

# **Productivity Commission Inquiry into the Workplace Relations Framework**

## **Supplementary Submission**

**by the**

**Australian Catholic Council for Employment Relations**

**9 April 2015**

1. In March 2015 the Australian Catholic Council for Employment Relations (ACCER) lodged a submission concerning wage-related matters raised in the inquiry into the Workplace Relations Framework by the Productivity Commission (the Commission)
2. Paragraph 3 of those submissions sought leave to file a supplementary submission after the filing submissions with the Fair Work Commission (FWC) for the Annual Wage Review 2014-15:

“As a regular participant in annual national wage reviews ACCER has considered and responded to a number of issues regarding the provision of an adequate safety net for low paid workers and their families. ACCER's submissions to the Annual Wage Review 2014-15 are in preparation at the present time and are due to be filed by 27 March 2015. As those submissions will bear on some of the issues being considered by the Productivity Commission, ACCER seeks leave to file a supplementary submission to the current inquiry by 10 April 2015.”

3. ACCER has been afforded the opportunity of filing supplementary submissions. Apart from some limited matters, we have not sought to reproduce the relevant sections of ACCER's submissions to the FWC. We ask the Commission to refer to the submission of 27 March 2015, which now appears on the FWC's website. The wage submission includes an Attachment of eight chapters, some of which are referred to in the following paragraphs. We only ask that the Commission consider those aspects of the submission and the attachment that are specifically referred to in the following paragraphs.

### *Issue of law: the single person benchmark*

4. As discussed in the substantive submission to the inquiry, in its decision in the *Annual Wage Review 2013-14* that FWC stated the "appropriate reference household for the purposes of setting minimum wages is the single person household" (the single person benchmark) see; *Annual Wage Review 2013-14, decision* [2014] FWCFB 3500, at

paragraphs [38], [365] and [373]. ACCER submission lodged with the FWC submits that, upon a proper construction of the terms of the *Fair Work Act 2009* :

(a) the establishing and maintaining of a safety net minimum wage under section 284(1) of the *Fair Work Act* requires the FWC to take into account the living standards and needs of the low paid with family responsibilities; and

(b) the establishing and maintaining of a safety net minimum wage under section 284(1) of the *Fair Work Act* without taking into account the living standards and the needs of the low paid with family responsibilities would be contrary to law.

5. The reasons provided to the FWC in support of these submissions on the construction of the minimum wage provisions of the *Fair Work Act* are in the Attachment hereto. ACCER has sought rulings from the FWC consistent with those submissions.
6. We draw these submissions to the attention of Commission because they are relevant to the proper application of the wage setting provisions of the current legislation and any proposed changes to them.
7. We also draw to the Commission's attention Chapter 2A and Chapter 2C of the Attachment to ACCER's wage submission. The relevance of fundamental principles and human rights to wage setting are addressed in Chapter 2A. Some of this has been included in ACCER's initial submission to the Commission's inquiry. We draw attention to the contents of Chapter 2C because they demonstrate that the single person benchmark is contrary to precedent and that, for example, the Australian Fair Pay Commission disavowed the single person benchmark in 2009.

*The substance of ACCER's Annual Wage Review submission*

8. ACCER's submissions show that many low income families are living in poverty and that the principal cause of this has been the failure of safety net wages to reflect rising community incomes over the past decade and more. This deleterious trend has been hidden within the national statistics that record the very substantial increases in Australian incomes, wealth and living standards over the same period (paragraph 12).
9. The National Minimum Wage (NMW) and the rates set for low paid award classifications are not living wages: they do not enable families to provide for their children, to live in

dignity and to achieve a basic acceptable standard of living by reference to contemporary national living standards. This assessment is made on the basis of the ordinary and expected situation in which workers find themselves and is not made on the basis of unusual or exceptional circumstances (paragraph 13)

