

29 May 2020

Fair Work Commission
Annual Wage Review 2019-20
GPO Box 1994
Melbourne VIC 3001

Dear Members of the Expert Panel,

Annual Wage Review 2019-20
Supplementary submissions of the National Retail Association Limited, Union of Employers

In accordance with the timetable of the Annual Wage Review 2019–20 (**the Review**) as updated by the Expert Panel on 6 April 2020, the National Retail Association Limited, Union of Employers (**NRA**) makes these supplementary submissions to address:

- (a) supplementary questions on notice published by the Expert Panel on 13 May 2020; and
- (b) data published after 4 May 2020.

Noting that supplementary question on notice 1.2 asks parties to reiterate or clarify their position with respect to the amount of any increase to minimum wages, the NRA reiterates its position that that there ought to be **no (0%) increase to minimum wages as as result of the Review**.

Supplementary question on notice 1.1

Supplementary question on notice 1.1 asks the parties to comment on particular observations made in the discussion paper issued by the Expert Panel on 13 May 2020 (**the Discussion Paper**).

The NRA does not contest any of the general principles outlined in the Discussion Paper with respect to the ability of the Expert Panel to defer or delay the effect of any determination to vary award minimum wages or the National Minimum Wage Order (**NMWO**).

However, the NRA contests the apparent presumption in the Discussion Paper that any exercise by the Expert Panel of its powers to vary minimum wages in the Review must necessarily result in an increase to minimum wages.

This appears, most relevantly, at paragraphs 58(i) – (v) and 59(i) – (iii) of the Discussion Paper, each of which appears to presume that the outcome of the Review must be an increase to minimum wages.

No obligation to increase modern award minimum wages

It should be noted that subsection 285(2) of the *Fair Work Act 2009* (Cth) (**the Act**) reads as follows:

- (2) *In an annual wage review, the FWC:*
 - (a) *must review:*
 - (i) *modern award minimum wages; and*
 - (ii) *the national minimum wage order; and*

- (b) **may** make one or more determinations varying modern awards to set, vary or revoke modern award minimum wages; and
- (c) **must** make a national minimum wage order. (Emphasis added)

Importantly for present purposes, paragraph 285(2)(b) provides that while the Expert Panel **may** make a determination varying modern award minimum wages, it is **not required** to do so.

Whilst the material traversed in the Discussion Paper considers at length the circumstances in which the Expert Panel may:

- (a) defer the commencement of a variation determination; or
- (b) exclude certain classes or groups of employers or employees from the operation of a variation determination;

it does not consider the general discretion of the Expert Panel to make, or not make, such a determination. Such discretion is clearly and unequivocally conferred by the terms of paragraph 285(2)(b).

The NRA notes that the discretion to *not* make an increase to minimum wages has precedent in *Wage-Setting Decision 2/2009* by the Australian Fair Pay Commission (AFPC), in which the AFPC determined to exercise its powers under sections 196, 200, 216 and 864 of the *Workplace Relations Act 1996* (Cth) by maintaining the Federal Minimum Wage and the Australian Pay and Classification Scales at their pre-existing levels.

Under each of the aforementioned provisions, the legislation provided that the AFPC **may** “adjust” the various minimum wage instruments. It conferred no obligation on the AFPC to make any adjustment to minimum wages if the AFPC determined that any adjustment was not appropriate.

The NRA submits that the power conferred on the Expert Panel to vary modern award minimum wages similarly do not require the Expert Panel to make any determination varying modern award minimum wages if, having regard for sections 134 and 284 of the Act, it determines that no increase to modern award minimum wages is warranted.

No obligation to alter the terms of the National Minimum Wage Order

Paragraph 285(2)(c) of the Act is somewhat different in the obligations it imposes on the Expert Panel with respect to the NMWO.

Whilst the Expert Panel has discretion to **not** make any determination with respect to modern award minimum wages, paragraph 285(2)(c) compels the Expert Panel to make a new NMWO for each financial year.

However, there is nothing in the terms of the Act which requires that the terms of a new NMWO must be any different from the terms of a previous NMWO.

Sections 294 and 296 mandate particular content and forms of expression for the NMWO.

Paragraph 294(1)(a) requires that the NMWO must “set” the national minimum wage; it does not require that the national minimum wage so set must be different from the national minimum wage set by the previous NMWO.

Indeed, there is nothing in either sections 294 or 295 to indicate that any term of a new NMWO must be any different from an earlier NMWO.

