

Form F46 – Application to vary a modern award

Fair Work Act 2009, ss.157–160

This is an application to the Fair Work Commission to make a modern award or make a determination varying or revoking a modern award, in accordance with Part 2-3 of the [Fair Work Act 2009](#).

The Applicant



These are the details of the person who is making the application.

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input checked="" type="checkbox"/> Other please specify: Registered Organisation		
First name(s)			
Surname			
Postal address	Level 3, 51 Walker Street		
Suburb	North Sydney		
State or territory	NSW	Postcode	2060
Phone number	0405 448 119 and 0400 395 348	Fax number	
Email address	brent.ferguson@aigroup.com.au and ruchi.bhatt@aigroup.com.au		

If the Applicant is a company or organisation please also provide the following details

Legal name of business	Australian Industry Group
Trading name of business	
ABN/ACN	76 369 958 788
Contact person	Brent Ferguson and Ruchi Bhatt

Does the Applicant need an interpreter?



If the Applicant requires an interpreter (other than a friend or family member) in order to participate in conciliation, a conference or hearing, the Fair Work Commission will provide an interpreter at no cost.

Yes – Specify language

No

Does the Applicant require any special assistance at the hearing or conference (eg a hearing loop)?

Yes – Please specify the assistance required

No

Does the Applicant have a representative?



A representative is a person or organisation who is representing the applicant. This might be a lawyer or paid agent, a union or employer organisation, or a family member or friend. There is no requirement to have a representative.

Yes – Provide representative's details below

No

Applicant's representative



These are the details of the person or organisation who is representing the Applicant (if any).

Name of person			
Firm, organisation or company			
Postal address			
Suburb			
State or territory		Postcode	
Phone number		Fax number	
Email address			

Is the Applicant's representative a lawyer or paid agent?

Yes

No

1. Coverage

1.1 What is the name of the modern award to which the application relates?



Include the Award ID/Code No. of the modern award

Fast Food Industry Award 2010 [MA000003]

1.2 What industry is the employer in?

NA

2. Application

2.1 What are you seeking?

Specify which of the following you would like the Commission to make:

- a determination varying a modern award
- a modern award
- a determination revoking a modern award

2.2 What are the details of your application?

The Australian Industry Group seeks the insertion of a new schedule in the *Fast Food Industry Award 2010* in response to the COVID-19 pandemic, in the terms set out at **Attachment A**.

Attach additional pages, if necessary.

2.3 What are the grounds being relied on?

Using numbered paragraphs, specify the grounds on which you are seeking the proposed variations.



You must outline how the proposed variation etc is necessary in order to achieve the modern awards objective as well as any additional requirements set out in the FW Act.

We refer to **Attachment B**.

Attach additional pages, if necessary.

Signature



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

Signature	
Name	Stephen Smith
Date	1 May 2020
Capacity/Position	Head of National Workplace Relations Policy



Where this form is not being completed and signed by the Applicant, include the name of the person who is completing the form on their behalf in the **Capacity/Position** section.

PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS



DRAFT DETERMINATION

Fair Work Act 2009

s.157 – Application to vary a modern award to achieve the modern awards objective

Application by the Australian Industry Group

([insert matter number])

FAST FOOD INDUSTRY AWARD 2010

[MA000003]

[COMMISSION MEMBER(S)]

[INSERT LOCATION AND DATE]

Application to vary the Fast Food Industry Award 2010

A. Further to the decision [insert citation] issued by the Full Bench on [insert date], the above award is varied as follows:

1. By inserting the following Schedule H:

Schedule H - Award flexibility during the COVID-19 Pandemic

H.1 The provisions of Schedule H are aimed at preserving the ongoing viability of businesses and preserving jobs during the COVID-19 pandemic and not to set any precedent in relation to award entitlements after its expiry date.

H.2 Schedule H operates from [insert date] (**Date of Operation**) until [insert date 3 months from the date of operation]. The period of operation can be extended on application to the Fair Work Commission.

