



# Summary of Decision

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## Annual Wage Review 2020–21

C2021/1

[2021] FWCFB 3501

### Introduction

[1] The *Fair Work Act 2009* (Cth) (Act) requires the Fair Work Commission (Commission), constituted by an Expert Panel for annual wage reviews (Panel), to conduct and complete a review of the national minimum wage (NMW) and modern award minimum wages in each financial year (the Review). The Panel must make a NMW order and may set, vary or revoke modern award minimum wages. The NMW order applies to award/agreement free employees<sup>1</sup> and modern award minimum wages are the minimum wages contained in modern awards.<sup>2</sup>

[2] The Panel received submissions from the Australian Government, most state governments, parties that represent the interests of employers and employees, and other bodies.

[3] The Australian Government and the majority of state governments did not propose a quantum increase to the NMW and modern award minimum wages.<sup>3</sup> The Victorian Government proposed a 2 per cent increase to the NMW and modern award minimum wages.<sup>4</sup>

[4] The ACTU proposed a uniform increase of 3.5 per cent to the NMW and modern award minimum wages,<sup>5</sup> supported by the SDA.<sup>6</sup> ACCER submitted a 4 per cent increase to the NMW and a minimum of 4 per cent increase to the C13 to C10 rates.<sup>7</sup>

[5] The Australian Chamber of Commerce and Industry (ACCI) and the Australian Industry Group (Ai Group), Australian Business Industrial (ABI) proposed an increase of 1.1 per cent.<sup>8</sup>

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<sup>1</sup> The NMW order sets both the NMW and special NMWs for employees who are juniors, to whom training arrangements apply, or who have disabilities; and applies to award/agreement free employees. The NMW order additionally sets the casual loading for award/agreement free employees. An award/agreement free employee cannot be paid less than the rate of pay specified in the NMW order (see ss 294–299 of the Act). Further, if an enterprise agreement applies to an employee and the employee is not covered by a modern award, then the employee’s base rate of pay under the enterprise agreement must not be less than the rate specified in the NMW order (s.206(3) of the Act).

<sup>2</sup> Including classification rates; wage rates for junior employees, employees to whom training arrangements apply and employees with a disability; casual loadings and piece rates.

<sup>3</sup> See Australian Government submission, 26 March 2021; New South Wales Government submission, 26 March 2021; South Australian Government submission, 26 March 2021; Western Australian Government submission, 23 April 2021; Queensland Government submission, 26 March 2021.

<sup>4</sup> Victorian Government submission, 26 March 2021 at para. 4.

<sup>5</sup> ACTU submission, 26 March 2021 at para. 5.

<sup>6</sup> SDA submission, 26 March 2021 at p. 2.

<sup>7</sup> ACCER submission, 26 March 2021 at para. 7.

<sup>8</sup> Ai Group post-Budget submission, 14 May 2021 at p. 2; ACCI post-Budget submission, 14 May 2021 at para. 14.

Other employer organisations proposed an increase no higher than inflation.<sup>9</sup> While the Master Grocers Australia and the National Farmers’ Federation stipulated no increase.<sup>10</sup>

[6] A key contextual consideration in relation to the present proceedings is the statutory constraints regarding the conduct of Reviews. In particular, s.285(1) provides that the Panel ‘must conduct and complete an annual wage review in each financial year’ (emphasis added). It follows that 30 June 2021 provides the outer limit for the completion of the *Annual Wage Review 2020–21* (2020–21 Review).

[7] As a practical matter the Review decision had to be published mid-June 2021 in order to allow sufficient time for draft variation determinations to be published and for interested parties to submit corrections or other amendments to the draft determinations. Given these constraints, the Panel’s decision has not sought to canvass all of the issues raised in the submissions. The Panel focussed on the issues which the Act requires that it takes into account.

[8] As was the case last year, this Review is being undertaken during a global pandemic. The Review timetable was again extended to allow parties to provide submissions regarding the impacts of the pandemic as they have unfolded and to comment on the most recent available data. The Australian Bureau of Statistics (ABS) March Quarter *National Accounts* were released on 2 June 2021 and interested parties filed submissions in respect of these data on 4 and 8 June 2021.

## The Decision

[9] In the *Annual Wage Review 2019–20* decision the majority concluded that there were ‘significant downside risks in the period ahead’ and that the economic considerations ‘weigh in favour of greater moderation in terms of the outcome of the Review’.<sup>11</sup> The majority concluded that:

‘The prevailing economic circumstances and the uncertainty surrounding the pathway out of recession have led us to adopt a cautious approach to both the quantum and the timing of an adjustment to the NMW and modern award minimum wages.’<sup>12</sup>

[10] The present circumstances are very different. There was a broad consensus in the submissions before us that the current performance of the economy has exceeded expectations and that the economic recovery was well underway.<sup>13</sup>

[11] The Australian economy has recovered to a greater extent and more quickly than anticipated.

