of the clause is obviously undermined if an employee can simply assert that they did remain within the district and upon such an assertion, the employer is required to pay the allowance.

68. 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. In our view, the provision would not require the allowance to be paid for such a day.

69. 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.

The requirement to pay the allowance during long service leave

70. Clause X.7 also requires the payment of the allowance 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 the amount payable to an employee during long service leave, falls foul of this provision and therefore, has no effect (ss.136 and 137).

71. This submission is consistent with the Commission's recent decision that award provisions that list 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.[14]

72. 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.

[14] [2014] FWCFB 9412 at [104] – [105].

73. 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).

74. 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 there is a dependent or partial dependent

75. 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 "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.

- 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.

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

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

- 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.

77. 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. It essentially means that where an employee has a spouse, de facto spouse or child to whom a modern award applies under which there is no entitlement to a district allowance, the employee's employer must pay double the district allowance. Having regard to the fact that, even if the claims before the Full Bench were successful, there would remain 106 modern awards without an entitlement to district allowances, the impact of such a provision is extraordinary.

78. 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.

79. 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.

80. 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.

81. 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.

5. THE STATUTORY FRAMEWORK

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

83. 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.

84. 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).

85. 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).

86. 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).

87. 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.

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

6. THE COMMISSION'S APPROACH TO THE REVIEW

89. At the commencement of the Review, a Full Bench dealt with various preliminary issues. The Commission's decision provides the framework within which this Review is to proceed (the Preliminary Issues decision).[15]

90. 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.[16]

91. 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.[17]

92. 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*."
>
> [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

[15] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788.

[16] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [23].

[17] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [24].

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.[18]

93. 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."[19]

94. The frequently cited passage from Tracey J's decision in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)*[20] was adopted by the Full Bench.[21] 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.[22]

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[18] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [25] – [27].

[19] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [36].

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

[21] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [39].

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

95. 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.[23]

96. Accordingly, the Preliminary Issues decision establishes the following key threshold principles:

- A proposal to vary a modern award must be accompanied by submissions addressing the relevant statutory requirements and probative evidence;
- The Commission will proceed on the basis that a modern award achieved the modern awards objective at the time that it was made;

[23] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [31] – [34].

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

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

- 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.

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

98. In a subsequent decision considering multiple claims made to vary the *Security Services Industry Award 2010*, a Full Bench upon which Vice President Watson was presiding made the following comments, which we respectfully commend to the Full Bench: (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.[24]

99. 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 opposed.

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

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

100. There was no universal entitlement to district or location allowances arising from pre-modern awards, which applied to all employees in each of the industries that are affected by the SDA and ASU claims. This in and of itself means that the allowances now sought must be seen as a new entitlement. Any suggestion that such an allowance previously formed part of the minimum safety net applying to all employees in the relevant industries is an obvious overstatement.

101. The existence of district/location 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 a select few locations. Some awards contained a schedule that appears similar in its form to what is now proposed by the ASU. Its incidence, however, was by no means universal.

102. For example, the *Contract Call Centres Award 2010* is based on the terms and conditions that were found in the *Contract Call Centre Industry Award 2003*[25].[26] That award did not contain any district or location allowances.

103. The *Business Equipment Award 2010* "effectively amalgamated three awards[27] currently covering the servicing, clerical and sales activities of employers in the business equipment industry".[28] Of those three awards, only the *Business Equipment Industry - Technical Service - Award 1999*[29] contained an entitlement to a location allowance. The application of that provision in certain states was more confined than the ASU's proposal.

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[25] AP827785.

[26] *Award Modernisation* [2009] AIRCFB 345 at [162].

[27] The *Business Equipment Industry - Clerical Officers - Award 2000* (AP769431); the *Business Equipment Industry - Technical Service - Award 1999* (AP769412) and the *Business Equipment Industry (Commercial Travellers) Award 2000* (AP769409).

[28] *Award Modernisation* [2009] AIRCFB 345 at [161].

[29] AP769412.

