

Application by Shop Distributive and Allied Employees' Association to vary the General Retail Industry Award

**Introduction**

1. On 19 June 2020 the Annual Wage Review Panel published its decision in relation to the Annual Wage Review 2019-20.<sup>1</sup>
2. That decision determined that there be an increase in the minimum wage of 1.75%. However, different commencement days were applied to different industries. In particular, the increase is to apply to employees covered by the *General Retail Industry Award 2010 (GRIA)* from 1 February 2021.
3. In the ordinary course, by reason of s.286(1) of the *Fair Work Act* an annual wage review increase would take effect from 1 July in the relevant year. Because of the exceptional circumstances that currently prevail the review decision determined on a later date relying on the exception in s.286(2). That change has an effect which was unforeseen at the time the Commission made orders in respect of the *Penalty Rates Decision*.<sup>2</sup>
4. Under the terms of the *Penalty Rates Transitional Decision*<sup>3</sup> there is to be a final reduction in Sunday penalty rates for full-time and part-time employees under the GRIA commencing on 1 July 2020. Part of the rationale for that commencement date in the *Penalty Rates Review Decision* was that employees would most likely be obtaining an increase in wages because of the Annual Wage Review, relevantly, from 1 July 2020. The implementation of the decision was staged in that way to ameliorate the effects of the reduction.<sup>4</sup>
5. Now that that is not going to occur this application is made to restore the alignment between the reduction in penalty rates and the Annual Wage Review increase which was contemplated by the Full Bench in the transitional decision.

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<sup>1</sup> [2020] FWCFB 3500.

<sup>2</sup> [2017] FWCFB 1001.

<sup>3</sup> [2017] FWCFB 3001

<sup>4</sup> See [57].

## Legal framework

6. The Commission is empowered to vary the modern award if it is necessary to achieve the modern awards objective.<sup>5</sup>
7. The modern awards objective is set out in s.134 as follows:

*What is the modern awards objective?*

- (1) *The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:*
  - (a) *relative living standards and the needs of the low paid; and*
  - (b) *the need to encourage collective bargaining; and*
  - (c) *the need to promote social inclusion through increased workforce participation; and*
  - (d) *the need to promote flexible modern work practices and the efficient and productive performance of work; and*
  - (da) *the need to provide additional remuneration for:*
    - (i) *employees working overtime; or*
    - (ii) *employees working unsocial, irregular or unpredictable hours; or*
    - (iii) *employees working on weekends or public holidays; or*
    - (iv) *employees working shifts; and*
  - (e) *the principle of equal remuneration for work of equal or comparable value; and*
  - (f) *the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and*
  - (g) *the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and*
  - (h) *the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability,*

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<sup>5</sup> Section 157 *Fair Work Act 2009* (Cth).

*performance and competitiveness of the national economy.*

*This is the modern awards objective.*

8. In *SDAEA v AIG*<sup>6</sup> the Full Court said in respect of the modern awards objective at [48]:

*...the modern awards objective requires the FWC to perform two different kinds of functions, albeit that the modern awards objective embraces both kinds of function. The FWC must “ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions” and in so doing, must take into account the s 134(1)(a) to (h) matters. What must be recognised, however, is that the duty of ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions itself involves an evaluative exercise. While the considerations in s 134(1)(a) to (h) inform the evaluation of what might constitute a “fair and relevant minimum safety net of terms and conditions”, they do not necessarily exhaust the matters which the FWC might properly consider to be relevant to that standard, of a fair and relevant minimum safety net of terms and conditions, in the particular circumstances of a review. The range of such matters “must be determined by implication from the subject matter, scope and purpose of the Fair Work Act.”*

9. In the *Preliminary Jurisdiction Decision*<sup>7</sup> the Full Bench described the modern awards objective in the following terms:

**[31]** *The modern awards objective is directed at ensuring that modern awards, together with the NES, provide a ‘fair and relevant minimum safety net of terms and conditions’ taking into account the particular considerations identified in paragraphs 134(1)(a) to (h) (the s.134 considerations). The objective is very broadly expressed. The obligation to take into account the matters set out in paragraphs 134(1)(a) to (h) means that each of these matters must be treated as a matter of significance in the decision-making process. As Wilcox J said in *Nestle Australia Ltd v Federal Commissioner of Taxation*:*

*“To take a matter into account means to evaluate it and give it due weight, having regard to all other relevant factors. A matter is not taken into account by being noticed and erroneously discarded as irrelevant.”*

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<sup>6</sup> (2017) 253 FCR 368

<sup>7</sup> 2014 FWC FB 1788

*[32] No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.*

*[33] There is a degree of tension between some of the s.134(1) considerations. The Commission's task is to balance the various s.134(1) considerations and ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions. The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.*

*[34] Given the broadly expressed nature of the modern awards objective and the range of considerations which the Commission must take into account there may be no one set of provisions in a particular award which can be said to provide a fair and relevant safety net of terms and conditions. Different combinations or permutations of provisions may meet the modern awards objective.*

*[Footnotes omitted]*

10. As to the question of whether a variation might be considered necessary, the Full Bench in the *Penalty Rates Decision* said at [136]:

*... we agree with the observation that reasonable minds may differ as to whether a particular award term or proposed variation is necessary (within the meaning of s 138), as opposed to merely desirable. It seems to us that what is "necessary" to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.*

11. These submissions will return to the question of consideration of those matters below.

### **The Penalty Rates Decision**

12. In the February 2017 decision the Full Bench said this.

*[2021] We have given some consideration to the form of the transitional arrangements to apply to the reductions in Sunday penalty rates we propose. We have concluded that appropriate transitional arrangements are necessary to mitigate the hardship caused to employees who work on Sundays. We have*

*not reached a concluded view as to the form of those transitional arrangements and we propose to seek submissions from interested parties as to that issue. For the assistance of those parties who wish to make submissions as to the form of the transitional arrangements we express the following provisional views:*

*(i) Contrary to the views expressed by the Productivity Commission we do not think it appropriate to delay making any changes to Sunday penalty rates for 12 months, at which time the reductions apply in full. The Productivity Commission's proposal imposes an unnecessary delay on the introduction of any reduction in Sunday penalty rates and would give rise to a sharp fall in earnings for some affected employees.*

*The Productivity Commission suggests that a 12 month delay would allow the affected employees to 'review their circumstances' so that they 'can seek other jobs, increase their training and make other labour market adjustments'.*

*As we have mentioned, the employees affected by these changes are low paid and have limited financial resources. It is unlikely that they will be able to afford the costs associated with increasing their training.*

*Further, workers in the Accommodation and Food Services and Retail sectors have lower levels of educational attainment than the total workforce, which is likely to limit their capacity to obtain other employment. As noted in the Peetz and Watson Report:*

*'... while a majority of tertiary students who are employed work in either retail or hospitality (i.e. accommodation and food services) industries, this does not mean that most people who work in those industries are tertiary students. Nor does it indicate that they are not in need ... Pay rates in retail therefore affect not only tertiary students but also a significant number of other people who are likely to be dependent on earnings from this industry as their principal or sole source of income.'*

*(ii) If 'take home pay orders' are an available option then they may mitigate the effects of a reduction in Sunday penalty rates. But we do not favour any general 'red circling' term which would preserve the current Sunday penalty rates for all existing employees. A consequence of such a term would be that different employees of the one employer may be employed on different terms and conditions. Such an outcome would add to the regulatory*

burden on business (a relevant consideration under s.134(1)(f)).

(iii) The reductions in Sunday penalty rates should take place in a series of annual adjustments on 1 July each year (commencing 1 July 2017) to coincide with any increases in modern award minimum wages arising from Annual Wage Review decisions.

