

**Application by the Australian Industry Group and the Australian Chamber of
Commerce and Industry**

s.157 – Variation of a modern award to achieve the modern awards objective

Clerks – Private Sector Award 2020

AM2020/30

**SUBMISSION BY Ai GROUP AND ACCI IN SUPPORT OF THE
APPLICATION**

1. Introduction

1. The Australian Industry Group (**Ai Group**) and the Australian Chamber of Commerce and Industry (**ACCI**) seek amendments to Schedule I—Award Flexibility During the COVID-19 Pandemic (**Schedule**) in the *Clerks – Private Sector Award 2020* (**Award**).
2. The Schedule was inserted into the Award on 28 March 2020 through a decision of a Full Bench of the Commission (**28 March Decision**).¹
3. The amendments sought are reflected in the Draft Determination filed by Ai Group and ACCI on 25 June 2020. That Draft Determination replaces the one filed with the Application.
4. If granted, the proposed amendments would:
 - a. Extend the period of operation of the Schedule, by three months, to 30 September 2020;
 - b. Insert a new clause I.1.2 as follows:

I.1.2 Any direction or request given by an employer under Schedule I must be given in writing and does not apply to the employee if the direction is unreasonable in all of the circumstances.

¹ *Application to vary the Clerks – Private Sector Award 2010* (AM2020/10), [2020] FWCFB 1690.

- c. Delete clause 1.2.1 – Operational flexibility, clause 1.2.2 – Part-time employees working from home, clause 1.2.3 – Casual employees working from home, and clause 1.2.7 – Close-down;
 - d. Correct a cross-referencing error in existing clause 1.2.4 – Ordinary hours of work for employees working from home;
 - e. Limit the application of clause 1.2.5 – Agreed temporary reduction in ordinary hours, to those employers that had implemented a temporary reduction in ordinary hours under Schedule I in the Award before 30 June 2020; and
 - f. Delete existing clause 1.2.6 – Annual leave (which enables an employer to direct an employee to take annual leave), and replace it with a new clause that enables an employer to request an employee to take annual leave, with a requirement that the employee not unreasonably refuse the request.
5. The application is made because of the ongoing challenges facing employers and their clerical employees due to the COVID-19 pandemic (**Pandemic**).

2. Discussions with the ACTU and ASU, and the conciliation process

6. Prior to filing the application, Ai Group and ACCI endeavoured to have discussions and reach agreement with the Australian Council of Trade Unions (**ACTU**) and the Australian Services Union (**ASU**) on the extension of the Schedule, but the union parties advised that they are not prepared to extend the operation of any of the provisions in the Schedule.
7. Discussions with the ACTU and the ASU belatedly took place on 23 and 24 June during two Conciliation Conferences chaired by Commissioner Bissett. However, despite the efforts of Ai Group and ACCI to reach agreement with the unions, ultimately the ACTU and ASU advised that they were not prepared to extend the operation of any of the provisions in the Schedule.

8. The ACTU's and ASU's position is disappointing given the level of joint cooperation and commitment that led to the Schedule being developed and jointly proposed to the Commission.
9. Notwithstanding the ACTU's and ASU's opposition, an extension to the Schedule is necessary to ensure that the Award continues to achieve the modern awards objective.

3. Materials filed in support of the Application

10. The Application is supported by Government statistics, information from the Commission (including an [Information Note](#) issued by the Commission on 26 June 2020) and survey materials, as referred to in this submission. Given the timeframes that the industrial parties and the Commission are working under during the Pandemic, these materials are more probative in demonstrating the facts of relevance to the Application than witness evidence from what would necessarily be a small number of employers.
11. In part, the Application is supported by notorious facts that the Commission is able to take judicial notice of.
12. This Application is not pursued as part of the 4 Yearly Review of Modern Awards. However, the following extract from the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues Decision*² highlights the approach that the Commission commonly takes in respect of applications to vary awards:

[23] The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a 'stable' modern award system (s.134(1)(g)). The need for a 'stable' modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI's submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

² [2014] FWCFB 1788.

13. We submit that the changes sought in this Application are not major changes. The Application simply seeks that existing award provisions, which were introduced by the Commission to assist employers and employees to cope with the Pandemic, are extended for a further short period of time given that:
 - a. The Pandemic is continuing;
 - b. The circumstances that the Schedule was intended to address still exist;
and
 - c. The terms of the Schedule expressly contemplate that the period of operation may be extended by the Commission.
14. We also submit that the changes sought are “self-evident” and are able to be determined with little formality.
15. Having regard to the Commission’s obligation under section 577 of the *Fair Work Act 2009 (FW Act)* to exercise its functions in a fair, just, quick and informal manner that avoids unnecessary technicalities, the Applicants submit that the materials filed together with the Application provide a satisfactory basis to warrant the extension of the Schedule. The materials constitute the very type of materials that could reasonably be expected to be gathered in support of an urgent and temporary amendment to the safety net to ensure the Award remains relevant to workers during a time of crisis.
16. The Application for the extension of this temporary Award schedule should be distinguished from applications to make permanent award changes and, having regard to section 577 of the FW Act, it would not be appropriate to apply the same evidentiary threshold applicable to permanent award changes to urgent, temporary changes in response to a developing economic and health crisis.