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<sup>9</sup> SAWIA submission, 26 March 2021 at p. 11; NRA submission, 26 March 2021 at para. 1.1.1.

<sup>10</sup> MGA submission, 26 March 2021 at para. 77; NFF submission, 26 March 2021 at p. 26.

<sup>11</sup> [2020] FWCFB 3500 at [101]–[102]

<sup>12</sup> Ibid at [188]

<sup>13</sup> Australian Government submission, 26 March 2021 at paras 45, 51; Government of Western Australia submission, 23 April 2021 at para. 10; Victorian Government submission, 26 March 2021 at para. 40; ACTU submission, 26 March 2021 at paras. 4b–4c, 92, 98, 143; ACTU submission in reply, 23 April 2021 at paras 1, 20; ACTU post-budget submission, 14 May 2021 at para. 47; ACCI submission, 26 March 2021 at paras 101–102, 104, 118; ACCI submission in reply, 23 April 2021 at para. 19; ACCI post-budget submission, 14 May 2021 at para. 18; Ai Group initial submission, 26 March 2021 at p. 4; ABI supplementary submission, 4 June 2021 at p. 4; MGA submission, 26 March 2021 at paras 20, 51; NFF submission, 31 March 2021 at p. 11; SDA, 26 March 2021 at p. 5.

[12] The improved recovery was fuelled in large part by strong household spending and public demand, as well as better health outcomes and continued expansion of monetary and fiscal policy.<sup>14</sup> The outcomes for GDP and the labour market were at least as good as the ‘upside’ scenarios forecast by the RBA in 2020.<sup>15</sup>

[13] The Minutes of the Monetary Policy Meeting of the Reserve Bank Board on 4 May 2021 summarise how well the domestic economy has improved recently:

‘... the Australian economy was transitioning from recovery to expansion earlier and with more momentum than previously anticipated. The unique features of the pandemic and the policy response had seen the economy rebound much faster than in previous downturns. GDP was expected to have returned to its pre-pandemic level in the March quarter and there were more people employed in March than before the onset of the pandemic.’<sup>16</sup>

[14] Stronger economic performance over the latter part of 2020 has improved the baseline forecast scenario published in the RBA’s May 2021 *Statement on Monetary Policy*, even from the February 2021 *Statement*, including:<sup>17</sup>

- GDP growth revised up from 8 per cent to 9¼ per cent over the year to the June quarter 2021 and from 3½ per cent to 4¾ per cent over the year to the December quarter 2021.
- Household consumption revised up from 14 per cent to 15½ per cent over the year to the June quarter 2021 and from 4 per cent to 5½ per cent over the year to the December quarter 2021.
- The unemployment rate revised down from 6½ per cent to 5¼ per cent for June 2021 and from 6 per cent to 5 per cent for December 2021.
- The Consumer Price Index (CPI) revised up from 3 per cent to 3¼ per cent for the June quarter 2021 and from 1½ per cent to 1¾ per cent for December 2021. The increase was largely caused by the unwinding of government support measures, such as free child care.<sup>18</sup> Trimmed mean inflation was also revised up from 1¼ per cent to 1½ per cent for both the June and December quarters 2021.
- Growth in the Wage Price Index (WPI) revised up from 1 per cent to 1½ per cent for the June quarter 2021 and from 1½ per cent to 1¾ per cent for the December quarter 2021.

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<sup>14</sup> RBA (2021), *Statement on Monetary Policy*, February, p. 61.

<sup>15</sup> House of Representatives Standing Committee on Economics (2021), *Proof Committee Hansard*, Commonwealth of Australia, 5 February, p. 2.

<sup>16</sup> RBA (2021), *Minutes of the Monetary Policy Meeting of the Reserve Bank Board*, 4 May.

<sup>17</sup> RBA (2021), *Statement on Monetary Policy*, February, Appendix: Forecasts; RBA (2021), *Statement on Monetary Policy*, May, Appendix: Forecasts.

<sup>18</sup> RBA (2021), *Statement on Monetary Policy*, February, p. 67.

