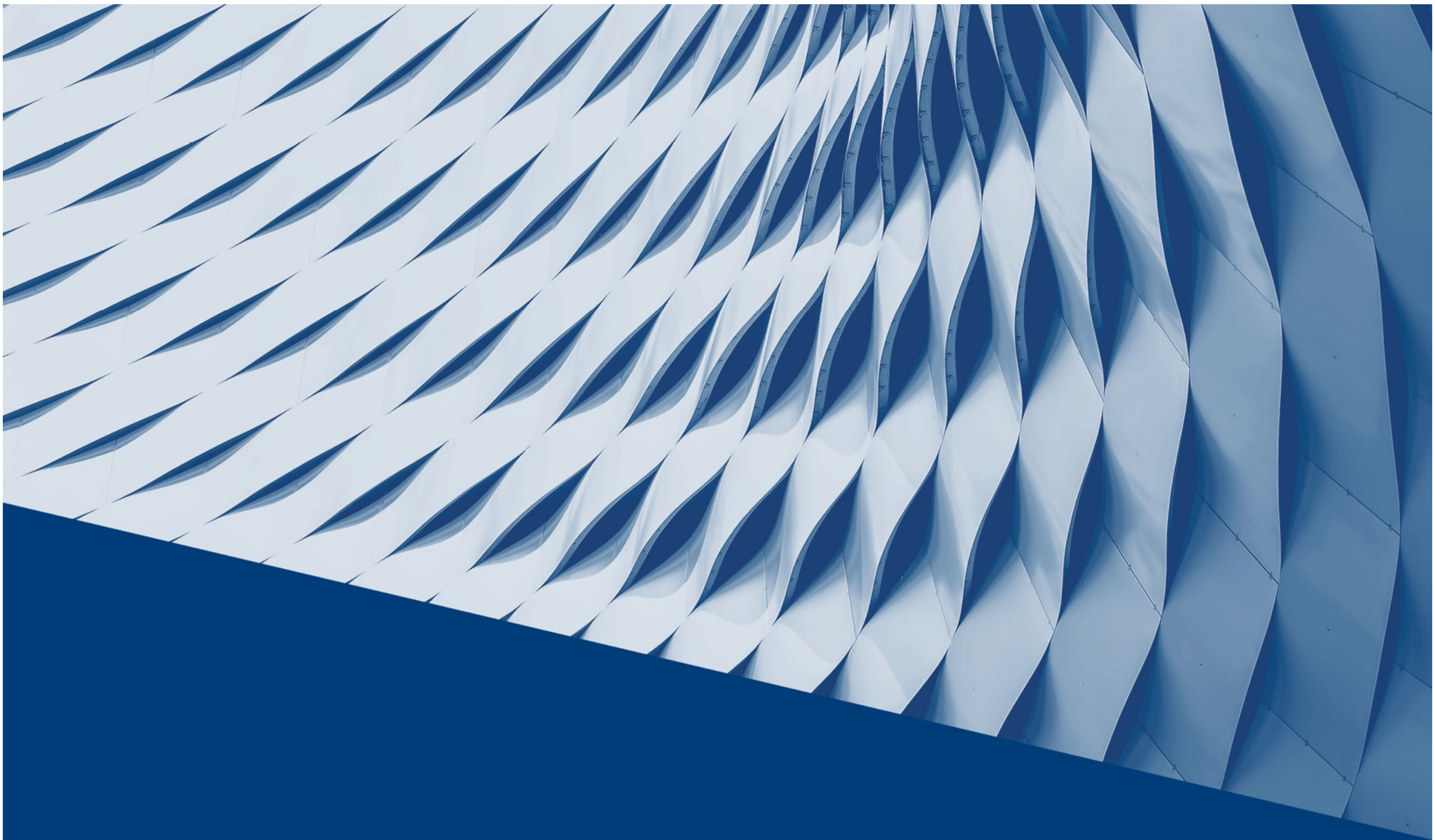


Supplementary Submission to the Annual Wage Review 2019-20

ACTU Submission, 29 May 2020

D. No.: 23/2020

australian council of trade unions

CONTENTS

LIST OF TABLES

LIST OF FIGURES

1. OVERVIEW

1. This submission serves three purposes: to comment on recent data which is relevant to the Panel's decision making, to comment on reply submissions provided by other parties and to answer the supplementary questions published by the Panel.

2. There is no doubt that many employees and employers are facing difficulty as a result of the COVID-19 pandemic. Many workers in precarious work, and vulnerable groups, women, youth, part time and casual are disproportionately represented amongst the low paid, and many of these are excluded from government support packages. Similarly, many employers in award reliant industries are adjusting to significant falls in consumer demand that have been brought about as a result of regulatory restrictions.

3. As restrictions begin to lift, it is hoped that conditions improve for all Australians that have been affected. In our view, a real lift to minimum wages will help rather than hinder that transition.

2. COMMENT ON MATTERS ARISING SINCE 4 MAY

5. We provide a commentary on recent major statistical releases below. Some smaller scale measures are referred to in the following section.

2.1 Retail trade

6. The ABS released preliminary figures on 20 May for retail trade for April 2020.[1] The ABS provides detailed data notes in that release indicating the higher degree of uncertainty around its preliminary data than in its standard release data. Reasons include the increased imputation and higher non-response rates required for the preliminary data.

7. The retail trade figures reveal the responsiveness of spending patterns in the economy to the exigencies of crisis lockdown. The corollary is that retail trade figures also reveal the potential for benefit from income stimulus as the government measures assume. JobKeeper and indeed JobSeeker are premised on a recognition that improving income to the low paid supports the economy, because the low paid basically spend all income received.

8. Retail turnover in seasonally adjusted current figures fell 17.9% in April 2020, to $24,727.6 million, a fall of $5,383.3m from March 2020. In the preliminary figures which incorporate an adjusted method of seasonal adjustment, this amounted to a fall of 9.4% compared with April 2019. However, the fall for April 2020 given in the preliminary figures followed an increase in March 2020 given in the last ABS standard monthly release[2] in current terms of 8.5% seasonally adjusted.

9. The changes in spending patterns over the last couple of months were captured in a massive redistribution amongst industries within the overall figures in both March and April 2020. For March 2020, the increases for Food retailing (24.1%), Other retailing

---

1 https://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/8501.0.55.008Main%20Features1Apr%202020?opendocument&tabname=Summary&prodno=8501.0.55.008&issue=Apr%202020&num=&view=

2 https://www.abs.gov.au/ausstats/abs@.nsf/mf/8501.0

(16.6%), and Household goods retailing (9.1%) were mirrored by a fall in Cafes restaurants and takeaways of 22.9% and also in Clothing, footwear and personal accessory retailing (-22.6%), and Department stores (-8.9%) in the same month.

10. For April 2020, half of the total fall in retail trade in seasonally adjusted terms of $5,383.3m came from Food retailing which fell 17.1% (-$2,444.3m) from March 2020. We note that for April 2020:

> "Sales in Food retailing are 5% above the level of April 2019.
>
> "Analysis of supermarket and grocery store scanner data shows that monthly retail turnover fell in original terms for Non-Perishable Goods, Perishable Goods and All Other Products by 23.7%, 15.3% and 24.5% respectively in April 2020 compared to March 2020. These falls follow significant unprecedented demand in March 2020 where Non-Perishable Goods rose 39.0%, Perishable Goods rose 21.6% and All Other Products rose 30.5%."[3]

11. Meanwhile, in April 2020 there were further strong falls in Cafes, restaurants and takeaway food services and Clothing, footwear and personal accessories retailing.

> "Businesses reported that regulations regarding social distancing measures limited their ability to trade as normal for the entire month. Turnover in Clothing, footwear and personal accessories, and Cafes, restaurants and takeaways in April 2020 is around half the level of April 2019. April also saw a strong result for Online retailing, with 10% of total retail turnover purchased online."[4]

2.2 Living cost indexes

12. ABS also released the quarterly Selected Living Cost Indexes (LCIs) for the March quarter 2020 on 6 May 2020.[5]

13. LCIs are intended to measure changes in living costs for a range of household types, in order to answer the question 'By how much would after tax money incomes need to

3 https://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/8501.0.55.008Main%20Features1Apr%202020?opendocument&tabname=Summary&prodno=8501.0.55.008&issue=Apr%202020&num=&view=

4 https://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/8501.0.55.008Main%20Features1Apr%202020?opendocument&tabname=Summary&prodno=8501.0.55.008&issue=Apr%202020&num=&view=

5 https://www.abs.gov.au/ausstats/abs@.nsf/mf/6467.0?OpenDocument

change to allow households to purchase the same quantity of consumer goods and services that they purchased in the base period?'

