[2020] FWCFB 1690

DECISION

Fair Work Act 2009
s.157 - FWC may vary etc. modern awards if necessary to achieve modern awards objective

Application to vary the Clerks – Private Sector Award 2010
(AM2020/10)

Clerical industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER BISSETT

MELBOURNE, 28 MARCH 2020

Joint Application to vary modern award to achieve the modern awards objective – application supported by ACTU and ASU –determination made.

1. Background

[1] This decision concerns an application to vary the *Clerks-Private Sector Award 2010* (MA000002) (the Clerks Award) filed jointly by the Australian Chamber of Commerce and Industry (ACCI) and the Australian Industry Group (Ai Group), with the support of the Australian Council of Trade Unions (ACTU) and the Australian Services Union (ASU) on 26 March 2020 (the Joint Application). A revised draft variation determination was filed on 27 March 2020, which did not materially alter the substance of the variations proposed.

[2] At the request of the parties, the hearing of this matter was expedited.

[3] On 26 March 2020, we issued a statement (the 26 March Statement)[1] setting out the background to the application and expressed a number of *provisional* views including that:

> '[21] It is our *provisional* view that the term proposed is a permitted term and that it is 'reasonable' within the meaning of s.93(3). In relation to the latter point we invite the applicants to consider varying proposed clause (o) such that the employer is to consider the personal circumstances of an employee before issuing a direction for that employee to take accrued annual leave.'[2]

[1] [2020] FWCFB 1630

[2] Also see the other provisional views at [23] and [24]

[4] In the 26 March Statement we invited any interested party to file a written submission supporting or opposing the Joint Application and the *provisional* views set out at paragraphs [21], [23] and [24] of the 26 March Statement by 4pm on Friday 27 March 2020. Parties interested in attending the hearing by telephone were also invited to send an email to the President's chambers providing their name and contact number by 4pm on Friday 27 March 2020.

[5] The following submissions were received from:

- the Honourable Christian Porter MP, Minister for Industrial Relations on 27 March 2020; and
- the ACCI and Ai Group on 27 March 2020.

[6] In addition to ACCI, Ai Group and the ASU – requests to attend the telephone hearing were filed by the ACTU and the Minister for Industrial Relations (Minister).

[7] The application was heard at 9:30am on Saturday 28 March 2020 by telephone. The following parties were represented at the hearing:

- ACCI;
- Ai Group;
- ACTU;
- ASU; and
- Minister.

[8] By way of background we note that on 24 March 2020 we granted an application to vary the *Hospitality Industry (General) Award 2010* (the Hospitality Decision). Our reasons for that decision were published on 25 March 2020[3] (the Hospitality decision).

[9] 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. At [9] – [13] of the Hospitality Decision we set out the Commission's obligations to afford procedural fairness and noted the content of the doctrine of procedural fairness is determined by the context. In the Hospitality Decision, we concluded as follows:

> '[11] Relevantly, s.577(a) and (b) provide that the Commission must perform its functions and exercise its powers in a manner that:
>
> '(a) Is fair and just; and
>
> (b) Is quick, informal, and avoids unnecessary technicalities;'.
>
> [12] The key contextual considerations in the matter before us are:

[3] [2020] FWCFB 1574

- the statutory framework;
- the consent of the key interested parties;
- the parties' joint request for expedition; and
- the need to respond quickly to a rapidly changing industrial environment.

[13] In this instance, the consent of the key industrial parties' is the central consideration.

[14] In the event that this application had been contested then, plainly, different considerations would have been enlivened, necessitating a more protracted hearing process than the one we have adopted in this matter.'

[10] Similar circumstances arise in relation to the Joint Application. The Joint Application was made with the consent of the key industrial parties. A Statement in relation to the Joint Application was published on the Commission's website and sent to all subscribers on 26 March 2020. Any interested party was provided with an opportunity to respond to the Joint Application and to participate in the hearing. In these circumstances we are satisfied that we have met our obligation to afford procedural fairness to those affected by the Joint Application.

2. COVID-19 Pandemic

[11] The application arises from the unique set of circumstances pertaining to the COVID-19 pandemic.

[12] In the Hospitality decision we set out the range of Government responses to the COVID-19 pandemic at [16] to [27].

[13] The Commission has published an information note on the Government responses to the COVID-19 pandemic on its website. The information note outlines the measures taken by both federal and state governments to put restrictions on social gatherings and non-essential businesses, as well as the assistance provided to support businesses and households.

Impact on clerical and office work

[14] Annexure B to the Joint Application sets out the following impacts of the COVID-19 pandemic on office work:

'50. Office work is currently materially impacted by CoV.

51. Most offices in CBD's and major towns are now empty with employees encouraged to work from home as far as practicable.

52. Those still attending work are adopting new work patterns to reduce the level of exposure to colleagues.

> 53. This includes rostering a limited number of employees into work at any one time and spacing employees out in the physical office environment.'

