



Australian Government

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Response to

Supplementary

Questions on Notice

1 June 2020

1 Decision making process

1.1 Question to all parties

The Fair Work Commission has published a discussion paper titled '*What can and can't be done in the Annual Wage Review 2019-20*'.

All parties are invited to comment on the following questions.

1. Are any of the observations at [1] – [57] of the discussion paper contested and, if so, on what basis?
2. Are any of the observations at [58] ('What the Commission can't do') contested and, if so, on what basis?
3. Are any of the observations at [59] ('What the Commission can do') contested and, if so, on what basis?

As a preliminary observation, the Australian Government commends the Fair Work Commission (the Commission) for continuing to examine the legislative framework to identify appropriate opportunities to afford flexibility for employers and employees during the COVID-19 pandemic.

Part 1.3 of the discussion paper concerns the potential capacity of the Commission to make staged variations to modern award minimum wages and adjustments to the national minimum wage order. Set out below are observations in relation to this issue with particular focus on questions 1.1(1) and 1.1(3) of the supplementary questions on notice.

Generally, the *Fair Work Act 2009* (FW Act) anticipates that an adjustment to modern award minimum wages will take effect on a single date – that is, in the first full pay period on or after 1 July in the financial year following completion of the annual wage review (ss 286(1) and (5) of the FW Act). This timing of adjustments was designed to 'ensure certainty and predictability for employers and employees'¹.

Part 2-6 of the FW Act expressly permits the Commission, in exceptional circumstances, to specify a date later than 1 July as the day on which a determination comes into operation [s 286(2)]. Conversely, Part 2-6 does not expressly provide for adjustments to modern award minimum wages to take effect in a staged manner. In this respect some drafting contrasts exist with other parts of the FW Act, for example s 166(4), where the Commission is specifically authorised to provide that a determination to vary modern award minimum wage for work value reasons under Part 2-3 take effect in stages.

The discussion paper suggests that where there are exceptional circumstances, it may be open to the Commission to provide staged modern award minimum wage variations by making two or more variation determinations with different dates of operation. While appreciating in principle the need to identify options in the current environment, it is nevertheless prudent to acknowledge that an argument may exist that such an approach may be inconsistent with s 286(4), which prevents the Commission from making a variation determination with a deferred date of effect. While it is clear that the Commission may make multiple determinations varying modern award minimum wages in an annual wage review (eg. for different cohorts of employees), it does not necessarily follow that the Commission may make multiple determinations, coming into effect at different times, dealing

¹ Explanatory Memorandum, Fair Work Bill 2008 (Cth), p 181.

with the one group of employees. Making multiple variation determinations with different dates of operation could be argued to achieve essentially the same result that s 286(4) prohibits.

The existence of multiple possible legal interpretations suggest that the Commission should exercise caution in relation to its consideration of staged variations, particularly given their broad potential application and the complexity that would be associated with 'undoing' determination/s.

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?**
- 4.2 What do the parties say about the merit of such a proposal?**
- 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?**
- 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 particularly invite the Commonwealth to respond to this question. Parties are asked to submit a draft term to give effect to any such proposal.**

In relation to question 4.1 and consistent with the observations in response to question 1.1, the Australian Government considers that the Panel does have the power to determine a deferred date of operation in respect of a specified cohort of employers.

In relation to question 4.2, the Jobkeeper Payment was designed to provide support to businesses impacted by the COVID-19 crisis to maintain the connection with their employees. Its design utilised existing mechanisms to deliver support in a timely manner. For several reasons, while it may be an available mechanism to identify the employers and employees to whom a deferral should apply there may also be shortcomings with such an approach that the Commission would need to recognise.

The JobKeeper Payment essentially operates on the basis of a one-off test for eligibility. Once an employer has demonstrated they meet the eligibility criteria, they continue to participate in the scheme. Therefore, a business may continue to participate even if its turnover subsequently recovers.

Most ACNC registered charities have a range of special rules in relation to the turnover decline test. They must only satisfy a lower 15 per cent turnover test and may elect to exclude any government grants from turnover. These charities may also elect not to include all employees in the scheme. This means that these charitable groups may be eligible for JobKeeper Payment while operating in industries with demand above pre-crisis levels.

Finally, the JobKeeper Payment does not guarantee a minimum \$1500 per fortnight for the entire workforce of an eligible business. The wage condition requirement at section 789GD of the FW Act depends, in part, on the employee's eligibility for the JobKeeper Payment.

In view of the above considerations the Australian Government makes no comment in relation to the date of operation or the drafting of such a term (questions 4.3 and 4.4).

2 Economic and labour market considerations

2.1 Question to the Australian Government

Can the Australian Government provide information from the Australian Taxation Office (ATO) on the types of businesses that have registered and are eligible for the Commonwealth Government's JobKeeper Payment to deal with the economic impact of the coronavirus (COVID-19)?

The Panel would be assisted by the following data on registered businesses:

- main industry of operation (4-digit level);
- business size by number of employees;
- business size by turnover; and
- the extent in which turnover has declined among these businesses.

The number of organisations which had enrolled for the JobKeeper as at Wednesday 20 May 2020 was **910,055**. The enrolment is to notify intent to claim, and confirm the financial institution details for receiving the JobKeeper payment.

- Of these organisations, 759,654 had made claims in relation to their eligible employees and had their applications processed.

The total number of organisations which are eligible for JobKeeper is unknown as this would include organisations which have not enrolled, but may be eligible.

Based on the 759,654 organisations that have made claims for JobKeeper as at 20 May 2020, an industry breakdown of the ABNs based on ANZSIC codes registered with the ABR as at 20 May was:

Industry of ABN's that have applications processed for JobKeeper	Number of unique ABN's	Percentage of total (%)
Construction	111,329	14.66
Professional, Scientific and Technical Services	109,754	14.45
Other Services	75,938	10
Health Care and Social Assistance	71,576	9.42
Transport, Postal and Warehousing	57,027	7.51
Accommodation and Food Services	54,094	7.12
Retail Trade	50,063	6.59
Manufacturing	38,282	5.04
Administrative and Support Services	38,116	5.02
Arts and Recreation Services	32,950	4.34
Rental, Hiring and Real Estate Services	23,189	3.05

Education and Training	22,919	3.02
Wholesale Trade	22,377	2.95
Agriculture, Forestry and Fishing	21,086	2.78
Financial and Insurance Services	12,871	1.69
Information Media and Telecommunications	11,683	1.54
Public Administration and Safety	2,732	0.36
Electricity, Gas, Water and Waste Services	1,567	0.21
Mining	1,337	0.18
Special ATO Division (out of ANZSIC scope)	551	0.07
Null	213	0.03
Total	759,654	100

The breakdown in the organisations that have made claims by number of employees is given below.

- Zero employees: 11,558 organisations (1.52% of total);
- 1 to 4 employees: 637,307 organisations (83.89% of total);
- 5 to 19 employees: 92,321 organisations (12.15% of total);
- 20 to 49 employees: 12,696 organisations (1.67% of total);
- 50 to 99 employees: 2,886 organisations (<1% of the total);
- 100 to 499 employees: 1,846 organisations (<1% of the total);
- Over 500 employees: 235 organisations (<1% of the total).

The breakdown in the organisations that have made claims by turnover is given below:

- Small business: 665,713;
: Defined as business income < \$2M or GST Annual Turnover < \$2M
- Small to Medium Enterprises: 63,105;
: Defined as business income between \$2M and \$250M or GST Annual Turnover ≥ \$2M
- Large business: 1,473;
: Defined as business income > \$250M

Data on the extent to which turnover has declined among organisations is currently unavailable.