104. The *Electrical Power Industry Award 2010* was created having particular regard to Victorian non-enterprise awards. [30] Neither of those contained district allowances.[31]

105. Whilst the *Vehicle Industry - Repair, Services and Retail Award 2002* [32] contained some location allowances, the *Vehicle Industry Award 2000*[33], which covered the vehicle manufacturing industry, did not afford employees such a benefit. Despite this, the SDA's proposed clause would apply to all employers and employees covered by the *Vehicle Manufacturing, Repair Services and Retail Award 2010*.

106. Certain pre-modern awards that preceded the *Fast Food Industry Award 2010* contained location allowances, however they were confined in their application to discrete parts of Western Australia, Northern Territory and Queensland.

107. To the extent that district allowances existed, comments made by the AIRC during the Part 10A Award Modernisation Process (extracted below) 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 these two States/Territories as they were "not aware of any allowances in other States which [were] of significant magnitude overall to require consideration".[34]

108. Further, the AIRC noted that:[35]

    - 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".

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

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

[32] AP824308.

[33] AP801818.

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

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

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

109. This alone supports our view that what is now sought by the Unions cannot properly be characterised as the retention of a pre-existing entitlement. The SDA's claim purports to introduce an entitlement that arises in remote areas across Australia that were not previously captured by a pre-modern award entitlement. Similarly, the ASU's claim requires the payment of an allowance to employees located in specific towns where an entitlement did not previously arise, particularly in New South Wales and Queensland. Furthermore, the quantum of the allowances sought exceed those that were previously payable.

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

8. THE PART 10A AWARD MODERNISATION PROCESS

111. 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[36]. 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.

112. 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.

113. 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.[37]

114. 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

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

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

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 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.[38]

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

- The decision noted the national application of modern awards as a matter of relevance to the possibility of including provisions that only operate in particular towns.

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

116. 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:

- **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 Bench 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.

- **The Northern Territory**: the clause could not be maintained for more than five years. This was based on a decision of the Australian Conciliation and Arbitration Commission (ACAC) to retain district

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

allowances in awards applying in the Northern Territory but without further adjustment such that they 'lose their significance over time'.[39]

117. 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.[40]

118. 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 allowances were to be inserted and maintained. There does not

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

[40] [2008] AIRCFB 1000.

appear to be any express contemplation of the payment of district allowances in Queensland or New South Wales. 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 for employers.

119. 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 one 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.

120. 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 meet the modern awards objective.

9. FIXATION AND ADJUSTMENT

121. A key issue arising from these proceedings is the need to determine an appropriate method of fixing and adjusting location allowances.

122. 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.[41]

123. 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.[42]

124. We refer also to a 1980 decision of the Western Australian Industrial Relations Commission (WAIRC), in which it dealt with applications to vary district allowances.[43] The WAIRC considered district allowances to be comprised of three components – price, isolation and climate – and found that each component should be separately considered in determining whether the allowance should be adjusted. The difficulty in assessing each of the components was acknowledged. Specifically, the WAIRC observed the arbitrary nature of attributing a value to the factors of isolation and climate. The decision reflects the inherent difficulties in assessing how and the extent to which a district allowance should be adjusted.

125. The Unions in these proceedings have failed to propose a fair, relevant and appropriate method of fixation and adjustment of the allowances sought.

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[41] [2008] AIRCFB 717 at [28].

[42] [2008] AIRCFB 1000 at [80].

[43] *District and Location Allowances* (1980) WAIRC 1141.

The SDA's claim

126. Little can be said of the SDA's claim in this regard in light of its failure to identify the amount that would be payable to an employee under its proposals.

The ASU's claim

127. The ASU's claim suffers from a clear deficiency in this regard, as its proposed clause X.10 does not constitute an appropriate method of fixing and adjusting the allowances proposed.

128. Clause X.10 states that each location allowance is to be varied from the beginning of the first pay period commencing on or after 1 July of each year in accordance with the movement of the schedule of ADF district allowances published by the Federal Government.

129. There is little to no explanation given by the ASU as to where this schedule is published, the basis upon which those allowances are set or adjusted and its reasons for relying upon this formulation.

