Ai GROUP SUBMISSION

Fair Work Commission

Annual Wage Review 2020 – 2021

Reply Submission and Responses to Questions on Notice

23 April 2021

1. Introduction

On 26 March 2021, the Australian Industry Group (**Ai Group**) filed its initial submission in the *Annual Wage Review 2020-21* (**Ai Group's March 2021 Submission**).

Ai Group's March 2021 submission focussed upon the major economic effects of the COVID-19 pandemic. On many measures, Australia's economy has bounced back at a faster and stronger pace than had been anticipated (reflecting the size, speed and success of various economic support measures implemented in 2020), but the effects of the pandemic and recession are continuing.

The impact of the discontinuation of the JobKeeper scheme from 28 March 2021, including the extent of job losses and business closures, is not yet clear. For this reason, Ai Group will advise the Expert Panel of our position on any minimum wage increase in the round of submissions due on 14 May 2021. This will enable Ai Group to assess the latest economic data before settling on a proposed quantum for any minimum wage increase.

The 3.5 per cent minimum wage increase proposed by the ACTU and the 4 per cent minimum wage increase proposed by the Australian Catholic Council for Employment Relations (**ACCER**) are obviously unsustainable. Such minimum wage increases are incompatible with the current economic vulnerabilities and would put jobs at risk and worsen unemployment and underemployment.

Australia already has the highest minimum wage in the world (on a purchasing power parity basis).

In this Reply Submission, we address various matters raised in the ACTU's submission and ACCER's submission.

We also address the question put to all parties in the Questions on Notice published on 13 April 2021 about the timing of any wage increases in awards that had delayed increases last year. In this regard:

- We propose an operative date of 1 September 2021 for any wage increase in Group 2 awards. Last year, the minimum wage increase for these awards was delayed by four months. This year, we propose a delay of two months. This would facilitate a smooth transition to a 1 July operative date for any minimum wage increase next year, if there are no ongoing 'exceptional circumstances'.

- We propose an operative date of 1 January 2022 for any wage increase in Group 3 awards. The industries covered by these awards continue to be adversely affected by the pandemic, and the delayed increases for these awards in last year's Decision would otherwise result in employers being required to pay two wage increases in close succession.

2. Labour market conditions are changing rapidly and the outlook is uncertain

Labour market conditions are changing rapidly. The national recovery in employment, work hours and labour participation has progressed strongly in Q1 of 2021 but there are mixed signals regarding spare capacity. Unemployment, underemployment and the number of people working 'zero' hours has improved but they remain higher than pre-COVID levels and more elevated for younger workers and jobseekers.

The outlook is even more uncertain than usual. There is significant risk of slower (or stalling) recovery in Q2 of 2021 due to the cessation of JobKeeper and other direct supports at the end of March, combined with ongoing activity restrictions. Border movement restrictions in particular will continue to impede the recovery of activity and employment in hospitality, tourism, education and other large employing industries. For these reasons, Ai Group will present an update on the latest labour market indicators in May and June.

In March 2021, the ABS's headline monthly labour market survey showed:

- Total employment recovered to pre-pandemic levels in February 2021. Another 70,700 jobs were added in March 2021 (+0.5% m/m and +0.6% p.a.), taking total employment to a new record high of 13,078,000.

- Aggregate work hours were up by 2.2% m/m and 1.2% p.a. in March 2021. However, the ABS notes that work hours have been unusually volatile in 2021. The rise in hours worked in March followed a large increase (5.8% m/m) in February and a large decrease in January (-4.9% m/m), when a larger than usual number of people took annual leave.

- The jobs recovery has been stronger for part-time workers (less than 35 hours per week, +2.2% and +76,800 people over the year to March) rather than full-time workers (-0.2% and -2,500 over the year to March). 32.1% of all workers were working part-time in March 2021, just shy of the record high of 32.3% in October 2020.

- The number of unemployed people fell to 778,100 in March 2021. This was the lowest number since April 2020 but it remains above March 2020 (716,000) and February 2020 (695,700). The unemployment rate fell by 0.2 percentage points to 5.6% but it is still 0.4 percentage points higher than one year earlier. Youth unemployment (for 15 to 24 year olds) improved to 11.8% in March 2021 but remains 0.2 percentage points above March 2020. Even after this improvement, the unemployment rate is still higher than the RBA's suggested 'full employment' rate of unemployment (under 5%) that would be required to generate stronger wage inflation.

- The underemployment rate dropped to 7.9% of the labour force in March 2021 and is now 0.9 percentage points lower than in March 2020. This equates to 1.094 million people who were employed but seeking more work hours in March 2021, the lowest number since February 2020. Underemployment is still significantly higher for younger workers than for older workers. 16.2% of 15-24 year old people in the labour force (employed or unemployed) were underemployed in March 2021 compared to 8% of all working age people in the labour force (15-64 years).

- Fewer people with a job were working less than their usual work hours for economic reasons in March 2021 (390,300 people who were stood down or on reduced hours) compared to March 2020 (466,500) and well below the COVID-19 peak in April 2020 (1.781 million). This group included 56,900 people who had a job but worked zero hours in March 2021, down from 76,400 in March 2020 and a peak of 766,800 in April 2020. This group overlaps with – but is not necessarily included in – the ABS measure of underemployment.