14. The LCIs are closely aligned with the CPI measure of inflation, of 2.2% for the period from March quarter 2019 to March quarter 2020. We can expect that the increases in LCIs for low paid employees would be more similar to those dependent on transfers than to those for employees, as the latter refer to the employee on average income. Low paid employees are likely to show a pattern of expenditure that reflects relative living standards and the needs of the low paid and accordingly would face LCI increases that more closely reflect those weights.

Table 1: Living cost indexes, March Quarter 2020

Weighted average of eight capital cities, All groups	% change Dec qtr 2019 to March qtr 2020	% change Mar qtr 2019 to Mar qtr 2020
Selected Living Cost Indexes (LCIs) - Household type:		
Pensioner and Beneficiary LCI (PBLCI)	0.8	2.4
Employee LCI	0.1	1.1
Age pensioner LCI	0.8	2.4
Other Government Transfer Recipient LCI	0.7	2.4
Self-funded Retiree LCI	0.2	2.3
Consumer Price Index (CPI)	**0.3**	**2.2**

Source: https://www.abs.gov.au/ausstats/abs@.nsf/mf/6467.0?OpenDocument

2.3 Weekly payroll jobs and wages in Australia

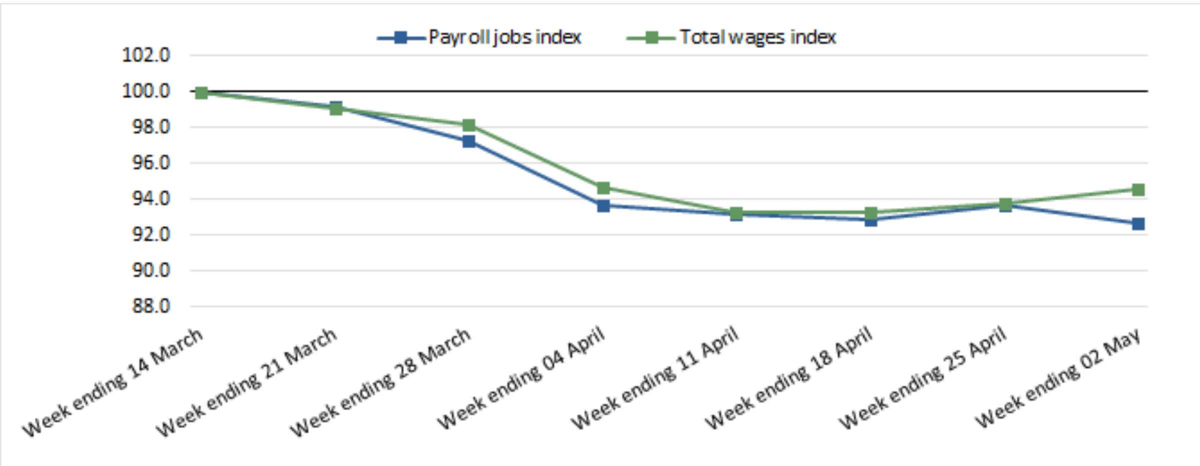
15. The ABS has been releasing a new cat 6160.0.55.001 - *Weekly Payroll Jobs and Wages in Australia*, with the latest issue released on 19 May for the week ending 2 May, based on a smaller sample of businesses than for its standard releases.

16. The ABS reported that in the seven weeks between the week ending 14 March and the week ending 2 May 2020 payroll jobs decreased by 7.3% and total wages paid decreased by 5.4%.

17. The ABS reported that in the week from week ending 25 April 2020 and week ending 2 May 2020 payroll jobs decreased by 1.1%, compared to an increase of 0.9% in the previous week. Total wages paid increased by 0.9%, compared to an increase of 0.5% in the previous week.

18. The ABS presents the weekly data in index form for payroll jobs and total wages in a chart, reproduced as Figure 1 below[6].

Figure 1: Changes in payroll jobs and total wages indexed to the week ending 14 March 2020



Source:https://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyReleaseDate/C4682792DAAB8C55CA2585510005C748?OpenDocument

19. The changes of the most recent week ending 2 May are likely to have been affected by the cumulative effects of the announcements of 22 March of progressive implementation of Stage 2 lockdown, 30 March when the JobKeeper program was announced and most of all by the 8 May initial deadline for the Jobkeeper program. It is noted that the ABS counts

[6] https://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyReleaseDate/C4682792DAAB8C55CA2585510005C748?OpenDocument

anyone in receipt of JobKeeper as employed.[7] Businesses who are registered for JobKeeper are more likely to have laid off those employees for whom they would not receive JobKeeper, such as those employed casually for less than 12 months, and visa workers. These are predominantly lower paid workers. The fall in jobs and increase in payroll shown in the week ending May 2 may well reflect that. The effects will become clearer with later releases.

2.4 Budgetary effects of stimulus.

20. The recent announcements that only $60 billion of the $130 billion planned had been spent suggests that fiscal measures for job preservation and income support are to be supported. It also suggests that an increase to the minimum wage and awards offers an efficient means of increasing spending in the economy and raising employment in the current circumstances.

2.5 Labour Force

21. The ABS released its standard monthly Labour Force data for April on 15 May.[8]

22. Employment decreased by 594,300 or by 4.6% in April 2020 from March 2020, seasonally adjusted, with hours worked decreasing a massive 9.2%, nearly double. Part time employment decreased by 373,800 much more than the decrease in full time work of 220,500 over the month to April 2020.

23. Unemployment has increased by one percentage point or by 104,000 in April 2020. However, the underemployment rate showed a bigger increase, increasing by 603,300 in April 2020 to 1.8 million people, and up 50% from April 2019. This is an increase of 4.9 percentage points of the workforce between March 2020 and April 2020, to 13.7 percent, the highest on record.

---

7 https://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/5261.0Main%20Features2May%202020?opendocument&tabname=Summary&prodno=5261.0&issue=May%202020&num=&view=

8 https://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6202.0Main%20Features2Apr%202020?opendocument&tabname=Summary&prodno=6202.0&issue=Apr%202020&num=&view=

24. The fall in participation of nearly half a million reflects both a loss of people from the labour force (because of losing work, and not expecting to find work).

> "The labour force includes the total number of employed and unemployed people. Between March and April the labour force decreased by 489,800 people (-3.6%) to 13,242,000. Over the past year the labour force decreased by 2.1%, while the total civilian population aged 15 years and over increased by 1.5%.
>
> The participation rate decreased 2.4 pts to 63.5% in April 2020, and was 2.3 pts lower than in April 2019. Female participation decreased 2.9 pts to 58.4%, and male participation rate decreased 1.9 pts to 68.9%."[9]

25. Youth (15-24) participation in the labour force fell by 5.6 percentage points for that age group in April 2020, twice as much as for the total population. Employment for the youth age group fell 213,500 or by 10.8% from March 2020 to April 2020.

26. These data are clearly more influenced by the current pandemic crisis and regulatory measures than any other factor. An increase in the minimum wage would increase spending and mitigate the effects on the economy and relative living standards and the needs of the low paid.

27. The ACTU notes that, more recently, ABS 940.0 - *Household Impacts of COVID-19 Survey, 29 Apr - 4 May 2020* released 18 May reports: "The proportion of Australians aged 18 years and over working paid hours increased from 55.8% in April to 59.0% in May".[10]

---

9 https://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/6202.0Main%20Features2Apr%202020?opendocument&tabname=Summary&prodno=6202.0&issue=Apr%202020&num=&view=

10 https://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/4940.0Main%20Features229%20Apr%20-%204%20May%202020?opendocument&tabname=Summary&prodno=4940.0&issue=29%20Apr%20-%204%20May%202020&num=&view=

2.6 Wage Price Index

28. The wage price index (WPI) for most recent quarter March 2020 was released by ABS on 13 May.[11] This showed an increase of 2.1% over the March quarter of 2019. This is less than CPI of 2.2% for the same period. There is nothing to suggest that a smaller minimum wage increase would assist with recovery of the economy. The experience of the Depression and other downturns has not supported the notion that lower wages assist recovery.

2.7 RBA Statement on Monetary Policy May 2020

29. The RBA's quarterly Statement on Monetary Policy for May 2020 was released on 7 May.[12] It clearly links the timing of the economic recovery to the lifting of social distancing and other health restrictions.