[15] The Australian Government delayed the release of the 2020–21 Budget from May until October 2020 and therefore the 2020–21 Budget was not available at the time of the last Review. The Mid-Year Economic and Fiscal Outlook (MYEFO) was published in December 2020 and the Treasury made several revisions to its forecasts for 2020–21 between the Budget<sup>19</sup> and the MYEFO.<sup>20</sup> With the 2021–22 Budget released in May 2021, changes to forecasts of key economic indicators also underscore the improved assessment of the Australian economy over this time. In particular, there were improved forecasts over 2020–21 for:<sup>21</sup>

- real GDP growth, revised up from  $\frac{3}{4}$  per cent to  $1\frac{1}{4}$  per cent;
- household consumption, revised up from  $\frac{1}{2}$  per cent to  $1\frac{1}{4}$  per cent;
- non-mining business investment, revised up from –11 per cent to  $-6\frac{1}{2}$  per cent;
- the CPI, revised up from  $2\frac{1}{4}$  per cent to  $3\frac{1}{2}$  per cent;
- employment growth, revised up from 4 per cent to  $6\frac{1}{2}$  per cent; and
- the unemployment rate, revised down from  $7\frac{1}{4}$  per cent to  $5\frac{1}{2}$  per cent.

[16] In his Budget speech, the Treasurer described the economic environment thus: ‘Australia’s economic engine is roaring back to life’.<sup>22</sup>

[17] While the economic recovery is well underway and the overall outlook is much more positive than it was last year, the Panel acknowledged the risk of domestic outbreaks and on-going disruptions to other major economies. COVID-19 outbreaks necessitating further containment measures remain a significant risk and, as the Commonwealth submits ‘even localised outbreaks could have an impact on consumer and business confidence weighing on consumption and investment’.<sup>23</sup>

[18] In this context the Panel noted that four of the key assumptions underpinning the economic forecasts in the 2021–22 Budget are:<sup>24</sup>

- During 2021, localised outbreaks of COVID-19 are assumed to occur but are effectively contained.
- While most domestic activity restrictions have been lifted, it is assumed that general social distancing restrictions and hygiene practices will continue until medical advice recommends removing them. The lifting of domestic activity restrictions will help support consumer and business activity.

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<sup>19</sup> Commonwealth Treasury (2020), *Budget 2020–21*, Commonwealth of Australia, October.

<sup>20</sup> Commonwealth Treasury (2020), *Mid-Year Economic and Fiscal Outlook 2020–21*, Commonwealth of Australia, December.

<sup>21</sup> For MYEFO forecasts, see Statistical report (version 1), p. 74, Table 14.3.

<sup>22</sup> Hon. Josh Frydenberg (2021), *Budget Speech 2021–22*, May.

<sup>23</sup> Australian Government submission, 26 March 2021 at paras 4, 53.

<sup>24</sup> Australian Government (2021), *Budget 2021-22 Budget Paper No.1*, Box 2.1, p. 36.

- There are no extended or sustained state border restrictions in place over the forecast period.
- Inbound and outbound international travel is expected to remain low through to mid-2022, after which a gradual recovery in international tourism is assumed to occur.

[19] A key to the effective containment of COVID-19 is the pace of the vaccine rollout. A quick rollout of the vaccine increases the likelihood of an end to social distancing and density requirements, lockdowns and border restrictions, allowing businesses and employees to return to workplaces without uncertainty of the impact of future outbreaks to their business or employment. The 2021–22 Budget assumes that a population-wide vaccination program is likely to be in place by the end of 2021.<sup>25</sup>

### *The adjustment*

[20] The Panel determined that it is appropriate to increase the NMW. Having regard to the proposed NMW and the other relevant considerations, the Panel also considered that it is appropriate to adjust modern award minimum wages.

[21] In the Panel’s view awarding an increase of the magnitude proposed by the Australian Catholic Council for Employment Relations (and the ACTU) in the present economic circumstances would pose a real risk of disemployment and of adversely affecting the employment opportunities of low-skilled and young workers.

[22] The Panel also acknowledged that awarding an increase which is less than increases in prices and living costs would amount to a real wage cut. Such an outcome would mean that many award-reliant employees, particularly low-paid employees, would be less able to meet their needs. For some households such an outcome would lead to further disadvantage and may place them at greater risk of moving into poverty.

[23] ACCI submitted that ‘[t]here is no significant work for this Review to do on living standards and employee needs, save for supporting businesses and jobs’.<sup>26</sup> We disagree. Data provided in Appendix 6 of the decision show that for a number of hypothetical household types at various wage rates there was a decline in their disposable income relative to the 60 per cent median income poverty line between the December quarter 2019 and the December quarter 2020.<sup>27</sup> Those households that improved were mainly as a result of temporary increases to transfer payments, such as a higher JobSeeker payment, during the pandemic period.

[24] Consistent with the position taken in past Review decisions,<sup>28</sup> the Panel has taken the 0.5 percentage point increase in the Superannuation Guarantee rate into account in determining the level of increase in minimum wages in this Review, but has not applied a direct, quantifiable, discount to the minimum wage increase. The 2021–22 Budget made several other announcements regarding changes to support businesses and to households.