130. We have reviewed the ADF Pay and Conditions Manual, which is published by the Department of Defence.[44] It appears that the "Grades" assigned by the ASU in its draft determination correlate with the "Grades" assigned by the ADF schedule of allowances, which also applies in various specific locations.[45]

131. The method by which this schedule is adjusted or the criteria for determining whether to vary these allowances is not clear to us. Nor can we understand why the ASU has chosen allowances payable to the ADF as the appropriate measure of what should be paid to an employee covered by the awards that are the subject of its claim. The working conditions faced by members of the ADF, their pay and conditions and presumably, the factors determining any adjustment to those allowances, is not analogous to the modern awards system applying to national system employees. The selection of the ADF schedule,

[44] Department of Defence, *ADF Pay and Conditions Manual*

[45] See Chapter 4 Part 4 and Annexure 4.4.A of the Manual.

without any explanation from the ASU as to why this is appropriate, seems somewhat peculiar.

132. We also note that if this proposal was adopted, the quantum of the allowance payable to employees covered by the relevant modern awards would be determined by a force outside this jurisdiction. In essence, the Commission would be inserting an entitlement into modern awards which is determined by a scheme that operates beyond the realms of the Fair Work jurisdiction. It is clearly inappropriate and undesirable to assign the role of determining and adjusting modern award allowances to another jurisdiction that is not required to give consideration to matters relevant to employers and employees covered by these awards.

133. The ASU has clearly failed to propose an appropriate method of fixing and adjusting the allowances it has proposed for inclusion in the relevant modern awards.

10. THE COST OF LIVING

134. The Unions consistently 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. In making the following submissions, we put to one side the question of whether the Unions have in fact established that employees located in each of the relevant areas do face a higher cost of living.

135. A higher cost of living in remote and regional parts of Australia is a matter that is more appropriately and adequately addressed by various other government schemes and policies. For example:

- Persons working or living in a remote area for 183 days or more during the current income year qualify for a tax offset. The Australian Taxation Office (ATO) has prepared a list of remote areas that are classed as either "Zone A" or "Zone B". The extent of the offset that can be claimed is determined by the zone in which the person lives/works. Special provision is also made for a person to claim the offset in certain circumstances where they were eligible during the previous financial year.[46]

- A person living in Tax Zone A or Tax Zone B may also be entitled to a Remote Area Allowance from the Department of Human Services.[47]

- Patient Assistance Travel Schemes provide a subsidy to assist with travel, escort and accommodation expenses incurred when rural and remote Australians travel over 100 kilometres to access specialised health care not available within a specified distance from their place of residence.[48]

136. 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.

[46] ATO, *Are you entitled to claim for living in a zone or serving in an overseas force?* (14 June 2014)
[47] Department of Human Services, *Remote Area Allowance* (17 November 2014)
[48] Department of Health, *Patient Assistance Travel Schemes*

This is a matter for governments and social assistance/welfare schemes. As indicated above, such assistance is already 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 its employees. To the extent that the Unions believe that minimum wages set by the Commission do not sufficiently remunerate employees in regional or remote areas, this is a matter for other forums. The introduction of new financial obligations on employers by way of an allowance is not the appropriate means by which this should be achieved.

11. THE EVIDENCE

137. The Unions variously appear to rely on the following factual propositions in support of their claims:

- That the cost of living is higher in regional and remote areas;
- That the employees covered by the relevant awards are low paid workers;
- That location allowances significantly impact on low paid workers in regional and remote areas;
- That location allowances attract and assist in retaining employees in regional and remote areas;
- That employees working in regional and remote areas face harsher climatic conditions; and
- That employees working in regional and remote areas suffer various consequences flowing from the isolated nature of the location in which they work.

138. The Unions have filed witness evidence in order to seek to establish some of the propositions upon which they rely, however we note the following obvious shortfalls in their evidentiary case.

139. The evidence filed is far from probative and is confined to the retail industry, the pharmacy industry and the social, community, home care and disability services industry. There is *no* evidence before the Commission in support of the Unions' contention that the remaining 13 modern awards that are the subject these claims must be varied as proposed in order to ensure that the awards meet the modern awards objective.

140. The testimony is also limited in terms of the specific locations to which it relates. If the Unions seek to frame their claim by reference to the higher cost of living faced in certain locations, it is incumbent upon them to bring evidence

to establish that the cost of living is in fact higher in each of those locations than what is experienced by employees who do not live in those 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 specific quantum proposed is necessary, in the sense contemplated by s.138, for each of the towns, locations or areas where it would be payable.

