



Discussion paper

What can and can't be done in the Annual Wage Review 2019–20

13 May 2020

In the present Review, parties have advanced various proposals including deferring the commencement of any adjustments and excluding modern awards or sectors of industry from any adjustment awarded. This paper explores the statutory parameters relevant to these and similar proposals.

This paper has been prepared by staff of the Fair Work Commission for discussion purposes and does not represent the view of the Expert Panel on any issue.

1. The Legislative Framework

1.1 Annual wage review timetable

1. Division 3 of Part 2–6 of the *Fair Work Act 2009* (the Act) provides for the Fair Work Commission (the Commission) to conduct annual wage reviews.
2. Pursuant to s.285(1) the Commission ‘must conduct and complete an annual wage review in each financial year’. Section 285(2) provides that in conducting and completing an annual wage review, the Commission:
 - (a) must review:
 - (i) modern award minimum wages; and
 - (ii) the national minimum wage order; and
 - (b) may make one or more determinations varying modern awards to set, vary or revoke modern award minimum wages; and
 - (c) must make a national minimum wage order.’ [Emphasis added]
3. The Act has particular provisions relating to the variation of modern awards and the making of the national minimum wage order.

Variation determinations for modern awards
4. Pursuant to s.286(1) and subject to the Commission finding ‘exceptional circumstances’:

‘a determination (a **variation determination**) varying one or more modern awards to set, vary or revoke modern award minimum wages that is made in an annual wage review comes into operation on 1 July in the next financial year.’ [Emphasis added]
5. Section 286(2) provides that if the Commission:

‘is satisfied that there are exceptional circumstances justifying why a variation determination should not come into operation until a later day’ [emphasis added]

the Commission may specify that later day as the day on which the variation determination comes into operation. If the Commission does so, the variation determination comes into operation on that later day (s.286(3)).
6. Pursuant to s.286(4) the Commission:

‘cannot provide for the effect of a variation determination on modern award minimum wages to be deferred to a day that is later than the day on which the determination comes into operation.’

7. Section 286(5) provides that a variation determination:

‘does not take effect in relation to a particular employee until the start of the employee’s first full pay period that starts on or after the day the determination comes into operation.’
8. Where the Commission makes one or more variation determinations in an annual wage review, s.292 requires the Commission to publish the award wage rates as varied: in the case of wage rates in modern awards other than enterprise awards and state reference public sector modern awards—before 1 July in the next financial year; and in the case of wage rates in modern enterprise awards and state reference public sector modern awards—as soon as practicable.
9. Section 135 in Part 2–3 of the Act has the effect of prohibiting variation of modern award minimum wages outside an annual wage review, except where justified by work value reasons (under s.157(2)), to remove ambiguity or uncertainty or to correct errors (under s.160), or on referral from the Australian Human Rights Commission (under s.161).
10. Further, the Commission’s general power under s.603 to vary or revoke a decision or an instrument made pursuant to a decision¹, cannot be used to vary or revoke an annual wage review decision, or a variation determination or national minimum wage order made in an annual wage review (s.603(3)(d)).

National minimum wage order

11. Pursuant to s.287(1), a national minimum wage order (NMWO):

‘that is made in an annual wage review comes into operation on 1 July in the next financial year (the **year of operation**).’ [Emphasis added]
12. While a NMWO must come into operation on 1 July in the next financial year, the effect of some or all of its components may be delayed in ‘exceptional circumstances’.²
13. Section 287(4) provides that if the Commission ‘is satisfied that there are exceptional circumstances justifying the adjustment taking effect’ ‘on a specified day in the year of operation that is later than 1 July’ (and the adjustment is limited to the particular situation to which the exceptional circumstances relate, in accordance with s.287(4)(b)) then the NMWO may provide that an adjustment of the national minimum wage, casual loading for award/agreement free employees or a special national minimum wage, set by the NMWO takes effect on the specified later day.
14. Pursuant to s.287(5) a NMWO:

‘takes effect in relation to a particular employee from the start of the employee’s first full pay period that starts on or after 1 July in the year of operation’

or in the case of an adjustment that the NMWO provides is to take effect on a specified later day, the adjustment takes effect from the start of the employee’s first full pay period that starts on or after the specified day.
15. Section 601(4) requires the Commission to publish a NMWO as soon as practicable after making it.