Proposed deferral of wage increases on the basis of participation in JobKeeper scheme

As the NRA is seeking primarily that the Expert Panel exercise its discretion to make no change to minimum wages, the NRA does **not** believe that the proposal to defer the operation of minimum wage increases on the basis of participation in the JobKeeper scheme is meritorious.

There are a number of practical impediments to the proposal, specifically that:

- (a) the class of entities to which the proposal would relate would not be fixed or identifiable as at 1 July 2020, as entities may elect to participate in the JobKeeper program at any point in time until its conclusion on 27 September 2020 (or such longer period as may be provided for by Parliament);
- (b) an entity may still access the JobKeeper scheme even if they do not “qualify” in accordance with the legislative criteria, provided that their turnover projections were reasonable – see LCR 2020/1 at paragraphs 53 – 54;
- (c) not all businesses that qualify for the JobKeeper scheme have elected to participate in the scheme;
- (d) it is otherwise poor public policy to:
 - (i) make a deferral of the application of any increase to minimum wages contingent on participation in a government scheme for which the class of participants is not “closed”, potentially incentivising an increased burden on the public purse; and
 - (ii) presume that the conclusion of the JobKeeper scheme conclusively indicates that the broader economic circumstances which prompted the deferral are sufficiently ameliorated.

In consequence of the above, the NRA is not convinced that a deferral of any increase to minimum wages by reference to the JobKeeper program is appropriate in all of the circumstances.

Data published after 4 May 2020 and supplementary submissions

The NRA noted, in its submissions dated 6 May 2020, that the optimistic retail turnover figures released on 22 April 2020 were unlikely to be reflective the true impact of COVID-19 on the retail sector.

Preliminary retail trade figures for the month of April released by the Australian Bureau of Statistics (**ABS**) on 20 May 2020 appear to vindicate this prediction, with these figures recording a 17.9% decline in retail turnover in the month of April 2020.¹

The commentary of the ABS notes that this is the single largest fall in retail turnover ever published as a result of the ABS survey. Even when the preceding month’s rise – the highest on record – is taken into account, retail turnover was down 9.4% from the same time the previous year.²

The ABS also noted that turnover in clothing, footwear and personal accessories, and cafes, restaurants and takeaways in April 2020 was half what it was in April 2019.³

¹ Australian Bureau of Statistics (2020) *Retail Trade, Australia, Preliminary, Apr 2020*, cat. no, 8501.0.55.008, viewed 22 May 2020, <https://www.abs.gov.au/ausstats/abs@.nsf/mf/8501.0.55.008>

² Ibid

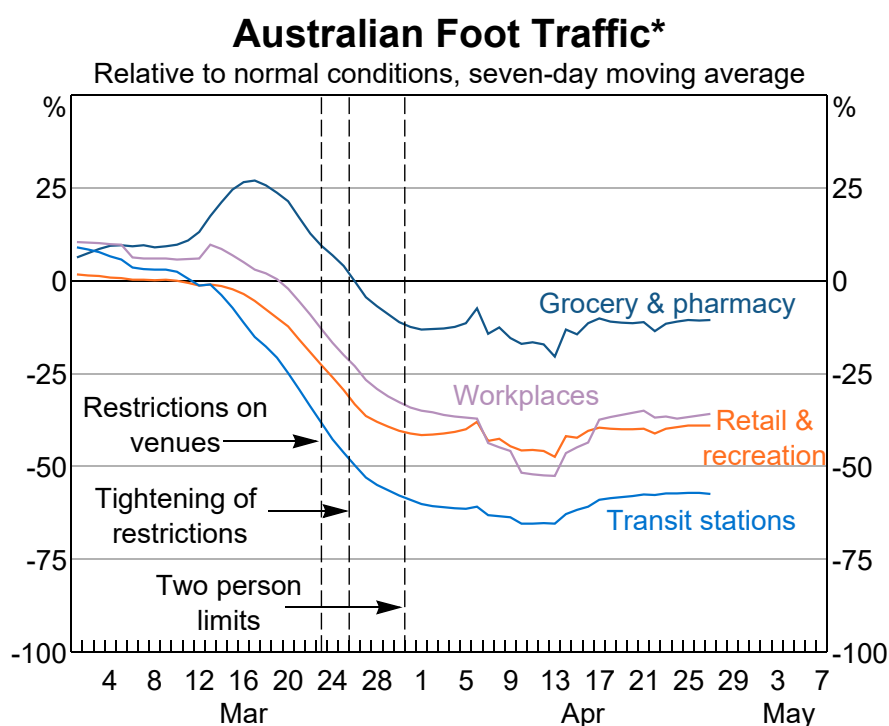
³ Ibid

The decline in turnover of 17.9% represents a total reduction in retail trade of approximately \$5,383.3 million (or approximately \$5.4 billion, rounded up).⁴

Whilst it is noted that these figures are only preliminary at this stage, it is unlikely that the final figures published by the ABS will differ significantly from these preliminary estimates.