- Participation in the labour force (employed plus unemployed people) hit a record high in March 2021 at 66.3% of Australians aged 15 years and over. This was wholly driven by a rise in female labour force participation to 61.8%. Male participation declined to 70.9% in March 2021.

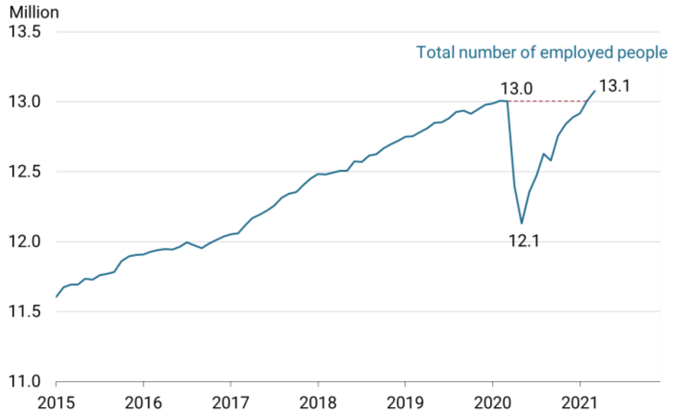
- Improving participation rates pushed the total size of the labour force to a record high of 13.855 million people in March 2021, which is 1% larger than one year earlier. This is despite a rapid deceleration in adult population growth during 2020 (due to disruptions to migration) to just 0.4% p.a. in March 2021 (+77,500 adults), its weakest in the current labour force data series (dating back to 1978). With the national participation rate already at a record high, it is not clear how much more labour supply can be gained by encouraging greater labour participation, in the absence of stronger growth in the adult population.

- Across the states, South Australia was the only state to have less employment in March 2021 than one year earlier (-1.2%). South Australia also had the highest unemployment rate in March 2021 (6.8%). The strongest employment growth over the year to March was in Qld and WA, but NSW and Vic had lower unemployment rates.

- Australia's long-term unemployment rate (the proportion of the labour force who are unemployed for longer than one year) increased to 1.8% in March 2021, the highest rate since November 1999. This is despite the headline unemployment rate falling to 5.6% in March.

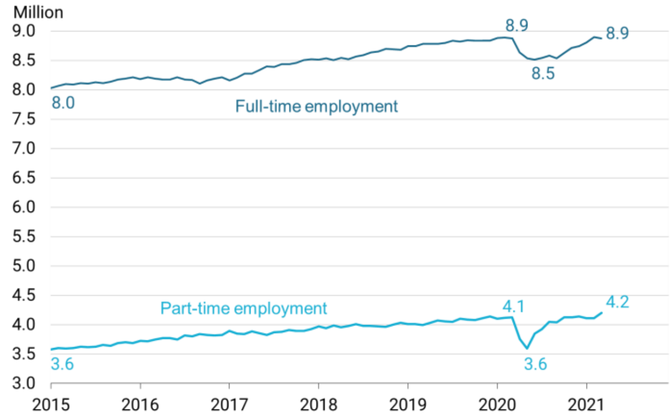
The current situation regarding employment, unemployment, underemployment, underutilisation and labour market participation are highlighted in Charts 1 to 9 below.

Chart 1: Total employed people*, 2015 to March 2021



* total employment includes all employees (with or without paid leave entitlements), self-employed contractors and business operator-owners.
Source: ABS, *Labour Force Australia*, March 2021.

Chart 2: Employed people, full-time and part-time*, 2015 to March 2021

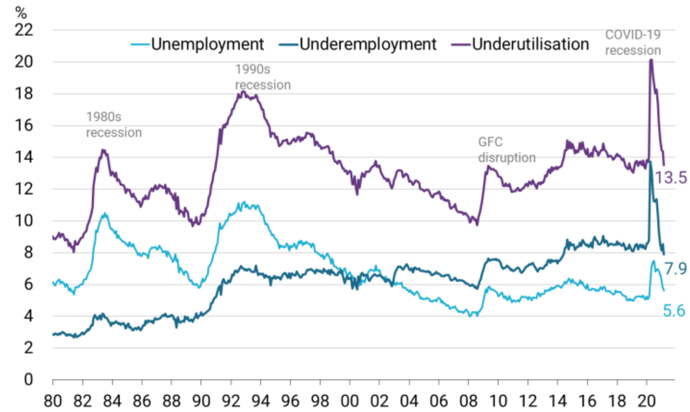


* the ABS defines part-time work as less than 35 hours per week.
Source: ABS, *Labour Force Australia*, March 2021.