30. The RBA anticipates even slower growth of wages due to the pandemic.[13] It points out: " A key input to the FWC's deliberations is the evidence on the effects of minimum wages on employment. In recent decisions, the FWC's assessment has been that modest changes to award wages have not had a noticeable adverse effect on employment."[14] It refers to the freeze of award wages at 2009 after the GFC. This was in fact a fall in real wages. It may have been one reason that productivity and growth in GDP per capita growth was particularly slow in Australia compared with other countries since then.

---

11 https://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyReleaseDate/07C8525D230737D4CA2581D700791749?OpenDocument

12 https://www.rba.gov.au/publications/smp/2020/may/

13 https://www.rba.gov.au/publications/smp/2020/may/ p.5

14 https://www.rba.gov.au/publications/smp/2020/may/ p.83

2.8 Treasurer's Ministerial Statement on the Economy, Parliament House, Canberra entitled 'The economic impact of the crisis', 12th May 2020

31. On 12 May the Treasurer made a statement to Parliament on the economic impact of the crisis. As part of this statement he noted that Treasury has made estimates of the number of people that will flow back into work as a direct result of ending the restrictions. Treasury estimates that with the restrictions lifted under the three separate stages, 850,000 people will be back at work. More than half of those workers will come from three sectors. With 338,000 jobs in accommodation and food services; 76,000 jobs in arts and recreation; and 71,000 jobs in transport, postal and warehousing. Construction with 45,000 jobs and manufacturing with 20,000 jobs will also be significant contributors. Furthermore, Treasury estimate that as a result of easing the restrictions in line with stages 1, 2 and 3, GDP will increase by $9.4 billion each month. Treasury estimates of the $9.4 billion, increasing demand, including in retail, will contribute $2.9 billion. The opening of cafes, pubs, clubs, entertainment venues, health and fitness gymnasiums will contribute $2.4 billion. The opening of schools will contribute nearly $2.2 billion and other industry sectors, like local government, museums, and parks will contribute a further $1.2 billion. The relaxation of travel restrictions is expected to contribute around $700 million. Treasury estimates that the benefits of just stage one being lifted will lead to more than 250,000 people going back to work and more than $3 billion in additional GDP.

2.9 The data on Jobkeeper has proved to be unreliable, May 2020

32. On the 22 May the Treasury and the ATO released a joint statement regarding JobKeeper program. This noted that the ATO and Treasury advised the Government of a reporting error in estimates of the number of employees likely to access the JobKeeper program. Treasury significantly revised down the number of employees likely to be covered under the JobKeeper program to be around 3.5 million from a previous estimate of 6.5 million. Given the highly unreliable nature of this data concerning the number of employees effected, it would be unwise to base any decision regarding the minimum and award wages on such data.

3. COMMENT ON THE REPLY SUBMISSION OF THE AI GROUP

33. Whilst the Ai Group adopts a reasonable enough ultimate position that it is too soon for it to commit to a particular outcome in this Review, its resort to derision of our position as part of articulating its own suggests that its pathway to reaching this conclusion was more the product of rumination that reason. No justification is provided for the labels "obviously unsustainable" and "a certain way to destroy jobs and businesses during the COVID-19 crisis", which are directed towards us and the Australian Catholic Bishops Conference. The only logical way to rationalise the otherwise contradictory positions of "we don't know what outcome should be yet" and "whatever the right outcome is, the ACTU is wrong", is to presume that the Ai Group's position is the product of two assumptions: Firstly, that a minimum wage increase will destroy jobs and business during the COVID-19 crisis and, secondly, that the crisis is deepening. The difficulty the Ai Group faces is that it hasn't mounted a credible argument that either of those assumptions are valid. Nor has it articulated how it is that, even if its assumptions are valid, that those downside risks automatically translate to a rejection of any particular outcome, given the range of considerations which the Panel is required by the Act to take into consideration.

34. The first assumption is essentially borne of blind faith in the neoclassical theoretical model of wage costs, notwithstanding a lack of empirical support in its application to minimum wages as shown in the research reviewed in our initial submission to this Review (and the many preceding it).

35. Furthermore, with the level of household consumption having fallen significantly - the Treasurer revealed that consumption in the overall economy is expected to be 16% lower in the June quarter in his address to Parliament on 12 May - we need to think about the difference between what microeconomics and macroeconomics teaches us in the current context. While in microeconomics if we look at a single enterprise facing the assumed downward sloping demand curve for Labour, a wage increase will reduce employment if '*all other things remain constant*'. Because we are only looking at changing wages in one enterprise there is no impact on overall incomes or aggregate demand. So, we can assume the demand for the product and services the enterprise is selling does not change. But that does not apply when we examine the macro situation and apply the wage changes to all or a substantial number of enterprises. We have what economists call a 'fallacy of

composition'. In other words, we do not get the same outcome if all enterprises follow the same path. This is because we break the assumption '*all other conditions must remain constant'* when we go from an individual enterprise to the total economy.

36. Wages play two different roles in the economy. While they are a key cost to employers, they are also a major source of income for consumers. If the real incomes of all or a significant proportion of consumers are reduced, aggregate demand for goods and services will decline. As a result, the demand for labour curve of the individual enterprise moves down to the left (a reduction in demand). The Panel is required to take into account the impact of its decision on the Australian economy. The decision must therefore take into account the macroeconomic impact. The Ai Group has based their submissions and analysis on microeconomic theory which is divorced from the real world and makes unrealistic assumptions.

37. If real wages were to fall for the low paid even further as result of the Commission decision (i.e. less than rate of inflation over the coming year) there would be negative macroeconomic consequences and we would be repeating the mistakes of the Great Depression.

38. The second assumption is problematic because the "sudden and significant deterioration in economic conditions" which Ai Group points to is related to the direct and indirect effects of temporary restrictions on social and economic activity. The Ai Group quote a number of indexes which show sharp declines at the end of March 2020. Many of the Ai Group's own indexes, which it refers to extensively, show similarly steep and rapid declines associated with the global financial crisis. A most interesting observation is how rapid the climbs were after the GFC related falls, once the bottom had been reached. The pre-requisites to any substantial post GFC recovery commencing were, we suggest, more complex and protracted than a lifting of temporary regulatory restrictions on activity accompanied by some of the largest fiscal stimulus measures the country has ever seen. Whilst we do not suggest an immediate return to normal will be achieved once those restrictions have been lifted, we do suggest a recovery phase will be kickstarted by that action and that the recovery should be rapid. In that context, it becomes important to predict when the bottom will be reached. To that end, it is encouraging that more recent

iterations of the some of the sources the Ai Group refer to are showing some signs that the beginning of the recovery phase is either imminent or underway.

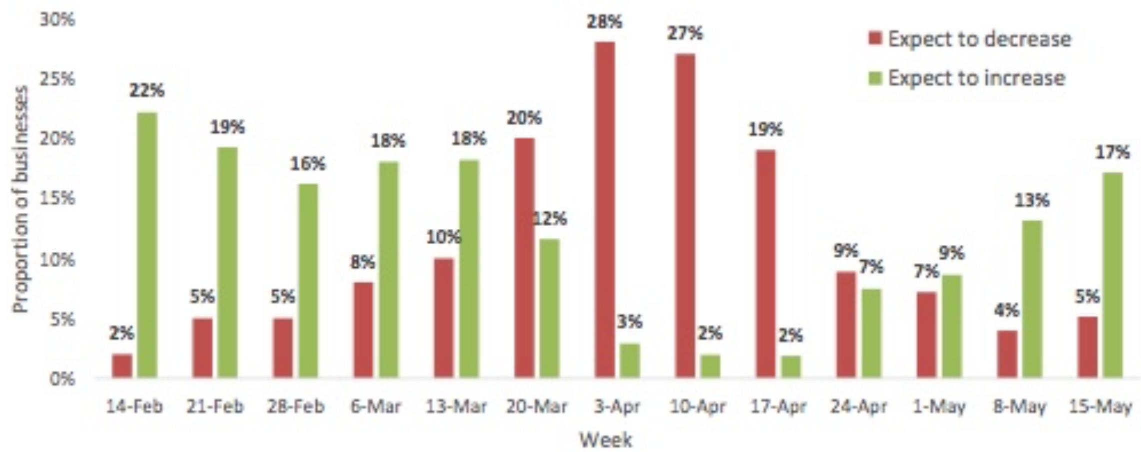
39. In terms of confidence, the Westpac-Melbourne Institute Consumer Sentiment Index for May 2020[15] showed a 16.4% improvement between an April and May, with results taken in 4-8 May. This is described by its authors as an “impressive recovery in confidence” and it is said that “the May turnaround marks the biggest monthly gain in the Index since the survey began nearly 50 years ago”. Similarly, the NAB monthly business survey for April[16], taken in 23-30 April, showed a 19 point increase in business confidence and a minor uptick in cashflow.