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<sup>25</sup> Australian Government (2021), *2021–22 Budget Strategy and Outlook, Budget Paper No. 1*, 11 May, p. 36.

<sup>26</sup> ACCI submission, 26 March 2021 at para. 55.

<sup>27</sup> Statistical report (version 11), Table 8.6.

<sup>28</sup> See *Ibid* at [358]–[360]; [2014] FWCFB 3500 at [285]

[25] Taken overall, the change in circumstances—the markedly better economic environment, the scheduled SG increase and the tax-transfer changes—weigh in favour of a higher increase than was awarded in last year’s Review.

[26] The factors the Panel are required to take into account have led it to award an increase of 2.5 per cent. The NMW will be \$772.60 per week or \$20.33 per hour. The hourly rate has been calculated by dividing the weekly rate by 38, on the basis of the 38-hour week for a full-time employee. This constitutes an increase of \$18.80 per week to the weekly rate or 49 cents per hour to the hourly rate.

[27] The proposed NMW and the relevant statutory considerations led the Panel to increase modern award minimum wages by 2.5 per cent.

### *The timing of the adjustments*

[28] Absent exceptional circumstances, the Act provides that variations to a NMW order and modern award minimum wages arising from a Review are to operate from 1 July in the financial year following the Review.

[29] Pursuant to s.287(1), a NMW order:

‘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]

[30] While a NMW order 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’.<sup>29</sup>

[31] Section 286(1) provides that:

‘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]

[32] 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)).

[33] In the 2019–20 Review, the majority of the Panel decided to increase modern award minimum wages in 3 groups based on industry clusters. Depending on the modern award and the industry cluster it was allocated, the increases to modern award minimum wages occurred on either 1 July 2020, 1 November 2020 or 1 February 2021.

[34] In the questions on notice published on 7 April 2021 all parties were invited to comment on how the Panel should deal with the different operative dates from the 2019–20 Review and whether there should be any changes to the composition of the 3 industry clusters. The various

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<sup>29</sup> *Fair Work Act 2009* (Cth), s. 287(4).

employer interests generally submitted that exceptional circumstances justified later operative dates in respect of particular modern awards.

[35] The submissions advanced by ACCI, Ai Group and some other employer interests are predicated on the proposition that either there should be a ‘gap’ of 12 months between modern award minimum wage increases or, as Ai Group put it, the delayed operative dates from last year’s decision mean that unless a delayed increase is granted this year, some employers would be required to pay two wage increases in close succession. Ai Group contends the delayed operative dates from last year’s Review decision is an ‘exceptional circumstance’, warranting delayed operative dates this year. ABI contends that if the Panel decided to align all industry clusters to a single commencement date then that should be 1 January 2022 for all sectors.<sup>30</sup>

[36] The Panel said two things about this.

[37] First, the mere fact of a deferred date of operation of an increase in last year’s Review is not, in and of itself, an exceptional circumstance such as to warrant a deferral in this year’s Review.<sup>31</sup> It should not be presumed that differential treatment is appropriate for this year’s decision merely because differential treatment was afforded by the majority in last year’s Review decision.<sup>32</sup> Accepting the premise of Ai Group’s argument would create a self-perpetuating mechanism whereby the exception became the rule.<sup>33</sup> However, we accept that the period of time between successive increases, together with other data, is relevant to an overall assessment of whether exceptional circumstances exist such as to warrant a delayed operative date.

[38] Second, the submission put ignores the fact that these employers had the benefit of a delayed operative date arising from last year’s decision. Further, the delay is sought to be perpetuated with no analysis of the contemporary circumstances applying in the industries covered by the relevant awards.

[39] In the Panel’s view, the data showing the differential impact of the pandemic on particular industry sectors and the import of s.286(2) of the Act does not support a general deferral of the type advocated by ABI and nor does it support the automatic adoption of the ‘clusters’ determined by the majority in last year’s Review decision. A more nuanced approach is required.

[40] The Panel and submissions were assisted by several reports by Professor Jeff Borland that provided an assessment of the economic effects of COVID-19. In the final report, published after the release of the March quarter 2021 National Accounts, Professor Borland found that by April 2021, aggregate labour market activity in Australia had recovered to its pre-COVID level.

[41] The reports looked at the circumstances of the 3 groups of industries since the last Review. Based on labour market data, as well as gross value added and sales, it was found that the performance of some industries meant that they could shift between groups.

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<sup>30</sup> ACCI supplementary submission in reply, 8 June 2021 at para. 26; Ai Group responses to questions on notice, 23 April 2021 at p. 17; ABI supplementary submission, 2 June 2021 at p. 11.