[15] The Minister's written submission also addresses the impact of the COVID-19 pandemic on business and in particular clerical work, at [6] – [11] and [13]:

> '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.
>
> 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 …
>
> 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.'[4]

[16] Further, as noted at [12] in the Minister's submission many of the functions covered by the Clerks Award fall within the occupation of 'Clerical and Administrative Worker' 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.[5] Around two thirds of those employees (66.9%) had

[4] Minister's submission, 27 March 2020

[5] Labour Force Detailed Quarterly, Cat. No. 6291.0.55.003, Nov 2019

their pay set by an award or by more generous individual arrangements underpinned by the Clerks Award (16.5% and 50.4% respectively).[6]

3. The Application

[17] The application seeks to add a new schedule; Schedule I–Award Flexibility during the COVID-19 Pandemic, to the Clerks Award. It is proposed that the new schedule operate until 30 June 2020.

[18] The variation proposed is directed at providing targeted flexibility in the relation to:

- the range of duties employees can be required to perform;
- the minimum engagement for a part-time and casual employees working from home;
- the spread of ordinary hours of work for day workers working from home;
- the temporary reduction of ordinary hours by agreement;
- the taking of annual leave; and
- the notice period for a close-down.

(i) Period of operation

[19] The Schedule has a limited life and will operate from 28 March 2020 until 30 June 2020. The period of operation can be extended on application.

(ii) Operational flexibility

[20] Clause I.2.1(a) and (b) provide that employees may be directed to perform duties outside the scope of their classification subject to:

- such duties being within their skill and competency;
- the duties being 'safe and the employee is licensed and qualified to perform them;' and
- a requirement that an employer must not reduce an employee's pay as a result of being directed to perform duties in accordance with the clause.

[21] We also note that clause 19.7, Higher Duties Allowance, will apply to an employee 'when required to perform any of the duties in a classification higher than their usual classification for more than one day.'[7]

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[6] 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

[7] See clause 19.7 Clerks Award

(iii) Working from home

[22] Proposed clauses I.2.2, I.2.3 and I.2.4 provide flexibility in relation to employees working from home as follows:

- Clause I.2.2 provides that (instead of clause 11.5 Part Time Employment) an employer must roster a part-time employee who is working from home by agreement with the employee, for a minimum of 2 consecutive hours on any shift.

- Clause I.2.3 provides that (instead of clause 12.4 Casual Employment) an employer must pay a casual employee who is working from home by agreement with the employer, a minimum payment of 2 hours work at the appropriate rate.

- Clause I.2.4 provides for agreed flexibility in the spread of ordinary hours of work for day workers who are working from home.

(iv) Flexibility in hours of work – agreed temporary reduction in ordinary hours

[23] Proposed clause I.2.5 facilitates agreements between an employer and the full time and part-time employees in a workplace or section of the workplace, to temporarily reduce ordinary hours. Proposed clause I.2.5(b) provides that:

> (b) At least 75% of the full-time and part-time employees in the relevant workplace or section must approve any agreement to temporarily reduce ordinary hours.

[24] Proposed clause I.2.5(c)(i) provides that hours of work may be reduced to not fewer than 75% of the full-time ordinary hours applicable to a full-time employee immediately prior to the reduction in ordinary hours.

[25] Proposed clause I.2.5(c)(ii) provides that hours of work may be reduced to not fewer than 75% of the part-time employee's agreed hours immediately prior to the reduction in ordinary hours.

[26] Proposed clause I.2.5 provides a number of safeguards that condition the exercise of an employer's power to direct such shorter full time or part time hours:

- The support of employees to the temporary reduction of hours is to be determined by a vote and at least 75% of the employees must agree. For the vote to be valid the employer must comply with the following requirements (set out in proposed clause I.2.5(h)):

    - Where any of the employees are known to be members of the Australian Services Union or another organisation, the ASU or other organisation shall be informed before the vote takes place;

- Prior to the vote of employees, the employer shall provide the employees with the contact details of the ASU, should they wish to contact the ASU for advice;

- The employer must notify the Fair Work Commission by emailing XXXX@fwc.gov.au[8] that the employer proposes to conduct a vote under Schedule I. The employer shall provide the work email addresses of the employees who will be participating in the vote, to the Commission. The Commission will then distribute the ASU COVID-19 Information Sheet to the employees prior to the vote. The Commission shall list the name of the business on a register which will be accessible to the ASU, upon request, for the period when Schedule I is in operation; and

- The vote shall not take place until at least 24 hours after the above requirements have been met (i.e. the requirements in clauses I.2.5(h)(i), (ii) and (iii).

- Where a reduction in hours takes effect under clause I.2.5(a), the employee's ordinary hourly rate will be maintained but the weekly wage will be reduced by the same proportion.