40. Measures of employment intentions maintained by the Department of Education, Skills and Employment, also referred to by the Ai Group, have markedly improved as of early May, and are not dissimilar to those observed in late February, prior to the commencement of any mandatory restrictions, as shown in Figure 2 below:

[15] https://www.westpac.com.au/content/dam/public/wbc/documents/pdf/aw/economics-research/er20200513BullConsumerSentiment.pdf

[16] https://business.nab.com.au/nab-monthly-business-survey-april-2020-39968/

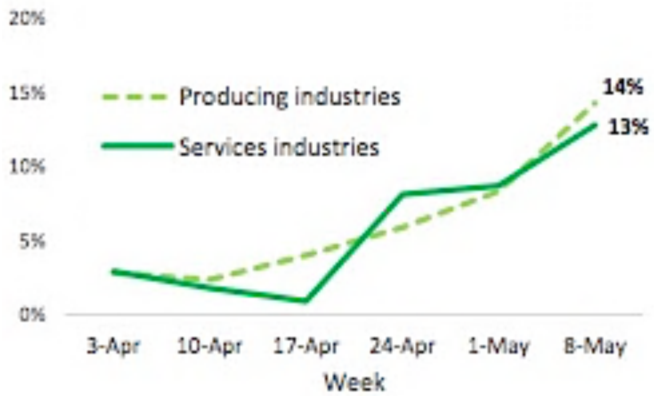
Figure 2: Businesses expecting to increase or decreas staff in the coming months



Source: Reproduced from "Impacts of COVID-19 on businesses – Staffing expectations updated", Department of Education, Skills and Employment, 26 May 2020.[17]

41. More detailed observations are available for the week up to 8 May 2020, and show broad-based improvements in hiring intentions by industry type, region and business size, as shown in Figure 3 to Figure 5 below.

Figure 3: Business expected to increase staff, by industry type



Source: Reproduced from "Impacts of COVID-19 on businesses – 8 May", Department of Education, Skills and Employment, 18 May 2020.[18]

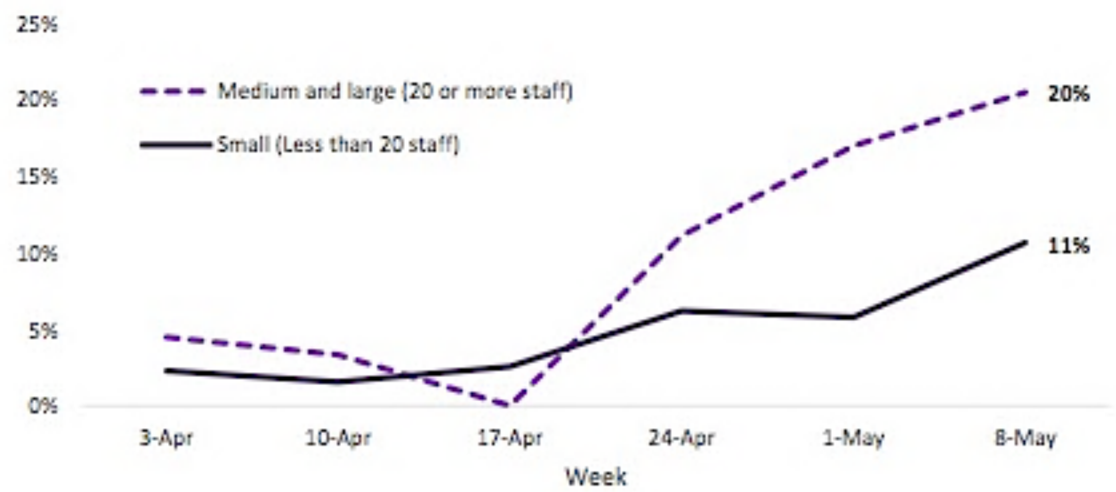
[17] https://lmip.gov.au/PortalFile.axd?FieldID=3193699&.pdf

[18] https://lmip.gov.au/PortalFile.axd?FieldID=3193581&.pdf

Figure 4: Businesses expecting to increase staff, by location type

Source: Reproduced from "Impacts of COVID-19 on businesses – 8 May", Department of Education, Skills and Employment, 18 May 2020.[19]

Figure 5: Businesses expecting to increase staff, by business size



Source: Reproduced from "Impacts of COVID-19 on businesses – 8 May", Department of Education, Skills and Employment, 18 May 2020.[20]

42. The green shoots evident from these measures are echoed by signs from NAB surveys which show some improvement in consumption expenditure for the week ending 8 May, of 3.8% in the 4 week moving average measure, 2.8% in the week to 8 May.[21] Growth in

[19] https://lmip.gov.au/PortalFile.axd?FieldID=3193581&.pdf

[20] https://lmip.gov.au/PortalFile.axd?FieldID=3193581&.pdf

[21] "NAB Economics Data Insights: Impacts of Coronavirus on consumption based spending and business payment inflows", NAB 14 May 2020, https://business.nab.com.au/wp-content/uploads/2020/05/NAB-Data-Insights-May-Report.pdf

consumption was seen in all states and territories.[22] Similar encouraging signs were observed in data provided by credit bureau illion and economic consultancy firm AlphaBeta, based on weekly samples of transactions of around 250,000 consumers. The data showed rises in both discretionary and essential spending in early to mid-May, as shown in Figure 6. These rises were attributed to the combined effects of the Coronavirus supplement and the easing of restrictions. In the context of the Review, the relative contributions of the one off stimulus versus regular higher incomes which is visible in Figure 6, should be of interest to the Panel.

Figure 6: Weekly index of consumption per person (100 = normal weekly base excluding Christmas), 1 February-17 May 2020

Source: Reproduced from "COVID-19 Economic Impact: Real Time Tracking", illion & AlphaBeta, 25/5/20, https://www.alphabeta.com/illiontracking

43. Also encouraging are results from the ABS *Business impacts of COVID-19* survey from May 2020, concerning business requirements for returning to pre-COVID-19 trading

---

[22] *Ibid.*

conditions.[23] The survey was carried out between 13 and 22 May and relevantly asked business respondents "Aside from relaxing government restrictions, what is needed for this business to return to its pre-COVID-19 trading conditions".[24] Results showed that the second most popular response to the question (29% of all business) report that "nothing else" was required. The most popular response (35% of all business) was "Increased or returning customer demand". The third most popular response (14% of businesses) was "Increased cash flow". This tends to suggest a boost in consumer demand, in combination with the continued responsible easing of restrictions, would be welcomed.

44. As to the manner in which any of the matters raised by Ai Group interact with the Panel's decision making process, the Ai Group applies a double standard. On the one hand, it urges the Panel to take into account the fact that some workers will see a rise in their incomes on account of the JobKeeper payment, yet it at the same time it submits that it would be "unwise" for the Panel to apply the same treatment to employers with respect to the effect on them of JobKeeper and other "measures aimed at reducing the costs of employment". The Ai Group is also clearly ignorant of the fact that Review is as much a backward looking exercise as forward looking one, and should therefore take into account that the award reliant workforce by definition received no wage increases notwithstanding the favourable economic, labour market and business conditions that persisted for most of the 2019/20 year.

45. We should also point out that the short term childcare funding changes to which the Ai Group referred are not strictly workforce participation measures. Rather, they are a response to funding shortfalls in the sector as parents withdrew their children from care because of concerns about health and safety. The households which were the largest beneficiaries of the government package[25] were those who had higher incomes and were more exposed to out of pocket fees prior to the implementation of the changes (which has made their childcare free). There was no expansion of permanent vacancies in the

[23] ABS Business Indicators, Business Impacts of COVID-19, (5676.0.55.003, Table 7), 28 May 2020.

[24] The survey instrument is publicly available: https://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/5676.0.55.003Main%20Features7May%202020?opendocument&tabname=Summary&prodno=5676.0.55.003&issue=May%202020&num=&view=

[25] https://www.dese.gov.au/covid-19/childcare/childcare-faq

childcare sector as a consequence of the reform. Permanent vacancies, as opposed to exceptional or occasional vacancies, only arise when a child is no longer enrolled for a particular day at a given child care centre.

