



IN THE FAIR WORK COMMISSION

Matter No.: AM2020/30

S 157 Variation of a Modern Award to achieve the Modern Award's objective

Clerks - Private Sector Award 2020

SUBMISSION OF THE AUSTRALIAN SERVICES UNION

Submitter: Robert Potter, National Secretary

Organisation: Australian Services Union

Address: 116 Queensberry Street
Carlton South, Victoria, 3053

Phone: 03 9342 1400

Email: info@asu.asn.au

Date: Monday 29 June, 2020

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- Attachment 1 Newspaper article
- Attachment 2 National Cabinet Statement
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Introduction

1. This submission is in reply to the application by the Australian Industry Group (AiG) and the Australian Chamber of Commerce and Industry (ACCI) to extend “Schedule I – Award Flexibility During the COVID-19 Pandemic” which was placed in the Clerks - Private Sector Award (Award) by the FWC Full Bench on 28 March 2020. Schedule I is to expire on the 30 June 2020 and the employer associations seek to extend the Schedule to 30 September 2020. The ASU opposes this application.
2. The ASU along with the ACTU did support the application by the above employer associations to insert Schedule I into the Award at the Full Bench hearing on 28 March 2020. The ASU supported the Schedule at the time given the rising COVID-19 infection rates and the shutting down of the economy by Federal and State Governments. However, the circumstances are significantly different now and we do not think it is warranted to extend the Schedule in the Award beyond the 30 June 2020.
3. One of the major reasons the ASU supported the Schedule on the 28 March was that it would only exist for 3 months and end on the 30 June 2020. Mr M Rizzo on behalf of the ASU said at the hearing on the 28 March at PN 101:

“Your Honour and the Full Bench, the ASU (indistinct) fully supports 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, thus does expire on 30 June 2020 and so that is a comfort to us and we will see what happens on that particular date, but the ASU commends the variation to the Full Bench and encourages it to (indistinct). If you Honour, please” (emphasis added).

Thus we do not support the extension of the Schedule beyond the agreed time of 30 June 2020.

Circumstances have changed since March 28 2020

4. The ASU submits that the circumstances around the pandemic have changed significantly since March 2020 and thus the extension of Schedule I is unwarranted.
5. In the lead up to the March 28 Full Bench hearing Federal and State Governments were starting to shut down the Australian economy and put in place strict social distancing rules. Meanwhile there was a lot of fear, concern and panic regarding the spread of

COVID-19 resulting in mass infections and deaths in Australia. Headlines in the Sydney Morning Herald and The Age on 16 March 2020 said “*Australia prepares for 50,000 to 150,000 coronavirus deaths*”. Then cited Government health experts who said, “*Under the best scenario of a 20 percent infection rate, about 50,000 people out of 5 million infected with COVID-19 would die. A moderate scenario of 10 million infections – 40 percent of the population – would mean 100,000 dead. In a worst case scenario, 15 million people would get the coronavirus and 150,000 would die*” (see **Attachment 1**).

6. Fortunately, this did not come to pass. At the time of writing there are over 7,500 confirmed cases of COVID-19 and 104 deaths. Also in recent weeks social distancing rules have eased in most parts of Australia, with many normal activities resuming, including schools, and most Australian States reporting little or no new COVID-19 cases. Thus the environment has changed significantly compared to when the ASU agreed to Schedule I in March 2020. In fact, as recently as Friday 26 June, the National Cabinet Statement released by the Prime Minister affirmed the easing of restrictions “National Cabinet recommitted to the strategy of suppression of COVID-19 and to the three step framework to a COVID-Safe Australia” (see **Attachment 2**).
7. Employers may point to the recent increase of infection in Victoria as justification for extending the Schedule. The ASU does not accept this argument. The Clerks – Private Sector Award 2020 is a national Award, not just a Victorian Award. The Commission needs to look at the national wider environment where some States and Territories have not registered new infections for days or weeks in a row.