- If an employee's hours have been reduced in accordance with clause I.2.5(a) then:

  - the employer must not unreasonably refuse an employee request to engage in reasonable secondary employment;

  - the employer must consider all reasonable employee requests for training, professional development and/or study leave; and

  - all relevant accruals and all entitlements on termination of employment will continue to be based on each employees' weekly ordinary hours of work prior to the commencement of Schedule I.

[27] We note that the Clerks Award currently provides that changes in the hours of a part-time employee may be 'made by agreement in writing between the employer and employee' (see clause 11.3). Further, there is no current impediment to an employee reaching an agreement with their employer to move from full-time to part-time employment. Schedule I is not intended to prevent such flexibilities. Clause I.2.5(e) provides that:

> 'Nothing in Schedule I prevents an employer and an individual employee agreeing in writing (including by electronic means) to reduce the employees' hours or to move the employee temporarily from full time to part time hours of work, with a commensurate reduction in the minimum weekly wage.'

(v) Annual leave and Close down flexibility

[28] Proposed clause I.2.6 states:

[8] The email address will be clerksaward@fwc.gov.au

I.2.6 Annual leave

(a) Employers and individual employees may agree to take up to twice as much annual leave at a proportionately reduced rate for all or part of any agreed or directed period away from work, including any close-down.

(b) Instead of clauses 29.6, 29.7 and 29.8 (Annual leave), an employer may direct an employee to take any annual leave that has accrued, subject to considering the employee's personal circumstances, by giving at least one week's notice, or any shorter period of notice that may be agreed. A direction to take annual leave shall not result in an employee having less than 2 weeks of accrued annual leave remaining.

[29] Proposed clause I.2.7 deals with Close down and states:

I.2.7 Close down

(a) Instead of clause 29.5 (Annual leave), and subject to clause I.2.7(b), an employer may:

(i) require an employee to take annual leave as part of a close-down of its operations by giving at least one week's notice, or part of its operations, or any shorter period of notice that may be agreed; and

(ii) where an employee who 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.

(b) Clause I.2.7(a) does not permit an employer to require an employee to take leave for a period beyond the period of operation of Schedule I.

(c) Where an employee is placed on unpaid leave pursuant to clause I.2.7(a), the period of unpaid leave will count as service for the purposes of relevant award and NES entitlements.

[30] As to the proposed operative date of the variations, Part B of the revised draft determination states:

> 'This determination comes into effect on 28 March 2020. 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 28 March 2020.'

[31] We note that s.165 of the *Fair Work Act 2009* (Cth) (the Act) prescribes when variation determinations come into operation (other than determinations setting, varying or revoking modern award minimum wages), it provides:

'**When variation determinations come into operation, other than determinations setting, varying or revoking modern award minimum wages**

Determinations come into operation on specified day

(1) A determination under this Part that varies a modern award (other than a determination that sets, varies or revokes modern award minimum wages) comes into operation on the day specified in the determination.

Note 1: For when a modern award, or a revocation of a modern award, comes into operation, see section 49.

Note: For when a determination under this Part setting, varying or revoking modern award minimum wages comes into operation, see section 166.

(2) The specified day must not be earlier than the day on which the determination is made, unless:

(a) the determination is made under section 160 (which deals with variation to remove ambiguities or correct errors); and

(b) the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

Determinations take effect from first full pay period

(3) The determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation.'

[32] Part B of the draft variation determination is consistent with the relevant statutory provisions.

4. Consideration

[33] The Commission may make a determination varying a modern award if the Commission is satisfied the determination is necessary to achieve the modern awards objective. The modern awards objective is in s.134 of the *Fair Work Act 2009 (Cth)* (the Act) and provides as follows:

'*What is the modern awards objective?*

134(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

> (c) the need to promote social inclusion through increased workforce participation; and
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> (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
>
> (da) the need to provide additional remuneration for:
>
> (i) employees working overtime; or
>
> (ii) employees working unsocial, irregular or unpredictable hours; or
>
> (iii) employees working on weekends or public holidays; or
>
> (iv) employees working shifts; and
>
> (e) the principle of equal remuneration for work of equal or comparable value; and
>
> (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
>
> (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
>
> (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.'
>
> This is the **modern *awards objective***.
>
> *When does the modern awards objective apply?*
>
> (2) The modern awards objective applies to the performance or exercise of the FWC's ***modern award powers***, which are:
>
> (a) the FWC's functions or powers under this Part; and
>
> (b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.
>
> Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).'

[34] The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a)–(h) (the s.134 considerations).

[35] The modern awards objective is very broadly expressed.[9] It is a composite expression which requires that modern awards, together with the National Employment Standards (NES), provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss.134(1)(a)–(h).[10] Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.[11]

[36] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.[12] No particular primacy is attached to any of the s.134 considerations[13] and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[37] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.[14] Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.[15] In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[38] Section 138 of the Act emphasises the importance of the modern awards objective:

> '**Section 138 Achieving the modern awards objective**
>
> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.'