4. COMMENT ON THE REPLY SUBMISSION OF THE AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

46. The reply submission of the Australian Chamber of Commerce and Industry ('ACCI') takes a comparable position to that of Ai Group, insofar it simultaneously asserts tremendous uncertainty about the future and an unshakable belief the that wrong way to respond to that which it does not know, is to raise wages above CPI (or at all). Much of our commentary on the submission of the Ai Group equally applies to ACCI.

47. ACCI's position on how the Panel should factor in the Government assistance provided in relation to COVID-19 is essentially that it should be taken into account but, only in such a way that would lead the Panel to conclude that the provision of Government assistance to business precludes the awarding of an increase to minimum wages. That is, for those business that have been assisted by JobKeeper (including those who would no longer meet the turnover threshold tests), the Panel should not contemplate the possibility that they might exit the scheme in a better state than they entered it. Instead, the Panel should merely assume that the awarding of an increase to minimum wages will "counteract" the positive effects of that assistance (being effects which it should for all other purposes ignore). That is a rather tortuous argument, and among other flaws it rather assumes that these two forms of stimulus are opposing rather than complementary.

48. Like the Ai Group, ACCI also fail to appreciate that the Review must look both forward and to the year in Review in order to make a decision – it cannot be the case that the state of the economy over the period July-February is entirely irrelevant to the Panel's deliberations.

49. We are fundamentally opposed to the ACCI's contention that minimum wages should be set at a level that "..grows in line with average wages growth, to ensure that low paid employees are not left behind.."[26]. Such a mechanistic approach not only ensures that the low paid can never actually improve on their relative position, but would run counter to

[26] At [83]

the Panel's previous decisions.[27] It is also frankly insulting to many low paid and award reliant workers to suggest that they have "..a buffer that enables them to absorb a small or no increase in the NMW and award minimum wage at a time of massive financial crisis, while still maintaining a reasonable standard of living".[28] Such a submission also contradicts the position simultaneously advanced by ACCI that the slate has been wiped clean and none of the gains to business in the first part of the financial year (let alone the 28 years of economic growth prior to that) should be taken into account in this Review. In our submission, relative positions should be taken into account and the long term trends are clear.

50. In seeking to counter our position concerning the stimulus impacts of a wage increase, ACCI make some misguided observations:
    a. They seem to accept that by the time Panel makes its decision, a number of small business will have irretrievably closed.[29] There is nothing that the Panel can do to reverse this, but the consequence of it would include decreased competitive pressure and a redistribution of employment. Of the businesses that remain, those that had fared the worst (for any reason) will have the benefit of paying the least of their own money toward any wage increase, owing to the JobKeeper scheme. In addition, rather than simply "providing" an economic stimulus, employers would also be beneficiaries of it.
    b. ACCI seek to characterise our position in this Review as something it self-evidently is not. We are not seeking that the Panel endorse our own policy position that Australia should set a target for a living wage – indeed we expressly acknowledge that the Panel cannot do so.[30] The claim we have outlined is one which we consider makes progress toward our own objectives while also being consistent with the legislative requirements.
    c. ACCI label as a "logical fallacy" our conduct in seeking real increases to minimum wages in order to reduce inequality, after having already obtained "9 straight years

[27] [2017] FWCFB 1931 at [58]

[28] At [146]

[29] At [64], [178].

[30] ACTU Initial Submission, at [3].

of above inflation increases". The fallacy apparently exists because, after those 9 years, inequality still exists. The reality is that inequality in incomes has something to do with wages (and inflation has little to do with it). If those on higher wages see their incomes rise much more quickly than those on lower wages, the gap between rich and poor widens. That's what has been happening in Australia for decades – it takes a long time to catch up. We are trying to catch up on some long term trends, and, contrary to the position that ACCI wrongly attributes to us, our initial submission identifies that recent decisions of the Panel have made some progress.[31]

d. Our point about international research regarding minimum wages is not that those "international experiences and reactions"[32] are directly transferrable to Australia. The point is that across a multitude of economic systems, empirical studies are failing to find conclusive proof for the theoretical model that many had simply assumed to be irrefutable.

51. Amongst other reasons advanced for wage suppression advanced by ACCI, is the puzzling position that because the JobKeeper payment will reduce labour productivity, minimum wages should not rise. We cannot fathom why reduced output per employee, when brought about as a deliberate policy choice as part of a labour market and stimulus policy, should weigh against the granting of any regulated minimum wage increase. This is particularly the case where the costs of the labour to the employer receiving JobKeeper are in any event reduced if not eliminated.

52. In Question 2.1 of the initial Questions on Notice, ACCI was asked to "provide more detail and evidence" in support of its proposition that employers were holding back increases wages of experienced, older, non-award workers to provide minimum wage increases to award reliant workers. In its response, ACCI clearly has not done this. They have merely asserted that "it stands to reason"[33] and attempted to conflate the firm level focus of the question (and ACCI's initial proposition) with macro level observations.

---

[31] See ACTU initial submission at [317]-[318], [328], [353].

[32] *Ibid.*

[33] At [114]

5. COMMENT ON THE REPLY SUBMISSION OF THE NATIONAL RETAIL ASSOCIATION

53. The National Retail Association's ('NRA') reply submission confirms its position that there be no increase to minimum wages. This is a particularly disappointing position for the NRA to take, given its members have seen reduced labour costs as a result of successive reductions to Sunday penalty rates. Further reductions – of 15%, including for shiftworkers – are due to take effect in July.

54. We have had the benefit of discussing the SDA's position in response to the NRA. We agree with the SDA's reasoning that the timing of these further reductions in penalty rates should be reconsidered if minimum wages do not increase on 1 July.

55. Whilst the NRA points to a loss in revenue as measured by its member survey, revenue says little about viability without data about cost. The NRA has shown through the same survey that employers in the sector have no less than 8 mechanisms available to them to reduce their cost base, and that well over 70% of them are utilising at least one of those methods. At a wider level, it is asserted that if the results of its survey were "..extrapolated to the retail industry generally, this indicates a total loss of revenue on excess of $1 Billion in the month of March 2020". This would not be consistent with the seasonally adjusted observations of the ABS, which showed a $2.3 billion increase in retail turnover (at current prices) between February and March 2020.[34]

56. The NRA has shown that employers it deals with have been able to choose from a range of both Federal and State Government assistance schemes, where required, that are suited to their circumstances. Yet it also claims there are difficulties for "smaller business" employers of casuals moving from variable labour costs (which they must fund from profits) to fixed net labour costs of $0 when they enrol for JobKeeper. The difficulty is said to be that they "lack the financial means to be able to support or secure the up-front

[34] ABS 8501

payments required". We suggest that a business that is incapable of bridging that gap for a fortnight was likely a marginal business prior to the onset of the COVID-19 pandemic.

6. RESPONSES TO SUPPLEMENTARY QUESTIONS ON NOTICE

Response to Question 1.1

"1. Are any of the observations at [1]-[57] of the discussion contested and, if so, on what basis?"

Response:

57. Yes. We contest the observation in the first bullet point to paragraph 51 that "…the Commission has discretion to exempt some employers and employees from modern award minimum wage increases or to reduce the amount of the increase for some employers and employees".

58. In our view, an employer to whom a modern award minimum wage applies is required to pay that wage to its relevant employees. The employers who are required by a modern award to pay particular modern award minimum wages to particular employees are required to pay those wages because of the interaction between the modern award minimum wages and other terms in the award, including other terms that are about minimum wages. Those other terms are not capable of variation in a Review. The result is that a particular modern award minimum wage will always cover (or apply to) the entirety of the employers and employees who it is expressed to cover by the terms of the award and the Panel cannot distinguish classes of employers (or employees) from this through any determination varying modern award minimum wages issued in a Review. Our reasons for taking this view are as follows.

59. The only terms of a modern award that the Panel can vary in an annual wage review are those terms that are "modern award minimum wages". Modern award minimum wages are defined in section 284(3) as follows:

> ***Modern award minimum wages*** are <u>the rates of minimum wages</u> in modern awards, including:
> (a) Wage rates for junior employees, employees to who training arrangements apply and employees with a disability; and
> (b) Casual loadings; and
> (c) Piece rates.
>
> (emphasis in underline is added).