JobKeeper has been introduced

8. Another major change in circumstances since March 28 2020 which mitigates against the extension of the Schedule was the introduction of the JobKeeper Scheme by the Federal Government on 9 April 2020. JobKeeper provides eligible employers a payment of \$1,500 per fortnight for its employees until the 27 September 2020, while making amendments to the Fair Work Act 2009. The changes to the Act provides significant flexibility for eligible employers to reduce hours, change duties and location of work, and request changes to days and times of work and access to annual leave.
9. The ASU was completely ignorant of any JobKeeper type Scheme when it consented to the insertion of Schedule I into the Award. If we had known of such a Scheme we may

have not have consented to the insertion of Schedule I into the Award. Nevertheless, employers now have an option to access JobKeeper so to protect jobs. A Scheme which did not exist on March 28 and remains in place till nearly the end of September 2020 – the same timeline sought by the extension application.

Employers not using key section of Schedule I

10. Another reason that the extension should not be granted is that employers are not using a key part of the Schedule. Section I.2.5 of the Schedule allows for agreed temporary reduction in ordinary hours to not fewer than 75% of the full-time ordinary hours applicable to the employee. The potential to use this provision in the clerical and administrative industry is massive.
11. The Clerks- Private Sector Award 2020 covers thousands of employers and some 1.6 million workers in Australia. Yet, at the time of writing, figures from the Fair Work Commission inform us that only 24 employers have applied under this Section covering a total of just 352 employees (see **Attachment 3**). On March 28 the ASU thought hundreds of employers covering thousands of workers may make use of this provision. They have not and the ASU has not been approached by actual employers to extend the Schedule. Thus the ASU submits that the extension of the Schedule is unnecessary.

Schedule I may disadvantage some employees

12. The ASU submits that parts of the Schedule already disadvantages some employees and these disadvantages should not be extended. When the ASU consented to the Schedule in March it did so to try and save jobs and hours of work and understood that some workers may be temporarily disadvantaged. But, that the disadvantage would be short lived and end on 30 June 2020.
13. Examples of possible disadvantage are contained in I.2.4 ordinary hours of work for employees working from home. This is because of the increased spread of hours from 7am to 7pm to 6am to 11pm Monday to Friday, employees may not attract the relevant penalty payments. The expanded span of hours clause can also be open to misuse. Many workers covered by this Award are low paid women with limited negotiation power. While there is an agreement mechanism, employees could be pressured to agree to work extended hours with no penalties under this clause. Furthermore, in the employer draft there is no access to arbitration so to settle any disputes.

14. The ASU is also concerned that it was one thing to agree to the Schedule at the height of the crisis to save jobs, but now we are being asked to agree to a new scenario where we are likely to have permanent changes to the way work is performed, especially working from home. Apart from the possible loss of penalty rates, members are also concerned about intensification while working from home, with the distinction between work time and family time being increasingly blurred. As we step into the “new normal” of working from home, a move incidentally which employers resisted for years, the ASU is concerned that we will be establishing patterns of work and custom and practice which disadvantage workers and which will then be difficult to reverse.
15. Furthermore, an extension of the Schedule would be breach of trust for those 352 employees who voted to reduce their hours of work under I.2.5. They voted at the time with the understanding that this disadvantage would be for limited time until 30 June 2020.
16. The ASU submits that the union and some employees knew that some disadvantage may come as a result of the Schedule, but that this would be short-lived and end on 30 June 2020. To extend the Schedule would be to extend the disadvantage and who is to say that the employer groups would not apply again to the Commission to extend the Schedule beyond September. We submit the Commission should end the life of the Schedule on the 30 June 2020 as was agreed by the parties in March 2020.

Alternatives to Schedule I

17. The ASU submits that the Schedule should not be extended because the environment has changed considerably since March, employee disadvantage may be perpetuated and that there are existing alternatives to the Schedule if the employers seek flexibilities. If employers for example want to accommodate those working from home there is already a wide span of hours in the existing Award. Clause 13.3 provides for 7am to 7pm Monday to Friday and 7am to 12.30pm on Saturday. Further under Clause 13.4, those ordinary hours may be altered by agreement up to one hour at either end. This allows for a lot of hours where mutual flexibility can be agreed.
18. Furthermore, the ASU is prepared to make enterprise agreements with employers that address particular needs of that enterprise. The ASU is the most significant union in this Award and has many agreements with employers across the country which vary in size across many industries. Some critics may say that enterprise agreements may take

weeks or months to conclude and thus this suggestion is impractical. We say in response that a normal arbitrated variation to an Award can also take weeks and months. Note the current application before the Commission by the Health Unions to introduce paid pandemic leave in various Awards. These applications were filed on the 16 April 2020 and at the end of June they are still being heard. This is not a criticism of the Commission; it is simply noting the normal course of arbitrated variations to Awards.