Chart 3: Unemployed people*, 1990 to March 2021

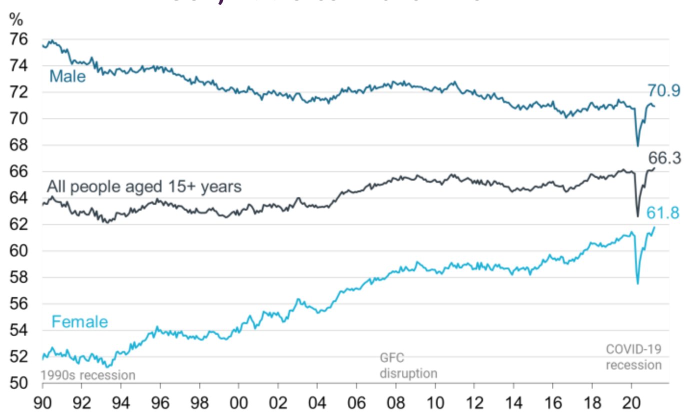
* unemployment means a person is not working at all but is actively seeking work. This is a different measure to eligibility for JobSeeker.
Source: ABS, *Labour Force Australia*, March 2021.

Chart 4: Unemployment*, underemployment** and underutilisation*** rates, 1980 to March 2021



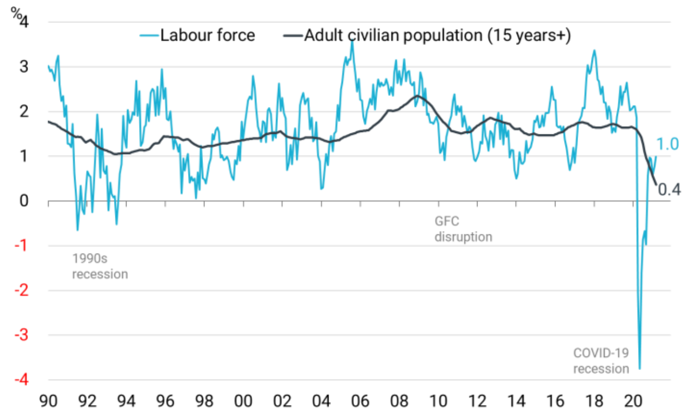
* unemployment means a person is not working at all but is actively seeking work. This is a different measure to eligibility for JobSeeker.
** underemployment means a person is employed but is willing and able to work more than their current hours.
*** underutilisation is the sum of unemployment and underemployment.
Source: ABS, *Labour Force Australia*, March 2021.

Chart 5: Labour force participation rates by sex, 1990 to March 2021



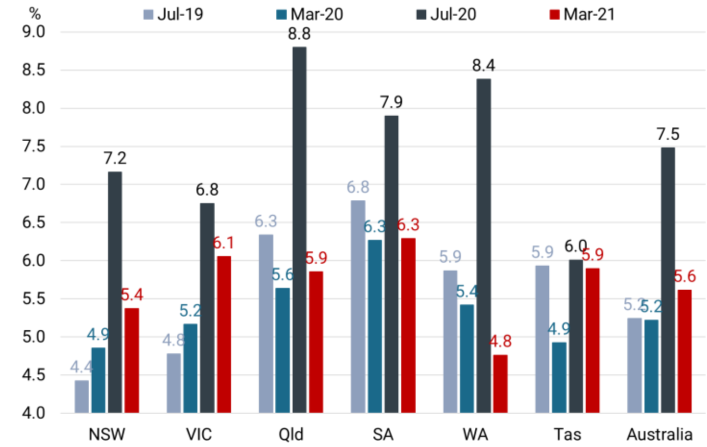
Source: ABS, *Labour Force Australia*, March 2021.

Chart 6: Labour force and adult population growth, 1990 to March 2021



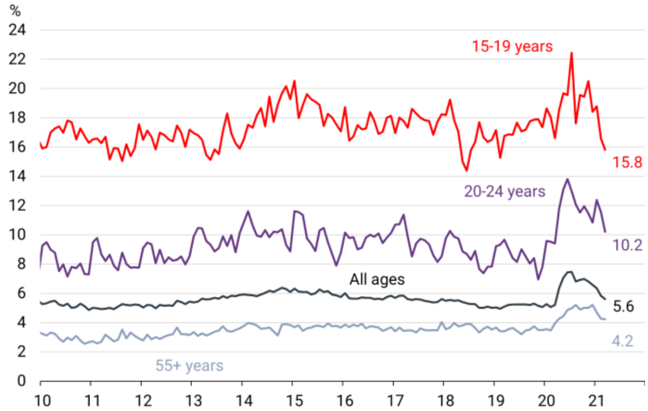
Source: ABS, *Labour Force Australia*, March 2021.

Chart 7: Unemployment rates by state, July 2019 to March 2021



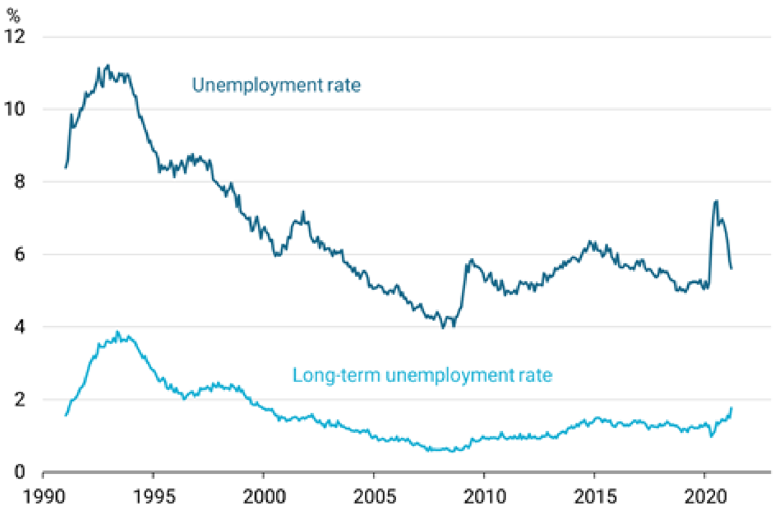
Source: ABS, *Labour Force Australia*, March 2021.