[39] What is 'necessary' to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.[16]

[40] The Joint Application seeks variations to:

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[9] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35]

[10] (2017) 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44]

[11] [2018] FWCFB 3500 at [21]-[24]

[12] *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56]

[13] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33]

[14] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106]

[15] See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review

[16] See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227

(a) ensure employees perform the broadest ambit of work provided that it is safe and they hold any necessary mandatory qualifications without reduction of pay;

(b) provide for increased operational flexibility for employees working from home;

(c) allow permanent employees to agree to reduce their working hours to not fewer than 75% of current hours (for the workplace or a section of the workplace) without displacing the common right for an employer and employee to individually agree to change hours of work;

(d) subject to considering the employees personal circumstances and giving one weeks' notice, direct the taking of annual leave;

(e) allowing a general right to close down the business provided that employees must access any accrued annual leave.

[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.

[42] Further, as submitted by ACCI and Ai Group, the variations proposed:

> 'seek to assist employers in accessing balance sheet provisions rather than placing further burden on cash flows to aid, in some part, to the survival of businesses which in the medium term will be critical for the recovery (and its speed) once the Pandemic and the Governments restrictions on the operation of business and working arrangements are removed.'[17]

[43] Importantly, as noted earlier, the Joint Application is supported by the ASU and the ACTU. In the course of oral argument the ASU 'fully supported' the submissions put on behalf of ACCI and Ai Group.

[44] As ACCI and Ai Group state in their written submissions (at [18]-[19]):

[17] ACCI/Ai Group submission at paragraph 6(d)

> 'The consent of the parties to the Joint Application, in itself, demonstrates the critical situation the parties and their constituencies find themselves in.
>
> That the Australian Services Union (supported by the Australian Council of Trade Unions) has taken the lead in such an important occupation-based award affecting many if not most businesses in Australia is to be acknowledged and commended.'[18]

[45] Further, the joint Application was strongly supported by the Minister, who submitted:

> '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.'[19]

[46] As Mr Rizzo, on behalf of the ASU, put it: 'these are extraordinary times that require a response that is not business as usual.'

[47] We now turn to the modern awards objective.

[48] It was common ground that the consideration in s 134(b), (da), (e) and (g) were not relevant. We deal with the other considerations below.

s. 134(1)(a): relative living standards and the needs of the low paid

[49] A threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid',[20] within the meaning of s.134(1)(a).

[50] The most recent data for median earnings is for August 2019 from the ABS Characteristics of Employment (CoE) survey. Data on median earnings are also available from the Survey of Employee Earnings and Hours (EEH) for May 2018. On the basis of the data from the CoE survey for August 2019, two-thirds of median weekly earnings for full-time employees is $920.00. Data on median weekly full-time earnings are also available from the EEH survey for May 2018, and two-thirds of median earnings is equal to $973.33.

[51] Using the two-thirds of median full-time wages as the benchmark, employees paid at classification levels 1 to 3 in the Clerks Award are 'low paid' within the meaning of s.134(1)(a).

[52] ACCI and Ai Group submitted that:

> 'relative living standards and the needs of the low paid"; this must now be seen in the context of seeking to maintain employment rather than losing employment even if this means some employees chose to temporarily to maintain employment while accepting reduced employment benefits and take home pay.'

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[18] ACCI and Ai Group joint submission, 27 March 2020.

[19] Commonwealth Minister for Industrial Relations submission, 27 March 2020.

[20] [2017] FWCFB 1001 at [166]

[53] We accept that the proposed variation may result in low paid employees working less hours and consequently receiving less pay. It is axiomatic that such a reduction in pay will mean that they are less able to meet their needs. But, as noted in the Hospitality decision, 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.

[54] We also note the agreed measures to mitigate the impact of reduced hours, particularly by maintaining relevant accruals; that all entitlements on termination of employment based on each employees weekly ordinary hours of work prior to the commencement of Schedule I; and by facilitating engagement in secondary employment, training, professional development and study.

> *s. 134(1)(c) the need to promote social inclusion through increased workforce participation*

[55] This consideration is directed at obtaining employment. The package of measures will facilitate the parties' shared objective of retaining as many employees in employment as practicable in the current crisis.

> *s. 134(1)(d) and (f) the need to promote flexible modern work practices and the efficient and productive performance of work and the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.*

[56] It is convenient to deal with these considerations together. The variation proposed will have a positive impact on business. ACCI and Ai Group submitted that this consideration must be:

> 'seen in the context of allowing business to survive the Pandemic … so that they can operate to sustain what employment they can and be in an effective position to recover and maintain and then grow employment once the Pandemic passes.'

[57] The proposed variation will promote flexibility and the 'efficient and productive performance of work' and will reduce the regulatory burden on business. This is a factor which weighs in favour of making the variation sought.