19. The ASU is prepared to work with an interested employer to explore the specific requirements of the company and try to come to some mutual agreement. The Commission noted in the Fast Food decision that it will encourage the negotiation of short term EBAs where employers are capable of bargaining and cited S.189(2) of the Fair Work Act which permitted this¹.

The Legal Environment has shifted since March 28

20. The approach taken by the Commission in the Hospitality Award on 24 March 2020 and the Clerks Award on the 28 March 2020 contrasts significantly with more recent Award variation decisions in the Fast Food Award 2010² and the Vehicle Industry³. The legal environment has changed since March 2020, with applications to vary awards or extend Schedules facing a more stringent test by the Commission.
21. Understandably, amidst the panic, confusion and uncertainty caused by the pandemic towards the March 28 Decision, the Commission “fast-tracked” the variations to the Hospitality Industry (General) Award 2010 and the Clerks Award. It noted in its Decision on March 28 in the Clerks Award at paragraph [2] that, “*At the request of the parties, the hearing of this matter was expedited.*”
22. Further in paragraph [9] of the Clerks Award Decision it noted, “*In the Hospitality Decision we observed that the notice provided to parties of the hearing of that application was much shorter than the Commission’s standard practice. We make the same observation in respect of the present matter (emphasis added).*”

¹ [2020] FWC FB 2316 [109]-[111] Fast Food Award 2010

² [2020] FWC FB 2316 [Fast Food Decision]

³ [2020] FWC FB 2367 [Vehicle Industry [2020] [Vehicle Decision]

23. Further still in paragraph [9] it noted regarding the Hospitality Decision that, *“In this instance, the consent of the key industrial parties is the central consideration”* and that, *“In the event that this application had been contested then, plainly, different considerations would have enlivened, necessitating a more protracted hearing process than the one we have adopted in this matter”*. The ASU notes that on this occasion regarding the present employer association application to extend the Schedule in the Clerks Award there is no consent from the ASU and the ACTU. In fact the application is opposed. Thus the Commission should not be comforted by a Joint Application as it justifiably was on March 28.
24. The Commission in its more recent decisions expects employers in future applications to file probative evidence in support of the necessity of the changes to save jobs, given that some COVID-19 restrictions have already been eased, there is a road map for the easing of remaining restrictions, and the JobKeeper Scheme is now in operation (see Fast Food Decision [82]). The Commission now says at [112] of the Fast Food Decision that, *“Any party seeking to expand the operation of the Schedule (or any similar COVID-19 related variations) will be required to make a new application under S.158 supported by probative evidence” (emphasis added)*.
25. While where variations analogous with JobKeeper are sought, the Commission now says protections consistent with JobKeeper must also be included, including access to arbitration (see Fast Food at [84] and Vehicles at [93]).

Conclusion

26. The ASU submits that the employer associations have not provided the Commission with sufficient probative evidence to persuade the Commission of the necessity to extend Schedule I. The legal environment has become more stringent since the Award variations in late March 2020. With the easing of restrictions, and the introduction of JobKeeper, the Commission quite rightly in its more recent decisions has demanded more of applicants. The ASU submits that the necessity to extend Schedule I beyond 30 June 2020 does not exist. The extension which would further disadvantage employees is not needed and unwarranted. The ASU asks the Commission to reject the employer association’s application.

Australia prepares for 50,000 to 150,000 coronavirus deaths

By [Dana McCauley](#), [Eryk Bagshaw](#) and [Rob Harris](#)

March 16, 2020 — 7.44pm

Up to 150,000 Australians could die from the coronavirus under a worst case scenario, the Morrison government says, as it considers advice on restricting visits to pubs, cinemas and aged care homes.

Deputy Chief Medical Officer Paul Kelly said that the number of infections would range between 20 per cent to 60 per cent of the population. He urged the public to comply with social distancing measures such as avoiding large gatherings of 500 or more people.

"This is an infectious disease," Professor Kelly said in Canberra. "The more we can do to separate people and stop the disease spreading, the better. The death rate is around 1 per cent. You can do the maths."