Chart 8: Unemployment rates by age, 2015 to March 2021



Source: ABS, *Labour Force Australia*, March 2021.

Chart 9: Unemployment and long-term unemployment rates (%), 1990 to March 2021



3. Response to the ACTU's Submission

Ai Group's position on most of the issues dealt with in the ACTU's submission will be clear from the content of Ai Group's Initial Submission in the Annual Wage Review. The ACTU has presented an overly optimistic account of the current economic circumstances and outlook.

The 3.5 per cent minimum wage increase proposed by the ACTU is incompatible with the current economic circumstances and outlook. Such an increase would put jobs at risk and worsen unemployment and underemployment.

3.1 Wages as stimulus

In its submission, the ACTU put forward the argument that an increase in minimum wages would be beneficial for the broader economy because it would lift spending, demand and therefore employment and profits in a way very similar to government stimulus payments. In Ai Group's view, this argument has substantial flaws and should not be accepted by the Panel.

The ACTU's argument is expressed in the following terms.[1]

> *An increase in the minimum wage should be considered to operate in similar and complementary manner to the one-off stimulus payments the Government made to households to support growth. In economic theory there is little difference – low paid award workers have a high marginal propensity to consume. A high proportion of any award increase will be spent in local communities increasing aggregate demand. Indeed, as this is not a 'one off sugar hit' but a permanent increase the effects would be significant.*
>
> *The increase in the minimum wage and modern award minimum wages will raise household spending and demand for goods and services in the Australian economy. The increase in sales revenue will increase employment and profits. The Panel has previously acknowledged the basic demand effect of wage increases[106], and we invite the Panel to again take this into account.*

The extract above from the ACTU Submission referenced the Decision in the *Annual Wage Review 2017-18* in which the Panel noted:

> *This issue was canvassed in last year's [i.e. the 2016-17] Review when the Panel found that the impact of an increase in minimum wages was 'not likely to be comparable to that of a public sector macroeconomic stimulus.' Nonetheless, the ACTU submission makes the important point that increases to the NMW and award wages are likely to have some effect on consumer demand that needs to be taken into account.'*

While we think the Panel's phrasing overstates the probability of a positive impact on aggregate demand (which includes both consumer and business demand), we agree with its conclusion that there is a lack of comparability between government stimulus measures and increases in minimum wages. This is in stark contrast to the ACTU 's fundamental point that "in economic theory there is little difference" between government stimulus measures and increases in minimum wages and that a rise in the minimum wage can be considered to operate in a "similar and complementary manner" to stimulus payments.

Unlike the COVID-19 stimulus payments which were financed with borrowed funds, rises in minimum wages will be paid by businesses and other employers. The borrowed funds from which stimulus payments are made come either from domestic or international savings or from credit creation. They add to the quantity of money in circulation and generally can be expected to add

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[1] ACTU Submission, paragraphs 139-140, page 91. (Note that footnote 106 in the ACTU Submission refers to paragraph 248 of the FWC's 2017-18 Minimum Wage Decision).

to aggregate spending in the economy. In contrast, rises in minimum wages involve a diversion of money from the business sector and other employers to those households in which there are members who receive higher wages because of the minimum wage decision.

Because there is no additional money injected into the economy from an increase in minimum wages, there is no comparability between stimulus payments made by governments and rises in minimum wages. One is stimulus: the other is a transfer within the economy. They are chalk and cheese.

There is a further lack of comparability between demand stimulus such as that deployed in response to COVID-19 and an increase in minimum wage rates. The stimulus payments to households and businesses were aimed at stemming an emerging imbalance between the demand and supply of labour. It did this by targeting the feared collapse of business demand for labour and business and household demand for goods and services. The impact of the package was to limit the imbalance in the labour market and assist the, still partial, correction to this imbalance.

Adopting the ACTU suggestion of using minimum wage rates as a lever with which to manage aggregate demand is very different to this. It would involve raising minimum wage rates at a time of high unemployment and underemployment. Extending the same logic to other phases of the business cycle, the ACTU proposal would involve reducing minimum wage rates (or at least moderating the degree of increase in wage rates) when unemployment is low. Rather than acting as a cure to disequilibrium in the labour market, the policy would worsen the imbalances in the labour market that it was intended to correct.

Turning away from this lack of comparability to the more general issue of the impact of a rise in minimum wages on aggregate demand, Ai Group is of the view that there is at least as much reason to expect that a rise in minimum wages will reduce aggregate spending than increase it. Of course, in reality the outcome will depend on a variety of circumstances and may well be different depending on the state of the business cycle.