10. In our view, the FWC, like its predecessors, has failed to give sufficient weight to the needs of low paid workers and their families and has failed to set a wage by reference to relative living standards across the Australian economy, including the living standards of those on age and disability pensions. The living standards of many full time low paid workers and their families, who depend on the wages safety net, are lower than those who depend on the pension safety net (paragraph 29).
11. The FWC has, ACCER submitted, an obligation to set the NMW at a level that will enable workers with family responsibilities to achieve a basic acceptable standard of living by Australia standards, a standard of living that is above poverty as it is conventionally measured. It should provide this in the ordinary and expected cases; and those cases must include families, whether couple parent or sole parent, with two dependent children. We are not advocating the coverage of unusual or exceptional cases, but a fair, realistic and rational application of a statutory obligation (paragraph 33).
12. The term “safety net”, which is not defined in the legislation, must be given its ordinary meaning. Its purpose is to protect workers in the ordinary and expected situations in which workers find themselves. The safety net does not have to cover exceptional cases, but it must cover ordinary and expected circumstances. These situations will cover single persons, workers who are sole parents and workers with a partner and children. In the contemporary Australian context, having two children is within the scope of the ordinary and expected circumstances. A safety net wage must, therefore, be sufficient to support families with two children, whether the family is headed by a couple where one of them stays at home to remain outside the paid workforce in order to care for their children, or by a sole parent in employment and incurring child care expenses. It would not be acceptable to set a wage that is sufficient for one of these families, but not for the other. A safety net designed for single workers cannot be a safety net for workers with family responsibilities. (See Attachment at Chapter 1C, *The legislative framework*, at paragraph 73.)

*Topics covered by ACCER's submissions*

13. *On average, safety net workers have had real wage cuts (paragraphs 59 to 66).* ACCER has argued that this is a matter of some importance, particularly in conjunction with the submissions on the distribution of productivity increases. The submissions show that, on average, safety net workers are employed in classifications that have had a real wage cut since 2001; see, in particular, paragraphs 297-307 of the Attachment.
14. *Safety net workers have not received productivity increases (paragraphs 67 to 75).* In the absence of a real wage increase, it cannot be said that, on average, safety net workers have had any benefit from the substantial increases in productivity over this time. As a matter of principle, workers should be entitled to increases in labour productivity. However, there is the issue of capital deepening, which has been acknowledged by the FWC, but not considered for its relevance to wage setting. This is a matter on which the Commission is well-placed to consider and express an opinion. ACCER would like to see more consideration given to, and measurement of, capital deepening so that parties to wage cases may better understand any *in principle* limit on the objective of distributing increases in labour productivity to workers. The impact of changes in the terms of trade is considered in this section. As with productivity, safety net workers have not had any benefit from the improving terms of trade since 2001 (and earlier).
15. *Safety net workers have fallen behind general wage increases (paragraphs 76 to 86).* The impact of this aspect on wage inequality is illustrated by Figure 3 in the Attachment to the submission. At paragraph 425 of the Attachment to the submission we observe:

“If we were to overlay on Figure 3 the real wage changes for safety net-dependent workers we would find that safety net-dependent workers were below the 10<sup>th</sup> percentile line, which showed a real increase of almost 15% increase over the 10 years 2004 to 2014. Over the period January 2004 to January 2014 the NMW increased by 38.8%, compared to a 31.8% increase in the CPI (see Table 1). This represents a 5.3% increase in real wages for the NMW worker, much less than the almost 15.0% increase received by the lowest paid percentile over a similar period. The same kind of calculation (again using Table 1) would put the C10-dependent worker, with a 1.4% real wage increase, even closer to the x axis.”
16. *The causes of increasing inequality (paragraphs 87 to 108).* In this section ACCER seeks to quantify the impact that the changing skills mix of the Australian workforce has had on increasing inequality. The method used is based on skill assessments associated with award classifications. ACCER accepts that this has limitations, but it appears to be