Under the best case scenario of a 20 per cent infection rate, about 50,000 people out of 5 million infected with COVID-19 would die. A moderate scenario of 10 million infections – 40 per cent of the population – would mean 100,000 dead.

In a worst case scenario, 15 million people would get the coronavirus and 150,000 would die.

Professor Kelly said authorities hoped to slow the rise in cases to keep the death rate lower than in other countries.

"Rather than concentrating on numbers, we are focused on preventing a large and rapid rise in cases in the coming weeks and months through thorough and proportionate public health measures," he said.

A six-hour meeting of all Australia's chief medical officers in Canberra on Monday night will also consider whether to reduce the 500-person limit set on Friday for all non-essential mass gatherings for enclosed spaces.

Professor Kelly said federal and state chief health officers would debate whether there should be different restrictions on a "football stadium versus a pub".

"We have been asked to give frank and fearless medical advice from the beginning and that's what we will continue to do," he said.

Prime Minister Scott Morrison and all state and territory leaders are expected to make a decision on the recommendations on Tuesday.

Mr Morrison said the coronavirus was a "one in 100-year event" and slowing the spread of the virus would save lives.

The potential new measures could mean pubs, restaurants and cinemas being either forced to shut or scale down their operations. Popular Sydney pub the Vic on the Park in Marrickville has a capacity of up to 1000. In Melbourne, the Exchange Hotel in the CBD

holds more than 900. Hoyts and Event cinemas in Sydney and Melbourne can hold more than 200 people in a session.

The US Centres for Disease Control and Prevention on Monday recommended a stop to mass gatherings of 50 people or more including weddings, parades and concerts for the next two months. Ireland shut down pubs and New York ordered all restaurants to become take-away only.

The Australian government expects the number of local cases to rise to 1000 by the end of the week after a dramatic increase in confirmed cases in NSW, with an additional 37 positive tests bringing the state's tally to 171 on Monday afternoon.

Six of NSW's cases attended a wedding in Stanwell Tops, between Sydney and Wollongong, on March 6. Another 14 people have been diagnosed with coronavirus in Victoria, taking the number of infected people in the state to 71.

The government is not expected to consider nationwide school closures at this stage as health officials weigh up extending the Easter school holidays in three weeks' time.

All options remain on the table if the infection rate escalates sharply. The government is wary of taking healthcare workers out of the workforce to care for their children or potentially infectious children being sent to stay with more vulnerable grandparents.

"That situation may change in the future," Mr Morrison said on Monday. "When it does, that's when we'll act."

Professor Kelly said elderly people, Australians with a disability and those living in remote communities were at increased risk.

"We need to do what we can to limit the opportunity for the infection to come into aged care," he said.

Aged Care Minister Richard Colbeck on Monday announced that providers would be asked to limit visits to residential facilities.

"Given the risks to older Australians from COVID-19, particularly those with chronic disease and other frailties, we now recommend that residential aged care providers restrict visitor access," Senator Colbeck said.

Energy Minister Angus Taylor said the Council of Australian Governments meeting would prioritise preparing the energy system for the spread of the disease.

"Our priority must be to ensure Australia is well-placed to respond to energy supply disruptions, including electricity, gas and liquid fuels," he said.

Available Online at: <https://www.smh.com.au/politics/federal/australia-prepares-for-50-000-to-150-000-coronavirus-deaths-20200316-p54amn.html>



The Hon. Scott Morrison MP
Prime Minister

Friday 26 June 2020

NATIONAL CABINET STATEMENT

The National Cabinet met today to further discuss Australia's current COVID-19 response, easing restrictions in the coming months, helping Australians prepare to go back to work in a COVID-safe environment and getting the economy moving again.

The Chief Medical Officer, Professor Brendan Murphy, provided an update on the measures underway, the latest data and medical advice in relation to COVID-19.

Treasury Secretary, Dr Stephen Kennedy, provided an update on the labour market and current economic conditions.

There have been over 7,500 confirmed cases in Australia and sadly 104 people have died. There are now around 500 active cases in Australia, and over the past week, daily infection rates have remained low. Testing remains high, with more than 2.2 million tests undertaken in Australia.