The SDA's Evidentiary Case

141. Whilst the SDA's claim relates to five modern awards, it has not called any evidence in respect of the *Hair and Beauty Industry Award 2010*, the *Fast Food Industry Award 2010* or the *Vehicle Manufacturing, Repair, Services and Retail Award 2010*.

142. The witness statements of Mr Robert Bassett, Ms Lee-Ann Hughes-Gage and Mr Malcolm Crowley should be given little weight. These employees are covered by enterprise agreements. Without undertaking a detailed analysis of the terms and conditions applying to those employees under the relevant enterprise agreements as compared to the modern awards, and in that context, the impact of receiving a district allowance or otherwise, their evidence does not shed any light on why the insertion of the allowance in the award might be necessary. The evidence does not establish that it is the payment of the specific district allowance to which they are entitled under their enterprise agreement, which enables them to meet what they say is a higher cost of living.

143. The evidence of Mr Peter Gunsberger is limited to his experience of working in "remote locations" in Queensland. Furthermore, the methodology by which he has chosen to photograph various goods as attached to his statement is unclear. In our view, this evidence should not be considered representative of the cost of living in any particular location.

144. At its highest, the evidence called by the SDA can be characterised as the belief or opinion of a few employees that those covered by the relevant awards would 'benefit' from an additional weekly payment in the form of a district

allowance. Such evidence is of limited value. It is virtually impossible to contemplate circumstances in which an employee would *not* form the view that an additional weekly payment would be 'beneficial'.

The ASU's Evidentiary Case

145. The witness statement of Ms Rosslyn Ferry deals only with Broken Hill and the need for an allowance to compensate employees there located. Not one of the other locations listed in the ASU's extensive claim is referred to.

146. Similarly, the statement of Ms Lana Thorne can stand only in support of the ASU's claim in respect of the *Social, Community, Home Care and Disability Services Award 2010* and employees located in Port Hedland in Western Australia. Her statement was attested to before the transitional district allowances clause ceased to have effect. In her evidence she speculates as to the financial impact that this would have. It is curious that the ASU has elected not to bring evidence of the impact that the deletion of transitional district allowances has *in fact* had on its membership in order to support the contention that such payments are necessary.

12. SECTION 138 AND THE MODERN AWARDS OBJECTIVE

147. In exercising its modern award powers, the Commission must ensure that modern awards, together with the National Employment Standards, 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).

148. 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.

149. We also note that each award, 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 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 minimum safety net is not sufficient.

150. The need for this approach is supported by s.156(5), which requires that the Commission review each award in its own right. We note the following observations made by the Commission in its Preliminary Issues decision:

> [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.[49]

151. The "necessary" test must be considered with respect to each specific proposal put by each union. By way of example, the ASU must establish that a provision requiring additional payment where an employee supports a dependent family member is necessary in the sense contemplated by s.138.

152. The Unions have failed to mount a case that establishes that the provisions proposed are necessary to ensure that each of the awards that are the subject of the claims, meets the modern awards objective. We note specifically, that the ASU's submissions are virtually silent as to why the variations proposed are necessary to achieve the modern awards objective. No analysis is provided against the considerations arising from s.134(1).

153. In dealing with the factors listed at s.134(1) below, we reiterate that our ability to counter the SDA's claim has been limited due to the manner in which it has sought to run its case.

A Fair Safety Net

154. 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. The imposition of a new obligation on employers to pay the proposed allowances is unfair to employers.

155. 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 to mitigate the impact of modernisation on employers and employees. The AIRC, when dealing with the inclusion of transitional provisions in awards, stated:

[49] *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [33] – [34].