¹ See s.598(2)

² [2014] FWCFB 3500 [498]

16. Section 296(3) prohibits variation of a NMWO except to remove ambiguity or uncertainty or to correct error (under s.296(1)) and prohibits revocation of a NMWO.

Conclusion—Timing of the review

17. It follows from the legislative scheme outlined above, that in the annual wage review that must be conducted in each financial year:
- any variation determination and a NMWO must be made before the end of that financial year;
 - any variation determination must come into operation on or after 1 July in the next financial year and must take effect on or after its date of operation;
 - the NMWO must come into operation on 1 July in the next financial year and the elements of it must take effect on or after that date;³ and
 - a variation determination and the NMWO cannot be 'revisited' either during the financial year in which it is made or subsequently (other than to remove ambiguity or uncertainty or to correct error).⁴
18. The Expert Panel observed in the *Annual Wage Review 2011–12*:

[240] A consequence of these provisions is that we must complete this Review by 30 June 2012 and any minimum wage variation and national minimum wage order determined by the Review is to come into operation on 1 July 2012, absent exceptional circumstances. Further, s.292(1)(a) provides that Fair Work Australia must publish the wage rates varied as a result of a review determination *before* 1 July in the next financial year. Hence, as a practical matter, it is necessary that a review decision be handed down in early June, in order to ensure that the new wages rates are published and to provide parties with an opportunity to comment on any draft variations to the minimum wage rates in modern awards. Such a timeframe also provides employers with an opportunity to implement the result of any determination we make, in a timely manner ...

[283] The current legislative restrictions effectively mean that employers wishing to seek relief from a variation determination are obliged to run their case before the outcome of the Review is known. This creates obvious practical difficulties. It also means that employers who face significant financial adversity as a result of circumstances which arise *after* the Review decision is completed have no means of seeking relief on the basis of economic incapacity. This is because s.157(2) limits Fair Work Australia's jurisdiction to vary modern award minimum wages outside the context of an annual wage review or the 4 yearly review of modern awards.

[284] The current legislative framework ensures that annual wage reviews are conducted in a timely way and provide certainty for businesses and employees, by specifying the operative date of any wage increases flowing from such reviews. However, the interaction of ss.157(2), 285(1) and 286 gives rise to what may have been an unintended consequence. The practical effect of these provisions is to inhibit the Panel's capacity to

³ It follows trivially that any variation determination made under Part 2-6 and the NMWO cannot have retrospective effect. In exceptional circumstances, a determination varying modern award minimum wages under Part 2-3 to remove ambiguity or uncertainty or correct error under s.160, may have retrospective effect as provided for in s.166(3). Similarly, in exceptional circumstances, a determination varying a NMWO to remove ambiguity or uncertainty or correct error may have retrospective effect as provided for in ss.297.

⁴ While there is no provision for a variation determination to be amended to remove ambiguity or uncertainty, award minimum wages (as varied by a variation determination) could be varied pursuant to s.160 to remove ambiguity or uncertainty or to correct error.

establish an incapacity to pay process that can be accessed *after* an annual wage review has been completed.’⁵

1.2 Capacity for the Commission to delay the effect of variation determinations and NMWO adjustments

Variation determinations for modern awards

19. As related above, in an annual wage review and before 30 June in the financial year in which the review is being conducted, the Commission may make one or more variation determinations. Each such variation determination will vary one or more modern awards⁶ to set, vary or revoke modern award minimum wages.
20. As also related above, unless the Commission ‘is satisfied there are exceptional circumstances justifying why a variation determination should not come into operation until a later day’, each such determination must come into operation on 1 July in the next financial year.
21. Section 286(2) provides:

‘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 just to the particular situation to which the exceptional circumstances relate.

Note: This may mean that the FWC needs to make more than one determination, if different circumstances apply to different employees.’
22. There is no express limit on how much later than 1 July in the next financial year the ‘later day’ of operation of a variation determination can be—in contrast to an adjustment under a national minimum wage order, which cannot be delayed beyond the end of that next financial year (see further below).
23. Pursuant to ss.286(3)–(5), a determination that comes into operation on a specified day after 1 July in the next financial year, must take effect in relation to a particular employee at the start of the employee’s first full pay period that starts on or after that day.
24. The Expert Panel observed in the *Annual Wage Review 2011–12*:

‘[245] As to the deferral claims, we accept that we may make a variation determination in respect of one or more modern awards that comes into operation on a day later than 1 July 2012, provided we are satisfied that there are exceptional circumstances justifying such a course. We also accept that a deferral claim may be granted in respect of a particular region(s) covered by a modern award, again provided that there are exceptional circumstances justifying such a result.’⁷
25. As related above, in an annual wage review and before 30 June in the financial year in which the review is being conducted, the Commission must make a NMWO. Pursuant to s.294 a NMWO must set:

National minimum wage order

⁵ [2012] FWAFB 5000 [240] and [283]–[284]

⁶ See ss.285(2)(b) and 286(1)

⁷ [2012] FWAFB 5000 [245]

- 'the national minimum wage'—which applies to all award/agreement free employees who are not in the classes referred to in the following point (s.294(3)); and
 - special national minimum wages for all award/agreement free employees in the classes respectively of junior employees, employees to whom training arrangements apply and employees with a disability—each of which may apply to all employees in such a class or to a subclass of them (s.294(4)); and
 - 'the casual loading for award/agreement free employees.'
26. Section 287(4) provides:
- 'The order may provide that an adjustment of the national minimum wage, the casual loading for award/agreement free employees, or a special national minimum wage, set by the order takes effect (whether for some or all employees to whom that wage or loading applies) on a specified day in the year of operation that is later than 1 July, but only 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 just to the particular situation to which the exceptional circumstances relate.'⁸
27. The specified later day the adjustment takes effect must be 'in the year of operation' (as defined in s.287(1)) and so must fall within the next financial year after the financial year in which the review is being conducted.
28. Pursuant to ss.287(5), such an adjustment 'takes effect in relation to a particular employee from the start of the employee's first full pay period that starts on or after the day specified'.
- Conclusion—Delaying variation determinations and NMWO adjustments*
29. It follows from the above that in an annual wage review:
- the Commission may make multiple variation determinations that operate from 1 July in the next financial year or (to the extent justified by exceptional circumstances) from a later date or various later dates (with any such determination taking effect in relation to a particular employee at the start of the employee's first full pay period that starts on or after the day it comes into operation); and
 - the NMWO made by the Commission must operate from 1 July in the next financial year, but (to the extent justified by exceptional circumstances) may provide for the adjustments of its various elements⁹ to take effect in relation to some or all employees from a later date or various later dates in that next financial year (with each adjustment taking effect in relation to a particular employee at the start of the employee's first full pay period that starts on or after the day it takes effect).

1.3 Staged variations and adjustments?

Variation determinations

⁸ In the Fair Work Bill 2008 as introduced into the Parliament, NMWOs came into operation on 1 July in the financial year after that in which the review was being conducted and the Commission could not provide for any delayed effect.

⁹ The national minimum wage, special national minimum wages and casual loading for award/agreement free employees

30. Outside the context of an annual wage review, the Commission may vary modern award minimum wages under Part 2-3 of the Act for work value reasons (s.157).¹⁰ Where the Commission makes a variation determination to that effect, s.166(4) provides that:
- ‘The FWC may specify in the determination that changes to modern award minimum wages made by the determination take effect in stages if the FWC is satisfied that it is appropriate to do so.’
31. There is no corresponding express provision for staged variation of modern award minimum wages in an annual wage review under Part 2-6 of the Act.
32. The legislative framework does not permit the Commission to make any single variation determination that would provide staged variations of award minimum wages—say on 1 July in the next financial year and 1 December in that next financial year. This is because a determination providing for the first increase would have to come into operation at or prior to the start of the employee’s first full pay period that starts on or after 1 July in the next financial year (per s.286(5)) and also provide for the effect of the second increase to be deferred to a day later than that date of operation. However, s.286(4) prohibits a variation determination providing for deferred effect.
33. Section 286(4) might be understood as being directed to ensuring that any delayed effect of a variation determination is justified by exceptional circumstances, rather than to excluding staged variations.
34. While a single variation determination cannot provide employees with staged award minimum wage variations, Part 2-6 does not expressly preclude the Commission providing staged variations by making two or more variation determinations with different dates of operation in respect of the same award minimum wages.

National minimum wage order

35. As related earlier, a NMWO must come into operation on 1 July in its ‘year of operation’, but to the extent justified by exceptional circumstances, the Commission may delay the effect of the adjustments of its various elements. Accordingly, there is no provision equivalent to s.286(4) in respect of a NMWO.
36. Similarly to variation of award minimum wages, Part 2-6 does not expressly preclude the Commission making a NMWO that would provide some or all employees with staged adjustments of the national minimum wage, a special national minimum wage or the casual loading.