> *s.134(1)(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*

[58] The Minister advanced the following submission in relation to s 134(1)(h):

> '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.'[21]

[59] We accept the submission put. This is a factor that weighs in favour of making the variation sought.

[60] Additional considerations apply to the proposed annual leave and close down flexibilities. We have set these provisions out earlier at [28] – [29] above.

[61] Subsections 93(3) and (4) of the Act are relevant in this regard and provide as follows:

'Terms about requirements to take paid annual leave

(3) A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.

Terms about taking paid annual leave

(4) A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave.' (emphasis added)

[62] Section 93 is part of the NES. Modern awards and the NES interact in different ways:

- A modern award may include any terms that the award is expressly permitted to include by a provision of Part 2-2 (which deals with the NES) (ss.55(2) and 136(1)(c)).[22]

- A modern award may include terms that:

  (i) are ancillary or incidental to the operation of an entitlement of an employee under the NES; or

  (ii) terms that supplement the NES (s.55(4)).

[63] Subject to the requirement to take leave being reasonable, a modern award term which provides that an employee can be required to take a period of annual leave is a term of the type contemplated by s.93(3) of the Act.

[64] The issue before us is whether these provisions are 'reasonable' within the meaning of s 93(3).

[65] We note that the terms in question are of limited duration to address an extraordinary set of circumstances. A direction to take annual leave requires the giving of at least 1 week's notice and such a direction shall not result in an employee having less than 2 weeks accrued

[21] Minister's submission, 27 March 2020, at [19]

[22] Section 127 provides that the Regulations may permit modern awards to include terms that would or might otherwise be contrary to Part 2-2 or s.55, or prohibit modern awards from including terms that would or might otherwise be permitted by Part 2-2 or s.55. No such regulations have been made

annual leave remaining. Further, in issuing a direction to take annual leave the employer is required to consider an employees' personal circumstances.

[66] Similarly, the proposed close down term modifies existing clause 29.5 by reducing the notice required from 'at least 4 weeks' to 'at least 1 weeks' notice.'

[67] We are satisfied that the terms proposed are permitted terms and are 'reasonable' within the meaning of s.93(3).

[68] In relation to proposed clause I.2.6(a) – the ability to take twice as much annual leave at a proportionally reduced rate by agreement – the statutory notes to s.55(4) provides a relevant example. Note 1 states:

> "Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:
>
> > (a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay.

[69] We are satisfied that proposed clause I.2.6(a) is an ancillary or incidental term permitted by s.55(4).

[70] There is one final element of Schedule I that warrants further consideration, that is proposed clause I.2.5(h), which provides as follows:

> (h) For the purposes of clause I.2.5(a), the approval of employees shall be determined by a vote of employees. In order for the vote to be valid, the employer must comply with the following requirements:
>
> (i) Where any of the employees are known to be members of the Australian Services Union or another organisation, the ASU or other organisation shall be informed before the vote takes place.
>
> (ii) Prior to the vote of employees, the employer shall provide the employees with the contact details of the ASU, should they wish to contact the ASU for advice; and
>
> (iii) The employer must notify the Fair Work Commission by emailing XXXX@fwc.gov.au that the employer proposes to conduct a vote under Schedule I. The employer shall provide the work email addresses of the employees who will be participating in the vote, to the Commission. The Commission will then distribute the ASU COVID-19 Information Sheet to the employees prior to the vote. The Commission shall list the name of the business on a register which will be accessible to the ASU, upon request, for the period when Schedule I is in operation.
>
> (iv) The vote shall not take place until at least 24 hours after the requirements of clause I.2.5(h)(i), (ii) and (iii) have been met.

[71] We note that the email address proposed at clause I.2.5(h)(iii) is clerksaward@fwc.gov.au. The ASU COVID-19 Information Sheet is set out at **Attachment A**.

[72] In their written submission ACCI and Ai Group characterise this element of Schedule I as 'unique' and contend that the Commission is able to include this type of provision in a modern award on 'multiple grounds.'

[73] The primary submission advanced is that the proposed term falls within the ambit of conditions contemplated by s.139(1)(j).