H.3 Schedule H applies to:

(a) employers who do not qualify for Jobkeeper payments and their employees;
and

(b) employees who do not qualify for Jobkeeper payments and their employers in relation to those employees.

H.4 If an employer or employee become eligible for Jobkeeper payments, the terms of Schedule H will not apply.

H.5 Schedule H is intended to assist in the continuing employment of employees.

H.6 During the operation of Schedule H, the following provisions apply.

H.7 Flexible part-time employment

While Schedule H is in operation and subject to written agreement between an employee and their employer in accordance with clause H.7.2, the following provisions will, in relation to that employee, operate instead of clause 12 of the award until [insert date 3 months from the Date of Operation]:

H.7.1 A part time employee is an employee who:

- (a) Works at least 8 but less than 38 hours per week;
- (b) Has reasonably predictable hours of work; and
- (c) Receives on a pro-rata basis, equivalent pay and conditions to those of full-time employees.

H.7.2 The employer and the part-time employee will agree in writing upon:

- (a) The number of hours of work which are guaranteed to be provided and paid to the employee each week or, where the employer operates a roster, the number of hours of work which are guaranteed to be provided and paid to the employee over the roster cycle (**the guaranteed minimum hours**); and
- (b) The days of the week, and the periods in each of those days, when the employee will be available to work the guaranteed minimum hours (**the employee's agreed availability**).

H.7.3 The employee must not be rostered to work less than 3 consecutive hours in any shift.

H.7.4 The guaranteed minimum hours shall not be less than 8 hours per week.

H.7.5 Any change to the guaranteed minimum hours may only occur with written consent of the part-time employee.

H.7.6 An employee may be offered ordinary hours in addition to the guaranteed minimum hours (**additional hours**) within the employee's agreed availability. The employee may agree to work those additional hours provided that:

- (a) The additional hours are offered in accordance with clause 25 – Hours of work and clause 26 – Overtime;
- (b) The employee may not be rostered for work outside of the employee's agreed availability;
- (c) agreed additional hours are paid at ordinary rates (including any applicable penalties payable for working ordinary hours at the relevant times);
- (d) An employee will accrue entitlements such as annual leave and personal/carer's leave on agreed additional hours worked;

- (e) The agreement to work additional hours may be withdrawn by a part-time employee with 14 days written notice;
- (f) The employee can refuse to work additional hours when offered on any occasion;
- (g) Additional hours worked in accordance with this clause are not overtime; and
- (h) Where there is a requirement to work overtime in accordance with clause 26, overtime rates will apply.

H.7.7 A part-time employee who immediately prior to the Date of Operation has a written agreement with their employer for a regular pattern of hours is entitled to continue to be rostered in accordance with that agreement, unless that agreement is replaced by a new written agreement made in accordance with clause H.7.2. If a part-time employee agrees to such a change, they shall, beyond Schedule H ceasing operation, revert to the previously agreed regular pattern of hours.

H.7.8 If an employee is first employed as a part-time employee during the operation of Schedule H, their employment beyond Schedule H ceasing operation will be on a casual basis unless:

- (a) the employer and employee agree that the employee will be engaged on a part-time basis beyond this period, and
- (b) the employer and employee reach agreement in writing on the matters identified in with clause 12.

H.8 Annual leave

H.8.1 Subject to clause H.8.3 and despite clauses 28.6, 28.7 and 28.8 (Annual leave), an employer may, subject to considering an employee's personal circumstances, request the employee in writing to take paid annual leave. Such a request must be made a minimum of 72 hours before the date on which the annual leave is to commence.

H.8.2 If the employer gives the employee a request to take paid annual leave, and complying with the request will not result in the employee having a balance of paid annual leave of fewer than 2 weeks, the employee must consider the request and must not unreasonably refuse the request.

H.8.3 A period of leave under clause H.8 must start before [insert date 4 weeks from the Date of Operation] but may end after that date.