4. Clerical employees in Australia and their employers

17. In the submission made by the Minister for Industrial Relations on 27 March 2020 in support of the inclusion of the Schedule in the Award, the following relevant points and statistics were set out:
10. The Clerks Award applies on an occupation basis. It covers employers in the private sector throughout Australia with respect to their employees engaged wholly or principally in clerical work, including administrative duties of a clerical nature.
 11. Employees covered by the Clerks Award include payroll staff, receptionists, business helpdesks, executive assistants and other administrative roles critical to keeping businesses running and ensuring Australians are paid.
 12. Many of these functions fall within the 'Clerical and Administrative Workers' occupation for the purposes of the monthly Labour Force Survey compiled by the Australian Bureau of Statistics. As at February 2020, that occupation included around 1.56 million employees, representing 14.3% of all employees.³ Around two thirds (66.9%) had their pay set by an award or more generous individual arrangements underpinned by the Clerks Award (16.5% and 50.4% respectively).⁴
 13. Clerical and Administrative Workers are engaged by businesses of all sizes, from micro employers to large businesses. In these circumstances, any measure which assists employers who engage clerical workers to maintain employment, and therefore their connection with and support for as many employees as possible, is to be supported, and the Minister strongly endorses the Application.
18. In paragraphs [15] and [16] of the 28 March Decision, the Full Bench referred to and relied upon the above points and statistics.
19. The Commission's 26 June 2020 [Information Note](#) (at paragraphs 5 and 6) included updated ABS data (ABS, *Labour Force, Australia, Detailed, Quarterly, May 2020*, Catalogue No. 6291.0.55.003) which showed that the decline in employment the May quarter 2020 was very significant. The largest decline (more than 20%) was for Community and personal service workers, which was more than 20 per cent. Among Clerical and administrative workers, there was a fall of 0.7 per cent in the May quarter 2020, which was below the all employed persons average (-6.3 per cent).

³ *Labour Force Detailed Quarterly*, Cat. No. 6291.0.55.003, Nov 2019.

⁴ ABS, *Employee Earnings and Hours*, cat. no. 6306.0, May 2018, non-managerial employees; *Labour Force Detailed Quarterly*, Cat. No. 6291.0.55.003, Feb 2020.

5. A potential extension in the operation of the Schedule was contemplated by the parties and the Commission when the Schedule was included in the Award

20. The Schedule was inserted into the Award on 28 March 2020 through the 28 March Decision.

21. The terms of the Schedule expressly contemplate that the period of operation may be extended by the Commission:

I.1.1 Schedule I operates from 28 March 2020 until 30 June 2020. The period of operation can be extended on application to the Fair Work Commission.

22. In the 28 March Decision, the Full Bench highlighted that the period of operation can be extended on application:

[19] The Schedule has a limited life and will operate from 28 March 2020 until 30 June 2020. The period of operation can be extended on application.

23. The reason why the expiry date of 30 June 2020 was inserted into the Schedule was that this was the expiry date agreed upon between the AHA and the AWU for the COVID-19 Schedule in the *Hospitality Industry (General) Award 2010*. Once this concession had been made by the AHA, the ACTU and ASU were not prepared to agree to a longer term, despite the fact that Ai Group and ACCI were of the view that a longer term was warranted.

24. Notwithstanding the agreement between the parties on a 30 June 2020 expiry date, there was an understanding that the ongoing need for the Schedule would be reviewed ahead of 30 June. The agreed words in clause I.1.1, as underlined above, reflect this understanding. In addition, the following submissions of Mr Rizzo of the ASU at the hearing on Saturday 28 March are consistent with this understanding: (emphasis added)

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Your Honour and the Full Bench, the ASU (indistinct) fully support this. We are responding to extraordinary times and the other reason, of course, why we support it is - the important point - is while it is for a short term, this does expire on 30 June 2020 and so that is a comfort to us and we will see what happens are that particular date, but the ASU commends the variations to the Full Bench and encourages it to (indistinct). If your Honour, please.

25. There is a clear need for the Schedule to be extended for the reasons outlined below.

6. The ongoing impacts of the Pandemic on employers and employees

26. The Pandemic is continuing to have a major impact on employers and employees, including those covered under the Award.

27. On 26 June 2020, the Commission published a [COVID-19 situation update](#) which provides an update of the current rate of transmission of COVID-19 in Australia.

28. In the *Annual Wage Review 2019-20 Decision*,⁵ the Majority of the Members of the Expert Panel stated:

[17] The shock to the labour market is unprecedented. The latest data, for May 2020, show that the unemployment rate increased by 1.9 percentage points in 2 months, to 7.1 per cent;⁶ while significant, it does not provide the full picture. The participation rate declined by 3.1 percentage points in 2 months, highlighting the fact that many people left the labour force.⁷ But for the decline in the participation rate, the unemployment rate would have been higher.

[18] As described by the ABS, there was a larger percentage of employed men and women who worked 0 hours in May 2020 than in previous years, as was also seen in April 2020.⁸ That the unemployment rate did not increase further is because these people were still defined as employed, in part because of the JobKeeper payment, and it is likely to increase further as the JobKeeper payment unwinds. Given this, the underemployment rate becomes the more relevant labour market indicator. In April 2020, it increased to 13.8 per cent, the highest rate on record, before declining to 13.1 per cent in May 2020.⁹

[19] A more detailed assessment of changes in the labour market, on a weekly basis, shows a dramatic fall in the number of jobs between late March and mid-April, before stabilising.¹⁰ These data confirm that at around late March to mid-April, economic activity, the labour market and confidence was at its lowest. We have seen some improvement or stabilisation in these data since late April, but they are still well below pre-COVID-19 levels.

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⁵ [2020] FWCFB 3500.

⁶ Statistical report (version 14), 18 June 2020, Chart 6.1.

⁷ Statistical report (version 14), 18 June 2020, Chart 6.1.

⁸ ABS, 'Insight into hours worked', *Labour Force, May 2020*, Catalogue No. 6202.0.

⁹ Statistical report (version 14), 18 June 2020, Chart 6.1.

¹⁰ Statistical report (version 13), 17 June 2020, Table 6.12.

[22] The current state of the Australian economy and the challenges that lie ahead are neatly encapsulated in the 2 June 2020 Statement by the RBA Governor on the Board's monetary policy decision:

'The Australian economy is going through a very difficult period and is experiencing the biggest economic contraction since the 1930s. In April, total hours worked declined by an unprecedented 9 per cent and more than 600,000 people lost their jobs, with many more people working zero hours. Household spending weakened very considerably and investment plans are being deferred or cancelled.

Notwithstanding these developments, it is possible that the depth of the downturn will be less than earlier expected. The rate of new infections has declined significantly and some restrictions have been eased earlier than was previously thought likely. And there are signs that hours worked stabilised in early May, after the earlier very sharp decline. There has also been a pick-up in some forms of consumer spending.