- the best means of measuring change that available at this time. ACCER has estimated that the increase in average skill levels has had a small impact on increasing inequality.
17. This part of the submission also deals with the FWC's response to rising inequality and to its acceptance in 2014 that minimum wage cases have contributed to increasing inequality. It has stated that "other factors" which are required to be considered in wage setting decisions have played a role in this outcome. These factors have lead to decisions that had the effect of increasing inequality or, to put it another way, have caused it not to take action that would have reduced rising inequality. ACCER argues that these 'other factors' and that the way in which they have impacted on wage outcomes are not discernible from past decisions.
  18. *Tax cuts and family payments have not maintained living standards (paragraphs 109 to 113).* This section refers to the Chapter 6 of the Attachment. That chapter refers to the lop-sided nature of tax cuts since 2001. While low paid workers have received tax cuts, they have been insufficient to compensate for the loss of wage relativity to the rest of the community. Wages need to be set having regard to the impact of the tax and transfer systems on relevant households. The effect of changes in wages taxes and transfers is summarised in Table 20 of the Attachment.
  19. *Poverty in the land of plenty (paragraphs 114 to 168).* This section of the submission refers to the current living standards of low paid workers and their families and to poverty in Australia. These paragraphs cover the measurement of relative living standards and their changes over time by reference to the Australian Bureau of Statistics' calculations of median equivalised disposable household income (MEDHI), supplemented by the Melbourne Institute's quarterly estimates of Household Disposable Income. ACCER argues that this is the best evidence in Australia on these kinds of measurements, which are critical for informed public policy. MEDHI can be used as the benchmark, but the relative poverty lines drawn from them are particularly useful. The FWC has referred to the 60% of median relative poverty line as the conventional measure of poverty (see *Annual Wage Review 2013-14, decision*, paragraph [399]. Table 27 shows the changes in MEDHI and poverty lines over the period January 2001 to January 2015. The information in Tables 28 to 30, compiled by ACCER, enables the relative position of safety net workers and their families to MEDHI and their poverty lines to be tracked over

time. Changes over time in disposable incomes relative to MEDHI or to the poverty line enable an assessment to be made of the impact of wages, taxes and (where relevant) transfers.

20. Figure 4 in the Attachment, which is based on those tables, illustrates that, over the period January 2004 to January 2015:
  - the NMW-dependent family of four fell further into poverty: from 3.3% below to 8.7% below, with a poverty gap of \$91.91 per week;
  - the C12-dependent family of four fell into poverty: from 1.7% above the poverty line to 5.4% below it, with a poverty gap of \$56.44 per week; and
  - the C10-dependent family of four fell into poverty: from 7.6% above to 1.2% below, with a poverty gap of \$12.20 per week (paragraph 616).
21. The position of single workers over this period is worse because their falling wage levels have not been partly offset by increased family payments. In January 2004 the single C12-dependent worker was 33.2% above the poverty line, but by January 2015 had fallen to 22.7% above the poverty line; see Tables 27 and 29. Because the Melbourne Institute's estimates show a flattening in HDI increases over the 12 months prior to its latest estimates (for the September quarter 2014) and because there was a 3.0% increase in safety net wage rates in July 2014, there has been a slight improvement in the position of safety net workers and their families relative to MEDHI and their poverty lines. This occurs from time to time, as Figure 4 shows, but this kind of change is typically of limited duration.
22. Data from the 2011 Census on the work profiles of low income families and estimates of the number of children living in poverty are referred to at paragraphs 154 to 160. This shows a very large number of children living in poverty (just over 110,000) in homes where there is a fulltime employee and two dependent children. It also shows that, among couple parent families with two children living in poverty, the number of single full time breadwinner families out-numbers the families with more than a full time breadwinner by almost two to one. The full time breadwinner should not have to work overtime or get a second job in order for the family to escape poverty and achieve a basic acceptable standard of living. Similarly, the second parent should not have to undertake full or part time employment in order for the family to escape poverty and achieve a basic acceptable standard of living. On these aspects, see paragraphs 631 to 639 of the

Attachment to the wage submission, which includes a reference to the Commonwealth Commission of Inquiry into Poverty, which was chaired by Professor Ronald Henderson, in the early 1970s.

23. Two recent Australian research reports on poverty and several international research reports on poverty are referred to in paragraphs 161 to 168. The aspect that we seek to draw particular attention to is the large number of households living in poverty even where there is a member in full time employment. In the ACOSS research, among households with fulltime employment 8.1% are under the 60% relative poverty line, with the members of these households comprising 22.2% of the total number living below the poverty line.