Conclusion—Staged variation determinations and NMWO adjustments

37. It appears from the above that in an annual wage review, to the extent justified by exceptional circumstances, the Commission may be able to provide staged variations of award minimum wages and/or staged adjustments of the elements of a NMWO. For example, it appears that the Commission may be able to make:
- a variation determination that comes into operation on 1 July in the next financial year and a second variation determination varying the same award minimum wages that comes into operation on 1 December in that next financial year; and/or

¹⁰ Or under s.160 or 161

- a NMWO that provides for one increase in the national minimum wage taking effect on 1 July in the next financial year and a second increase taking effect on 1 December in that next financial year.

1.4 Contingent variations and adjustments?

Variation determinations

38. As related earlier, a variation determination must be made before the end of the financial year in which the annual wage review is being conducted and cannot be revisited in that financial year or subsequently. This raises a question as to whether a variation determination might be formulated so as to take account of economic or other developments that may occur after the determination is made.
39. Perhaps, where justified by exceptional circumstances, a variation determination might provide a contingent variation of award minimum wages—for example, a determination coming into operation on 1 December in the next financial year might provide for specified award minimum wages to increase by 1 per cent if CPI to date has increased by at least 2 per cent or to increase by 0.5 per cent if CPI to date has increased by less than 2 per cent.
40. However, the legislative scheme presents some apparent obstacles to this. Pursuant to s.292(1):
- ‘If the FWC makes one or more determinations varying modern award minimum wages in an annual wage review, the FWC must publish the rates of those wages as so varied:
- (a) for wages in a modern award (other than a modern enterprise award or State reference public sector modern award)—before 1 July in the next financial year; and
- (b) for wages in a modern enterprise award or State reference public sector modern award—as soon as practicable.’ [Emphasis added]
41. On a literal reading, where a variation of award rates was contingent upon circumstances existing at a date after 1 July, the Commission could not satisfy the requirement under s.292(1)(a) to publish before 1 July ‘the rates of those wages as varied’. As related earlier, the legislative framework ensures ‘that annual wage reviews are conducted in a timely way and provide certainty for businesses and employees’¹¹. Further, contingent variation may not be consistent with the Commission’s obligation under s.134(1)(g) to:
- ‘ensure that modern awards, together with the National Employment Standards, provide a fair and relevant safety net ... taking into account ... the need to ensure a simple, easy to understand, stable and sustainable modern award system’ [Emphasis added]

National minimum wage order

42. The prospect of a NMWO containing contingent adjustments to the national minimum wage, special national minimum wages or the casual loading for award/agreement free employees, would raise similar issues to those outlined above. These include that s.295(1) requires that:
- ‘In a national minimum wage order:

¹¹ [2012] FWAFFB 5000 [284] (reproduced earlier)

- (a) the national minimum wage, and the special national minimum wages, set by the order must be expressed in a way that produces a monetary amount per hour; and
- (b) the casual loading for award/agreement free employees must be expressed as a percentage. [Emphasis added]

Note: The means by which the national minimum wage or a special national minimum wage may be expressed include:

- (a) a monetary amount per hour; or
- (b) a monetary amount for a specified number of hours; or
- (c) a method for calculating a monetary amount per hour.'

Conclusion—Contingent variation determinations and NMWO adjustments

- 43. It appears doubtful that the Commission can make variation determinations or NMWO adjustments that are contingent upon economic or other developments that may occur after the determination is made.
- 44. Apart from the apparent legislative obstacles, there are likely to be practical difficulties formulating a contingent variation determination or NMWO adjustment in a manner that captures all of the relevant contingencies constituting the particular situation to which the exceptional circumstances relate and in limiting the determination or adjustment to that particular situation.¹²

1.5 Capacity for the Commission to provide differential outcomes

Variation determinations

- 45. While s.287 expressly provides that, to the extent justified by exceptional circumstances, the various wages and loadings set by a NMWO may be different for different employees (see further below), it is not as obvious that the legislative scheme contemplates variation determinations that result in award minimum wages being different for different employees.
- 46. The Expert Panel in the *Annual Wage Review 2011-12* acknowledged the Commission's discretion to provide differential award minimum wage outcomes, but emphasised the importance of consistent award minimum wages in the broader legislative scheme:

[247] As to those claims that sought differential treatment in terms of the quantum of any variation (as opposed to a different date of operation) we accept ... that the Act does not compel the variation of modern award minimum wages in *all* modern awards. Section 285(2)(b) provides that in an annual wage review the Panel:

“may make one or more determinations varying modern awards to set, vary or revoke modern award minimum wages” (emphasis added).