In what follows we argue that the ACTU position that an “increase in the minimum wage and modern award minimum wages will raise household spending and demand for goods and services in the Australian economy [and] increase … sales revenue, … employment and profits” should not be supported as one that is generally correct.

We put forward two reasons in support of our position.

The first is that while household spending is an important component of total spending and therefore of aggregate demand, so is business spending. An increase in household spending financed by reducing alternative spending by businesses will not increase total spending or aggregate demand.

The second reason to doubt that a rise in minimum wages will stimulate aggregate demand is the very substantial gap between the extra costs experienced by employers and the actual increase in disposable incomes of households with members eligible for the higher wage rates.

Three sets of factors are relevant to this:

- The impacts of payroll tax and Australia's superannuation system on employers' costs and aggregate demand;
- The impact of income taxation on the higher wages paid; and
- The impacts of the withdrawal of income support payments as wages rise.

When minimum wages increase, so too do the superannuation payments paid on behalf of employees by employers. Under the legislated schedule of changes to the Superannuation Guarantee (SG), from 1 July this year employers will pay any increase in wages arising from the Panel's decision plus 10 per cent of the extra wages in additional SG payments.

The impact of payroll tax is similar and additional. If the employer is liable to payroll tax, additional payroll tax will be paid both on the higher wages and the additional superannuation contributions. As an illustration[2], if the average rate of payroll tax was 2 per cent, for every increase of $100 paid as a result of the increased minimum wages, employers' costs would rise by $112.20 ($100 + $10 in super plus 2% of 110 in payroll tax = $112.20).

The additional superannuation and the additional payroll tax are transfers of funds that the business could have deployed in ways that would have added to domestic demand. Instead these funds are withdrawn from domestic demand and are instead channelled into consolidated revenue and superannuation accounts.

The income tax impacts on people receiving increases in minimum wage rates are even more substantial. Effective marginal tax rates include the marginal tax rates in the personal income tax scale as well as the Medicare Levy and the shade-in and shade-out rates for a variety of tax offsets. Table 1 below illustrates the dimensions of the marginal tax rates faced by individuals earning between 50 per cent and 150 per cent of the current minimum wage for a full year. They do not include the impacts of the withdrawal of income support payments which are discussed further below.

Table 1 shows that for many low wage earners working full-time, an additional dollar in pre-tax wages, while subtracting well more than a dollar from the pre-tax spending power of their employer, can add as little as 64 cents to the employee's disposable income.

[2] Rates of payroll tax vary across Australian jurisdictions and many employers are not liable because of the payroll tax thresholds. We use the 2 per cent figure simply as an illustration even though most employers liable to payroll tax face rates well in excess of 2 per cent.

Table 1: Effective Marginal Tax Rates faced by Low Wage Individuals

Proportion of NMW wage	Annual income ($)	Effective Marginal Tax Rate
50%	19,652	0.0%
60%	23,582	29.0%
70%	27,512	29.0%
80%	31,443	21.0%
90%	35,373	21.0%
100%	39,303	18.5%
110%	43,233	18.5%
120%	47,164	28.5%
130%	51,094	36.0%
140%	55,024	36.0%
150%	58,955	36.0%

In addition to the dampening impact of income tax on disposable incomes and aggregate demand, many low-wage earners would also be affected by the withdrawal of income support payments. For instance:

- A person working relatively few hours and eligible for JobSeeker, might face a rate of withdrawal of their JobSeeker payment of 50 cents or 60 cents for every dollar of additional pre-tax income arising from an increase in minimum wages;
- A person transitioning to retirement and eligible for the age pension could face a loss of income support of 50 cents for every dollar of additional pre-tax income arising from an increase in minimum wages; and,
- For households in which there are dependent children, there can be a loss of 20 cents or 30 cents in household income for every dollar of additional pre-tax income received by either of the parents due to an increase in minimum wages.

For many low and medium-income households, the income tax system and withdrawal of income support payments combine to create the very high effective marginal tax rates for which the Australian tax transfer system is notorious.

These high effective marginal tax rates together with the superannuation and payroll tax impacts discussed above mean that the wedge between the extra costs for the employer and the resulting household disposal income is substantial. As an illustration, for an individual subject to a marginal tax rate of 36 per cent but unaffected by the withdrawal of income support payments, the increase in disposable income of $0.64 would represent just 57 per cent of the reduced spending power of the employer (using $1.122 as the employers' costs associated with a $1 rise in minimum wage rates). If in addition, the same household's entitlement to Family Tax Benefit A was reduced by 20 cents, the increase in household disposable income of $0.44 would represent just 39 per cent of the $1.122 of the employer's lost spending power.

While the aggregate effect across all employers and all households would be complex to calculate, the amount of extra cost to employers as a group (and therefore the loss of employers' spending power) must be substantially greater than the increase in disposable income received by the household sector.

We recognise that the actual macroeconomic impact of a rise in minimum wage rates necessarily needs to be assessed against the macroeconomic impact of the alternative course of action: if minimum wage rates were not raised (or not raised by the same extent) what would the macroeconomic outcome be?

This will depend on the extent to which businesses and other employers would otherwise have used the revenue for other purposes, whether profits would be affected, as well as the distribution policies of businesses and the tax treatment of distributed earnings. There is, in short, a considerable range of alternatives with an equally wide range of alternative macroeconomic impacts.