H.8.4 Clause H.8.1 does not prevent an employer and an employee from agreeing to the employee taking annual leave at any time.

H.8.5 An employer can only request that an employee take annual leave pursuant to this clause if the request is made for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 and to assist the employer to avoid or minimise the loss of employment.

H.9 Close down

H.9.1 Subject to clauses H.9.2, H.9.3 and H.9.4, an employer may:

- (a) Require an employee to take annual leave as part of a close down of its operation or part of its operation by giving at least 48 hours' notice or any shorter period of notice that may be agreed; and
- (b) Where an employee has not accrued sufficient leave to cover part or all of the close down, the employee is to be allowed paid annual leave for the period for which they have accrued sufficient leave and given unpaid leave for the remainder of the closedown.

H.9.2 Clause H.9.1 applies if the employer has decided to close down for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19.

H.9.3 An employer must provide an employee with written notice of any requirement to take annual leave or unpaid leave in accordance with this clause. An employee is not required to take leave under clause H.9.1 unless the employee is also advised in writing that the employer consents to a dispute arising from the requirement being settled by the Fair Work Commission through consent arbitration in accordance with clause 9.5 – Dispute Resolution and section 739(4) of the Act.

H.9.4 Clause H.9.1 only permits an employer to require an employee to take unpaid leave if it is in connection with a close down that commenced prior to [insert date 4 weeks from the Date of Operation] and the unpaid leave does not extend beyond [insert date 8 weeks from the Date of Operation].

H.9.5 Where an employee is placed on unpaid leave pursuant to H.9.1(b), the period of unpaid leave will count as service for the purposes of relevant award and NES entitlements.

H.9.6 If an employee is required to take unpaid leave pursuant to clause H.9.1(b) and the employee makes a request to engage in:

- (a) reasonable secondary employment;
- (b) training;
- (c) professional development;

during the period of unpaid leave, the employer must consider and not unreasonably refuse the request.

H.10 Dispute resolution

Any dispute regarding the operation of Schedule H may be referred to the Fair Work Commission in accordance with clause 9 – Dispute resolution.

2. Insert the following in clause 3.1:

Jobkeeper payment means a jobkeeper payment payable to an entity under section 14 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*

3. By updating the table of contents and cross-references accordingly.

B. This determination comes into operation on [insert date]. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after [insert date].

COMMISSION MEMBER

Attachment B

General

1. The Australian Industry Group (**Ai Group**) seeks a variation to the *Fast Food Industry Award 2010* (**Award**) in the terms set out at Attachment A to our application. If granted, the proposed variation would result in the insertion of a new schedule to the Award (**Schedule H**), which would apply for a period of three months. The application is made and the variation is sought in light of the unprecedented challenges facing employers and employees in the context of the COVID-19 pandemic (**Pandemic**).
2. Ai Group has engaged in detailed and extensive discussions with the Shop, Distributive and Allied Employees' Association (**SDA**) and the Australian Council of Trade Unions (**ACTU**) about the proposed variation. The ACTU and SDA consent to the variation sought. Ai Group and the SDA are registered organisations representing employers and employees, respectively, in the fast food industry.
3. Ai Group submits that the variation proposed is necessary to ensure that the Award achieves the modern awards objective. The bases for its submission are set out herein.

The Pandemic and its Impact on Work Performed by Employees and Employers covered by the Award

4. An Information Note published by the Commission contains extensive detail about various measures that have been taken by State and Federal Governments for the purposes of endeavouring to slow the spread of the Pandemic. We refer to and rely upon that Information Note. It was most recently updated on 17 April 2020.¹
5. Relevantly:
 - (a) Since midday on 23 March 2020, the Federal Government has required that restaurants and cafes restrict their services to the provision of food and beverages for takeaway and delivery.

¹ Fair Work Commission, *Information note – Government responses to COVID-19 pandemic* (updated 17 April 2020).