However, the outlook, including the nature and speed of the expected recovery, remains highly uncertain and the pandemic is likely to have long-lasting effects on the economy. In the period immediately ahead, much will depend on the confidence that people and businesses have about the health situation and their own finances.¹¹

The COVID-19 Pandemic

[23] The COVID-19 pandemic casts a large shadow over the current economic environment.

[24] While predominantly a public health issue, federal and state government-imposed restrictions to contain the spread of the virus, have had a profound economic impact.¹² The restrictions have included travel restrictions (both international and domestic) and social distancing rules. The social and economic consequences of these measures have been unprecedented and have led to business closures and job losses. All but 'essential workers' were forced to stop work or modify their work arrangements. These actions have significantly reduced domestic activity and resulted in 'a large and near simultaneous contraction across the global economy.'¹³

29. Professor Wooden, in his Minority decision in the *Annual Wage Review 2019-20*, stated:

[492] In seasonally adjusted terms, aggregate employment declined by 835 100 in two months (or by 6.4 per cent).

[493] Many persons in employment are also working far fewer hours than previously, in part because the JobKeeper program, by providing a subsidy to the wage costs of the most severely affected firms, has enabled workers in some businesses that are either not trading or trading at a reduced capacity to continue to pay many of its workers.

¹¹ RBA (2020), *Statement by Philip Lowe, Governor: Monetary Policy Decision, 2 June*. Also see RBA (2020), *Minutes of the Monetary Policy Meeting of the Reserve Bank Board – 2 June 2020*, released 16 June.

¹² See Fair Work Commission (2020), *Information note—Government responses to COVID-19 pandemic*, 16 June

¹³ RBA (2020), *Statement on Monetary Policy*, May, p. 1.

[494] In seasonally adjusted terms, aggregate monthly hours worked in May 2020 fell by 10.2 per cent compared with March 2020. The decline in demand for labour has thus been around 60 per cent larger than the decline suggested by the fall in employment.

[495] As with the expected decline in output, the decline in hours worked in 2020 will be larger than at any other time recorded in the data. Indeed, over the period covered by the monthly hours data (since July 1978) there has never been a decline in hours anywhere near as precipitous or as large as that recorded in April 2020 (–9.5 per cent). Even the decline over the year ended May 2020 (–9 per cent) far exceeds the worst drop in the recessions of both the early 1980s (–4.9 per cent over the year ended April 1983) and early 1990s (–5.1 per cent over the year ended April 1991).

[496] Reflecting on these trends in hours, there has been a marked surge in the number of underemployed workers—essentially part-time workers working fewer hours than desired and who are available to work additional hours. The underemployment rate rose by 4.3 percentage points between March and May—from 8.8 per cent to 13.1 per cent (seasonally adjusted)—with the underemployment rate reaching a record high in April (13.8 per cent) since the series commenced (in February 1978).

[497] Combined with unemployment, the total labour underutilisation rate in May 2020 was 20.2 per cent (seasonally adjusted). This compares with previous cyclical peaks of 14.5 per cent in May 1983, 18.2 per cent in November 1992, and 13.5 per cent in May 2009.¹⁴

[498] A feature of the current recession is that the unemployment rate is not especially high yet—just 7.1 per cent in May (seasonally adjusted). This, in part, reflects the effect of JobKeeper, with most Jobkeeper recipients likely recorded as employed (but probably also underemployed). However, it also reflects a decline in the labour force participation rate, with many job losers ceasing job search entirely in April. This has been facilitated by a suspension of mutual obligation requirements (i.e., job search requirements) by Centrelink (until 9 June) and by the introduction of the Coronavirus Supplement, which has (temporarily) greatly reduced the gap between in and out of work income for Jobseeker Payment recipients.

[499] According to the ABS (2020c), if the labour force participation rate in May had remained the same as in March (65.9 per cent instead of 62.9 per cent), and employment levels were as measured in May, there would be around an additional 623 600 persons measured as unemployed. Treating such persons as unemployed would cause the unemployment rate to jump from 7.1 per cent to 11.3 per cent, and the underutilisation rate to rise to a staggering 23.8 per cent.

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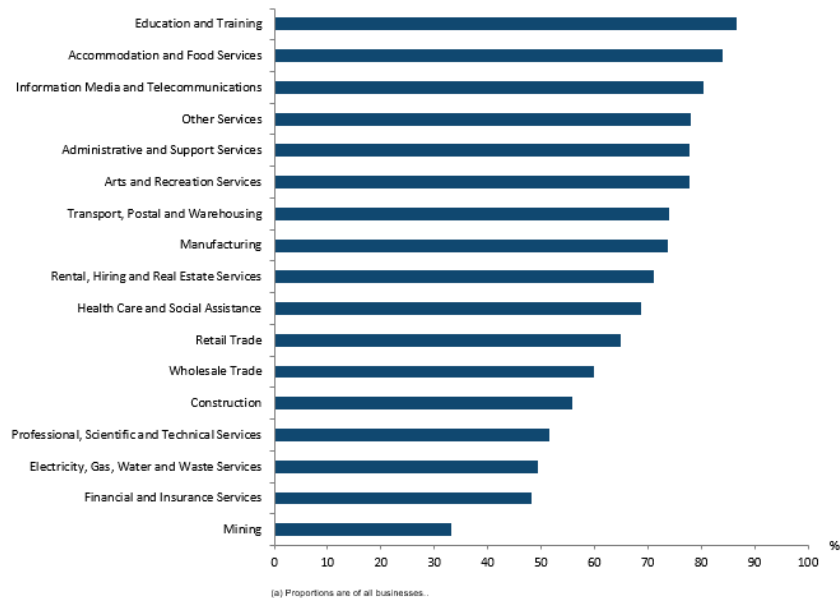
[547] Australia has almost certainly entered its most severe economic recession since the 1930s. The scale of the contraction is likely to be far worse than the recession of the early 1980s and early 1990s. This can already be seen in measured labour underutilisation rates jumping to levels not previously observed, and this is before

¹⁴ This measure is based on a count of heads. A superior measure of underutilisation would be based on the difference between usual hours worked and hours desired. Such volume-based measures of labour underutilisation are constructed by the ABS (see Labour Force, Australia, Detailed, Quarterly, ABS cat. no. 6291.0.55.003, Table 23a), but are only available on a quarterly basis. In May 2020 this rate was 11.9 per cent (not seasonally adjusted). This compares with the non-adjusted headcount rate at this time of 19.8 per cent. Thus, a count of heads significantly overstates the extent to which labour is truly underutilised. Nevertheless, the volume-based measure has also experienced the same surge in recent months, rising by 4.6 percentage points between February and May.

accounting for the many persons (~623 600) that dropped out of the labour force entirely. Indeed, my best estimate is that in April 2020, 23.8 per cent of all workers and potential workers in Australia were either without any job or working part-time in a job providing fewer hours than preferred.