<sup>31</sup> ACTU submission in reply, 23 April 2021 at para. 74.

<sup>32</sup> Ibid at para. 65.

<sup>33</sup> ACTU submission in reply, 23 April 2021 at para. 74.

[42] As Professor Borland observed in his report of 4 June 2021:

‘The updated information on changes in the numbers of jobs and on GVA and sales indicate a further need to reclassify industries between the clusters, initially defined in the majority decision of the Expert Panel in the Annual Wage Review 2019–20 (2019–20 Review)...’<sup>34</sup>

[43] The Panel was not satisfied that there are ‘exceptional circumstances’ such as to justify the adjustments set by a NMW order taking effect on a day later than 1 July 2021. The NMW order will come into operation on 1 July 2021.

[44] Professor Borland’s categorisation of industry sectors into ‘fully recovered’; ‘almost recovered’ and ‘lagging recovery’, and the data on which that categorisation is based, is relevant to the Panel’s assessment of whether, in respect of a particular modern award, there are exceptional circumstances such as to warrant a delayed operative date. However, the Panel noted that the categorisation by industry sectors is likely to mask significant variation at the modern award level; a point to which we shall return shortly.

[45] Three further matters are also relevant to the assessment of exceptional circumstances:

1. Relevant industry specific data.
2. The period of time between successive Review increases.
3. The likelihood that future lockdowns will be of limited duration and localised; comprising of stay-at-home orders localised to particular regions with limited reasons for people to leave their home.

[46] In relation to point 3 above, the Panel observed that the expected pattern of future lockdowns is likely to adversely impact hairdressing and beauty services; gyms; retail stores (other than food/essential supply retailers and those able to operate ‘click and collect’); accommodation and hospitality businesses (other than those providing take away food services) and businesses operating in the tourism and entertainment/sport sectors.

[47] The Panel noted that Professor Borland’s categorisation would see Retail trade and Arts and recreation services move to ‘fully recovered’; and Transport, postal and warehousing move to the upper cluster or ‘lagging recovery’.

[48] The Panel were aware that Professor Borland’s industry level categorisation is likely to mask significant variation at the modern award level. Transport, postal and warehousing illustrates that point. The modern awards mapped to this sector are as set out below:<sup>35</sup>

- *Road Transport and Distribution Industry Award 2020*
- *Passenger Vehicle Transportation Award 2020*
- *Rail Industry Award 2020*
- *Seagoing Industry Award 2020*

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<sup>34</sup> Borland J (2021), *An assessment of the economic effects of COVID-19*, Version 5, a report for the Fair Work Commission, 4 June, p. 9.

<sup>35</sup> Fair Work Commission (2020), *Information note—Modern awards and industries*, 30 March.



- *Marine Tourism and Charter Vessels Award 2020*
- *Air Pilots Award 2020*
- *Stevedoring Industry Award 2020*
- *Port Authorities Award 2020*
- *Coal Export Terminals Award 2020*
- *Marine Towage Award 2020*
- *Airline Operations – Ground Staff Award 2020*
- *Airport Employees Award 2020*
- *Storage Services and Wholesale Award 2020*
- *Transport (Cash in Transit) Award 2020*
- *Road Transport (Long Distance Operations) Award 2020*
- *Ports, Harbours and Enclosed Water Vessels Award 2020*
- *Aircraft Cabin Crew Award 2020*

[49] The modern awards mapped to this sector include a number of aviation and tourism awards (which are highlighted)—the sectors that these modern awards cover have plainly been impacted by the pandemic. Indeed, Professor Borland notes that the employment impact in this sector is primarily due to the persistent 25 per cent decrease in the number of jobs in aviation and space transport.<sup>36</sup> It seems likely that the circumstances in the aviation awards have impacted on the economic data for the Transport, postal and warehousing sector as a whole. The Panel noted that there are no award specific data in relation to the remaining awards mapped to this industry sector. These awards were all in the central cluster last year, with an operative date of 1 November 2020.

[50] The highlighted awards above align with the aviation and tourism sector. The other modern awards in the tourism sector are the *Alpine Resorts Award 2020* and the *Wine Industry Award 2020* (collectively the Aviation and Tourism Awards).

[51] Save for the highlighted awards, the Panel was *not* persuaded that there are exceptional circumstances such as to warrant a later operative date than 1 July 2021 in respect of any of the other awards mapped to the Transport, postal and warehousing sector.

[52] The following modern awards are mapped to the Accommodation and food services industry:<sup>37</sup>

- *Hospitality Industry (General) Award 2020*;
- *Restaurant Industry Award 2020*;
- *Fast Food Industry Award 2010*; and
- *Registered and Licensed Clubs Award 2020*.