60. This in itself strongly suggest that the power provided in section 285(2) of the Act to "..make one or more determinations varying modern awards to set, vary or revoke modern award wages" in a Review is a power directed at the rates of pay expressed in a modern award, and only those rates. It is not a power to vary, set, revoke (or create) other terms in an award which condition the right to receive those wages (or who has that right) or the obligation to pay them (or who has that obligation). The terms of modern awards which do condition which employees are entitled to receive particular modern award minimum wages (such as classification structures) and which employers are obliged to pay those rates (such as coverage terms) are not terms that could be described as "modern award minimum wages". The practical effect of this construction is that status quo of modern award minimum wages in a modern award applying universally to all employers to whom the award applies, in respect of the employees whose work is covered by the award, is not alterable in a Review. Each employer must pay the modern award minimum wages expressed to apply to that employer, to its relevant employees. A mechanism to achieve a distinction between the employers covered by a modern award in terms of the wages that they must pay must involve the alternation of more than just "modern award minimum wages", and is thus outside the purview of a Review.

61. There are some considerations that might suggest a different conclusion is available. For example, it would be tempting to reach reflexively for an implied powers type rebuttal to an argument of this nature. However, a submission on implied powers would still need to contend with the terms of the statute itself, and what was *necessary* to give effect to the power as expressed in the statute:

> "Every court possesses jurisdiction arising by implication, upon the principle that a grant of power carries with it everything necessary for its exercise. The term 'necessary' in connection with the implied power is to be understood as identifying a power to make orders which are reasonably required or legally necessary to the accomplishment of what is specifically provided to be done by the statute".[35]

62. It is not *necessary* that the power to make determinations to vary "modern award minimum wages" contain implied powers to make ancillary orders that enable differential modern award minimum wages to apply to some employers covered by the Award and not others. Nor does the strict statutory definition of the subject of the power - modern award minimum wages as "rates of pay" - give the leeway required to imply that determinations

[35] ABCC v. CFMEU [2018] HCA 3 at [40], per Kiefel CJ.

to vary modern award minimum wages may or must contain terms differentiating which employers bound by the award are obliged to pay those rates in order to be legally effective.

63. Applying conventional rules of statutory interpretation provides no different result:

> "The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense."[36]
>
> "The constructional choice presented by a statutory text read in context is sometimes between one meaning which can be characterised as the ordinary or grammatical meaning and another meaning which cannot be so characterised. More commonly, the choice is from 'a range of potential meanings, some of which may be less immediately obvious or more awkward than others, but none of which is wholly ungrammatical or unnatural', in which case the choice 'turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies'"[37]

64. Firstly, construing the phrase "rates of minimum wages" so as to include within it the conditions that qualify or define the obligation to pay those rates or the right to receive them is, self-evidently, "wholly ungrammatical or unnatural". Secondly, the context tells strongly against such a construction. Perhaps the shortest route to demonstrating that is that the choice of the legislature to make some distinction between "modern award minimum wages" at section 284(2) and "terms about...minimum wages.." in section 139(1)(a) must be given some work to do. The longer route is to recognise that Part 2-6 of the Act, which deals with minimum wages and Part 2-3 of the Act, which deals with Modern Awards, are directed to different things.

65. Part 2-3 of the Act empowers the Commission to make, vary or revoke modern awards[38] dealing with matters which may[39] and must[40] be included in those awards. Modern award minimum wages are not specified in either category[41], although "terms about..minimum

---

[36] SZTAL v. Minister for Immigration and Border Protection [2017] HCA 34 at [14], per Kiefel CJ, Nettle and Gordon JJ.

[37] *Ibid.* at [38], per Gageler J.

[38] s. 157

[39] s. 139-142, 136(1)(c)-(d)

[40] s. 143-149D

[41] It is however mandatory to specify base rates of pay and full rates of pay for pieceworkers, or provide for how those rates are determined: s. 148.

wages" are permitted, but not mandatory. That modern award minimum wages are contemplated as a subset of "terms about minimum wages" is apparent from the description of "terms about ..minimum wages" in section 139(1)(a):

> A modern award may include terms about any of the following matters:
> (a) Minimum wages (including wage rates for junior employees, employees with a disability and employees to who training arrangements apply); and
> (i) Skills-based classifications and career structures; and
> (ii) Incentive based payments, piece rates and bonuses
> (emphasis added)

66. Part 2-3 of the Act is plainly concerned with the universe of award determination. Close scrutiny is provided to the "coverage terms" of modern awards. Such terms are mandatory[42] and have the effect of determining who the award may apply to and upon whom its obligations are cast. There are specific conditional prohibitions on varying a modern award to reduce the range of employees or employers covered and on making new modern awards where it might be appropriate to instead vary an existing modern award to expand its coverage.[43] There are, additionally, unique provisions concerning who has standing to bring an application that would impact on coverage terms[44] versus an application to vary other terms of an award.[45] Special attention is also given to variations of modern award minimum wages, insofar as the Commission cannot vary them unless the variation is "justified by work value reasons"[46] and is it necessary to do so outside of an annual wage review "to achieve the modern awards objective" and the Commission has also taken into account the rate of the national minimum wage.[47] The power to make a modern award or vary a modern award is also conditioned by the requirement that exercising that power is necessary to achieve the modern awards objective. Section 138 also requires that:

> "A modern Award may include terms that it is permitted to include, and must include terms that is required to include, only to the extent that it is necessary to achieve the modern awards objective and (to the extent applicable), the minimum wages objective."

[42] s. 143

[43] s. 163.

[44] Items 4-6 of the table at section 157(1)

[45] Items 1-2 in the table at section 157(1)

[46] s. 157(2)(b)

[47] S. 135

67. These requirements make plain that what Part 2-3 is directed to is ensuring that modern awards, *as a whole*, meet the modern awards objective. In describing section 157, the Federal Court said:

> "The statutory foundation for the exercise of FWA's power to vary modern awards is to be found in s 157(1) of the Act. The power is discretionary in nature. Its exercise is conditioned upon FWA being satisfied that the variation is 'necessary' in order 'to achieve the modern awards objective.' That objective is very broadly expressed: FWA must 'provide a fair and relevant minimum safety net of terms and conditions' which govern employment in various industries. In determining appropriate terms and conditions regard must be had to matters such as the promotion of social inclusion through increased workforce participation and the need to promote flexible working practices.
>
> The sub-section also introduced a temporal requirement. FWA must be satisfied that it is necessary to vary the award at a time falling between the prescribed periodic reviews.
>
> The question under this ground then becomes whether there was material before the Vice President upon which he could reasonably be satisfied that a variation to the Award was necessary, at the time at which it was made, in order to achieve the statutory objective."[48]

Whilst there is no longer a jurisdiction concerned with "4 yearly Reviews" of modern awards, that jurisdiction in Part 2-3 was similarly directed to the same broad purpose, according to a Full Bench of this Commission:

> "The Commission's task in the Review is to determine whether a particular modern award achieves the modern awards objective. If a modern award is not achieving the modern awards objective then it is to be varied such that it only includes terms that are 'necessary to achieve the modern awards objective' (s.138). In such circumstances regard may be had to the terms of any proposed variation, but the focal point of the Commission's consideration is upon the terms of the modern award, as varied."[49]

68. The purpose of Part 2-6 of the Act is different, because it is concerned with rates of pay only. The functions under Part 2-6 are discharged by an Expert Panel, that is constituted by persons specifically appointed for that purpose.[50] There is no requirement in Part 2-6 to ensure that variations to modern award minimum wages are only made to the extent necessary to *achieve* the modern awards objective simply because it would be non-sensical to require the Panel to achieve that goal where it lacks the tools required to do so: the question of whether or not a modern award meets that objective is answered by examination of more than just the rates of pay it prescribes.

---

[48] *SDEA v. NRA* (No. 2) [2012] FCA 480 [35]-[37]

[49] [2017] FWCFB 1001 [269]

[50] s. 612, 617, 620, 627.

69. There is no explicit requirement in Part 2-6 to make adjustments in modern award minimum wages "justified by" work value considerations because the primary focus of the task in Part 2-6 is the maintenance of a universe or system of minimum rates of pay, rather than the justifications for each of those rates of pay. The work value requirement exists in Part 2-3 precisely because Part 2-3 is designed to permit (and indeed requires) detailed examination of the relationship between the rates that are paid and the work that is performed. A level of methodological and doctrinal separation between the functions of regular centralised minimum wage adjustments according to broad social and economic criteria and the adjustment of classification structures in line with work value principles has a long pedigree.[51] Such a separation continues, in our submission, to a point.