In disputing the generality of the assertion that minimum wage rises will add to aggregate demand, our focus has been on situations where the extra wages paid (plus super and payroll tax) mean that other business expenditure is not undertaken. We do not claim this is the only alternative class of impacts, but we do suggest it is an important class of impacts and one that is likely to be strongly represented in any particular overall alternative path.

For completeness, some points can be made about the business tax implications of this set of alternatives.

In many cases where other business expenditure is displaced, there is simply a substitution of one deductible expense for another, the business's tax position would remain unchanged. There would be no additional business income tax paid if the minimum wage rise did not occur.

Moreover, if the additional spending was on non-wage expenses, the superannuation and payroll tax leakages from aggregate demand do not apply. Nor do the leakages from aggregate demand resulting from personal income tax and the withdrawal of income support payments. As a consequence, the impact on aggregate demand of the alternative deployment of the same funds would be considerably greater.

Admittedly, if the alternative expenditure was on capital equipment which is generally not deductible in full, the tax impact would normally be more complex than the substitution of one set of deductible expenses for another. However, in the present circumstances, with the wide availability of immediate expensing of capital expenditure until the middle of 2022, this difference does not apply, and capital expenditure can be considered equivalent to other deductible business costs from a tax point of view.

In summary, our argument is that across a wide range of the alternatives to an increase in minimum wages, the macroeconomic impact will be greater than if minimum wage rates were increased. Consequently, the notion that a rise in minimum wage rates will result in an increase in economy-wide spending, aggregate demand and employment, should not be supported as a general proposition.

Impact of Annual Wage Review decisions on bargaining behaviour

In its submission, the ACTU asserts that changes in bargaining behaviour seen over 2020 are likely to have "little if any relationship to the movements in minimum wages awarded by the Panel over the last few years".[3] It claims that, for businesses that were recipients of JobKeeper, the flexibilities introduced into the Fair Work Act 2009 (**FW Act**) via JobKeeper enabling directions may have met or exceeded the level of flexibility sought or achievable in bargaining for many employers. The ACTU therefore asserts that the conclusion of JobKeeper related flexibilities may create renewed interest in bargaining amongst employers.

Ai Group urges the Panel to accord these unsubstantiated assertions little weight. There is no indication that the limited availability of JobKeeper enabling directions to a subset of employers in relation to a part of their workforce in any way discouraged enterprise bargaining and, as such, no basis to assume that the finalisation of the JobKeeper payment subsidy (and associated flexibilities) will provide a stimulus for enterprise bargaining.

Amendments to the FW Act brought about by the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (Cth) enabled employers to issue JobKeeper enabling directions which could provide (subject to numerous safeguards) increased flexibility around employees' hours of work, performance of duties and location of work. It also enabled employers and employees to agree on flexibility pertaining to the taking of annual leave and days and times of work. Although the provisions allowing for such directions to be issued were originally intended to be repealed on 28 September 2020, they were continued in modified form with the introduction of JobKeeper 2.0. In September 2020, the capacity to issue JobKeeper enabling directions was extended to 28 March 2021 (with the exception of the annual leave provisions) but retained only in limited form for 'legacy employers' no longer entitled to the JobKeeper payment.

The workplace relations flexibilities introduced to support the JobKeeper scheme were limited and did not encompass the broad scope of matters typically dealt with in an enterprise agreement. The limited flexibilities were not an adequate substitute for enterprise bargaining to the point that it discouraged collective agreement making.

The short duration of the provisions should further assist the Panel in concluding that the availability of JobKeeper enabling directions did not act as a disincentive to bargain.

[3] ACTU Submission (26 March 2021), [428].

Furthermore, with the exception of the limited flexibilities available to 'legacy employers' from September 2020, the availability of JobKeeper enabling directions was contingent on an employer qualifying for the JobKeeper scheme which required the employer to demonstrate a significant decline in turnover (this could only be based on actual decline in turnover from 28 September 2020). Legacy employers were similarly required to demonstrate a smaller downturn.

There was no capacity for employers to issue JobKeeper enabling directions to employees in respect of which they were not receiving JobKeeper payments. Although the eligibility for employees changed over time, this broadly excluded casuals (other than 'long term casuals'), most junior employees, non-Australian residents and employees who were not engaged prior to 1 March 2020 (from 15 August 2020, this was changed to 1 July 2020).

Ai Group continues to rely on the position put on page 51 of its March 2021 submission and agrees with the view expressed by the Expert Panel in the *Annual Wage Review 2016-17 Decision* that there are many complex factors that may contribute to decisions of employers and employees about whether or not to bargain.