[74] ACCI and Ai Group advance the following submission in support of this proposition:

> '10. Specifically, the clause:
>
> (a) is about 'consultation' and 'representation' as contemplated by section 139(1)(j); and
>
> (b) addresses matters identified in section 145A(1) and (2) of the Act, which obliges modern awards to contain provisions about consultation and allow for representation in that regard.
>
> 11. The Award is special in that it operates for an occupation of broad reach and will apply to many if not most businesses of any scale in Australia.
>
> 12. The procedures contemplated by clause I.2.5(g) operate in a unique circumstance; the wholesale reduction of working hours and with it pay.
>
> 13. The procedures operate to ensure that the employees concerned are informed, can consult with or seek representation from the Australian Services Union or otherwise access information about the process.'[23]

[75] In the alternative ACCI and Ai Group submit that these provisions fall within the scope of s.142(1). ACCI and Ai Group submit:

> '16. They are incidental to a matter otherwise permitted by section 139 (1) (c): hours of work.
>
> 17. They are also essential for such a unique term to operate effectively in the context of:
>
> (a) the broad nature of the occupational basis of the Award;
>
> (b) the unique nature of the operative clause itself providing for a reduction in working hours and pay by a vote rather than individual agreement; and
>
> (c) the need to ensure, in the unique circumstances of the Pandemic that employers and employees can act expeditiously while ensuring that employees

[23] ACCI and Ai Group submission, 27 March 2020, at [10] – [13]

are informed of their rights and can access representation from the Australian Services Union should they so desire in a timely manner.

18. The consent of the parties to the Joint Application, in itself, demonstrates the critical situation the parties and their constituencies find themselves in.'[24]

[76] We turn first to the primary submission advanced by ACCI and Ai Group.

[77] Section 139(1)(j) provides:

'(1) A modern award may include terms about any of the following matters:

…

(j) procedures for consultation, representation and dispute settlement.'

[78] Section 139 is in Pt 2-3 of Chapter 2 of the Act. The purpose of Chapter 2 is to prescribe minimum terms and conditions of employment for national system employees. It is appropriate to characterise s.139 as a remedial or beneficial provision, which is intended to benefit national system employees.

[79] The proper approach to the construction of remedial or beneficial provisions was considered by the Full Bench in *Bowker and others v DP World Melbourne Limited T/A DP World; Maritime Union of Australia and others*[25] (*Bowker*). In *Bowker* the Full Bench said:

'The characterisation of these provisions as remedial or beneficial has implications for the approach to be taken to their interpretation. As the majority (per Gibbs CJ, Mason, Wilson and Dawson JJ) observed in *Waugh v Kippen*:

"... the court must proceed with its primary task of extracting the intention of the legislature from the fair meaning of words by which it has expressed that intention, remembering that it is a remedial measure passed for the protection of the worker. It should not be construed so strictly as to deprive the worker of the protection which Parliament intended that he should have."[26]

Any ambiguity is to be construed beneficially to give the fullest relief that a fair meaning of its language will allow,[27] provided that the interpretation adopted is 'restrained within the confines of the actual language employed that is fairly open on the words used.'[28] As their Honours Brennan CJ and McHugh J put it in *IW v City of Perth*:

"... beneficial and remedial legislation, like the [Equal Opportunity] Act, is to be given a liberal construction. It is to be given 'a fair, large and liberal' interpretation rather than one which is 'literal or technical'. Nevertheless, the task remains one of statutory construction. Although a provision of the Act must be given a liberal and beneficial

[24] Ibid, at [16] – [18]

[25] [2014] FWCFB 9227.

[26] *Waugh v Kippen* (1986) 160 CLR 156 at 164.

[27] *Bull v Attorney General (NSW)* (1913) 17 CLR 370 at 384.

[28] See *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 638; and *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18 at [29] per French CJ, Crennan, Kiefel and Keane JJ.

> construction, a court or tribunal is not at liberty to give it a construction that is unreasonable or unnatural."[29]
>
> If the words to be construed admit only one outcome then that is the meaning to be attributed to the words. However if more than one interpretation is available or there is uncertainty as to the meaning of the words, such that the construction of the legislation presents a choice, then a beneficial interpretation may be adopted.'[30]

[80] We adopt the above remarks and apply them to the matter before us. The particular subject matters set out in s.139(1)(j) are to be given their ordinary meaning and there is no warrant for a restrictive construction to be placed on any of them.

[81] As Mr Ward, on behalf of ACCI, put it during the course of oral argument 'the essential character of the provision is about ensuring that, on short notice, an employee understands what representation is available to assist them in understanding their rights and to represent them in discussions with their employer.'

[82] We are satisfied that proposed clause I.2.5(h) can be characterised as a term about 'procedures for consultation, repairable and dispute settlement'. But, out of an abundance of caution, we also propose to address ACCI and AI Group's alternate argument.

[83] Section 142(1) provides:

> **Incidental and machinery terms**
>
> Incidental terms
>
> (1) A modern award may include terms that are:
>
> (a) incidental to a term that is permitted or required to be in the modern award; and
> (b) essential for the purpose of making a particular term operate in a practical way.

[84] To be included in a modern award pursuant to s.142 the term must satisfy the requirements of both s.142(1)(a) and (b).

[85] As to s.142(1)(a), the October 2017 *Plain Language Standard Clauses Decision*[31] adopted the Macquarie Dictionary definition of the phrase 'incidental to', namely 'liable to happen in conjunction with; naturally appertaining to.' We agree and adopt the same definition.