30. Importantly, the Expert Panel determined to delay the operative date for this year's 1.75% increase to modern award minimum wages in the Clerks Award until 1 November 2020. It included the Award in its list of Group 2 Awards which was acknowledged by the Panel as covering industry sectors which were 'adversely affected by the pandemic'.¹⁵
31. On 24 June 2020, the ABS released its latest survey on [Business Impacts of COVID-19](#).¹⁶ The ABS reported that over three quarters of businesses in the Administrative and Support Services sector reported a decrease in revenue compared to last year. Of those businesses, more than three in every ten estimated that revenue had fallen by more than 50 per cent. Two relevant ABS charts are below:

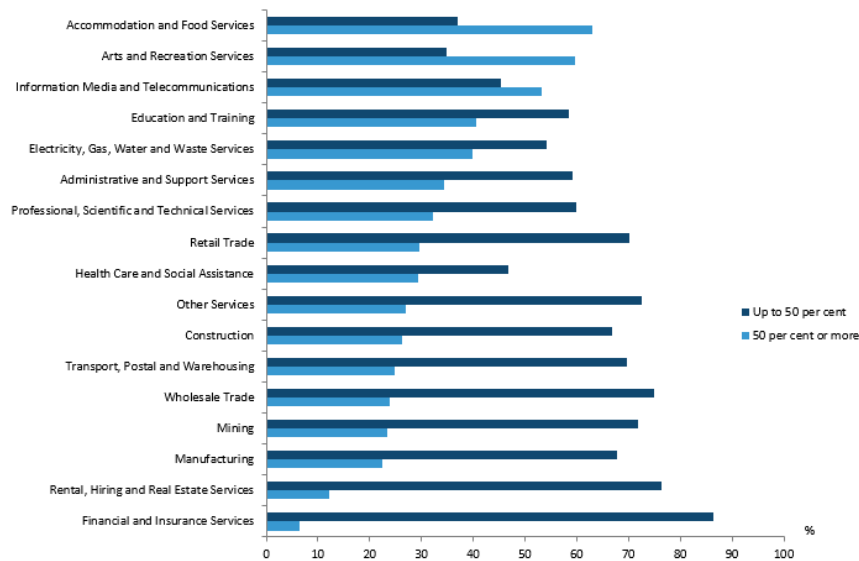
Businesses that reported decreased revenue compared to the same time last year, by industry



¹⁵ [2020] FWCFB 3500, [163].

¹⁶ *Business Indicators, Business Impacts of COVID-19* (cat. No. 5676.0.55.003), June 2020.

Magnitude of revenue decrease, by industry



32. In addition, as reported in the Commission’s 26 June [Information Note](#), a higher proportion of businesses in Administrative and support services (almost 80 per cent) reported a reduction in demand for products or services than the average across all industries. In addition, a higher proportion of businesses in both Administrative and support services and Professional, scientific and technical services (both around half) reported that they were impacted by government restrictions on operations than the all industries average.
33. An [Information Note](#) published by the Commission contains extensive detail about various measures that have been taken by State and Federal Governments for the purposes of endeavouring to slow the spread of the Pandemic. The Information Note was most recently updated on 16 June 2020.
34. The following propositions flow from the current economic and business environment:
- a. Many businesses are under a great deal of pressure;
 - b. A very large number of people have lost their jobs over the past three months;
 - c. The jobs of a very large number of employees are currently at risk;

- d. A very large number of employees are working fewer hours than they were working in March 2020; and
 - e. A very large number of employees are working fewer hours than they would prefer to work.
35. In the current environment, it is essential that the Commission err on the side of not reducing existing flexibility for employers and employees, including not removing existing flexible award provisions that some employers and employees are no doubt relying upon.

7. The ASU's argument that the changes have been 'superseded' by the JobKeeper amendments to the FW Act

36. Mr Robert Potter, the National Secretary of the ASU, has been quoted in at least two recent media articles as stating that there is no ongoing need for the Schedule because the award variations have been "superseded" by the JobKeeper amendments to the FW Act.¹⁷
37. This argument is not valid for at least four reasons:
- a. Clause I.1.4 - Ordinary hours of work for employees working from home, deals with matters that are not dealt with in Part 6-4C of the FW Act;
 - b. The provisions in Part 6-4C of the FW Act relate to particular types of directions and requests that employers can issue, but clause I.2.4 - Ordinary hours of work for employees working from home, can only be initiated by employees.
 - c. Many employers that are not eligible for JobKeeper are under significant stress;

¹⁷ Ewin Hannan, The Australian, *Coronavirus: Bosses hit unions' stance on penalties*, 21 June 2020; Workplace Express, *'COVID-19 clerks award change past use-by date: Union'*, 22 June 2020

- d. Employers can only apply the provisions in Part 6-4C to 'eligible employees'.

38. These issues are discussed below.

Clause I.1.4 - Ordinary hours of work for employees working from home, deals with matters that are not dealt with in Part 6-4C of the FW Act

39. The provisions in Part 6-4C of the FW Act relate to particular types of directions and requests that employers can issue, but clause I.1.4 - Ordinary hours of work for employees working from home, deals with matters that are not dealt with in Part 6-4C of the FW Act. This is clear from the words: "*where an employee requests and the employer agrees...*".