(iv) As to the number of annual instalments, the 5 annual instalment process which accompanied the making of the modern awards is too long for present purposes. It will be recalled that the Award Modernisation Full Bench was dealing with an array of award provisions that were the subject of transitional arrangements including minimum wages, whereas we are only dealing with one provision, Sunday penalty rates. It is likely that at least 2 instalments will be required (but less than 5 instalments). The period of adjustment required will depend on the extent of the reduction in Sunday penalty rates, the availability of 'take home pay orders' and the circumstances applying to each modern award. The most significant reduction is for full-time and part-time employees covered by the Retail Award (from 200 per cent to 150 per cent), it follows that a longer period of adjustment may be required in this award.

[2022] As we have mentioned, we will invite submissions in response to the provisional views we have expressed."

(emphasis added)

13. In the June 2017 Transitional Decision in respect of the implementation of reductions in penalty rates the Full Bench said the following.

[43] We accept that while the transitional arrangements determined in this decision will ameliorate the adverse impact of our decision upon the employees affected, it will not remove that impact and the implementation of the variations we propose (albeit over an extended time period) are still likely to reduce the earnings of the employees affected. The phased reductions in Sunday penalty rates that we intend to make will be implemented at the same time as the implementation of any increases arising from the Annual Wage Review decision. This will usually mean that the affected employees will receive an increase in their base hourly rate of pay at the same time as they are affected by a reduction in Sunday penalty rates. As such, the take home pay of the employees concerned may not reduce to the same extent as it otherwise would – but it is also important to acknowledge that they will receive a reduction in

*the earnings they would have received but for the implementation of the Penalty Rates decision. Accordingly, any Annual Wage Review increase cannot be said to ameliorate the impact of our decision. It is the phased implementation of the Sunday penalty rate cuts which provides a degree of amelioration.”*

(emphasis added)

14. It should be noted therefore, that while the Full Bench did not operate upon the basis that an increase under the Annual Wage Review would ameliorate the reductions in penalty rates, it did operate on the basis that the timing of the reductions to coincide with the increase under the Annual Wage Review was an ameliorative factor in favour of that choice of date.

### **The Annual Wage Review**

15. The Panel in the Annual Wage Review noted that the retail trade industry had clearly been impacted by the COVID-19 pandemic though to a lesser extent than the impact on accommodation and food services and arts and recreation services.<sup>8</sup> It also noted at [73] that retail turnover had risen sharply in March 2020 and that gross operating profits had increased in the March quarter above the all industries' average.<sup>9</sup> On the other hand it was observed that parts of the industry which were subject to forced closures saw significant falls in turnover.<sup>10</sup>
16. However, more recent information reveals a more encouraging picture. Shortly after the Panel published its decision the ABS released the Retail Trade Preliminary Data for May 2020.<sup>11</sup> This showed a seasonally adjusted increase in trade of 16.3%, the largest ever in the 38 year history of the series. Turnover in May 2020 was 5.3% higher than in May 2019. Turnover increased across all groups in the Household goods retailing industry.
17. This improvement is also reflected in the consumer spending data. Consumer spending has returned to 97 per cent of its pre-COVID-19 level as of June 14,

<sup>8</sup> 2020 FWC FB 3500 at [47].

<sup>9</sup> 2020 FWC FB 3500 at [73] and [74].