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[29] (1997) 191 CLR 1 at 12.

[30] [2014] FWCFB 9227 at [25]-[27].

[31] [2018] FWCFB 3009 at [134].

[86] As to the meaning of 'essential' in s.142(1)(b), we note that in a 2018 decision concerning the redrafting of the standard Termination of Employment clause in modern awards[32] the Plain Language Full Bench said:

> '[48] As we observed in the *October 2017 decision* (at [143]), we consider that there is little discernible difference between the words 'essential' and 'necessary' when used in the context of a provision such as s.142(1)(b). Further, a distinction is to be drawn between that which is necessary or essential, and that which is desirable. As observed by Tracey J in *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* 'That which is desirable does not carry the same imperative for action'.[33]

[87] We agree with the above observation.

[88] Further, in the Plain Language proceedings dealing with the Termination of Employment standard term the ACTU advanced the following submission about s.142(1)(b):

> 'The adjective "practical" operates on the "way" in which it must be essential for clause E(1)(a) to operate. It does not contemplate non-observance of clause E(1)(a) – something that is not operating cannot be said to be operating in a "way", regardless of the adjective used. The incentive purposes of clause E(1)(c) therefore do not give that clause the character of making clause E(1)(a) operate in a practical way, let alone being essential order that it do so. Something that provides an incentive to make a clause operate at all, might be considered to effect the purpose of that clause, but that is not the same as making the clause operate in a "practical way", or in any "way" for that matter. As far as the compensatory purpose is concerned, it also suffers from the vice of being directed to what happens when clause E(1)(a) is not observed, rather that the manner or way in which it is observed.'[34]

[89] The Plain Language Full Bench rejected that submission, as follows:

> '[57] A number of the submissions before us have focused on the individual elements of s.142(1)(b) and in particular the word 'essential' and the expression 'operate in a practical way'. In our view the provision needs to be construed as a composite term.
>
> [58] In the context of s.142(1), reasonable minds may differ as to whether a particular term is 'essential for the purpose of making [a permitted term] operate in a practical way'. In our view the construction advanced by the ACTU is too narrow and seeks to confine the expression 'operate in a practical way' in a manner not contemplated by the terms of s.142(1)(b) when read in context, including the relevant legislative history.'[35]

[90] We adopt the same approach to the matter before us.

[91] We are satisfied that proposed clause I.2.5(h) is incidental to a permitted term (namely types of employment – s.139(1)(b) and arrangements for when work is performed – s.139(1)(c)). Given the usual features of clause I.2.5, the need for expedition and for affected

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[32] [2018] FWCFB 3009.

[33] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) IR 219 382 at [46].

[34] ACTU submission, 20 November 2017 at para [25].

[35] [2018] FWCFB 3009.

employees to be made aware of their representation options, we are satisfied that proposed clause I.2.5(h) is essential for making clause I.2.5 operate in a practical way.

[92] We are satisfied that proposed clauses I.2.5(h) is permitted by s.139(1)(j). If we are wrong about that we are satisfied that the term is included in a modern award on the basis that it is incidental to a permitted term and essential for the purpose of making that term operate, in a practical way (s.142(1)).

5. Conclusion

[93] We note that the terms in Schedule I may be included in a modern award pursuant to ss.136(1)(a) and (c), and ss.139(1)(a), (c), (h) and (j) and s.142(1) of the Act.

[94] In the 26 March Statement we expressed the *provisional* view, taking into account the relevant s.134 considerations, that the variation of the Clerks award as proposed in the Joint Application is necessary to achieve the modern awards objective. We confirm the *provisional* view and will make the variation to the Clerks award.

[95] We are satisfied that the variation proposed is necessary to achieve the modern awards objective (s.157) and in so deciding we have taken into account the considerations in s.134(1)(a) to (h) insofar as they are relevant. Further, once varied the Clerks award will only include terms to the extent necessary to achieve the modern awards objective (s.138).

[96] For the reasons set out above we will make the variation determination sought. The determination will come into operation on 28 March 2020. As required by s.165(3) the determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation.

[97] A copy of the variation determination is at **Attachment B**.

[98] The measures encompassed in the variation strike an appropriate balance between the provision of additional flexibility and treating affected employees fairly. As Mr Ward, on behalf of ACCI, put it in oral argument during the course of commending the role played by the ASU and ACTU: 'these are times for humility, courage and generosity of spirit.' In our view these qualities have been amply demonstrated by all of those involved. We commend the parties on the balanced nature of the agreed package.