70. That point is reached where the Panel reviews the wages that are expressed in National Minimum Wage Orders. The Panel, acting under Part 2-6, is the only authority which has power to adjust the wages that are expressed in National Minimum Wage Orders. Part 2-3 has no application to such wages. It would be a curious result therefore if the powers of the Panel in Part 2-6 in relation to National Minimum Wages and the casual loading were limited to dealing with only "rates of pay", or if Part 2-6 neither prescribed nor provided for the prescription of who was obliged to pay or entitled to receive those wages. So it should be unsurprising that a key difference between the provisions which govern the orders made by the Panel with respect to National Minimum Wages compared to those that govern the determinations which it may make with respect to wages expressed in modern awards reveal a capacity in the former case to prescribe matters that cannot be prescribed in the latter:
    a. Whilst section 286 in relation to determinations varying modern award minimum wages has similarities to section 287 dealing with national minimum wage orders, there are two things that the latter explicitly allows the Panel to do which the former doesn't: set a different National Minimum Wage (or special national minimum wage) for <u>some classes</u> of employees on account of exceptional circumstances and "limited to just the extent necessary because of the particular situation to which the exceptional circumstances relate"[52]; and defer the date than an adjustment of the National Minimum Wage or Special National Minimum Wage

[51] See [2018] FWCFB 7621 at [131] -[162].

[52] At s. 287(2)-(3)

or a casual loading takes effect "..for some or all of the employees to whom that wage or loading applies" on account of exceptional circumstances and "limited to just the extent necessary because of the particular situation to which the exceptional circumstances relate"[53];

b. Section 294 deals with the content of a National Minimum Wage Order. There is no equivalent provision dealing with the content of a determination varying modern award minimum wages. Section 294 provides, *inter alia*, that :

> A special national minimum wage applies to the employees to whom it is expressed in the order to apply. Those employees must be:
> (a) All junior employees who are award/agreement free employees, or a specified class of those employees; or
> (b) All employees to whom training arrangements apply and who are award/agreement free employees, or a specified class of those employees; or
> (c) All employees with a disability who are award/agreement free employees, or a specified class of those employees.
>
> (emphasis added)

71. The Panel lacks the capacity to prescribe or invent subclasses of whom shall pay or receive varied modern award minimum wages. The prescription of who pays or receives modern award minimum wages is not the within the purview of Part 2-6 of the Act.

"2. Are any of the observations at [58] ('What the Commission can't do') contested and, if so, on what basis?"

Response:

72. The observation at paragraph [58](ii) is contested, for reasons explained above. More particularly, even if a case for differential treatment were made out on the basis of the principles developed in economic incapacity cases, it could not lead to a result whereby the Panel permitted employers bound by the same award to pay different modern award minimum wages to employees engaged in the same work.

---

[53] At s. 287(4).

"3. Are any of the observations at [59] ('What the Commission can do') contested and, if so, on what basis?"

Response:

73. The observation at paragraph [59](ii) is contested, for reasons explained above. More particularly, a result which permitted employers bound by the same award to pay different modern award minimum wages to employees engaged in the same work is not a result that could be delivered by the Panel in a Review. The Panel could however choose to vary some modern award minimum wages and not others in a particular modern award (e.g. those above or below C10), or defer the increase of some modern award minimum wages and not others in a particular modern award where satisfied of exceptional circumstances (provided that course was appropriately limited and linked to the exceptional circumstances). That result could conceivably have the practical effect of distinguishing between employers who do or not employ workers at particular levels in a classification structure.

"4. As to the mechanism to identify the employers and employees to whom a deferral should apply: (at [59](ii) dot point 4)

4.1 Does the panel have the power to determine a deferred date of operation in respect of employers that have qualified for the JobKeeper Scheme and have notified the Commissioner of Taxation in accordance with s.6(1)(e) of the *Coronavirus Economic Response Package (Payments and Benefits) Rules* 2020 that they elect to participate in the JobKeeper Scheme?"

Response:

74. Not in respect of modern award minimum wages, for the reasons explained above. In respect of the national minimum wage or a special national minimum wage, a deferral of this type would be permissible provided it was both appropriately expressed as identifying classes of employees (rather than only classes of employers) whom it was directed to and appropriately linked and limited to identified exceptional circumstances.[54]

[54] See s 287(4)

"4. As to the mechanism to identify the employers and employees to whom a deferral should apply: (at [59](ii) dot point 4)

4.2 What do the parties say about the merit of such a proposal?

Response:

75. It would be premature to comment on the merit of such a remedy unless or until the "Exceptional Circumstances" that it was intended to address had been defined. This is because of the requirement in section 287(4) that a deferral to an adjustment in a National Minimum Wage Order is only permissible if:

> "(a) The FWC is satisfied that there are exceptional circumstances justifying the adjustment taking effect on that day; and
>
> (b) The adjustment is limited to just the particular situation to which the exceptional circumstances relate."
>
> (emphasis added)

76. We have outlined above why it is that the Panel cannot, in our view, discriminate between the employers covered by a modern award in the determinations it issues to vary modern award minimum wages. If the Panel finds against us on that, it nonetheless must, as specified in section 286(2) identify what the relevant exceptional circumstances are and tailor its response accordingly:

> "If the FWC is satisfied that there are exceptional circumstances justifying why a variation determination should not come into operation until a later day, the FWC may specify that later day as the day on which it comes into operation. However, the determination must be limited to just the particular situation to which the exceptional circumstances relate".

77. If we make the assumption that the choice of criteria posed in the question of the Panel was somehow linked to the COVID-19 pandemic or its effects being nominated as the "exceptional circumstance", then it is immediately apparent that any trigger based on the JobKeeper scheme is not "limited to just the particular situation to which the exceptional circumstances relate".

78. The only unifying characteristic of award reliant businesses that "…have qualified for the JobKeeper Scheme and have notified the Commissioner of Taxation in accordance with s.6(1)(e) of the *Coronavirus Economic Response Package (Payments and Benefits) Rules* 2020 that they elect to participate in the JobKeeper Scheme" is that they have – at some point – experienced a decline (or projected a decline) in GST turnover relative to the same

time in 2019. There is no requirement that the decline in turnover be anyway linked to COVID-19 specified anywhere in the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020.* Lest there be any doubt about that, the ATO advises the following on its "Frequently Asked Questions" pages for the JobKeeper scheme:

> "Question: Do I have to show that it is COVID-19 that caused the decline in the turnover of my business?
> Answer: No. It does not matter whether it is COVID-19 or the subsequent effect on the economy that has caused the drop in turnover, provided the turnover has fallen by the required percentage and you satisfy the other eligibility criteria."[55]

The scheme therefore covers a range of situations, including those where other forms of support are available.

79. Further, there is no requirement that the decline in turnover be the same for all business. The qualifying decline in turnover is different for different business: from anywhere between 15% to 50% depending on the size of the business and whether or not it is a registered charity.[56]

80. Most importantly, even if one accepts that some or all of the three different decline in turnover thresholds are proxies for "need", the scheme is structured such that the payment continues after the "need" has passed. This temporal issue regarding qualification for the JobKeeper scheme and notification of the Commissioner of taxation does not appear to be an issue that is able to be addressed by alteration of the criterion expressed in the question posed by the Panel. This is because Rule 6(1)(b), 6(1)(e), 6(2), 7 and 8 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* appear to contemplate both qualification and notification happening "at *or before"* a particular time and then continuing to be valid for the duration of the operation of the JobKeeper scheme. Whether the criteria as expressed in the Rules is ambiguous or not, the "once only" approach is the rule for all practical purposes based on what the ATO, who administer the scheme, are advising participants and prospective participants:

---

[55] https://www.ato.gov.au/General/JobKeeper-Payment/In-detail/Employers--frequently-asked-JobKeeper-questions/

[56] See r. 8 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*.

"Step 1: Enrol for the JobKeeper payment
You only need to complete this step once. Your registered tax or BAS agent can also enrol for you.
……
Step 3: Make a business monthly declaration
You must provide information as to your current and projected turnover. This is not a retest of your eligibility, but rather an indication of how your business is progressing under the JobKeeper Payment Scheme. "[57]

"Question: My business suffered a steep decline in turnover in March, but I've changed to a new business model and I may build the business up again soon. Does this mean I lose JobKeeper?