Application of junior rates to AQF qualified employees

At paragraph 443 of its submission, the ACTU suggests that the Expert Panel give consideration to the issues raised in paragraphs [84] – [85] of the decision of a Full Bench of the Commission rejecting an application by the Shop, Distributive and Allied Employees Association (**SDA**) to restrict junior rates in the *General Retail Industry Award 2020* (**Retail Award**) to employees at the Level 1 classification (**24 November 2020 Decision**).[4] The relevant excerpts from the decision are reproduced below:

> ***[84]*** *It seems to us that the application of junior rates to level 4 classification employees gives rise to an anomaly. It is conceivable that, depending on their age and service with their employer, a 20 year old tradesperson may only receive 90 per cent of the level 4 minimum rate. Such an outcome is inconsistent with the general approach adopted by the Commission to the proper fixation of minimum rates. As mentioned earlier, the tradespersons rate (level 4 in the Retail Award) should align with the C10 rate in the Manufacturing and Associated Industries and Occupations Award 2020; but that is not presently the case for junior employees under the Retail Award. As mentioned earlier, the concepts of uniformity and consistency underpin the fixation of minimum wages in modern awards. In a practical sense this means that the minimum wage rate for a tradesperson should be set consistently across the modern award system; this is not the case in the Retail Award because of the application of junior rates to level 4 employees.*
>
> ***[85]*** *Further, the classification definitions associated with classification levels 5, 6, 7 and 8 all envisage the performance of work at a higher level than that performed by a level 4 employee. Accordingly, if junior rates are not applicable to level 4 employees it makes no*

[4] [2020] FWCFB 6301.

sense to apply them to higher classification levels.

Although the SDA's proposed variation was rejected, the Full Bench expressed the *provisional view* that the Retail Award be varied to provide that junior rates only apply to classification levels 1, 2 and 3.[5] Since the decision was issued, the Commission has published a draft determination to vary the Retail Award and invited responses from interested parties.

Ai Group disagrees with the ACTU that the matters raised in paragraphs [84] – [85] would appropriately be dealt with in the context of the present Annual Wage Review. As noted in the Full Bench's 20 November 2020 decision, there is no consistent treatment of junior rates across the modern awards system.[6] This is supported by the information note published by the Commission in the context of that case on 5 November 2020.[7]

The parties to the proceedings which resulted in the 20 November 2020 decision and subsequent proposed changes to the Retail Award were confined to those with a significant interest in the Retail Award and, as such, many interested groups have not expressed an opinion on the conclusions of the Full Bench in that decision. Any changes made in the context of the present Annual Wage Review would have a significant impact on junior rates across the award system.

Considering the differential treatment of junior rates across the modern award system, any applications to vary modern awards in such a way as to exclude AQF qualified employees from receipt of junior rates should be made under s.157 of the FW Act and any proposed variation would need to be justified by work value reasons.

4. Response to ACCER's Submission

The 4 per cent minimum wage increase proposed by the ACCER is unsustainable and incompatible with the current economic circumstances and outlook. Such an increase would put jobs at risk, worsen unemployment and underemployment, and harm many low paid employees.

At paragraph [37] of ACCER's Submission, it is asserted that the decision of the Expert Panel in the *Annual Wage Review 2019-20* risked jurisdictional error by focussing on the question of fairness in isolation from the words 'a safety net'. ACCER claims that the Expert Panel failed to "come to grips with the fundamental question asked by the statute, being what is necessary for any order to answer the description of being a *safety net* of fair minimum wages".

Contrary to ACCER's submissions, the concept of 'fairness' was not dealt with in isolation from the words 'a safety net'. 'Fairness' was considered, in paragraph [104] of the *Annual Wage Review 2019-20 decision*, in the context of what might constitute 'a fair and relevant minimum safety net of terms and conditions' and 'a safety net of fair minimum wages', each of which are relevant to

[5] [2020] FWCFB 6301, [86].

[6] [2020] FWCFB 6301, [45].

[7] Fair Work Commission, *Information note*, 'Junior rates in Modern Awards' (5 November 2020).

the modern awards objective and the minimum wages objective in ss. 134 and 284 respectively.

The reference in the *Annual Wage Review 2019-20 decision* to ‘fairness’ as including the perspective of employers and employees was in the context of evaluating what might constitute ‘a fair and relevant minimum safety net of terms and conditions’ and ‘a safety net of fair minimum wages’.[8] Similar conclusions regarding the meaning of ‘fairness’ in the context of a ‘safety net’ appear in the *Annual Wage Review 2016-17 decision* and the *Annual Wage Review 2017-18 decision*.[9]

This issue of fairness being assessed in the context of the safety net mandated under the modern awards objective was dealt with in detail in the *4 yearly review of modern awards – Penalty Rates – hospitality and retail industries decision* (**the Penalty Rates Decision**). The decision included an extensive discussion of the meaning of the term ‘safety net’ in s. 134 of the FW Act.[10] The Commission’s Penalty Rates Decision was upheld by the Full Court of the Federal Court.[11]

It is incorrect and artificial to read the Commission’s conclusions pertaining to the meaning of ‘fairness’ as divorced from the notion of a ‘safety net’.

It may also be added that in its *Annual Wage Review 2017–18 decision* the Expert Panel rejected the argument put by ACCER that a beneficial reading of s.284(1) excludes decision making being based on the application of the criterion of fairness as between employers and employees and rejected ACCER’s argument that the Panel’s ‘primary obligation’ in setting wage rates is to set a safety net wage rate that will provide a decent standard of living.[12] The argument put by ACCER this year, with respect to the Expert Panel’s consideration of the ‘safety net’, may be interpreted simply as disagreement with the manner in which the term has been interpreted by the Panel.