[53] Professor Borland recommends that the Accommodation and food services sector remain in the ‘lagging recovery’ (upper cluster).

[54] The Panel was satisfied that there are exceptional circumstances justifying the variation determinations in respect of the Accommodation and food services sector (with the exception of the *Fast Food Industry Award 2010*) and the Aviation and Tourism Awards coming into

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<sup>36</sup> Borland J (2021), *An assessment of the economic effects of COVID-19*, Version 5, a report for the Fair Work Commission, 4 June, p. 11.

<sup>37</sup> [2020] FWCFB 3500 at [66]

operation on 1 November 2021. The Panel considered that the combination of factors outlined in the Decision at [245] – [246] applying to these awards is exceptional and justifies a delay until 1 November 2021.

[55] As to the *Fast Food Industry Award 2010*, the Panel observed that fast food businesses are, generally speaking, less likely to have been adversely affected by the pandemic than cafes and restaurants because the restrictions imposed to contain the virus have generally not prohibited take away food services.<sup>38</sup>

[56] Employment in the Fast Food sector is dominated by the Major Fast Food Chains. As observed in a Full Bench decision published on 20 February 2019,<sup>39</sup> McDonald’s, Hungry Jacks and Cravable Brands (Oportos, Red Rooster and Chicken Treat) (the Major Fast Food Chains) employ a substantial majority (about three-quarters) of all Fast Food industry employees.<sup>40</sup> There is no evidence before us from the Major Fast Food Chains regarding any adverse impact on the operations as a consequence of the restrictions imposed to contain the pandemic.

[57] The Panel acknowledged that an operative date of 1 July 2021 will mean that businesses covered by the *Fast Food Industry Award 2010* will face two minimum wage increases in a 6 month period. But these businesses also had the benefit of no increase in minimum wages between 1 July 2020 and 1 February 2021. Further, the timing issue is, of itself, not sufficient to warrant a finding of exceptional circumstances in light of the turnover data. The Panel was *not* persuaded that there are exceptional circumstances such as to warrant a later operative date than 1 July 2021 in respect of the *Fast Food Industry Award 2010*.

[58] For the Arts and recreation services sector, Professor Borland recommends that this sector shift from the upper cluster to the almost recovered (central) cluster and in so doing observes that by the end of March 2021 the number of jobs had returned to the same level as March 2020 and that both gross value added (GVA) and sales show that the extent of the recovery in activity has almost matched the initial decrease.<sup>41</sup>

[59] In the Panel’s view, Professor Borland’s analysis in respect of the Arts and recreation services sectors is also unlikely to be applicable to the circumstances of each of the modern awards mapped to this sector. The relevant awards are:

- *Amusement, Events and Recreation Award 2020*;
- *Live Performance Award 2020*;
- *Fitness Industry Award 2020*;
- *Sporting Organisations Award 2020*;
- *Racing Clubs Events Award 2020*;
- *Racing Industry Ground Maintenance Award 2020*;
- *Horse and Greyhound Training Award 2020*; and
- *Travelling Shows Award 2020*.

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<sup>38</sup> [2021] FWCFB 3500 at [258]

<sup>39</sup> [2019] FWCFB 272 at [98]

<sup>40</sup> [2019] FWCFB 272 at [37]

<sup>41</sup> Borland J (2021), *An assessment of the economic effects of COVID-19*, Version 5, a report for the Fair Work Commission, 4 June, p. 12.

[60] Save for the *Horse and Greyhound Training Award 2020*, the Panel noted that the businesses covered by these awards have also been adversely impacted by the pandemic and by the various government restrictions to restrict transmission. It is also likely that these will also be adversely impacted by the pattern of lockdowns/restrictions we are likely to see over the course of the next 12 months.

[61] The combination of circumstances persuaded the Panel that in respect of the awards in the Arts and recreation services sectors, save for the *Horse and Greyhound Training Award 2020*, it was satisfied that there are exceptional circumstances justifying the variation determinations in respect of these modern awards coming into operation on 1 November 2021.

[62] The *Horse and Greyhound Training Award 2020* covers employers in the horse and greyhound training industry. While the horse racing industry has been affected by the restrictions imposed to contain the pandemic in many instances scheduled races took place, albeit with limited or no crowds. The restrictions on public attendance at race meetings would not have directly affected the businesses covered by this award—they train and prepare horses and greyhounds for racing.

[63] The Panel acknowledged that the operative date of 1 July 2021 will mean that the businesses covered by the award will face two minimum wage increases in a 6 month period. But those businesses have also had the benefit of no increase in minimum wages between 1 July 2020 and 1 February 2021. The timing issue is, of itself, not sufficient to warrant a finding of exceptional circumstances.