National Cabinet discussed the localised outbreaks in Victoria and the health response underway and committed to providing as much support as is necessary. Localised response plans are part of the Three-Step Framework for easing restrictions agreed by all jurisdictions. Victoria is responding well, including with testing and tracing, and the Commonwealth and other jurisdictions stand ready to assist where needed.

National Cabinet recommitted to the strategy of suppression of COVID-19 and to the Three-Step Framework to a COVID-safe Australia.

We need to continue to have the right controls in place to test more people, trace those who test positive and respond to local outbreaks when they occur. These are Precedent Conditions to enable Australia to relax baseline restrictions and enable Australians to live and work in a COVID-safe economy.

National Cabinet thanked Professor Murphy for his work on the COVID-19 response and wished him well in his new role as Secretary of the Commonwealth Department of Health.

National Cabinet will meet again on 10 July 2020.

Localised Health Response

National Cabinet discussed the outbreaks in Victoria and how best to ensure a coordinated, cross-jurisdictional response to localised health outbreaks going forward.

The National Cabinet agreed to a new plan for Australia's Public Health Capacity and COVID-19. Under the plan developed by the AHPPC, six actions for state, territory and Commonwealth governments will improve long term sustainability of the public health workforce for the remainder of COVID-19 and beyond by:

- strengthening a formal surge plan for the public health response workforce and review the ongoing structure of the public health units;
- progressing the national interoperable notifiable disease surveillance system (NINDSS) project and prioritise appropriate interfaces;
- establishing a national training program for surge workforce;
- better support the Communicable Disease Network of Australia (CDNA), including shared costs;
- prioritising enhancing the public health physician workforce capacity; and
- considering options for developing a formal public health workforce training program.

Hotel Quarantine

National Cabinet confirmed that the current hotel quarantine arrangements remain in place. In addition, National Cabinet agreed that further testing will be conducted for all those in hotel quarantine, including within the first 48 hours in quarantine and then on day 10-12 of quarantine.

Roadmap for arts and entertainment venues

National Cabinet asked AHPPC to develop a roadmap for re-opening arts and entertainment venues, in particular to enable planning for productions to commence.

This will build on the AHPPC Statement on the safe return of crowds to stadiums, arenas and large theatres. Under this plan the AHPPC advises that in Step 3, seated and ticked events may take place with crowd limits for example, stadiums with a capacity of up to 40,000 people may operate at 25 per cent seating capacity and stadiums with a capacity of greater than 40,000 people may not have more than 10,000 people. In later steps, states and territories may allow all large venues to admit larger crowds provided there is no evidence of community transmission, the event is seated and ticketed, physical distancing and other public health measures are maintained, and all public health risks are managed.

Small venues and physical distancing

National Cabinet agreed that under Step 3 of the Framework for a COVID-safe Australia and based on AHPPC advice, states and territories can allow small premises to apply a one-person, per two square-metre rule with a COVID-safe plan in place.

Federation Reform

National Cabinet today agreed that former Director-General of the Western Australian Department of Premier and Cabinet and former Commonwealth Cabinet Secretary Mr Peter Conran AM will lead the

review of the former COAG Councils and Ministerial Forums with a view to rationalise and reset their work. National Cabinet also agreed to Terms of Reference for the Review which set out avenues for consultation with Commonwealth and state and territory ministers and officials.

National Cabinet agreed that Review will make recommendations on a streamlined structure, scope and reporting arrangements and on focused regulatory and policy work programs. The review will provide recommendations to National Cabinet by September 2020.

Additional Papers

National Cabinet endorsed a number of papers to enable reopening under a 3 Step Framework for a COVID Safe Australia:

- AHPPC Statement on the review of physical distancing and person density restrictions including for smaller venues;
- AHPPC Statement on Hotel Quarantine;
- AHPPC Statement on risk management for boarding schools and school-based residential colleges;
- AHPPC Statement to update residential aged care facilities about minimising the impact of COVID-19;
- AHPPC Statement on preliminary media reports of the results of a randomised trial of the use of dexamethasone;
- AHPPC Statement on recent outbreaks of COVID-19 in Victoria;
- AHPPC Statement on the safe return of crowds to stadiums, arenas and large theatres; and
- Australian aviation industry's protocol.