[248] Further, s.284(4) defines varying modern award minimum wages as “varying the current rate of one or more modern award minimum wages”.

[249] It follows that the Panel has a discretion to vary some or all modern award minimum wages in the context of an annual wage review. The question then becomes the basis upon which the Panel should exercise that discretion.

¹² As required by ss.286(2) and 287(4)

[250] The threshold to be met in order to warrant an exemption from a general determination in an annual wage review was not given much attention in the submissions. During the consultations ... [it was] submitted that a party seeking such an exemption need not demonstrate exceptional circumstances, rather ... it would be sufficient to warrant an exemption if a party provided an evidentiary basis for exercise of the Panel's discretion.

[251] Historically, the predecessors of Fair Work Australia only granted applications for such differential treatment on the basis of "very serious or extreme economic adversity" and the material in support of such applications was "rigorously tested". Such matters were commonly set out in an Economic Incapacity principle.

...

[254] On a number of occasions the then Commission had cause to consider the Economic Incapacity principle and the following observations may be made on the basis of those cases:

- The onus is on the party seeking to rely on economic incapacity and a strong case must be made out in order to warrant relief.
- An incapacity claim needs to be supported by oral and/or documentary evidence capable of analysis and evaluation.
- Incapacity claims will only rarely be successful in respect of a whole industry. In a number of cases the diversity of experience in the sectors covered by an award have made it inappropriate to exempt all sectors from an increase.

[255] In our view, these general observations are broadly relevant to our consideration of the exemption claims currently before us, for three reasons.

[256] First, the Act was legislated against the background of a long standing approach to claims based on economic incapacity. Parliament may be presumed to have known of the historical approach taken to such claims.

[257] Secondly, the legislative framework reveals a preference for consistent variation determinations across all modern awards. The minimum wages objective requires us to establish and maintain a safety net of fair minimum wages. The modern awards objective requires us to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions. The modern awards objective also speaks of the need to ensure a "stable and sustainable modern award system".

[258] The notion of a fair safety net of minimum wages embodies the concepts of uniformity and consistency of treatment ... If differential treatment was afforded to particular industries this would distort award relativities and lead to disparate wage outcomes for award-reliant employees with similar or comparable levels of skill. In that context, it is important to note that in establishing and maintaining the minimum wages safety net, the Panel must take into account the principle of equal remuneration for work of equal or comparable value.

[259] The maintenance of consistent minimum wages in modern awards and the need to ensure a stable and sustainable modern award system would be undermined if the Panel too readily acceded to requests for differential treatment.

[260] It is also important to appreciate that in an annual wage review, the Act directs the Panel's attention to a range of macroeconomic and general factors including: the performance and competitiveness of the national economy; inflation; employment growth; relative living standards; the promotion of social inclusion; and the needs of the low paid.

The nature of these factors directs the Panel's attention to matters which are relevant to the variation of *all* modern awards.

[261] The final point in support of the adoption of the propositions set out at paragraph [254] above, is the legislative preference for consistent operative dates for variation determinations made in an annual wage review. As noted previously, ss.286 and 287 provide that all such determinations must come into operation on 1 July in the next financial year. A party seeking a later operative date must satisfy the Panel that there are exceptional circumstances which justify a later date. It would be an odd outcome if a lower threshold applied in relation to claims for a different quantum to the threshold which applies to claims for a later operative date.¹³ [Emphasis added and endnotes omitted]

47. The scope of the Economic Incapacity principle as it appeared in the *Safety Net Review – Wages Decision 2005* was:

'Any respondent or group of respondents to an award may apply to, temporarily or otherwise, reduce, postpone and/or phase-in the application of any increase in labour costs determined under this Statement of Principles on the ground of very serious or extreme economic adversity.'¹⁴

National minimum wage order

48. Section 285(2) requires the Commission in each national wage review to make a single NMWO. However, as well providing for adjustments of the elements of the NMWO to have differing dates of effect for different employees (as justified by exceptional circumstances), s.287 expressly provides that the adjustments may provide different outcomes for different employees.