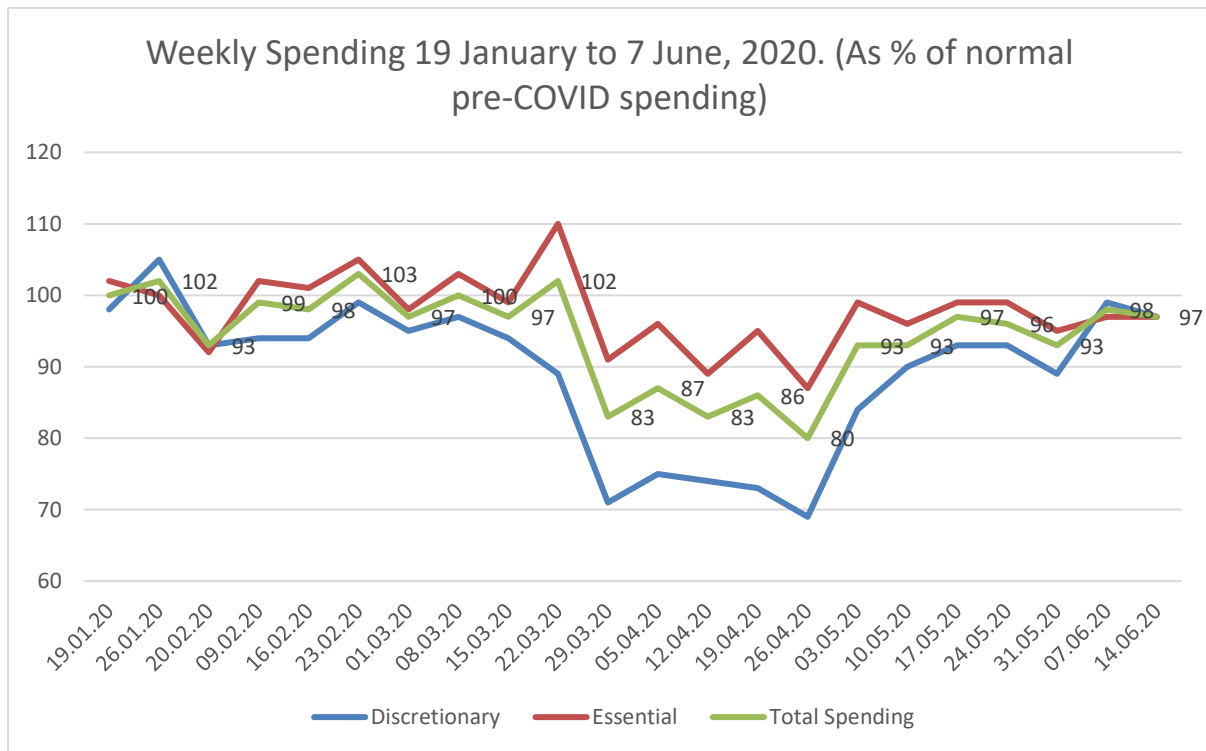
<sup>10</sup> 2020 FWC FB 3500 at [76].

<sup>11</sup> ABS Catalogue Number 8501.0.55.008- a copy is attached to these submissions.

with the April drop in consumer spending having largely recovered. This spending is in essential and discretionary categories.<sup>12</sup>

18. The re-opening of large sections of the economy across the nation has seen total individual consumption return to 97 per cent of its pre-COVID spending levels.

See below



Weekly spending since January 19. Source: AlphaBeta/Illium

<sup>12</sup> . Based upon anonymised transaction data compiled by AlphaBeta/Illium. This data is collated by observing the spending habits of over 250,000 Australian consumers. See <https://www.alphabeta.com/illiontracking/> accessed 25 June 2020.



19. When it became apparent that the Wage Review Panel might be considering a delayed implementation of any increase to the minimum wage the SDA filed a supplementary submission which was dealt with by the Full Bench as follows.

[121] *In its supplementary submission in reply, the SDA submits:*

*'If the Panel is minded to agree with the NRA that employees in the sector ought to have no wage increase, there would nonetheless be a reasonable basis for the Commission to initiate a proceeding to consider similarly deferring any further reduction in Sunday penalty rates.'*

[122] *The penalty rate reductions to which the SDA refers form part of the broad context in which the Review is conducted but we have not given them significant weight. Further, 3 specific points may be made about the SDA's submission.*

[123] *First, the Panel cannot defer a reduction in penalty rates under an award in the course of a Review. To 'defer' a reduction in penalty rates, the award terms specifying the reduced penalty rates and when they apply would have to be varied and the Panel is confined to reviewing 'modern award minimum wages' and making determinations 'varying modern awards to set, vary or revoke modern award minimum wages'. 'Modern award minimum wages' are defined in s.284(3) as the 'rates of minimum wages in modern awards, including ... wage rates for junior employees ... casual loadings ... and piece rates.' 'Modern award minimum wages' do not include 'penalty rates'. The two are separately dealt with in ss.139(1)(a) and (e) of the Act and were distinguished by the Full Bench in the Penalty Rates Decision.*