[8] [2020] FWCFB 3500, [104].

[9] [2019] FWCFB 3500, [10]; [2017] FWCFB 3500, [128].

[10] [2017] FWCFB 1001, [113] – [132].

[11] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161.

[12] [2018] FWCFB 3500, [18] – [26].

5. Response to Questions on Notice

1 Question to all parties

In the Annual Wage Review 2019–20 (2019–20 Review), the majority decision of the Expert Panel was to increase modern award minimum wages in 3 groups based on industry clusters. Depending on the modern award and the industry cluster it was allocated, the increases to modern award minimum wages occurred on 1 July 2020, 1 November 2020 and 1 February 2021.

A number of parties have indicated how the Expert Panel should approach the different operative dates of increases to modern awards based on the 3 clusters in their initial submission to this Review.

All parties are invited to comment on how the Expert Panel should deal with:

1. **the different operative dates from the 2019–20 Review; and**

2. **whether there should be any changes to the composition of the 3 industry clusters identified in the 2019–20 Review, giving consideration to movements in the change in employee jobs and total wages presented in the report by Professor Jeff Borland and the most recent data shown in the Fair Work Commission's Statistical report—Annual Wage Review 2020–21.**

How the Commission should deal with the different operative date from the 2019-20 Review

On pages 57 – 59 of Ai Group's March 2021 submission, we argued that 'exceptional circumstances' for the purposes of ss.286(2) and 287(4) of the FW Act continue to exist this year which justify a delayed operative date for any wage increase in Group 2 and Group 3 Awards as defined in the *Annual Wage Review 2019-20 Decision*.

The 'exceptional circumstances' that exist this year justifying a delayed operative date for any wage increase in awards covering particular industry sectors are two-fold:

1. Some industry sectors have been extremely impacted by the pandemic and have not yet recovered to anything like pre-pandemic levels.

2. The delayed operative dates last year for award wage increases in particular sectors has resulted in the exceptional circumstance that employers would be required to pay two wage increases in close succession, unless a delayed increase is granted again this year. The Panel alluded to this in the *Annual Wage Review 2019-20 Decision*:

> ***[192]*** *Finally, we also acknowledge that the different operative dates we have determined for the 3 award clusters may have implications for the timing of any variation in modern award minimum wages in the 2020–21 Review.*

We propose the following approach to operative dates for Group 2 and Group 3 awards:

- **Group 2 awards**

  We propose an operative date of 1 September 2021 for any wage increases in Group 2 awards. Last year, the minimum wage increase in these awards was delayed by four months. This year, we propose a delay of two months. This would facilitate a smooth transition to a 1 July operative date for any wage increase in Group 2 awards next year, if there are no ongoing 'exceptional circumstances'.

- **Group 3 awards**

  We propose an operative date of 1 January 2022 for any wage increases in Group 3 awards. The industries covered by these awards continue to be adversely affected by the pandemic, and the delayed increases for these awards in last year's Decision would otherwise result in employers being required to pay two wage increases in close succession.

Whether there should be any changes to the composition of the 3 industry clusters

Ai Group proposes that there be no changes to the composition of the 3 industry clusters.

Economic data which reflects changes in employee jobs and total wages between 14 March 2020 and 27 March 2021 by industry, reproduced in the Commission's *Statistical Report – Annual Wage Review 2020-21*, continues to show a central group of industries impacted by a decline in jobs with visibly separate clusters that either continue to struggle more substantially or which have experienced a more noticeable recovery.[13]

In the Report by Professor Borland,[14] a revised set of clusters is proposed.

Regardless of any economic justification for a different set of clusters, if clusters were being determined for the first time this year, it would be inappropriate to reformulate the clusters at this time because:

- The effect would be to require employers in some sectors to pay a wage increase only 5 months after the previous increase, in the case of Group 3 awards, and 8 months after the previous increase, in the case of Group 2 awards.

- The removal of the JobKeeper payment subsidy on 28 March 2021 could have a significant impact on the jobs and wages data relied on by Professor Borland in reformulating the clusters.

[13] Fair Work Commission (2020), *Statistical Report – Annual Wage Review 2020 – 21*, version 6, 22 April, Chart 6.11, p.53.

[14] Borland, J (2021), *An Assessment of the Economic Effects of COVID-19*, Version 2, Fair Work Commission Research Report 1/2021, 17 February, p. 1 - 2.

- Professor Borland's analysis is based on employment data across entire industries, and not segments within industries.

The Retail industry highlights the importance of these points. Professor Borland has proposed that the Retail industry be moved from Group 3 to Group 1. The effect of this would be that retailers would need to pay a minimum wage increase on 1 July 2021, despite only paying an increase on 1 February 2021. Some parts of the retail industry have experienced growth while other parts of the industry are still experiencing very tough times. The imposition of two wage increases in 5 months would no doubt have a big impact on employment and business closures in struggling parts of the retail industry.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, engineering, transport & logistics, labour hire, mining services, the defence industry, civil airlines and ICT.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. We provide the practical information, advice and assistance businesses need. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and we support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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