- (b) Since 26 March 2020:
 - (i) The Federal Government has required that food outlets operating in food courts within shopping centres restrict their services to the provision of food and beverages for takeaway and delivery.
 - (ii) The Federal Government has implemented a ban on international travel, subject to a limited number of exceptions.
- (c) Since 29 March 2020, the Federal Government has advised people to stay at home unless partaking in a very limited range of activities:
 - (i) Shopping for what is needed – food and other essential supplies;
 - (ii) Medical or health care needs, including compassionate requirements;
 - (iii) Exercise in compliance with the public gathering requirement; and
 - (iv) Work and study, if it cannot be done remotely.
- (d) Since 29 March 2020 the Federal Government has also imposed a limitation on the number of persons that can gather together. The general requirement is not more than two persons, with the exception of people of the same household and family units. In recent days, some of these restrictions have been eased slightly in certain states. For example, in New South Wales, from 1 May 2020, two adults may visit another household.

6. In addition to the above, various states and territories have imposed restrictions on the ability of a person to cross state / territory borders.

7. As a result of the aforementioned factors and the health risks posed by the Pandemic, the operations of employers covered by the Award have been significantly impacted. In particular, fast food outlets have experienced a dramatic decline in demand from consumers. This appears to be attributable to:

- (a) Reduced foot traffic in shopping centres given Government restrictions and advice concerning the number of people who may gather together and the limited purposes for which persons should be leaving their homes.
- (b) A prohibition on people dining in food courts in shopping centres.
- (c) A prohibition on people dining in fast food restaurants.

- (d) Reduced foot traffic through airports given Government restrictions on travel and state / territory border crossings.
 - (e) Reduced foot traffic through central business districts given Government advice to work from home wherever possible.
 - (f) Reduced movement generally, including visiting standalone food outlets, in light of Government advice regarding the limited purposes for which persons should be leaving their homes.
8. The pressures on employers covered by the Award at this time are multifaceted and cumulative in nature. They include, most notably, concerns about dramatic reductions in demand for the products and services they provide and the consequential reductions in revenue and demand for labour.
9. Many employers in the fast food industry apply the Award to their employees (that is, they are not covered by an enterprise agreement). A recent information note published by the Commission in the context of matter AM2020/12 identifies that of the range of industries there considered by reference to ANZSIC categories, the 'Accommodation and Food Services' industry exhibits the higher proportion of award reliance, with some 44.9% of employers applying the relevant modern award. The Award is one such award.
10. In addition, in December 2019, the Commission terminated² the enterprise agreement that applied to all McDonald's outlets in Australia and to more than 100,000 McDonald's employees. McDonald's is the largest fast food chain in the country and the Award now applies to its employees.
11. We also note that in a recent report³ prepared by Professor Borland for the Commission, the Professor identified the fast food industry as being one that "seem[s] most likely to experience decreases in employment as an immediate consequence of COVID-19"⁴. The Award was identified as an award "where it might be most valuable in the immediate term to allow extra

² *Re McDonald's Australia Enterprise Agreement 2013* [2019] FWCA 8563.

³ Professor Jeff Borland, *Benefit from greater flexibility in employment arrangements, a report to the Fair Work Commission* (March 2020).

⁴ Professor Jeff Borland, *Benefit from greater flexibility in employment arrangements, a report to the Fair Work Commission* (March 2020) at page 3.

flexibility in employment arrangements – in terms of the number of workers affected and the scope for adjustment in hours of work”⁵.

The Relevant Legislative Requirements

12. Ai Group’s application is made pursuant to s.157 of the *Fair Work Act 2009 (Act)*.
13. Section 157 of the Act empowers the Commission to vary modern awards if necessary to achieve the modern awards objective.
14. The modern awards objective requires the Commission to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, having regard to the matters set out in s.134(1) of the Act.
15. In its recent decision about variations the *Clerks – Private Sector Award 2010 (Clerks Award)* in the context of the Pandemic, the Commission characterised the contextual considerations surrounding the application there made as follows:

[41] *The context in which the Joint Application is being advanced and the character of the variations proposed are important contextual considerations. In particular, the variations are:*