> [19] … Most modern awards will contain terms which involve changes in minimum terms and conditions for many employees. That is because modern awards will replace a number, in some cases many, pre-reform awards and NAPSAs and establish a uniform safety net for employees and employers formerly covered by those pre-reform awards and NAPSAs. The effect of s.576T is that while modern awards must not include terms and conditions of employment that are determined by reference to State or Territory boundaries, a modern award may include such terms for an initial period of five years. It is no doubt the legislature's intention to permit the Commission to include transitional provisions in modern awards to cushion the impact of changes in wages and other conditions. In the case of employees such provisions might deal with any reductions in their terms and conditions. In the case of employers the focus might be on increases in costs.[50]

156. The paragraph above must be read with the AIRC's conclusion that the entitlement to a district allowance for employees in the Northern Territory cannot be maintained for more than five years and that there is need to review the clause in relation to Western Australia.[51] Together, these statements of the Full Bench indicate a clear intention that district allowances would not necessarily form part of the federal modern award system on a permanent basis.

157. Further, disabilities suffered by an employee required to work in a particular location may, to some extent, be addressed by an industry allowance payable under an award. The obligation to pay a district allowance which addresses factors that are, in part, already compensated for, is not a fair outcome for employers.

158. If district allowances were to be included in awards, a uniform and transparent method for adjusting district allowances would need to have been developed in order to ensure fairness and consistency. This concern was raised by the AIRC when the awards were made.[52] We have earlier dealt with concerns arising from the method of adjustment proposed by the Unions. In our view, they have failed to develop a fair, relevant and appropriate method of fixation and adjustment.

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[50] *Award Modernisation* [2009] AIRCFB 345.

[51] *Award Modernisation* [2008] AIRCFB 1000 at [81] – [82].

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

159. Issues pertaining to fairness also arise from the specific terms of the proposed clauses. We refer to the submissions we have earlier made regarding the requirement to pay double the allowance where an employee has a family member who is not in receipt of a district allowance as an examples of the unfairness that would flow from these terms.

A Relevant Safety Net

160. The Unions have failed to address the relevance of a district allowance in the modern awards system. We again refer to the AIRC's clear intention that district allowances only be included until 31 December 2014 to cushion the transition to the modern awards system and to allow an opportunity to review district allowances in Western Australia.[53]

161. The irrelevance of district allowances in the Northern Territory was clearly accepted by 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.[54] A Full Bench of the ACAC found that:

- District allowances in the Northern Territory were introduced in 1915 based on the discomfort caused by climatic conditions and because Darwin was 'cut off from the rest of the world'.
- Residents of Darwin and other parts of the Northern Territory should no longer be compensated for factors going to isolation and climate.
- 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.

[53] *Award Modernisation* [2009] AIRCFB 345 at [19] and *Award Modernisation* [2008] AIRCFB 1000 at [81].
[54] *District Allowance Clauses – Northern Territory Awards,* Print F4832.

- 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.

- 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.

162. 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.[55]

163. 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, when consequences arising from harsher climatic conditions, isolation and access to services have improved in rural and regional parts of Australia. We note that despite the above decision, the ASU's claim requires the payment of an allowance to employees in Darwin and Alice Springs and the SDA's claim could apply to various parts of the Territory. Neither union has explained how or why, in light of the above decision, such allowances are relevant in any State or Territory in this day and age.

164. To the extent that the Unions rely on arguments regarding the cost of living, we point to the submissions we have earlier made on this issue.

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

The Provision of a Minimum Safety Net

165. 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 above and need not repeat the arguments we have made in support of the proposition that district allowances, to the extent that they existed in pre-modern awards, were not universal in their application. What is now sought by the Unions' is the extremely expansive application of a brand new entitlement.

Section 134(1)(a) – relative living standards and the needs of the low paid

166. 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.

167. The *Annual Wage Review 2014 – 2015* decision dealt with the interpretation this provision:

> [310] The assessment of relative living standards requires a comparison of the living standards of workers reliant on the [national minimum wage] and minimum award rates determined by the annual wage review with those of other groups that are deemed to be relevant.
>
> [311] 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.[56]

168. The term "low paid" has a particular meaning, as recognised by the Commission in its Annual Wage Review decisions:

> [362] There is a level of support for the proposition that the low paid are those employees who earn less than two-thirds of median full-time wages. This group was the focus of many of the submissions. The Panel has addressed this issue previously in considering the needs of the low paid, and has paid particular regard to <u>those receiving less than two-thirds of median adult ordinary-time earnings and to those paid at or below the C10 rate in the Manufacturing Award.</u> Nothing put in these proceedings has persuaded us to depart from this approach.[57]

[56] [2015] FWCFB 3500 at [310] – [311]

[57] *Annual Wage Review 2012 – 2013* [2013] FWCFB 4000. See also *Annual Wage Review 2013 - 2014* [2014] FWCFB 3500 at [310].