Many employers that are not eligible for JobKeeper are under significant stress

40. Although it was targeted towards employers that were under significant stress as a result of the Pandemic, the rules by which significant stress is assessed and the range of other factors that bear on eligibility mean that many employers that are under considerable stress as a result of the Pandemic are not eligible for JobKeeper. Many of these ineligible employers are experiencing a level of economic stress that is greater than that being experienced by many eligible employers.

41. Also, in large part due to the success of the JobKeeper scheme in alleviating the stress experienced by eligible employers, a range of inequities and competitive disadvantages are being experienced by employers that are not eligible for JobKeeper payments.

42. Generally, employers can only be eligible if they have experienced, or expect to experience a reduction in turnover greater than or equal to the relevant threshold for the relevant class of employers. There are three different thresholds:

- For employers that are not-for-profit registered charities, the turnover threshold is 15%;

- For other employers that are not part of a large group (aggregated turnover worldwide in 2019 of more than \$1 billion), the turnover threshold is 30%; and
 - For employers that are part of a large group, the turnover threshold is 50%.
43. Employers that do not, or do not expect to experience a reduction in turnover greater than the relevant threshold are not eligible for JobKeeper.
44. There are two main reasons the use of thresholds for eligibility for JobKeeper based on reductions in turnover is not a robust means of identifying the level of stress faced by different employers.
45. The first is that there are different turnover thresholds used to assess eligibility. It is clear there are many businesses that face but do not meet the 50% turnover reduction threshold that are in at least as much stress as that experienced by businesses that face a 30% turnover reduction threshold. For instance, there are many medium-sized Australian businesses that are members of a group of businesses that in 2019 had aggregate turnover of more than \$1 billion. These businesses need to have experienced, or expect to experience, a reduction in turnover of at least 50% to be eligible for JobKeeper. If the turnover of the separate business is expected to fall by 45%, they are ineligible. Many such businesses compete in industries where other businesses face a 30% threshold. There is a presumption that, because they are members of a group of business, they have a greater capacity to cope with a reduction in turnover that is more severe than that of their competitors. It is far from clear why, in general, this presumption would be expected to match the facts.
46. A particular difficulty relates to cases where the Australian business is a member of a multinational organisation. While the more stringent threshold is based on the 2019 aggregate turnover of the whole organisation in 2019, the reduction in turnover upon which eligibility for JobKeeper is based applies only to the change in turnover of the individual Australian business. Even if the worldwide group experiences a reduction in turnover of more than 50% and is therefore in no position to support its Australian business, if the individual Australian business suffered a lesser reduction in its Australian turnover, the Australian business

would be ineligible for JobKeeper.

47. A second reason the use of thresholds for eligibility for JobKeeper based on reductions in turnover is not a robust means of identifying the level of stress faced by different employers is that different businesses can have vastly different cost structures. This includes different businesses in the same industry.
48. A business with a higher margin on sales will generally have a greater capacity to absorb a given reduction in turnover than a business with a lower margin on sales. Different margins on sales can arise for any number of reasons. One business may be new and highly leveraged whereas it may compete with a mature business that has no or little debt; one may own the premises in which it operates while the other may lease its property; one business may be more capital intensive and another more labour intensive; one may operate in an industry with low barriers to entry and face fewer competitors while another may face fierce competition that pushes margins very low; or one business may be at the frontier of efficiency whereas its competitors are not. As a consequence of this variety of circumstances, a common turnover reduction threshold does not readily capture the extent of economic stress experienced by different employers. Many employers that are experiencing lower reductions in turnover are under greater stress than other employers who are experiencing higher reductions in turnover.
49. The problems associated with the varying relationship between reduction in turnover and stress is magnified considerably when JobKeeper payments received by eligible employers is considered. Jobkeeper is designed to alleviate the stress experienced by eligible employers and their employees. Ineligible employers do not benefit from JobKeeper and, even if experiencing less stress than a business who becomes eligible, will be relatively worse off after the subsidy received by the eligible business is taken into account.

Employers can only apply the provisions in Part 6-4C of the FW Act to ‘eligible employees’

50. Employers can only receive JobKeeper payments in respect of their eligible employees. Employees are not eligible employees if any of a relatively long list of exclusions apply, including (but not limited to):

- They are casual employees who are not “long-term casual employees” (casual employees employed by the employer on a regular and systemic basis for at least 12 months prior to 1 March 2020);
- They do not agree to be nominated by their employer as an eligible employee;
- They were not employed by the employer on 1 March 2020;
- They were under 16 years old on 1 March 2020;
- They were under 18 years old and full-time students who were not financially independent on 1 March 2020 (ineligibility applies from 11 May 2020);
- They were temporary residents (other than holders of 444 Visas) on 1 March 2020.

51. It is obvious from the above list that a very large number of employers eligible for JobKeeper will have a number of employees who are not “eligible employees” and to whom the provisions of Part 6-4C of the FW Act do not apply (particularly casuals who have been employed for less than 12 months and employees on most types of Visas).

52. For the above reasons, the ASU’s argument that there is no ongoing need for the Schedule because the award variations have been “superseded” by the JobKeeper amendments to the FW Act is not valid.

8. Clause 1.2.4 - Ordinary hours of work for employees working from home

53. It is common knowledge that a very large number of office workers, including clerical workers, are currently working from home. Therefore, we submit that the Commission can, and should, take judicial notice of this for the purpose of these proceedings.

54. In Victoria, the State Government is requiring employers to work from home if this is possible. The relevant information on the [Business Victoria website](#) is: (emphasis added)

“Victoria's restriction levels

Due to a rise in cases of coronavirus (COVID-19) in Victoria, some of the easing of restrictions planned for 11.59 pm on 21 June have been changed or have been deferred until 13 July.

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What you need to know:

- If you can continue to work from home, you must continue to work from home.”

55. In New South Wales, the relevant [Government's requirement](#) is:

“Working from home

Employers must allow employees to work from home where it is reasonably practical to do so.”

56. In Queensland, the [Government's requirement](#) is:

“Working from home

Employees who have been working from home can return to the workplace, if it suits both you and them.”