[64] A strong case must be made out in order to warrant the deferral of a variation determination arising from a Review. The Panel was not persuaded that such a case is made out in respect of the *Horse and Greyhound Training Award 2020*.

[65] The remaining group of modern awards in respect of which the majority in last year's Review decision concluded there were exceptional circumstances which warranted an operative date of 1 February 2021 are the Retail trade awards.

[66] The modern awards which can be broadly characterised as relating to Retail trade are:

- *Commercial Sales Award 2020*;
- *Dry Cleaning and Laundry Industry Award 2020*;
- *General Retail Industry Award 2020*;
- *Hair and Beauty Industry Award 2010*;
- *Mannequins and Models Award 2020*;
- *Nursery Award 2020*; and
- *Vehicle Repair, Services and Retail Award 2020*.

[67] Professor Borland categorises Retail trade as being in the fully recovered cluster. However, the Panel observed that the data suggest that turnover and jobs vary across subdivisions within Retail trade.<sup>42</sup>

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<sup>42</sup> [2021] FWCFB 3500 at [274]–[275]

[68] For instance, fuel retailing does not appear to have been adversely impacted and data on new car sales suggest signs of recovery within the industry.<sup>43</sup> On the basis of the data, the Panel was not persuaded that there are exceptional circumstances such as to warrant a delayed operative date in respect of the *Vehicle Repair, Services and Retail Award 2020*.

[69] The Panel acknowledged that an operative date of 1 July 2021 will mean that businesses covered by the *Vehicle Repair, Services and Retail Award 2020* will face two minimum wage increases in a 6 month period. But those businesses also had the benefit of no increase in minimum wages between 1 July 2020 and 1 February 2021. Further, the timing issues is, of itself, not sufficient to warrant a finding of exceptional circumstances in light of the turnover data.

[70] Second, the Panel agreed that there are some businesses that can be broadly characterised as relating to the Retail trade sector which have plainly been impacted by the restrictions imposed to contain the virus, specifically:

- *Dry Cleaning and Laundry Industry Award 2020*;
- *Hair and Beauty Industry Award 2010*;
- *Mannequins and Models Award 2020*; and
- *Nursery Award 2020*.

[71] The Panel was satisfied that there are exceptional circumstances justifying the variation determinations in respect of these modern awards coming into operation on 1 November 2021. The Panel considered that the combination of factors outlined in the Decision at [245] – [246] applying to these awards is exceptional and justifies a delay until 1 November 2021.

[72] As to the *Commercial Sales Award 2020*, there is no specific data about the impact of the pandemic on the employers covered by this award. The Panel accepted that there is likely to have been some adverse impact resulting from the restrictions on movement imposed by various public health orders; but some of these businesses are also likely to have transitioned to online sales.

[73] The Panel acknowledged that the operative date of 1 July 2021 will mean that the businesses covered by the award will face two minimum wage increases in a 6 month period. But those businesses have also had the benefit of no increase in minimum wages between 1 July 2020 and 1 February 2021. The timing issue is, of itself, not sufficient to warrant a finding of exceptional circumstances.

[74] A strong case must be made out in order to warrant the deferral of a variation determination arising from a Review. The Panel was not persuaded that such a case is made out in respect of the *Commercial Sales Award 2020*.

[75] The Panel accepted that some businesses covered by the *General Retail Industry Award 2020* have not been adversely impacted by the pandemic to any significant extent and are performing well; for example, supermarkets and homeware businesses. But, as mentioned earlier, the turnover and jobs data shows a considerable diversity of experience across the

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<sup>43</sup> Statistical report (version 12), 15 June 2021, Chart 3.20; Car advice, [VFACTS May 2021: New-car sales results continue to show signs of recovery](#), May 2021.

subdivisions within Retail trade. It is likely that other businesses covered by the award have been substantially impacted.

**[76]** The degree of impact is likely to be influenced by location (CBD, metropolitan or regional), the subsector in which the business operates and the size of the business. Smaller businesses are less likely to have the resources to quickly pivot to online sales and more likely to operate in a limited number of locations.

**[77]** As mentioned, it is likely that future lockdowns will be of limited duration and localised. Such lockdowns are likely to have adverse consequences for some of the businesses covered by the *General Retail Industry Award 2020*.

**[78]** The Panel was also conscious that an operative date of 1 July 2021 will mean that businesses covered by the *General Retail Industry Award 2020* will face two minimum wage increases in a 6 month period; but we note that they have had the benefit of no increase in minimum wages between 1 July 2020 and 1 February 2021.