Answer: No. You only need to satisfy the decline in turnover test once to be entitled to JobKeeper. For example, satisfying it for March 2020 (compared in March 2019) is sufficient, even if your business recovers to previous levels after this.
There are ongoing reporting obligations for current and projected GST turnover, but even where these show a recovery of turnover they don't affect eligibility."[58]

(emphasis added)

81. The fact that a business may "…have qualified for the JobKeeper Scheme and have notified the Commissioner of Taxation in accordance with s.6(1)(e) of the *Coronavirus Economic Response Package (Payments and Benefits) Rules* 2020 that they elect to participate in the JobKeeper Scheme" is therefore a not a reliable indicator that for any period after July 2020 the business continues to suffer a decline in turnover (to any degree) relative to any comparison period, hence it cannot be a reliable indicator of an incapacity to pay increased wages. In that respect, it suffers from similar defects to those identified in last years' review when receipt of a "Commonwealth Government Special Disaster for Small Business" was advanced as a basis for exemption.[59]

82. In addition, the fact that a business may "…have qualified for the JobKeeper Scheme and have notified the Commissioner of Taxation in accordance with s.6(1)(e) of the *Coronavirus Economic Response Package (Payments and Benefits) Rules* 2020 that they elect to participate in the JobKeeper Scheme" is not a reliable indicator of the experience of

---

[57] https://www.ato.gov.au/General/JobKeeper-Payment/Employers/Enrol-for-the-JobKeeper-payment/

[58] https://www.ato.gov.au/General/JobKeeper-Payment/In-detail/Employers--frequently-asked-JobKeeper-questions/

[59] [2019] FWCFB 3500 at [448], [450].

employees of those business. A disconnect of this type was also identified as a barrier to the claim for deferral in last year's Review. [60]

83. Whilst many part time and casual award employees may well be receiving more income than they ordinarily would because of JobKeeper, for many the scheme is of no assistance. Not all employees of a business are "eligible employees" of a business for the purposes of the JobKeeper scheme. For instance:

    a. Casual employees must meet 2 criteria before they can be eligible to receive JobKeeper payments: that there were a casual employee on 1 March 2020; and that during the 12 months prior to that date they had been employed on a regular and systematic basis.[61] As shown in our initial submission, 47% of "award only" employees are casual employees, based on ABS 2018 data. The Wilkins and Zilio (2020) research published by the Commission estimated that 66.5% of low paid award reliant employees were casual employees, based on HILDA data.[62] Whilst we cannot be certain of the number of casual these casual employees who fall outside JobKeeper eligibility, it is certain there are some given that 8.8% of all low paid award reliant workers (that is, both permanent and casual) work irregular schedules based on Table 8 of Wilkins and Zilio's (2020) report. If one were to adopt the not-unreasonable assumption that the low paid, award reliant employees who worked irregular schedules were *all* casual employees, then it would be clear that at least 13.4% of low paid award reliant workers would be ineligible for JobKeeper, even without considering whether they were employed on 1 March 2020 and the duration of their employment prior to that date.[63] In

---

[60] [2019] FWCFB 3500 at [449].

[61] *Cornonavirus Economic Response Package (Payments and Benefits) Rules 2020*, r. 9(2)(b)(ii), r. 9(5)

[62] Wilkins R & Zilio F (2020), *Prevalence and persistence of low-paid award-reliant employment*, Melbourne Institute of Applied Economic and Social Research, Fair Work Commission Research Report 1/2020, February, at p17

[63] Wilkins and Zilio found that low paid award reliant workers as a whole group had the lowest mean tenure with their current employer, at 2.5 years, compared low paid non-award workers, higher paid award workers and higher paid non-award workers (at Table 8).

our reply submission, we showed over 1 million casual employees employed for less than 12 months, with a substantial number in award reliant industries.[64]

b. 1 March 2020 is a significant date for all employees, in that employees who became employed by a business after that date are not eligible to receive JobKeeper, irrespective of the form of their employment[65]. It is to be remembered in this context that employment was still growing in March 2020, with an aggregate growth of 16,800 employed persons.[66]

c. Most workers on temporary visas are ineligible to receive JobKeeper.[67] As we noted in our reply submission, data from the 2016 Census indicates that 42% of the employed temporary residents in Australia at that time were employed in the four most award dependent sectors identified in our initial submission.[68]

84. Further, an employer may meet the criterion identified in the question posed by the Panel even if they claim the JobKeeper payment only for an eligible business participant (such as an owner manager)[69] and choose not to claim it for any of their employees. There appears to be no material difference in the provisions between notifying the Commissioner of election to participate in respect of employees as dealt with in rule 6.(1)(e) or in respect of eligible business participants as dealt with in rule 11(1)(e).

85. Finally, in assessing the appropriateness of the criteria posed by the Panel's question, the Panel should be alive to the potential for the Scheme to change after it has published its decision. This creates even greater uncertainty about equality of treatment and ensuring a relationship between a deferral and the exceptional circumstances to which it relates. A

---

[64] At Figure 2.

[65] See *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* r.9(2)(b). See also ATO 'FAQ' (https://www.ato.gov.au/General/JobKeeper-Payment/In-detail/Employees--frequently-asked-JobKeeper-questions/) : "If you change jobs after 1 March 2020, your new employer will not be eligible to claim JobKeeper payments for you. However there are some limited exceptions that may apply where you remain employed within the same corporate group"

[66] ABS 6202.0, Trend employment growth March 2020.

[67] See *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* r.9(2)(c).

[68] ABS 3419.0 (Data Cube 1, Table 17) & ACTU Calculations.

[69] See *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* r.12.

review of the JobKeeper Scheme is due to conclude at the end of June, and make recommendations for alternation to the scheme.[70] Whilst it is not clear what those changes might be, the Government has already rejected calls to expand the scheme to cover casuals who have worked with their employer for less than 12 months.

"4. As to the mechanism to identify the employers and employees to whom a deferral should apply: (at [59](ii) dot point 4)

4.3 If it is accepted that such a course is open to the Panel, what deferred date of operation is proposed and in respect of which awards?

Response:

86. We are unable to discern how the FWC could be satisfied that any particular day is appropriate.

"4. As to the mechanism to identify the employers and employees to whom a deferral should apply: (at [59](ii) dot point 4)

4.4 In the event that the Panel decided to provide a deferred date of operation of any increase granted, in respect of some or all modern awards, on the basis of participation in the JobKeeper Scheme (as set out in 4.1 above), how should such a term be drafted? We particular invite the Commonwealth to respond to this question. Parties are asked to submit a draft term to give effect to any such proposal.

Response:

87. Given our views as expressed above, we are unable to draft an order meeting this description which would also be an order that the Panel could make in a Review.

---

[70] Crowe, D. & Bonyhady, N. "How about we don't spend it: Coalition divided over $60 bullion JobKeeper windfall", The Age, 24 May 2020; Grattan, M., "Treasury revises JobKeeper's cost down by massive $60 billion, sparking calls to widen eligibility", The Conversation, 22 May 2020.

Response to Question 2.1

"1. In previous reviews, the majority of parties have proposed a dollar or percentage increase to the national minimum wage and modern award minimum wages.

In this year's review, Ai Group stated that:

> 'Given the continuing major deterioration in the economy, Ai Group has not yet proposed a particular minimum wage increase in these proceedings. We intend to put forward a position on the quantum of any minimum wage increase in the 5 June round of submissions. At that time, we will be in a much better position to assess what, if any, minimum wage increase would be appropriate.'

ACCI have similarly submitted:

> 'All signs increasingly point to the need for the Expert Panel to exercise a significant degree of caution and restraint when assessing the impacts and risks of whether to increase minimum wages in 2020 and the magnitude and timing of any increase.'

The Expert Panel would be assisted if the parties could provide more clarity and greater precision regarding the outcome they propose in this Review in their supplementary submission which is due to be filed on 29 May 2020. Parties who nominated a particular outcome in their initial submissions are asked to confirm whether that is still their position. If necessary, revisions to the proposals can be made in submissions to be filed in June.

<u>Response:</u>

88. The ACTU continues to seek the outcomes identified in its initial submission. Consistent with the position we put at paragraph 15 of our submission on revisions to the timetable, we will continue to consider social and economic developments and forecasts for as long as the Review remains on foot.

ADDRESS
ACTU
365 Queen Street
Melbourne VIC 3000

PHONE
1300 486 466

WEB
actu.org.au

Australian Unions