49. Section 287(2) requires that the national minimum wage and the casual loading for award/agreement free employees set by a NMWO:

'must be the same for all employees, unless:

- (a) the FWC is satisfied that there are exceptional circumstances justifying setting different wages or loadings; and
- (b) the setting of different wages or loadings is limited just to the extent necessary because of the particular situation to which the exceptional circumstances relate.'

50. Similarly, s.287(3) requires that a special national minimum wage set by a NMWO for a specified class of employees:

'must be the same for all employees in that class, unless:

- (a) the FWC is satisfied that there are exceptional circumstances justifying setting different wages; and
- (b) the setting of different wages is limited just to the extent necessary because of the particular situation to which the exceptional circumstances relate.'

¹³ [2012] FWA FB 5000 [247]–[261]

¹⁴ PR0002005 p.131

Conclusion—Differential outcomes

51. It appears from the above that in an annual wage review:
- subject to a party establishing the case for differential treatment in accordance with principles developed in Economic Incapacity cases, 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; and
 - to the extent justified by exceptional circumstances, the Commission has discretion to exempt some employers and employees from increases to the national minimum wage or a special national minimum wage, or to reduce the amount of the increase for some employers and employees.

1.6 Establishing exemption and deferral claims

52. The Expert Panel observed in the *Annual Wage Review 2018-19*:

'[447] In previous Reviews, we have set out the requirements that proponents of a deferral of wage increases under ss 286(2) or 287(4) must meet.[citing *the Annual Wage Review 2016-17*] We have also previously observed that the approach to dealing with such an application should be consistent with the principles established in cases considered under the former Economic Incapacity Principle adopted by the Commission in the June 1986 *National Wage Case Decision*. These principles include that the onus is on the party seeking relief and that a strong case must be made out. We adopt without repeating those requirements and observations.'¹⁵ [Endnotes omitted]

53. In the *Annual Wage Review 2016-17* the Expert Panel stated:

'... In our decision in the 2015–16 Review, we ... referred to earlier Review decisions in 2013–14 and 2012–13 in which we set out the requirements that proponents of an exemption or deferral of wage increases on the grounds of natural disasters must meet. These can be summarised as follows:

- a deferral claim may be granted in respect of one or more modern awards or in respect of particular regions covered by modern awards, provided that we are satisfied that there are exceptional circumstances justifying such a course;
- a claim must clearly indicate whether a complete exemption is sought from any minimum wage increase or, if a deferral is sought, the period of the deferral;
- proponents of a deferral or exemption should advance a mechanism for the proper identification of the employers and employees affected and to whom the exemptions should apply;
- the declaration of natural disasters by government cannot, of itself, be regarded as constituting 'exceptional circumstances' for the purpose of s.286;
- information about the effect of the disaster event on different classes of employers and enterprises and the assistance provided by government are necessary elements in any case seeking to establish exceptional circumstances;

¹⁵ [2019] FWCFB 3500 [447]

- any assessment of the effect of a natural disaster must necessarily include an assessment of the impact upon employees who would bear the cost of a deferral of or exemption from a minimum wage increase; and
- sufficient detail is required so that if exceptional circumstances were found to exist, any order made would comply with the statutory obligation that it be 'limited just to the extent necessary because of the particular situation to which the exceptional circumstances relate'.¹⁶ [Emphasis added and endnotes omitted]

54. While parties in a number of annual wage reviews have sought deferral of or exemption from increases to modern award wages or the national minimum wage on the basis of exceptional circumstances, to date no such claim has succeeded.
55. For example, in both the *Annual Wage Review 2016-17* and the *Annual Wage Review 2018-19* the Expert Panel considered submissions that natural disasters had given rise to exceptional circumstances justifying deferral of increases to modern award wages or the national minimum wage. In the *Annual Wage Review 2016-17* the Expert Panel related:

'As we have previously stated, we recognise that natural disaster inflicts hardship on many businesses, particularly small businesses and that deferral of any rise in minimum wages may contribute to easing pressure on businesses. However, we also recognise that natural disaster inflicts hardship on employees and their families due to loss of wages and damage to property and that in some cases the employees affected may be among the lowest paid in the community.

... However ... we are not assisted by the submission of [the party concerned] ... which continues to suffer from the deficiencies that we have identified in previous decisions.

... Again [the party] ... has not made clear whether the deferral relates to the NMW or to modern award wages, or both [and] ... has not proposed any mechanism to properly identify the employers affected and to whom the deferral should apply. Other than indicating that there should be a deferral of any wage increase for farmers and agribusinesses in the regions which have been affected by drought or cyclone, no other information is provided about who these employers may be. There is no detail about the employees they may engage. The submission does not identify which modern award or awards these employers and employees may be covered by nor is there any indication if the NMW order would apply to the employees.