[124] *Second, the Penalty Rates Decision provides for the phased reduction of Sunday penalty rates in certain awards in the hospitality and retail sectors which will reduce the employment costs of some employers covered by the modern awards affected by the decision. However, as noted by the Panel in last year's Review decision, the Penalty Rates decision only applies to a small number of modern awards."*

[125] *Finally, we would also observe that there have also been other changes to modern awards that have increased employment costs. It is particularly relevant to note that in addition to the Sunday penalty rate reductions highlighted by the SDA, a subsequent Full Bench increased the penalty rates for casuals for Saturday work and for evening work on Monday to Friday.*

20. This application is made in light of, and with due acknowledgment to, the first two comments made by the Full Bench.
21. As to the third observation by the Full Bench the following points may be made.
22. First, it is just that, that is, an observation and not the result of any forensic analysis of the situation.
23. Secondly, while it is true that there have been some penalty rate increases for some casual employees taking effect from November 2018 that cannot be seen as any sort of general offset to the reduction of Sunday penalty rates for all employees who work on a Sunday and not in the particular circumstances of the variation here sought, which will only impact upon full-time and part-time employees, not casual employees. No assessment of the number of employees in each group has been made and nor has any assessment been made of any relevant overlap in relation to each group. In addition, the Full Bench which varied the award to effect those increases considered that any overlap was likely to be small.<sup>13</sup>
24. Moreover, and thirdly, the increases made in the more recent variation favouring casual employees were made as a means to redress an anomaly which the Commission found was pre-existing in the modern award.
25. Those increases in respect of Saturday work commenced on 1 November 2018, 1 October 2019 and 1 March 2020. Increases for evening work applied on those dates and will continue on 1 October 2020 and 1 March 2021.

### **The Modern Awards Objective**

26. At the outset it might be observed that the Full Bench in the Penalty Rates case decided that it was necessary, in order to achieve the modern awards objective of a fair and relevant safety net, to have transitional arrangements in respect of the reductions in Sunday penalty rates for full-time and part-time employees. It

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<sup>13</sup> *Casuals Penalty Rate Decision* [2018] FWCFB 5897 [186]-[188].

decided implicitly that it was necessary to have the final reduction align with a wage review increase which was in all likelihood to occur on 1 July 2020.

27. That matter alone provides a foundation for the variation which is proposed.

*Section 134(1)(a) – relative living standards and the needs of low paid*

28. This consideration strongly favours the proposed variation.

29. In the Penalty Rates case, the Full Bench made the following two key findings in respect of award reliant employees generally in the retail industry:<sup>14</sup>

- (a) that “a substantial proportion of award reliant employees covered by the Retail Award are “low paid”; and
- (b) that retail households face greater difficulties in raising emergency funds, which suggested “that their financial resources are also more limited than those of other industry households.

30. There is no reason to believe that these considerations would have changed. Moreover, the dislocation and unemployment resulting from the COVID-19 pandemic will only have exacerbated these matters.

31. The Commission can therefore proceed on the basis that the retail employees who will be affected by this proposed variation will have the detriment of the reduction in their penalty rates ameliorated by the delay in that reduction so that it occurs at the same time as the 1.75% increase awarded from 1 February 2021.

*Section 134(1)(b) – the need to encourage collective bargaining*

32. This is a neutral consideration in relation to this application.

*Section 134(1)(c) – the need to promote social inclusion through increased workplace participation*

33. This is a neutral consideration in relation to this application.

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<sup>14</sup> At [1656].

*Section 134(1)(d) – the need to promote flexible modern work practices and the efficient and productive performance of work*

34. This too is a neutral consideration in relation to this application.

*Section 134(1)(da) – the need to provide additional remuneration for prescribed matters*

35. This was of course the subject of the Penalty Rates Decision. The questions of timing it is submitted need to be revisited in the light of the delayed introduction of the Annual Wage Review increase.