(a) are temporary in nature;

(b) are advanced by consent;

(c) are seen as necessary, based on the party’s experience of the COVID-19 Pandemic, the Governments response and the impact these are cumulatively having on employment, employment relationships and working arrangements; and

*(d) are aimed at providing employers and employees with the various flexibilities in working arrangements that are now seen as necessary options to preserve, as best as can be, on-going employment, paid hours of work and alternatives to standing down employees without pay or making employees redundant.*⁶

16. In our submission, those contextual considerations are also relevant to this application and lend support to the grant of the variation sought. In particular, we consider that the consent of

⁵ Professor Jeff Borland, *Benefit from greater flexibility in employment arrangements, a report to the Fair Work Commission* (March 2020) at page 4.

⁶ *Application to vary the Clerks – Private Sector Award 2010* [2020] FWCFB 1690 at [41].

the parties to the application, in itself, demonstrates the critical situation the parties and their constituencies find themselves in.

17. The circumstances warrant a variation to the minimum safety net that reflects a 'trade off' between additional operational flexibilities against some employment benefits, with a view to maintaining the viability of employers and the ongoing employment of their employees.

The Proposed Variations

18. The key aspects of proposed variation are explained hereunder.
19. We note at the outset that the proposed variations would apply to an employer and their employees only where they do not qualify for the recently introduced Jobkeeper scheme. That is, flexibilities afforded by Part 6-4C of the Act and the flexibilities afforded by the proposed new Schedule H are mutually exclusive.
20. Accordingly, the proposed variations are designed to fill the regulatory gap left by the Jobkeeper scheme and provide employers who cannot access the flexibilities now contained in the Act with a combination of measures that may be implemented to moderate the impacts of the Pandemic. We note in this regard that the industry consists of a number of large employers who employ the majority of employees in the industry. As the Commission observed in its decision of 2017 regarding a proposal to reduce penalty rates in the Award:

[1266] ... In terms of employee numbers the industry is dominated by the QSR major chains⁷ which employ about 86 per cent of the 214,265 Fast Food industry employees. Just under half (98,911 employees; 46 per cent) of Fast Food industry employees are employed in McDonald's outlets.⁸
21. By virtue of the size and scope of such employers, they may not satisfy the eligibility criteria for the Jobkeeper scheme. Some employees covered by the Award may also not satisfy the various relevant eligibility criteria. Schedule H would apply in all such circumstances.

⁷ I.e. 'Quick Service Restaurants' with more than 50 outlets.

⁸ 4 yearly review of modern awards – Penalty Rates [2017] FWCFB 1001 at [1266].

Clause H.7 – Part-time employment

22. Clause H.7 provides a temporary and alternate scheme for part-time employment. In circumstances where it applies, clause 12 would not apply.
23. The proposed provisions would operate as follows:
- (a) The provision operates for a period of three months from the date of operation of Schedule H.
 - (b) It would apply to pre-existing part-time employees and new employees employed pursuant to these provisions, only where the employer and employee reach agreement in accordance with clause H.7.2. Clause H.7.2 contemplates that an employer and employee may reach agreement in writing upon both of the following:
 - (i) The number of hours of work that the employee is guaranteed to be provided and paid for each week or roster cycle, as relevant (**Guaranteed Minimum Hours**).
 - (ii) The days of the week and the periods in each of those days when the employee will be available to work (**Agreed Availability**).
 - (c) An employee's Guaranteed Minimum Hours may be changed by written agreement.
 - (d) The clause requires that an employee must not be rostered to work for less than 3 consecutive hours in any shift and that the Guaranteed Minimum Hours must be at least eight hours per week. Together, these aspects of the proposed clause impose a floor on the number of hours that an employee may be required to work in a shift and in a week, respectively.
 - (e) An employee's hours of work are further regulated by the proposed definition of part-time employment, which relevantly states that a part-time employee will have reasonably predictable hours of work.
 - (f) An employee may be offered ordinary hours of work within their Agreed Availability in addition to their Guaranteed Minimum Hours, provided that the various conditions at clause H.7.6(a) – (h) are met. We do not propose to set out all of those conditions but highlight that:

(i) Additional hours of work are to be paid at ordinary rates (unless they constitute overtime, in accordance with clause 26). The proposed model of engagement of part-time employment enables an employer to provide permanent employees with paid hours of work despite reduced customer demand in a more flexible and agile way. Specifically, an employer can increase the number of ordinary hours to be worked by an employee in the event of, for instance, an unexpected spike in customer demand or a need to cover staff absences, absent the cost imposition of overtime rates. It also enables an employer to continue to engage part-time employees on the basis of what might be a more conservative guaranteed number of ordinary hours in a week than what is currently agreed under clause 12; with the prospect of increasing those hours as needed without being deterred by the impact of paying overtime rates.

(ii) Importantly, an employee cannot be *required* to work additional hours. An employee can refuse to work additional hours when offered on any occasion. An employee can also subsequently withdraw their agreement to work those hours, provided that the employer is provided with 14 days' notice.

(g) Clause 12, which regulates part-time employment, would not apply where an employer and employee have reached agreement pursuant to clause H.7.

(h) At clause H.7.7 and clause H.7.8, the proposal deals with the manner in which employees who have reached an agreement under clause H.7.2 will revert to part-time or casual employment under the Award when Schedule H ceases to operate.

24. Clause H.7 reflects a carefully constructed and sophisticated mechanism for enabling the provision of paid work on an ongoing and permanent basis, whilst providing for greater flexibility in relation to the treatment of hours worked by an employee that are in addition to their Guaranteed Minimum Hours. Various elements of the clause are deliberately designed to ensure that employees are offered work in accordance with their indicated availability and to ensure that employees have an ability to refuse to work any additional hours offered to them.

25. Clause H.7 is, in our submission, an appropriate temporary measure that will facilitate the sustainable and ongoing employment of part-time employees in what is a dynamic and unprecedented environment warranting the grant of greater flexibility than that which is currently afforded by clause 12 of the Award.

Clause H.8 - Annual leave

26. The proposed clause H.8 enables an employer to request that an employee take annual leave.
27. The provision contains various safeguards and limitations that are intended to ensure that whilst the provision provides a mechanism through which employees may be requested to take annual leave, such a request can be made only in certain circumstances and provided that various conditions are met. Importantly, the provision expressly contemplates that an employee may refuse an employer's request, however, must not *unreasonably* do so.
28. The other key elements of the clause are as follows:
- (a) An employer may make a request pursuant to clause H.8 subject to considering an employee's personal circumstances.
 - (b) The request must be made in writing.
 - (c) The request must be made at least 72 hours before the date on which the leave would commence.
 - (d) The request may be made only if it is made for reasons attributable to the Pandemic or Government initiatives to slow the transmission of COVID-19 and to assist the employer to avoid or minimise the loss of employment.
 - (e) An employee is not required to consider the request unless the request would leave the employee with a balance of two weeks of accrued annual leave.
 - (f) A period of leave taken pursuant to this clause must commence within four weeks of the date of operation of Schedule H, however it may end after that date.

Clause H.9 – Close down

29. Clause H.9.1 enables an employer to require an employee to take annual leave as part of a close down of its operations or part of its operations. Where an employee has not accrued sufficient annual leave to close all or part of the close down, the employee is to be allowed

paid annual leave for the period for which they have accrued sufficient leave and given unpaid leave for the remainder of the close down.