... There is also no material on the impact of any potential deferral upon the employees concerned. We note that there are many employees who have likely been adversely affected by the natural disasters ... In particular, employees in the regions impacted by Cyclone Debbie have likely been stood down without pay, which can only have compounded the effects of that event on those employees. No information is given ... about any government assistance that may be provided to the relevant employers or employees. Further ... [the party] has again sought an exemption for a 'given period' without identifying the period for which the exemption is sought or proposing a mechanism by which such period can be identified.

We are not persuaded that [the party] ... has established that there are 'exceptional circumstances' which justify an operative date of the NMW order and modern award minimum wage increases we have decided to be later than 1 July 2017. The

¹⁶ [2017] FWCFB 3500 [181]

considerations ... raised are, however, relevant matters and we have taken them into account in our consideration of the economy in Chapter 4.¹⁷ [Endnotes omitted]

56. Similarly, in the *Annual Wage Review 2018–19* the Expert Panel related:

'[The party concerned] ... sought a 6-month deferral under ss 286(2) and 287(4)(b) of the Act of any increase to the NMW and modern award minimum wages in respect of certain employers said to have been affected by flooding in the Townsville region of North Queensland in late January to early February 2019 ... The mechanism proposed ... for identification of employers who would be subject to the deferral is their eligibility for a Commonwealth Government Special Disaster Assistance Recovery Grant for Small Business (Recovery Grant) ...

... We accept that a flood event, considered alone or in combination with economic factors, may constitute exceptional circumstances. However, we are not satisfied in the present case that we should exercise the discretion in ss 286(2) and 287(4) ... for a number of reasons. First, the mechanism proposed ... to identify the employers who will be subject of the deferral does not meet the requirement in ss 286(2) and 287(4)(b) of the Act that it be limited just to the particular situation to which the exceptional circumstances relate. Eligibility for Recovery Grants is limited to small business, and it has not been demonstrated that the criteria for the approval of the grants sufficiently correlate with the standard of exceptional circumstances ...

... Second, the ... proposal also raises significant issues associated with consistency and fairness which, as we have observed in past Review decisions, are notions which underpin the concept of a safety net in both the minimum wages objective and the modern awards objective ...

... Third, and related to the first point, it is not clear to us that the receipt of a Recovery Grant is a reliable indicator of any incapacity to pay increased wages. Employers who have received a Recovery Grant may also have received other government assistance including low-interest loans for the purpose, among other things, of the payment of wages of employees. The receipt of a Recovery Grant is not necessarily an indicator of present or future business distress, given that some types of business (such as construction and cleaning) may expect higher client demand during the recovery phase.¹⁸ [Endnotes omitted]

57. Situations that might give rise to 'exceptional circumstances' for the purposes of Part 2-6 of the Act clearly are not confined to natural disasters resulting from extreme weather events. Construing the meaning of 'exceptional circumstances' in Part 2-6 may begin from the 'sensible working hypothesis' that it has the same meaning in Part 2-6 as in other parts of the Act.¹⁹ In considering the meaning of 'exceptional circumstances' as it appears in Part 3-1 of the Act, the Commission has found:

'the expression "exceptional circumstances" has its ordinary meaning and requires consideration of all the circumstances. To be exceptional, circumstances must be out of the ordinary course, or unusual, or special, or uncommon but need not be unique, or unprecedented, or very rare ... Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors or a combination of ordinary

¹⁷ [2017] FWCFB 3500 [182]–[186]

¹⁸ [2019] FWCFB 3500 [446]–[450]

¹⁹ *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 [106]

factors which, although individually of no particular significance, when taken together are seen as exceptional.²⁰

2. Conclusion—What the Commission can't do and what the Commission can do in relation to the Annual Wage Review 2019–20

2.1 What the Commission can't do

58. Based on the review of the legislative framework above and present annual wage review case law it appears that, amongst other constraints:

- (i) The Commission cannot delay making any determination varying modern award minimum wages or making the national minimum wage order beyond 30 June 2020 (although on or before that date, in some circumstances it may be able to make a variation determination or an adjustment under the national minimum wage order that has delayed effect—see the following point).

