

IN THE FAIR WORK COMMISSION

Matter No.: AM2020/10

Applicant: Joint application by the Australian Chamber of Commerce and Industry Group and the Australian Industry Group

MINISTER'S SUBMISSIONS

Introduction

1. These submissions are filed on behalf of The Hon Christian Porter, MP, Minister for Industrial Relations.
2. The submissions are filed in response to the directions issued by the Full Bench on 26 March 2020¹ in respect of the application filed under s 157 of the *Fair Work Act 2009 (Cth)* (**FW Act**) by the Australian Chamber of Commerce and Industry and the Australian Industry Group (together, **the Employers**) in the *Clerks – Private Sector Award 2010 (Clerks Award)*, with the support of the Australian Council of Trade Unions and the Australian Services Union (**ASU**).
3. The Minister relies on s 597 of the FW Act in order to make these submissions on behalf of the Commonwealth in the proceedings. The Minister submits that, given the extraordinary nature of the application, and the context in which it is made, it is in the public interest for the Minister to do so.
4. The Minister strongly supports the application and congratulates the parties to this application, and the ASU, on their preparedness to respond collaboratively to find practical solutions to reduce the hardship suffered by employers and employees created by this extraordinary crisis.
5. In addition, the Minister would like to thank the Fair Work Commission and, in particular, the Full Bench as constituted for its similar preparedness to respond in a practical, flexible and timely way to this situation.
6. It is plain that the COVID-19 pandemic will have unpredictable and unprecedented impacts on the Australian economy, including a profound impact on the capacity of employers in many and perhaps all industries to maintain employment.
7. The focus of the Minister and Government is on keeping more people in work, enhancing the safety net for those who are not in work and keeping businesses alive so that they can get to the other side of this crisis with the capacity to return to normal activity and eventually to full employment.

¹ [2020] FWCFB 1630.

8. While all industries and most businesses will be profoundly affected, it is clear that some will be affected more immediately and more deeply, and the application before the Commission reflects these priorities.

Economic impact on the industries and employment covered by the Clerks Award

9. The National Cabinet agreed on 24 March 2020 to prohibit further activities and introduce enhanced social distancing measures, and agreed to prohibit additional non-essential facilities from opening and services being offered. These further measures will particularly impact those clerical employees who support the many widespread workplaces which are affected, directly and indirectly, by these and other measures, both those currently in place and those which may become necessary in the future.
10. The Clerks Award applies on an occupation basis. It covers employers in the private sector throughout Australia with respect to their employees engaged wholly or principally in clerical work, including administrative duties of a clerical nature.
11. Employees covered by the Clerks Award include payroll staff, receptionists, business helpdesks, executive assistants and other administrative roles critical to keeping businesses running and ensuring Australians are paid.
12. Many of these functions fall within the 'Clerical and Administrative Workers' occupation for the purposes of the monthly Labour Force Survey compiled by the Australian Bureau of Statistics. As at February 2020, that occupation included around 1.56 million employees, representing 14.3% of all employees.² Around two thirds (66.9%) had their pay set by an award or more generous individual arrangements underpinned by the Clerks Award (16.5% and 50.4% respectively).³
13. Clerical and Administrative Workers are engaged by businesses of all sizes, from micro employers to large businesses. In these circumstances, any measure which assists employers who engage clerical workers to maintain employment, and therefore their connection with and support for as many employees as possible, is to be supported, and the Minister strongly endorses the Application.

Additional considerations - annual leave

14. The Joint Application proposes variations regarding the right of employers to require award-covered employees to take annual leave with one week's notice (see clause X.4(o)). In order to make the variation, the Commission must be satisfied that the requirement is '*reasonable*'.⁴ The Full Bench has given a provisional view that the variation is reasonable and is therefore permitted.⁵ However, the Full Bench also sought views from the parties in respect of whether any

² Labour Force Detailed Quarterly, Cat. No. 6291.0.55.003, Nov 2019.

³ ABS, Employee Earnings and Hours, cat. no. 6306.0, May 2018, non-managerial employees; Labour Force Detailed Quarterly, Cat. No. 6291.0.55.003, Feb 2020.

⁴ See s 93(3) of the FW Act.

⁵ [2020] FWCFB 1630 at paragraph [20] – [21].

direction to take annual leave under X.4(n) be subject to a consideration of the relevant employee's personal circumstances.

15. Whether a requirement is 'reasonable' must be determined having regard to the context in which the requirement is imposed.⁶
16. In the context of a proposed temporary amendment to the Clerks Award made in extraordinary circumstances to provide additional flexibility to employers, which is likely to assist them to manage their financial circumstances and to maintain employment, the Minister submits that it is open to the Full Bench to be satisfied that a 'requirement' to take annual leave which is made in accordance with the modified term will be 'reasonable'.
17. The proposed amendment is also consistent with a similar variation made to the *Hospitality Industry (General) Award 2010*⁷, and is accordingly supported by the Minister.

Application consistent with the modern awards objective

18. The measures contained in the proposed variation represent a temporary but necessary response to a current extraordinary situation faced by Australian businesses and their employees. As such they are consistent with both the public interest and the modern award objectives contained in s 134 of the FW Act.
19. In light of the significance of clerical workers to the national economy, and the large number of employees whose employment and livelihoods are at risk, the Minister emphasises the particular relevance of the objective in s 134(h) of the FW Act, which includes the sustainability, performance and competitiveness of the national economy. By assisting in maintaining employment and the viability of businesses, these measures will directly contribute to the strength and performance of the economy, and therefore contribute positively to the achievement of this objective.
20. In addition, the variation is supported by s 134(c), which refers to the need to promote social inclusion through increased workforce participation. Short term shocks to the economy have long term impacts on the most vulnerable workers. There is ample evidence that workforce participation rates take many years to recover following severe economic downturns. This emphasises the critical importance of the Full Bench supporting an approach that encourages employers to retain as many workers as possible in jobs until the immediate crisis passes.
21. For the reasons summarised above, and the reasons identified provisionally by the Full Bench, the Minister strongly supports the granting of the Application.

⁶ *Australian Federation of Air Pilots v HNZ Australia Pty Ltd* [2015] FWCFB 3124.

⁷ *Australian Hotels Association and United Workers' Union* [2020] FWCFB 1574.

Date: 27 March 2020

MinterEllison
Solicitors for the Minister