30. This clause also contains various safeguards and limitations:

- (a) Clause H.9.1 applies only if the employer has decided to close down for reasons attributable to the Pandemic or Government initiatives to slow the transmission of COVID-19.
- (b) An employee must be provided with *written notice* of a requirement to take annual leave or unpaid leave in accordance with this clause.
- (c) A period of at least 48 hours' notice must be provided, unless a shorter notice period is agreed.
- (d) The clause permits an employer to require an employee to take unpaid leave only if it is in connection with a close down that commenced within the first four weeks of the operation of Schedule H and the leave does not extend beyond eight weeks from that same date.
- (e) An employee is not required to take leave pursuant to the clause unless the employee is also advised in writing that the employer consents to any dispute arising from the requirement being settled by the Commission through consent arbitration in accordance with clause 9.5 of the Award and s.739(4) of the Act. The provision is not, however, intended to enable parties to a dispute to access consent arbitration unless the parties have endeavored to resolve the dispute at the enterprise level in accordance with clauses 9.2 and 9.3 of the Award; nor is the provision intended to preclude parties to agreeing that the matter be dealt with by the Commission in some other way, in accordance with clause 9.5.
- (f) A period of unpaid leave counts as services for the purposes of any relevant award and NES entitlements.
- (g) If an employee required to take unpaid leave requests to engage in reasonable secondary employment, training and / or professional development during the period of leave, the employer must consider and not unreasonably refuse the request.

Section 134 Considerations

31. The variation to the Award is necessary to achieve the modern awards objective in the circumstances of the Pandemic, having regard to the matters listed at s.134(1) of the Act. In particular:

- (a) Schedule H strikes an appropriate balance between what is “fair” for employers and employees in the context of the Pandemic. The proposed variations must be considered in light of the acute need for additional flexibilities that are facing employers in the current context. It is important to note in this regard that the variations proposed are temporary. Subject to an application being made to extend the operation of Schedule H, they would cease to operate after three months.
- (b) The Award, in its current form, is not “relevant”. It does not reflect the operational realities in which employers and employees are endeavouring to currently operate. The insertion of the proposed schedule would address this deficiency.
- (c) To the extent that the Commission considers that employees covered by the Award are ‘low paid’ in the sense contemplated by s.134(1)(a), we refer to and rely upon the Commission’s observations in its recent decision concerning the Clerks Award:
*[53] ... employers and employees face an invidious choice and the retention of as many employees as possible in employment, albeit on reduced hours, is plainly a priority.*⁹
- (d) It is also relevant that the clause seeks to mitigate the potential impact of the proposed variations in various ways, as outlined in this submission.
- (e) The proposed variations may encourage enterprise bargaining (s.134(1)(b)).
- (f) The measures proposed in Schedule H (particularly clause H.7) may increase workforce participation (s.134(1)(c)). To the extent that the proposed variations do not increase workforce participation relative to the level of workforce participation prior to the Pandemic, it will in our submission enable the retention of “as many employees in

⁹ *Application to vary the Clerks – Private Sector Award 2010* [2020] FWCFB 1690 at [53].

employment as practicable in the current crisis".¹⁰ This is, in our submission, a consideration weighing in favour of the grant of the proposed variation.

- (g) The proposed schedule will clearly promote flexible modern work practices and the efficient and productive performance of work (s.134(1)(d)).¹¹
- (h) Section 134(1)(da) is a neutral consideration.
- (i) Section 134(1)(e) is a neutral consideration.
- (j) The proposed variation will have a positive impact on business (s.134(1)(f))¹². It will provide employers with essential flexibilities that are necessary to enable them to better 'weather the storm'. Ensuring the ongoing viability of employers beyond the Pandemic is vital to ensuring that employees retain employment opportunities.
- (k) Section 134(1)(g) is a neutral consideration.
- (l) Though difficult to quantify in precise terms, we submit that the variation proposed will ultimately have a positive impact on employment growth, inflation and the sustainability, performance and competitiveness of the national economy (s.134(1)(h)).

¹⁰ *Application to vary the Clerks – Private Sector Award 2010* [2020] FWCFB 1690 at [55].

¹¹ *Application to vary the Clerks – Private Sector Award 2010* [2020] FWCFB 1690 at [57].

¹² *Application to vary the Clerks – Private Sector Award 2010* [2020] FWCFB 1690 at [56].