57. The following surveys and other materials highlight the large number of employees who are currently working from home:

**ABS Household Impacts of COVID-19 Survey, as discussed in the Commission's
26 June [Information Note](#)**

58. As highlighted in the Information Note, this ABS survey shows that 46 per cent of respondents were working from home in late April to early May 2020.

**Ai Group, [Business experiences of the COVID-19 pandemic, March to May 2020](#),
19 June 2020**

59. This report outlines business experiences of the Pandemic during March, April and May. A large proportion of businesses identified that their response included "Staff working from home". The following extracts from the report are relevant.

2. What has been your response?

The changes that businesses have made to adjust to conditions in March, April and May reflect a shift from uncertainty to endurance. In March, several respondents reported being unsure if they could continue trading. There was some confusion about the definition of 'essential business' and heightened concern about which 'non-essential' businesses would be allowed to keep operating.

In March almost two-thirds of businesses (63%) quickly moved to enable their staff to work from home wherever possible. In April, 44% nominated it as being a continued response and it was still a topical issue for 26% in May.

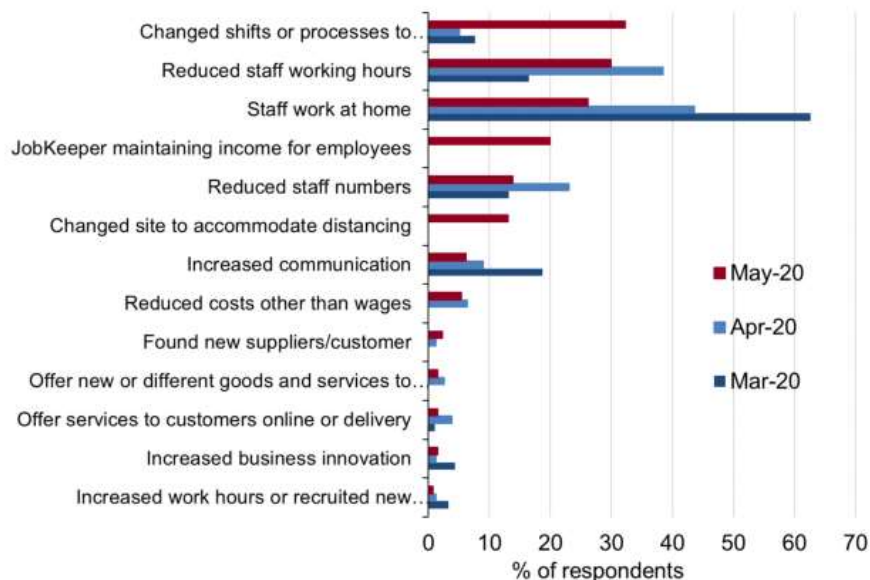
Another common initial action from businesses in March was to increase their communication, both internally and to customers and suppliers. This was a strategy for 19% of businesses when uncertainty was a key feature of the pandemic. The emphasis on additional internal communications decreased in April (9% of businesses) and May (6% of businesses).

In April the focus of business responses switched to managing their labour costs, with cuts to staff working hours and/or staff numbers being reported by higher proportions of businesses than in March. Shorter and fewer shifts, annual leave and long service leave were all utilised to reduce the number of hours employees worked for 16% of respondents in March, 38% in April and 30% in May. The introduction of the JobKeeper policy in mid-April, and confirmation of eligibility of businesses and employees in May, went some way to maintain employment hours which would have otherwise been cut. In May, 20% of respondents noted that JobKeeper was instrumental in maintaining income for their employees.

Table 2.1: What has been your response?

What has been your response?	Mar	Apr	May
% of businesses who reported (multiple answers possible for each business)	%	%	%
Staff work at home	63	44	26
Increased communication	19	9	6
Reduced staff working hours	16	38	30
Reduced staff numbers	13	23	14
Changed shifts or processes to accommodate social distancing	8	5	32
JobKeeper income for employees	0	0	20
Changed site to accommodate distancing	3	0	13
Reduce staff pay (bonuses or salary)	3	3	2
Reduced costs other than wages	0	6	5

**Chart 2.1: What has been your response?
Responses by month, March to May 2020**



ABS [Business Impacts of COVID-19](#),¹⁸ 24 June 2020

60. The ABS reported that the following proportions of businesses have introduced “Other workplace changes”. A footnote on this item states: “For example, staff working from home or operating with a reduced workforce”.

¹⁸ *Business Indicators, Business Impacts of COVID-19* (cat. No. 5676.0.55.003), June 2020.

	%
Small (0-19 persons)	44
Medium (20-199 persons)	72
Large (200 or more persons)	84
All businesses	46

61. The ABS report also notes the very large proportion of businesses that have introduced “Limitations to the number of people on site”, which will inevitably also incorporate employees who have been required to work from home:

	%
Small (0-19 persons)	56
Medium (20-199 persons)	76
Large (200 or more persons)	87
All businesses	57

Roy Morgan survey, [Coronavirus – impact on employment](#), 24 April 2020

62. This survey involved interviews with 1,444 Australians aged 14+ over the week prior to 24 April 2020. It showed that over two-thirds of working Australians (68%) had experienced ‘a change to their employment’ due to the Pandemic. The following extract is relevant. The impacts on workers include: (emphasis added)

	ALL employment changes mentioned*	MOST SERIOUS Employment change mentioned
Having work hours reduced	3.8m (25%)	1.9m (12%)
Stood down for a period of time	2.7m (18%)	2.4m (15%)
Had an increase in their work hours	2.5m (16%)	1.5m (10%)
Not had any work offered	2.4m (16%)	1.2m (8%)
Working from home**	1.6m (10%)	1.4m (9%)
Had their pay reduced for same number of work hours	1.4m (9%)	320,000 (2%)
Been made redundant	670,000 (4%)	670,000 (4%)
Some other change to employment	1.8m (11%)	1.3m (8%)
TOTAL Had a change to employment	10.5m (68%)	10.5m (68%)

****‘Working from home’ was not offered as an option for those answering the survey. Those who mentioned ‘working from home’ had answered ‘some other change to employment’ and were separated out due to the large number of respondents mentioning this employment change**