*Pensions and the living standards of pensioners*

24. For a number of years ACCER has argued, without any response, that pensions and the living standards of pensioners are relevant to the estimation of relative living standards and the needs of the low paid. This matter has added relevance because the 2009 reforms to the pensions system were based on the objective of providing a basic acceptable standard of living for pensioners. In its 2014 decision the FWC stated that they could be taken into account when setting wages, but there is no indication that this has been done. Because ACCER's reliance on these matters related to its contentions about the living standards of workers with family responsibilities, the adoption of the single person benchmark may have been the reason for their omission from the decision.
25. Good public policy requires that the minimum wage safety nets and the pension safety nets provide equitable outcomes, as between each other and the broader community, and that their respective adjustments maintain that equity over time. From an economic point of view, there needs to be an appropriate reward for work and compensation for the costs of work.
26. There are two tables in the Chapter 6C of the Attachment to ACCER's submission that deal with the relative changes over time. Table 21 presents various comparisons between the pensions and minimum wage rates over the 14 years to January 2015. Table 22 provides similar comparisons over the period January 2010 to January 2015. Under the 2009 reforms, pensions have increased by substantially more than safety net wage rates, continuing a trend that has been evident since 2001.

27. Comparative living standards between pensioners and safety net-dependent families are shown in Table 31 of Chapter 8D of the Attachment. ACCER has drawn attention to the differences in living standards:

“These comparisons raise serious issues about the levels of the wage and pensions safety nets. Pensions have been set, quite properly, to provide a basic acceptable standard of living and are adjusted to reflect increasing national wealth. On the other hand, safety net wages have been reduced relative to rising national wealth. That resulting disconnection between the wages and the pensions safety nets has increased over the past year. In January 2014 the difference between the equivalised incomes of the NMW family and the couple on the pension was \$9.26 per week (see Table 31 of ACCER's March 2014 submission), which meant that the family needed an increase in disposable income of \$19.45 per week to match the pensioner couple. That gap has now grown to \$28.39 per week, without any consideration of the costs of work.”(Paragraph 625 of the Attachment)



## ATTACHMENT

### ISSUE OF LAW: THE SINGLE PERSON BENCHMARK

28. Section 285 (1) of the *Fair Work Act 2009* (the Act) requires that the FWC conduct and complete an annual wage review in each financial year by reviewing modern award minimum wages and the national minimum wage order. In the annual wage review the FWC must also make a national minimum wage order to set the National Minimum Wage (NMW) for the year and thereby maintain a safety net of fair minimum wages; Part 2-6, in particular, sections 284(1), 285(2) and 294(1)(a).
29. Section 284(1) prescribes the minimum wages objective. The subsection requires that the FWC establish and maintain a safety net of fair minimum wages by taking into account the matters that comprise the minimum wages objective.
30. The terms of section 284 (1) are to be given their ordinary meaning, taking into account the minimum wages objective and the general objects of the Act. In particular, the term "safety net", which is not defined, must be given its ordinary meaning, informed by the minimum wages objective and the general objects of the Act.
31. The terms of section 284(1), so understood, require a broad consideration of the employment and personal circumstances of a wide range of employees, including those with family responsibilities. In particular, section 284(1)(c) requires the consideration of the relative living standards and the needs of the low paid with family responsibilities. Each specified matter in the minimum wages objective must be taken into account; see *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24.
32. ACCER submits that:
  - (a) the establishing and maintaining of a safety net minimum wage under section 284(1) of the Act requires the FWC to take into account the living standards and needs of the low paid with family responsibilities; and
  - (b) the establishing and maintaining of a safety net minimum wage under section 284(1) of the Act without taking into account the living standards and the needs of the low paid with family responsibilities would be contrary to law.

33. Section 3 of the Act, which sets out the object of the Act, includes the following:

"The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes *national economic prosperity and social inclusion for all* Australians by:

- (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account *Australia's international labour obligations*; and
- (b) *ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders*; and ...."(emphasis added.)

34. In order to promote "social inclusion for all Australians", when establishing and maintaining a safety net of fair minimum wages the FWC must take into account the circumstances of the low paid with family responsibilities, in particular:

- (a) their relative living standards; and
- (b) their needs.

35. The right of an employee to remuneration that provides for the employee's family responsibilities is recognised under Australia's international labour obligations which s 3 of the Act requires be taken into account.