For example, the Commission could not delay making determinations varying modern award minimum wages or delay making the national minimum wage order until December 2020, when the longer term impact of the COVID-19 pandemic might be clearer (but on or before 30 June 2020, in some circumstances it may be able to make a variation determination or adjustment under the national minimum wage order that will not take effect until December 2020).

- (ii) In making a determination increasing modern award minimum wages or an order increasing the national minimum wage, the Commission cannot delay the introduction of the increase beyond 1 July 2020 for some or all employers and employees, exempt some employers and employees from the increase, or reduce the amount of the increase for some employers and employees, unless this is justified by exceptional circumstances and/or the case for differential treatment is established in accordance with principles developed in Economic Incapacity cases.

For example, the Commission could not delay the introduction of an increase in minimum wages for employees of retailers whose trading conditions have been adversely impacted by the COVID-19 pandemic, unless a strong case for differential treatment based on exceptional circumstances had been made out.

- (iii) The Commission probably cannot make a determination varying modern award minimum wages or a national minimum wage order, the effect of which is contingent upon subsequent economic or other developments (and if the legislation did permit this, there are likely to be difficulties in practice formulating such a contingent variation or order with sufficient particularity).

For example, the Commission probably could not make an increase in modern award minimum wages for retail employees, contingent upon improvement in trading conditions in the second half of 2020.

- (iv) Once the Commission has made a determination increasing modern award minimum wages or an order increasing the national minimum wage, the Commission cannot subsequently deal with any claim by employers for a delay in introducing the increase, an exemption from the increase or a reduction in the increase (during the 2019–20 financial year or subsequently).

²⁰ [2011] FWA FB 975 [13] (summarising *Ho v Professional Services Review Committee No 295* [2007] FCA 388 [23]–[27]) and [2018] FWC FB 901 [15]–[17]

For example, if the Commission made a determination increasing modern award minimum wages for retail employees (on or before 1 June 2020), a retail employer could not subsequently bring a claim for exemption from that increase.

- (v) Once the Commission has made a determination varying modern award minimum wages or made the national minimum wage order, the Commission cannot subsequently revisit and amend in substance or revoke the determination or order (during the 2019–20 financial year or subsequently).

For example, if the Commission decided in light of retail conditions prior to 1 July 2020 to increase modern award minimum wages for employees of only some retail employers, the Commission could not subsequently extend that increase to employees of other retail employers whose trading conditions had substantially recovered.

2.2 What the Commission can do

59. Based on the review of the legislative framework above and present annual wage review case law it appears that, amongst other actions:

- (i) On or before 30 June 2020, the Commission can make one or more determinations varying modern award minimum wages and must make a national minimum wage order.
- (ii) In making a determination increasing modern award minimum wages or an order increasing the national minimum wage, the Commission can delay the introduction of the increase beyond 1 July 2020 for some or all employers and employees, exempt some employers and employees from the increase, or reduce the amount of the increase for some employers and employees, provided this is justified by exceptional circumstances and/or the case for differential treatment is established in accordance with principles developed in Economic Incapacity cases.

For example, some employers might be able to make out a case for delaying the application of an increase in award minimum wages for their retail employees, based on exceptional circumstances arising from the COVID-19 pandemic.

The employers would bear the onus of making out a strong case for relief supported by oral and/or documentary evidence. This would include:

- satisfying the Commission that there are exceptional circumstances justifying the deferral;
- identifying the awards and award minimum rates concerned;
- identifying the period of the deferral;
- advancing a mechanism to identify the employers and employees affected and to whom the deferral should apply;
- providing information about the impact of the circumstances on different classes of employers and enterprises, and any assistance provided by government; and
- assessing the impact of the circumstances on employees who would bear the cost of deferral.

The employers would have to provide sufficient detail to enable the Commission, if it was satisfied that exceptional circumstances were made out, to comply with its

legislative obligation to limit a deferral 'just to the particular situation to which the exceptional circumstances relate'.²¹

- (iii) The Commission may be able to provide staged modern award minimum wage variations by making two or more variation determinations with different dates of operation, provided this is justified by exceptional circumstances (and similarly may be able to provide staged national minimum wage adjustments).

For example, to the extent justified by exceptional circumstances, the Commission may be able to provide for one increase in award minimum wages commencing on 1 July 2020 and a further increase commencing on 1 December 2020.

²¹ See [2019] FWCFB 3500 [447] and [2019] FWCFB 3500 [181] extracted at paragraphs 51 and 52 above.