63. In a very large number of cases, employers are allowing their clerical employees to work from home at the current time, even where it is not a Government requirement to do so. Some of the reasons why employers are doing this include:
- a. Protecting the health of employees;
 - b. Accommodating the concerns of employees about travelling to workplaces on public transport;
 - c. Accommodation the concerns of employees about the use of lifts in office buildings;
 - d. Accommodating the concerns of employees about being exposed to the virus in workplaces;
 - e. Accommodating an employee's wish to drop off and pick up children from school (including, to avoid children being required to catch public transport);
 - f. Accommodating an employee's need to care for children; and/or
 - g. Accommodating an employee's need to care for elderly family members.
64. Ai Group and ACCI accept that employees are less likely to need to care for children during school hours than they were in March and April, because most schools are not closed. However, many employees still need to care for children at times during standard work hours, because:
- a. Schools are very concerned about, and focused upon, ensuring that children do not attend school if they have any cold or flu-like symptoms, or have high temperature. Many schools are checking the temperature of children each morning at school gates. Therefore, there are a lot more children who are being kept at home, than was the case before the Pandemic.

- b. Before and after school care is being offered on the basis of demand, and some schools are offering reduced services due to a lack of current demand. This is most likely due to the fact that many employees are currently working from home.
- c. Schools are being closed when a child or teacher is found to have the virus. For example, a 24 June 2020 article¹⁹ in the *Sydney Morning Herald* reported that Lane Cove Public West school would be closed on 25 June after a year 2 student tested positive for COVID-19. Also, the article reported that:

“Government school students in NSW returned for on-site learning on May 25 after nearly two months of remote learning.

However, a number of public and private schools have since temporarily closed after members of the school community tested positive for COVID-19, including Laguna Street Public School, Rose Bay Public School, Moriah College, Waverley College, St Ignatius College, Riverview and Warragamba Public School.”

65. Clause I.2.4 in the Schedule states:

I.2.4 Ordinary hours of work for employees working from home

(a) Instead of clause 25.1(b) (Ordinary hours of work (other than shiftworkers), for employees working from home by agreement with the employer where an employee requests and the employer agrees, the spread of ordinary hours of work for day workers is between 6.00 am and 11.00 pm, Monday to Friday, and between 7.00 am and 12.30 pm on Saturday.

(b) Day workers are not shiftworkers for the purposes of any penalties, loadings or allowances under the award, including for the purposes of clause 28.

(c) The facilitative provision in clause 25.2 (Ordinary hours of work (other than shiftworkers)), which allows the spread of hours to be altered, will not operate for the employees referred to in clause I.2.5(e).

66. The reference to clause “I.2.5(e)” in the clause is an error in the 2020 version of the Award. The correct cross-reference is “I.2.4(a)”, as appeared in the 28 March 2020 amendment to the 2010 version of the Award.

¹⁹ *Sydney Morning Herald*, On-line, Jamie Berry, *Year 2 Sydney student tests positive to COVID-19, school closed*, 24 June 2020.

67. It can be seen that there are a number of important safeguards built into the clause:

- The clause only operates where a day worker is working from home by agreement with the employer;
- The clause only operates in circumstances where the day worker requests, and the employer agrees, to the employee working ordinary hours outside of the regular 7.00am to 7.00pm spread of hours, but not before 6.00am or after 11.00pm.
- The facilitative provision in clause 25.2 (which allows the spread of hours to be extended by one hours at either end of the spread) is not applicable to employees who access the flexibility in clause 1.2.4.

68. It is important that clause 1.2.4 continue to operate until 30 September because:

- a. The clause provides more flexibility for employees who are working from home and are juggling work and family responsibilities, or other commitments. For example:
 - i. Employees' who wish to drop off and pick up children from school (including, to avoid children being required to catch public transport);
 - ii. Employees' who need to care for children;
 - iii. Employees who need to care for elderly family members.
- b. The clause includes appropriate safeguards, as outlined above.
- c. In the current economic circumstances, it is important that the Commission err on the side of not reducing existing flexibility for employers and employees, including not removing existing flexible award provisions that some employers and employees are no doubt relying upon.

- d. The subject matter of the clause is not addressed by the JobKeeper provisions in Part 6-4C of the FW Act.
- e. The clause is consistent with the following elements of the modern awards objective in s.134 of the FW Act, for the reasons identified in the 28 March Decision:
 - s.134(1)(a): relative living standards and the needs of the low paid
 - s.134(1)(c) the need to promote social inclusion through increased workforce participation
 - s.134(1)(d) and (f) the need to promote flexible modern work practices and the efficient and productive performance of work and the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.
 - s.134(1)(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

69. In an article by journalist Ewin Hannan in *The Australian* on 4 May 2020 entitled *Coronavirus: Quick return to work risks disaster, say unions*, ACTU Secretary, Sally McManus is quoted as saying:

ACTU secretary Sally McManus said workers wanted to get back to normal as soon as possible, but lockdown measures keeping the virus under control “should stay in place until the experts believe it’s safe to go back to work and all appropriate work health and safety measures were in place”.

“Before we can get back into workplaces, we need to make sure that those workplaces are safe, that all necessary distancing protocols are in place and that all workers have the rights in those workplace that they need to stay safe,” she said. “This includes leave entitlements that will allow all workers to get tested and self-isolate if required.”

70. The ACTU’s refusal to agree to an extension in the working from home provisions in Schedule I is inconsistent with their public statements that workers should not be required to return to workplaces prematurely.