**[79]** At an aggregate level, retail turnover had returned to pre-pandemic rates by early 2021 and GVA showed growth in activity during 2020–21.<sup>44</sup> Job losses have recovered somewhat but fell across all subdivisions within Retail trade. Retail trade also had the largest share of underemployed workers in February 2021, at 17.7 per cent; followed by Accommodation and food services at 15.3 per cent.<sup>45</sup>

**[80]** The Panel was satisfied that the combination of factors mentioned gives rise to exceptional circumstances justifying a later operative date for the variation determination in respect of the *General Retail Industry Award 2020*. However, those exceptional circumstances do not warrant a delay until 1 November 2021. The Panel considered that the combination of factors applying to this award justifies a delay until 1 September 2021.

**[81]** In respect of the remaining modern awards the Panel was not persuaded that there are exceptional circumstances such as to warrant a delayed operative date in the variation determinations arising from this Review. The Panel acknowledged that an operative date of 1 July 2021 will mean that businesses covered by some of these modern awards will face two minimum wage increases within a 12 month period. But those businesses have had the benefit of the delayed operative date arising from the 2019–20 Review. The timing issue is, of itself, not sufficient to warrant a finding of exceptional circumstances. A strong case must be made out in order to warrant the deferral of a variation determination arising from a Review. The Panel considered the submissions advanced in respect of these modern awards and the factors at [245]–[246] of the Decision and was not persuaded that such a case has been made out in respect of the remaining modern awards.

**[82]** In reviewing modern award minimum wages, the Panel is also required to review the minimum wages in modern enterprise awards and state reference public sector modern awards.<sup>46</sup> In the 2019–20 Review decision, the majority allocated the modern enterprise awards

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<sup>44</sup> Borland J (2021), *An assessment of the economic effects of COVID-19*, Version 5, a report for the Fair Work Commission, 4 June, p. 11.

<sup>45</sup> Statistical report (version 12), 15 June 2021, Chart 6.14; ABS, *Labour Force, Australia, Detailed*, April 2021.

<sup>46</sup> See Schedules 6 (at Item 17) and 6A (at Item 20) of the *Fair Work (Transitional Provisions and Consequential Amendments Act) 2009*.

and state reference public sector modern awards to the 3 ‘clusters’ based on their alignment with the modern awards in the 3 groups.<sup>47</sup> The Panel decided to follow the same approach this year.

**[83]** Save for the *Airservices Australia Enterprise Award 2016*, the variation determinations in respect of all other modern enterprise awards and state reference public sector awards to give effect to our decision will operate from 1 July 2021. The variation determination in respect of the *Airservices Australia Enterprise Award 2016* will take effect on 1 November 2021.

**[84]** In summary, the variation determinations in respect of the following modern awards and modern enterprise awards will come into operation on 1 November 2021:

- *Air Pilots Award 2020*
- *Aircraft Cabin Crew Award 2020*
- *Airline Operations – Ground Staff Award 2020*
- *Airport Employees Award 2020*
- *Airservices Australia Enterprise Award 2016*
- *Alpine Resorts Award 2020*
- *Amusement, Events and Recreation Award 2020*
- *Dry Cleaning and Laundry Industry Award 2020*
- *Fitness Industry Award 2020*
- *Hair and Beauty Industry Award 2010*
- *Hospitality Industry (General) Award 2020*
- *Live Performance Award 2020*
- *Mannequins and Models Award 2020*
- *Marine Tourism and Charter Vessels Award 2020*
- *Nursery Award 2020*
- *Racing Clubs Events Award 2020*
- *Racing Industry Ground Maintenance Award 2020*
- *Registered and Licensed Clubs Award 2020*
- *Restaurant Industry Award 2020*
- *Sporting Organisations Award 2020*
- *Travelling Shows Award 2020*
- *Wine Industry Award 2020.*

**[85]** The variation determinations in respect of the *General Retail Industry Award 2020* will come into effect on 1 September 2021.

**[86]** The decisions the Panel has made about the operative dates of the variation determinations arising from this Review are based on the factors set out above and a consideration of the submissions. The Panel acknowledged the limitations of the data and accepted that the categorisation adopted is imperfect. But, on the available information, the Panel was satisfied that the operative dates it determined are justified, consistent with the statutory framework and strike an appropriate balance between the interests of employers and employees.

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<sup>47</sup> [\[2020\] FWC FB 3500](#) at [165].

**Draft variation determinations**

[87] Draft variation determinations giving effect to the decision will be published later in the week. Interested parties will be required to submit any corrections or amendments by no later than 5pm on Thursday, 24 June 2021.

[2021] FWCFB 3501

- *This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission's reasons.*

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