



# **Australian Catholic Bishops Conference**

**Submissions on Supplementary  
Questions on Notice**

**May 2020**

<https://www.catholic.org.au/>

## INTRODUCTION

1. These submissions are made in response to the supplementary questions on notice posed on 13 May 2020.

### Question 1.1 – (1)

2. The ACBC does not contest the observations at [1] to [56] of the Discussion Paper. The ACBC submits that the proper construction of the words “exceptional circumstances” as used in Part 2-6 of the Act and in particular as it relates to the National Minimum Wage Award, is more nuance than the position described at [57] of the Discussion Paper.
3. It is true to say that the starting position for the proper construction of the phrase “exceptional circumstances” is that it has the same meaning as adopted in other parts of the Act. However, that presumption is rebuttable where the context purpose of surrounding text may provide a reason to do so. As was identified by the Full Court in *Workpac v. Skene* (2018) 280 IR 191 at 106:

*... However, it is not an assumption that is to be rigidly adopted and may be rebutted where the context, purpose or surrounding text provide reason to do so. Whether the context, purpose or surrounding text so require must be considered on a case by case basis: Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union [2018] FCAFC 88 at [3] (Allsop CJ); Craig, Williamson Pty Ltd v Barrowcliff [1915] VLR 450 at 452; Registrar of Titles (WA) v Franzon (1975) 132 CLR 611 at [11] (Mason J); Secretary, Department of Social Security v Copping (1987) 6 AAR 511 at 514-516 (Jenkinson J); Minister for Immigration and Multicultural and Indigenous Affairs v SZAYW (2005) 145 FCR 523 at [14] (Moore J); and Queensland v Forest (2008) 168 FCR 532 at [41] (Black CJ).*

4. In this case, the surrounding context concerns the making of an Order which answers the description set out in s.284, being an Order that establishes a safety net of fair minimum wages. As is explained in the ACBC’s primary submissions, in order to answer the description set out in s.284, any order must be sufficient to keep those whose wages are set by the order out of poverty.
5. The power conferred by s.286(2) to delay or defer the operative date of any Order must be construed in the context that the Expert Panel has determined that it is necessary to vary the NMW so as to ensure that it answers the description set out in s.284. With respect, what may be an exceptional circumstance warranting the delay of the implementation of an Order which is designed to keep persons out of poverty, will be materially different than considerations of whether a short limitation period should be extended. Whilst the potential deprivation of a person’s right to commence proceedings in respect of the termination of their employment is a serious matter, is of a different order of magnitude to whether an Order which is necessary to ensure that people are kept out of poverty is made.
6. In those circumstances, the ACBC submits that the proper construction of “exceptional circumstances” for the purposes of s.286(2) of the Act must be informed by the context in which it occurs. Accordingly, the range of circumstances considered will be narrower than those considered exceptional in other parts of the Act.
7. It should also be remembered that the circumstances do not just have to be exceptional, they have to be exceptional and *justify* the delay or deferment of the Order.
8. In that context, what is considered exceptional will be more exacting or demanding than might otherwise fall within the meaning of those words. To that end, the circumstances must be more than out of the ordinary course or unusual, or special or uncommon. The circumstances have to be sufficient to justify, contrary to the statutory scheme and ordinary

notions of human dignity, that persons who receive the NMW should not receive an increase, despite such an increase being necessary to ensure that they are kept out of poverty.

### Question 1.1 – Item 4

9. The ACBC accepts that if the Expert Panel was satisfied that, properly construed, “exceptional circumstances” arose in respect of the employers who were in receipt of the JobKeeper payments and that those circumstances justified the delay or deferment of any order, that the Commission could use the eligibility for, and receipt of, the JobKeeper payments as an identifying mechanism for the purposes of defining the scope of any deferral.
10. Notwithstanding the foregoing, the ACBC respectfully submits that the Expert Panel should not adopt that approach on the merits. The JobKeeper payments and the criteria for eligibility have been determined by the Federal Government. The basis for the choice of the particular criteria is not immediately apparent. Therefore, the mere choice of that criteria by the Federal Government for the purposes of economic support and stimulus payments are not necessarily a proper basis for determining that any NMW or Modern Award rates should not apply to those employers.
11. Without seeking to be critical of the JobKeeper scheme, the criteria adopted by it is, as it necessarily has to be, somewhat arbitrary. It is not immediately clear why employers who are suffering a 29% decrease in their turnover, should be required to meet the full cost of the variation to the NMW, but employers who are eligible for the job keeper scheme because they are suffering a 30% reduction should not be.
12. Moreover, the evident purpose of the JobKeeper scheme is to remedy the effects of the reduction in turnover. Accordingly, it can be assumed that the scheme has been calculated to effectively ameliorate the effects of any reduction. That is, the scheme has been designed to ensure that those firms suffering from a downturn, are compensated or protected. Given that purpose, it is not immediately clear why those firms should be the subject of further special treatment.
13. Further, as is presently stands, there is insufficient data concerning the position of those businesses which are eligible for and have taken up the JobKeeper payments. For some businesses, labour costs will not be their major cost and the JobKeeper payments will not be sufficient to offset the reduction in their turnover and their profitability will decrease. Equally so, other businesses whose labour costs were a more substantial part of their ongoing costs, will be adequately compensated by the JobKeeper payment and profitability may not be as adversely affected.
14. Once again, the ACBC is not critical of the Federal Government’s JobKeeper scheme, nor is it suggesting that businesses which are eligible and have taken up the scheme are not *necessarily* in hardship. The ACBC simply submits that at this stage there is insufficient data to justify a conclusion that businesses who are eligible for and in receipt of the JobKeeper payments are entitled to a deferral or delayed introduction of any increased rates of pay.

### Question 1.2

15. The ACBC maintains the position advanced in its primary submissions. That is, there should be a 4% increase to the National Minimum Wage Order and priority should be given to granting an increase to the non-trade qualified classifications in all Modern Awards. This is so even if it adversely affects the relativities between those lower paid classifications and the higher paid classifications.

16. The ACBC accepts that there is a high degree of uncertainty about the effect of the COVID-19 pandemic. The ACBC accepts that there will be adverse economic consequences from the pandemic. The extent of those consequences is unclear. The Reserve Bank Australia has indicated in their economic outlook that there will be either a V shaped or checkmark-shaped recovery suggesting that the recovery from the shutdown will be swift.<sup>1</sup> Equally so, other economists are more pessimistic.
17. The ACBC accepts that the current restrictions on movement and opening of most businesses constitutes an “exceptional circumstance” for the purposes of s.286(2) of the Act. Accordingly, the ACBC would not oppose a deferred implementation date of any increases to the National Minimum Wage until a period later in the year, to accommodate the lifting of restrictions.
18. Despite the general uncertainty about the effects of COVID-19, some matters still remain known. Those matters are that the current NMW Order does not answer the statutory description set out in s.284 because it is not sufficient to keep the recipients of it out of poverty. Accordingly, it is respectfully submitted that in order to answer the statutory injunction, the Expert Panel must make a variation to that Order to increase the quantum of the NMW. For those reason, the ACBC respectfully submits that an increase of 4% for the NMW and all classifications below the trade qualified level is appropriate.

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<sup>1</sup> Royal Bank of Australia, *Economic Outlook* (7 May 2020) <<https://www.rba.gov.au/publications/smp/2020/may/economic-outlook.html>>.



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