- (a) The United Nations' *International Covenant on Economic, Social and Cultural Rights*, recognises a universal right "... to the enjoyment of just and favourable conditions of work which ensure, in particular: ... Remuneration which provides all workers, as a minimum, with ... Fair wages and ... A decent living for themselves and their families ....." (Article 7(a)).

- (b) The International Labour Organisation's *Minimum Wage Fixing Convention, 1970* provides in article 3:

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

- (a) the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups;
- (b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment"

36. Australia has ratified the *International Covenant on Economic, Social and Cultural*

*Rights* and the *Minimum Wage Fixing Convention, 1970*, and these are within the scope of the reference to "Australia's international labour obligations" in section 3(a) of the Act.

37. The *Universal Declaration of Human Rights* also recognises that everyone who works has "the right to just and favourable remuneration ensuring for himself and his family an existence worth of human dignity, and supplemented, if necessary, by other means of social protection" (Article 23(3)). A minimum wages set without taking into account the relative living standards and needs of the low paid with family is not only inconsistent with recognised human rights but would be contrary to law.
38. The object of social inclusion calls attention to the requirement to promote the ability of workers and their families to live in dignity and participate in society. The provisions in the Act regarding the setting of the NMW should be treated as beneficial legislation and should not be construed or applied narrowly.
39. The construction of the minimum wages objective is assisted by the inclusion in the Explanatory Memorandum to the *Fair Work Bill* of a reference to the fulfilling the election commitments made by the Government:

"As the means for fulfilling the election commitments made by the Government in *Forward with Fairness*, released April 2007, and *Forward with Fairness – Policy Implementation Plan*, released August 2007, this Bill provides a much needed opportunity to reconceptualise the legislation from first principles and..." (*Explanatory Memorandum, Fair Work Bill 2008*, page iv)

*Forward with Fairness*, released in April 2007, provided:

"Working families in modern Australia face the daily challenge of balancing the pressures of work with the demands of family life, pay their mortgage and participating in the community....

Labor believes in support Australian working families. Labor also believes in a fair day's pay for a fair day's work....

A Rudd Labor Government will guarantee a safety net of decent, relevant and enforceable minimum wages and conditions for working Australians.

....

Decent minimum wages are central to Labor's safety net.

Under Labor, Fair Work Australia will review minimum wages in an open and transparent process conducted once each year....

Fair Work Australia will consider all the evidence available to it and make a decision which is fair to Australian working families, promotes employment growth, productivity, low inflation and downward pressure on interest rates" (Pages 7 and 11)

40. Further, by section 578 of the Act the FWC must, in performing functions or exercising

powers under the Act (such as making a minimum wage order), take into account the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of family responsibilities. Similar provisions are found in sections 153, 195 and 351 of the Act. These provisions reflect the intention of Parliament to prevent discrimination against (among others) employees with family responsibilities. The setting of wages upon the basis that employees are from a single household and do not have family responsibilities would be discriminatory. Thus the living standards and needs of the low paid with family responsibilities must be taken into account by the FWC when establishing and maintaining safety net wages.

41. The relative living standards and needs of the low paid with family responsibilities are affected by their family responsibilities. Family responsibilities have been consistently recognised and accepted by national wage fixing tribunals in relation to the fixing of minimum wages; see, for example, [...Chapter 2C of the Attachment to this submission]. In the absence of anything in the terms of the Act or in the extrinsic materials to suggest that, in setting minimum wages, the Act would permit a departure from past practice, it must be presumed that Parliament did not intend to change the basis upon which wages had been set for more than a century.
42. The setting of award wage rates is covered by Part 2-3 of the Act, in particular, sections 134(1) (which prescribes the "modern awards objective") and 139. Section 284(2) provides that the minimum wages objective applies to the "setting, varying or revoking [of] modern award wages". For the reasons set out in the foregoing paragraphs, ACCER further submits that:
  - (a) the setting and varying of award safety net wages under Part 6-2 of the Act requires the FWC to take into account the living standards and needs of the low paid with family responsibilities; and
  - (b) the setting and varying of award safety net wages under Part 6-2 of the Act without taking into account the living standards and the needs of the low paid with family responsibilities would be contrary to law.