This staggering decline in retail turnover is almost undoubtedly a symptom of both the social distancing measures in place to deal with the COVID-19 pandemic and also a propensity towards saving, rather than spending, household funds.

ABS data indicates that heading into May 2020, 84.9% of all Australians were avoiding public places including (but not limited to) shopping precincts.⁵ This aligns with data published by the Reserve Bank of Australia (RBA) in its May 2020 Statement on Monetary Policy, which illustrates the decline in foot traffic in follows:⁶



* Normal conditions are defined as the median value for foot traffic for the corresponding week day during 3 January to 6 February 2020; the application of restrictions has varied by state and territory

Sources: Google LLC (2020), 'Google COVID-19 Community Mobility Reports', available at <https://www.google.com/covid19/mobility/> viewed on 7 May 2020; RBA

⁴ Ibid

⁵ Australian Bureau of Statistics (2020) *Household Impacts of COVID-19 Survey, 29 Apr – 4 May 2020*, 'Table 5.1: Persons aged 18 years and over, Precautions taken due to spread of COVID-19, By sex and age: Proportion', data cube: Excel spreadsheet, cat. no. 4940.0, viewed 25 May 2020, <https://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4940.029%20Apr%20-%204%20May%202020?OpenDocument>

⁶ Reserve Bank of Australia (2020) *Statement on Monetary Policy – May 2020* "Domestic Economic Conditions", accessed 26 May 2020, <https://www.rba.gov.au/publications/smp/2020/may/domestic-economic-conditions.html>

As can be seen from the above, the reduced level of foot traffic stabilised around 16 – 17 April 2020 and has maintained that below-normal level since that time.

Data from the ABS also indicates that precautionary spending on household supplies has diminished, with 21.1% of Australians purchasing additional household supplies in the four weeks prior to 29 April – 4 May 2020⁷ as compared to 47.2% of Australians engaging in the same precautionary spending in the four weeks prior to 1 – 6 April 2020.⁸

This economic doldrums is expected to last for the foreseeable future, and while it is expected that the economy will recover, in time, the speed of this recovery is unknown. The RBA presently notes that:

Household consumption is forecast to decline by around 15 per cent in the June quarter. Reduced spending due to social distancing measures accounts for over half the decline; the decline in international travel also subtracts from consumption, although much of its effect on GDP is offset by lower imports. Because of social distancing restrictions and precautionary behaviour, household consumption is expected to decline by more than household income, which will be supplemented by increased social assistance payments, and the saving rate is expected to increase sharply.⁹

The final observation with respect to the saving rate is particularly relevant. If it is anticipated that Australian consumers will save, rather than spend, and businesses cannot rely on international visitors to spend in their stead, then a rapid economic recovery is unlikely.

We note that although the RBA is not able to predict with any particular clairvoyance how the economy will recover from the COVID-19 pandemic, its baseline scenario of “gradual recovery” expects that employment and GDP will begin to improve in the second half of 2020, but that year-average GDP will remain in the negatives until December 2021, and that unemployment will be above 6% through to June 2022.¹⁰

Given the current economic data, and the road to recovery anticipated by the nation’s most senior financial analysts, the NRA remains of the view that the retail industry, and indeed industry more broadly, cannot be expected to sustain an increase to minimum wages without a substantial negative impact on business continuity and employment.

Yours sincerely,



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⁷ Supra, note 5

⁸ Australian Bureau of Statistics (2020) *Household Impacts of COVID-19 Survey, 1 – 6 April 2020*, ‘Table 3.1: Persons aged 18 years and over, Personal health behaviours and precautions taken in the last four weeks due to the spread of COVID-19, By sex and age: Proportion’, data cube: Excel spreadsheet, cat. no. 4940.0, viewed 25 May 2020, <https://www.abs.gov.au/AUSSTATS/abs@nsf/DetailsPage/4940.01-6%20Apr%202020?OpenDocument>

⁹ Reserve Bank of Australia (2020) *Statement on Monetary Policy – May 2020* “Economic Outlook”, accessed 25 May 2020, <https://www.rba.gov.au/publications/smp/2020/may/economic-outlook.html>

¹⁰ Ibid at Table 6.1