*Section 134(1)(e) – equal remuneration for equal work*

36. This is a neutral consideration in relation to this application.

*Section 134(1)(f) – the impact on business including on employment costs and regulatory burden*

37. Clearly any delay in reduction of the Sunday penalty rates will result in the maintenance of existing employment costs for employers for the period of the delay. However, such prejudice is offset by the fact that there will be no countervailing increase in employment costs arising from the annual wage review until February 2021. It is likely that the delay in the increase will far exceed the financial burden imposed upon employers by not reducing penalty rates from 1 July 2020 since the annual wage increase is across the board, whereas the penalty rate deduction affects only a small proportion of hours (and disproportionately affects a particular subset of employees only).

38. In those circumstances, delaying the penalty rate decrease does not undo the work proposed by the Wage Review Decision but merely ensures that the burden is shared more equitably. As the Full Bench noted in the Annual Review Decision it was unable to take such a step because it was not within its powers.

*Section 134(1)(g) – simple and easy to understand Modern Award system*

39. This is likely a neutral consideration in relation to this application.

*Section 134(1)(h) – the impact on employment growth, inflation etc*

40. This is unlikely to be a relevant factor given that what is envisaged is not an impost or an increase in costs but is a delay in their decrease.

### **Conclusion**

41. For the foregoing reasons it is submitted that it is not only necessary but industrially fair to make the variation proposed. The current circumstances have involved both employers and employees facing uncertainty and significant financial burdens.
42. The decision by the Annual Wage Review Panel to delay the implementation of the annual wage increase in respect of employees covered by the GRIA was taken in acknowledgment of the effect on some sectors covered by the award of the COVID-19 pandemic. The limited nature of the increase in any event is also reflective of those matters. However, in circumstances where the timing of reductions in penalty rates for Sunday work were determined on the basis that the final reduction would occur on the same day as the Annual Wage Review increase, this argues strongly in favour of the proposition that that reduction should itself be delayed to coincide with the increase in February 2021. That will ensure that to some extent the burden is eased on those employees who are, no less than their employers, suffering from the effects of the dislocation arising from the pandemic.

Dated: 26 June 2020

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## 8501.0.55.008 - Retail Trade, Australia, Preliminary , May 2020

Latest ISSUE Released at 11:30 AM (CANBERRA TIME) 19/06/2020

### About this issue

This release provides a preliminary estimate for Australian retail turnover for May 2020. This estimate is compiled from the monthly Retail Business Survey and is based on preliminary data provided by businesses that make-up approximately 80% of total retail turnover and is therefore subject to revision. The final monthly estimate will be published in Retail Trade, Australia (cat. no. 8501.0) on 3 July 2020.

### Preliminary May key figures

	May 2020 \$m	April 2020 to May 2020 % change
<b>Turnover at current prices</b>		
Seasonally Adjusted	28 829.8	16.3