9. Clause I.2.5 – Agreed temporary reduction in ordinary hours

71. A very large number of employees, including clerical workers, are working under temporary reduced working hours arrangements.
72. The following surveys and other materials highlight the large number of employees who are currently working reduced hours:
- Ai Group, [Business experiences of the COVID-19 pandemic, March to May 2020](#), 19 June 2020: This report outlines business experiences of the Pandemic during March, April and May. “Reduced staff working hours” was the second more frequent response, after “Staff working from home. (See Table 2.1 and Chart 2.1 in section 9 of this submission).
 - Roy Morgan survey, [Coronavirus – impact on employment](#), 24 April 2020: This survey involved interviews with 1,444 Australians aged 14+ over the week prior to 24 April 2020. “Having working hours reduced” was the most frequent response, by far. (See the table in section 9 of this submission).
73. There is no doubt that many reduced working hours arrangements have been implemented through reaching agreement with individual employees, including clerical employees.
74. However, some employers have implemented reduced working hours arrangements through clause I.2.5.
75. The ASU has advised Ai Group and ACCI that 24 employers and 352 of their clerical employees have used clause I.2.5. We assume that the ASU has obtained this information from the Commission as a result of the following clause I.2.5(h)(iii):
- (iii)** The employer must notify the Fair Work Commission by emailing clerksaward@fwc.gov.au that the employer proposes to conduct a vote under Schedule I. The employer shall provide the work email addresses of the employees who will be participating in the vote, to the Commission. The Commission will then distribute the ASU COVID-19 Information Sheet to the employees prior to the vote. The Commission shall list the name of the business on a register which will be accessible to the ASU, upon request, for the period when Schedule I is in operation.

76. Ai Group and ACCI would appreciate confirmation from the Commission that the figures provided by the ASU are correct.
77. Unless the 24 employers have discontinued the shorter working hours arrangements implemented in accordance with the clause, there would appear to be at least 24 employers and 352 clerical employees, who will be potentially impacted by clause I.2.5 not being extended beyond 30 June 2020.
78. Ai Group and ACCI have proposed the addition of the following subclause, with the effect that the clause will not be available to employers that did not access the clause before 30 June 2020:
- (h) This clause only applies to employers who implemented a temporary reduction in ordinary hours under Schedule I in this Award before 30 June 2020.
79. It is important that clause I.2.5 continue to operate until 30 September 2020 for the employers referred to above because:
- a. The clause includes numerous safeguards.
 - b. For those employers who have utilised clause I.2.5 to respond to changes in their operational environment, there will be an immediate and material cost impact upon them with respect to the removal of the clause.
 - c. In the current economic circumstances, it is important that the Commission err on the side of not reducing existing flexibility for employers and employees, including not removing existing flexible award provisions that some employers and employees are relying upon.
 - d. Even though the subject matter of the clause is addressed in the JobKeeper provisions in Part 6-4C of the FW Act, many struggling businesses are not eligible for JobKeeper payments, and some employees of eligible businesses are not “eligible employees”. (See section 7 of this submission).
 - e. The clause is consistent with the following elements of the modern awards objective in s.134 of the FW Act, for the reasons identified in the 28 March Decision:

- s.134(1)(a): relative living standards and the needs of the low paid
- s.134(1)(c) the need to promote social inclusion through increased workforce participation
- s.134(1)(d) and (f) the need to promote flexible modern work practices and the efficient and productive performance of work and the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.
- s.134(1)(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

10. Clause I.2.6 – Annual leave

80. Clause I.2.6 in the Schedule currently states:

I.2.6 Annual leave

(a) Employers and individual employees may agree to take up to twice as much annual leave at a proportionately reduced rate for all or part of any agreed or directed period away from work, including any close-down.

(b) Instead of clauses 32.6, 32.7 and 32.8 (Annual leave), an employer may direct an employee to take any annual leave that has accrued, subject to considering the employee's personal circumstances, by giving at least one week's notice, or any shorter period of notice that may be agreed. A direction to take annual leave shall not result in an employee having less than 2 weeks of accrued annual leave remaining.

81. In the 28 March Decision, the Commission held that the above clause was consistent with the modern awards objective. Notwithstanding this, the Draft Determination filed on 25 June 2020 includes a clause which contains more safeguards than the above clause. The safeguards include:

- a. The employer can request that the employee can take a period of annual leave (unlike the ability to direct in the current clause).
- b. Any request must not be unreasonable in the circumstances. (Clause I.1.2).

- c. The request must not result in the employee retaining a balance of less than 2 weeks annual leave after the leave is taken. (Clause I.2.3(a)).
- d. The request must be made a minimum of 72 hours before the date on which the annual leave is to commence. (Clause I.2.3(a)).
- e. The period of annual leave must commence before 30 September 2020. (clause I.2.3(e)).
- f. An employer can only request that an employee take annual leave pursuant to the clause if the request is made for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 and to assist the employer to avoid or minimise the loss of employment. (Clause I.2.3(f)).
- g. An employee is not required to take leave under clause I.2.6 unless the employee is advised in writing that the employer consents to a dispute about whether the employer's request is reasonable in all the circumstances being settled by the Fair Work Commission through arbitration in accordance with clause 40.5— Dispute Resolution and section 739(4) of the Act. (Clause I.2.3(g)).

82. It is important that the clause continue to operate until 30 September because:

- a. The clause includes appropriate safeguards.
- b. In the current economic circumstances, it is important that the Commission err on the side of not reducing existing flexibility for employers and employees, including not removing existing flexible award provisions that some employers and employees are no doubt relying upon.
- c. Even though the subject matter of the clause is addressed in the JobKeeper provisions in Part 6-4C of the FW Act, many struggling businesses are not eligible for JobKeeper payments, and some employees of eligible businesses are not "eligible employees". (See section 7 of this submission).

d. The existing clause is consistent with the following elements of the modern awards objective in s.134 of the FW Act for the reasons identified in the 28 March Decision, and we submit that the proposed new clause is consistent with these elements of the modern awards objective:

- s.134(1)(a): relative living standards and the needs of the low paid
- s.134(1)(c) the need to promote social inclusion through increased workforce participation
- s.134(1)(d) and (f) the need to promote flexible modern work practices and the efficient and productive performance of work and the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.
- s.134(1)(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

83. Also, the proposed new clause has many similarities to clauses inserted into COVID-19 Schedules in the *Vehicle Repair, Services and Retail Award 2020* and the *Fast Food Industry Award 2010*, which the Commission held were consistent with the modern awards objective.²⁰

²⁰ *Application by the Victorian Automobile Chamber of Commerce and Ors to vary the Vehicle, Manufacturing, Repair, Services and Retail Award 2010*, [2020] FWCFB 2367; *Application by the Australian Industry Group to vary the Fast Food Industry Award 2010*, [2020] FWCFB 2316.