169. 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:

- Established that the relevant group of employees to whom the district allowances would be payable are "low paid" in the sense described above;

- 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 essentials for a "decent standard of living" and to engage in community life; or

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

170. The dearth 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).

171. The Unions rely upon the higher cost of living in remote and regional areas in support of their contention that the variation proposed is 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.

Section 134(1)(b) – the need to encourage collective bargaining

172. 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 are of no relevance.

173. It should also be borne in mind that the effect of the Unions' failing to succeed in their claims is not the removal of district allowances. That has already occurred by virtue of the sunset clause that was contained as part of the accident pay transitional provision. Thus, the assessment to be made with respect to s.134(1)(b) is referrable to the insertion of the clauses proposed by the unions, not the current absence of accident pay provisions in modern awards.

174. We submit that 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 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 WA Branch's members working in locations that are classified as "remote" or "very remote" by the Australian Bureau of Statistics, are covered by enterprise agreements. Indeed, of the 635 such members, only 10 are employed under the relevant modern award.[58]

175. 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.

176. The need to pay a district allowance to encourage employees to work in remote locations 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 industry. 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, the employer may consider negotiating an

[58] Witness statement of Peter O'Keeffe at [9] – [11].

alternate means of attracting and retaining employees, such as through other above award payments, or fly-in, fly-out arrangements.

177. 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.

178. 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

179. 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 here.

180. 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 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. 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 work practices and the efficient and effective performance of work

181. It is not consistent with this element of the modern awards objective for district allowances to be paid. 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

182. This is a neutral consideration.

Section 134(1)(e) – the principle of equal remuneration for work of equal or comparable value

183. This is a neutral consideration.

Section 134(1)(f) – the likely impact on business, including on productivity, employment costs and the regulatory burden

Employment Costs

184. 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 $96 per week in many locations in Western Australia. Where that employee has a dependent, they would be paid an additional $192 per week.

185. It must also be remembered that this may not be an expense that arises with respect to just one or two employees. A small business in a regional area with five employees, each of whom have a "dependent", could cost the business almost $1,000 per week. Submissions regarding the significant financial impact upon such an employer, particularly a small business, cannot be ignored.

186. 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.

187. 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.[59] At page 18, the report shows that a higher proportion of non-public sector organisations in regional/rural locations were award-reliant. 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. It cannot be assumed that those costs will be subsumed by over-award payments already due to an employee. (We also query the ability to now absorb such separately identifiable award entitlements since the deletion of the standard 'absorption' clause from all modern awards[60]).

188. For the reasons we have earlier set out, we are unable to provide any detailed analysis of the cost implications of granting the SDA's claim, but for the obvious observation that it would result in an increase in employment costs.

Regulatory Burden

189. The provisions proposed also impose a new and significant regulatory burden on employers. We have earlier dealt with the confusion arising from the interpretation of the SDA's draft determination. Its operation is cumbersome and difficult to understand. To determine the eligibility of an employee to an allowance under such a clause and then to administer such payments is a time consuming, costly exercise for employers.

190. Similar observations can be made about the ASU's claim. This is particularly so given that the clause imposes additional obligations on employers regarding the payment of the allowance where an employee has a dependent/partial

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

[60] *4 yearly review of modern awards* [2015] FWCFB 6656.

dependent and in certain circumstances where the employee is on leave. We have dealt with issues arising from such clauses earlier in these submissions.

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

191. 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. Further, s.576B(2)(d) stated that in performing its functions under Part 10A of the Act, the AIRC was to have regard to various factors including the desirability of reducing the number of awards operating in the workplace relations system.

192. We have dealt with a series 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

193. The need to maintain a stable modern award system runs contrary to the Unions' claim. 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.

194. Whilst the AIRC contemplated a full and proper review of district allowances at a later date,[61] the material filed by the Unions is not sufficient to enable the Commission to make such an assessment in this Review. The submissions and

[61] [2008] AIRCFB 1000 at [82].

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.

195. 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

196. 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**.**