### Retail turnover, current prices, seasonally adjusted, percentage change

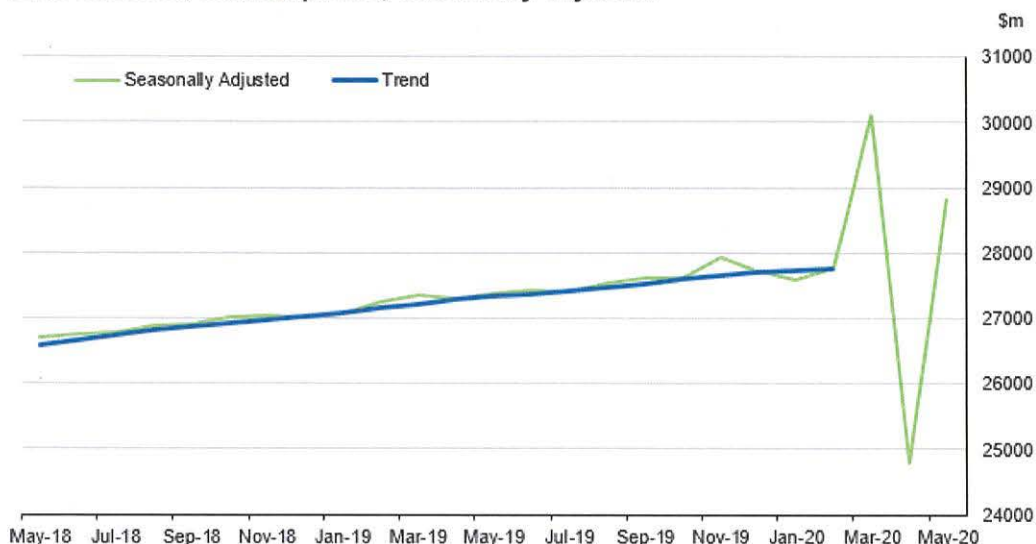


## Preliminary May key points

### Current prices

- The seasonally adjusted estimate rose 16.3% (\$4038.4m) from April 2020 to May 2020. This result is the largest seasonally adjusted month-on-month rise in the 38 year history of the series.
- In seasonally adjusted terms, Australian turnover rose 5.3% in May 2020 compared with May 2019. This compares to an average annual movement in 2019 of 2.7%.

### Retail turnover, current prices, seasonally adjusted



- There were large increases in turnover in Clothing, footwear and personal accessory retailing and Cafes, restaurants and takeaway food services, as restrictions eased throughout the month. The monthly rise in Clothing, footwear and personal accessory retailing exceeds 100% but remains more than 20% down on May 2019. Similarly, Cafes, restaurants and takeaway food services rose around 30% from April to May 2020 but remains 30% below the level of May 2019.
- Turnover increased across all subgroups in the Household goods retailing industry, with Furniture, floor covering, houseware and textile goods retailing, Electrical and electronic goods retailing and Hardware, building and garden supplies retailing all recording large rises from April 2020 to May 2020. Turnover in Household goods retailing is 30% higher compared to May 2019. Turnover for Department stores also increased from April 2020 to May 2020.
- Food retailing rose 7.2% from April 2020 to May 2020. Turnover rose for Perishable goods (7.0%), Non-perishable goods (3.8%) and All other products (5.8%) in May 2020 compared to April 2020, in original terms. Annually, Perishable goods rose 14.5%, Non-perishable goods 11.8%, and All other products 2.5%. The annual growth of 13% in Food retailing is consistent with consumers purchasing additional food and beverage for home consumption.
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## Notes

### Forthcoming issues

#### Issue

June 2020

July 2020

#### Data notes

#### Release date

week beginning 20 July 2020

week beginning 17 August 2020

Caution should be exercised in interpreting preliminary estimates as they may be significantly different to the final published estimates. This is due to several factors:



- Estimates are based on preliminary data provided by businesses that make-up approximately 80% of total retail turnover.
- Where respondents have not yet provided their data, it is estimated (or 'imputed') based on previous responses or averages from similar responding units. The level of imputation in preliminary estimates is significantly higher than for final estimates.
- The quality of imputation for preliminary releases may also be poorer than for final estimates, due to the higher level of non-response. Furthermore, historical imputes which are based on data from previous months, may not accurately reflect changes in the economy due to recent events.
- Changes to imputation methods were been made from the March monthly release to ensure non-respondents are more accurately reflected by the responding units in the current COVID-19 environment.
- Until February 2020 Retail Trade used the concurrent seasonal adjustment method, meaning that seasonal factors were re-estimated each time a new data point becomes available. If not appropriately accounted for, unusual real-world events, such as COVID-19, can distort estimates calculated using this method. From March 2020, seasonal factors are calculated using data up to and including February 2020, then projected from March 2020 onwards. This approach, known as the forward factor method, ensures that the seasonal factors are not distorted by COVID-19 impacts.

This page last updated 19 June 2020

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