[END]

**Contacts: Press Office, (02) 6277 7744
The Hon. Scott Morrison MP, Sydney**

Michael Rizzo

From: Jody Miles
Sent: Tuesday, 23 June 2020 8:15 AM
To: Michael Rizzo
Subject: FW: AM2020/10 - Clerks Award - register of employers [SEC=UNCLASSIFIED]

FYI – see below. The Clerks Award register has not receive any further applications.

From: Clerks Award [mailto:clerksaward@fwc.gov.au]
Sent: Monday, 22 June 2020 4:52 PM
To: Jody Miles
Subject: RE: AM2020/10 - Clerks Award - register of employers [SEC=UNCLASSIFIED]

Good afternoon Jody,

Please note that we have not received any applications in relation to the Clerks Award since the 11th May 2020.

The register provided to the ASU on the 11th May is the most recent copy.

Kind Regards,

[REDACTED]
Modern Awards, Economics and Research Section

Fair Work Commission
[REDACTED]
[REDACTED]

11 Exhibition Street, Melbourne VIC 3000
GPO Box 1994, Melbourne Victoria 3001
www.fwc.gov.au

The Fair Work Commission acknowledges that our business is conducted on the traditional lands of Aboriginal and Torres Strait Islander peoples. We acknowledge their continuing connection to country and pay our respects to their Elders past present and emerging.



From: Jody Miles <JMiles@asu.asn.au>
Sent: Monday, June 22, 2020 4:10 PM
To: Clerks Award <clerksaward@fwc.gov.au>
Subject: FW: AM2020/10 - Clerks Award - register of employers [SEC=UNCLASSIFIED]

Good afternoon,

Could the ASU please receive an update in relation to the Clerks Award as an ASU Industrial Officer has a video conference and also a Full Bench hearing later this week in relation to this Award.

Regards
Jody Miles
ASU National Research Officer

lt: +61 3 9342 1490 |m: 0438 207 720 |e: jmiles@asu.asn.au |w: www.asu.asn.au


Working days: Monday, Tuesday, Wednesday & Thursday (9.30am to 3.00pm)

From: Clerks Award [<mailto:clerksaward@fwc.gov.au>]
Sent: Tuesday, 16 June 2020 8:48 AM
To: Jody Miles
Subject: FW: AM2020/10 - Clerks Award - register of employers [SEC=UNCLASSIFIED]


Hi Jody,

By way of update, please be advised that the Commission has not received any further applications in relation to the Clerks Award. The register sent to the ASU on the 11th May is the most up-to-date copy.

Kind regards,


Senior Research Officer (a/c)
Modern Awards, Economics and Research Section

Fair Work Commission


Level 9, 11 Exhibition St, Melbourne Victoria 3000
GPO Box 1994, Melbourne Victoria 3001

www.fwc.gov.au

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From: Clerks Award
Sent: Wednesday, May 27, 2020 10:20 AM
To: 'JMiles@asu.asn.au' <JMiles@asu.asn.au>
Subject: FW: AM2020/10 - Clerks Award - register of employers [SEC=UNCLASSIFIED]

Hi Jody,

The Commission has not received any further applications under the Clerks Award since our last correspondence with you. The register sent to the ASU on Monday, 11th May still remains the most up-to-date copy. Please find re-attached for convenience.

Kind regards,


Senior Research Officer (a/c)
Modern Awards, Economics and Research Section

Fair Work Commission

Name of business

Accuteque Global
Bartercard Operations Pty Ltd
Bartercard Services Pty Ltd
Buck and Simple
Cardtronics Australasia
Coffee Guru
Cree8
Ezidebit Pty Ltd (part of Global Payments AU/NZ)
Fire EMT Pty Ltd
Gripwell Australia Pty Ltd
Job Capital Pty Ltd
McMillans Pty Ltd
MMK Accounting
Nordwake Pty Ltd
Ricky Richards
Tagline Constructions Pty Ltd
Team Management Systems
Timstock Trading House
Weatherford Australia Pty Ltd
Web Active Corporation Pty Ltd(part of Global Payments AU/NZ)
Westbury Textiles
Wynnum Haulage Pty Ltd
Opteon Property Group Pty Ltd
Altran Project Management

—
Total = 24
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Number of employees affected

Table current as at - 11 May 2020

3
65
3
3
47
7
3
8
3
9
3
3
3
19
13
3
9
4
9
3
3
6
121
2

= Total 352 employees.