PRESIDENT

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<PR717914>

Appearances:

Mr N Ward – Australian Chamber of Commerce and Industry

Mr L Izzo – Australian Chamber of Commerce and Industry

Mr M Rizzo – Australian Services Union

Mr D Williams – for the Commonwealth Minister for Industrial Relations

Mr S Smith – Australian Industry Group

Mr T Clarke – Australian Council of Trade Unions

Hearing details:

Melbourne
2020
28 March 2020

Final written submissions:

Joint submission of Australian Chamber of Commerce and Industry and Australian Industry Group, 27 March 2020
Submission of the Commonwealth Minister for Industrial Relations, 27 March 2020

Attachment A – ASU COVID-19 Information Sheet

Important Advice from the Australian Services Union

Your conditions at work for the next 3 months

There is a lot of change happening in response to the COVID-19 crisis and we are all adapting the way we live and work in response to the Government's mandate of isolation and social distancing. Two peak employer organisations and the Australian Services Union have been negotiating the best way to keep employers of clerical employees viable and to protect your job and others in your sector.

We are the biggest union in your sector, looking after many occupations including yours. Our role is to stand up for workers' rights, entitlements and to negotiate better pay and conditions on behalf of the entire workforce.

We have reached agreement with two peak employer organisations on award variations to maintain employment and help workplaces remain viable during this phase of the Covid-19 Pandemic. We have taken an extremely flexible approach with these negotiations recognising the unique situation and workers' priority to protect jobs.

With most people currently working from home, the changes will provide more flexible work hours so you can better juggle you work and home commitments. They also provide different ways that you can use annual leave that were not previously allowed.

The key changes to your work arrangements are:

1. On your request and by agreement with your employer while working at home you can change your working hours to fit within the window of 6am to 11pm Monday to Friday, and 7am to 12.30pm on Saturday.

2. While working from home, your employer now has the option to reduce the minimum shifts for part-time and casual employees to two consecutive hours. The existing Award is more restrictive than that, but while working from home many people need this flexibility.

3. If you choose, and by agreement with your employer, you can now take Annual Leave at half pay to extend it over a longer time.

4. If your workplace is under financial distress, to remain viable they can seek to reduce the hours of work for employees by no more than 25%. To do this your employer must have the support of 75% of workers in the workplace and if you are a union member your employer must consult with us prior to a vote. Importantly your leave accrues during this time at the normal rate that existed prior to any change to hours.

5. You can also seek other work with another employer to boost your income, while maintaining your current employment. Your employer cannot unreasonably refuse this.

The changes apply to people working under what is called the Clerks – Private Sector – Award which covers a range of clerical and administrative occupations including yours.

The changes we have outlined above are temporary. At this stage, they are planned to continue until 30 June 2020 at which time the normal conditions under the Award will resume, but we will of course be monitoring the COVID-19 situation closely as we get closer to that date.

The union has also put in place arrangements so you can get greater access to professional development courses because we know people are thinking seriously about their skills and future. Under the arrangements we have negotiated, your employer must consider all reasonable requests for your participation at these courses.

We recognise this is a tough time for you and your family. We are by your side every step of the way. If you have any concerns with your workplace or need support, please contact us – the details for your local area are provided on the following page.

The Australian Services Unions has developed online professional development webinars and training courses through our "ASU Career Launchpad" series. We have decided to provide ALL WORKERS access to one free course, noting our members still have access to the full suite of professional development modules. To take advantage of this and stay up to date about developments at your workplace please go to: https://mailchi.mp/asu.asn.au/clerks

How to contact your union

Australian Services Union Local Contacts	Phone Number
New South Wales	1300 784 278
Victoria	0473 385 033
Tasmania	0427 813 821
North and FN Queensland	07 3844 5300
Queensland – other parts	1800 177 244
South Australian and Northern Territory	08 8363 1322
Western Australia	0421 920 978

www.asu.asn.au australianservicesunion info@asu.asn.au By your side AUSTRALIAN SERVICES UNION

Authorised by Robert Potter, National Secretary, Australian Services Union, Ground Floor, 116 Queensberry Street, Carlton South VIC 3053

DETERMINATION

Fair Work Act 2009
s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

Australian Chamber of Commerce and Industry; The Australian Industry Group
(AM2020/10)

CLERKS—PRIVATE SECTOR AWARD 2010
[MA000002]

Clerical industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER BISSETT MELBOURNE, 28 MARCH 2020

Application to vary the Clerks—Private Sector Award 2010.

A. Further to decision [[2020] FWCFB 1690] issued by the Full Bench on 28 March 2020, the above award is varied as follows:

1. By inserting Schedule I as follows:

Schedule I—Award Flexibility During the COVID-19 Pandemic

I.1 The provisions of Schedule I 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.

I.1.1 Schedule I operates from 28 March 2020 until 30 June 2020. The period of operation can be extended on application to the Fair Work Commission.

I.2 During the operation of Schedule I, the following provisions apply:

I.2.1 Operational flexibility

(a) As directed by their employer, where necessary an employee will perform any duties that are within their skill and competency regardless of their classification under clause 15—Classifications and Schedule B—Classifications, provided that the duties are safe, and that the employee is licensed and qualified to perform them.

(b) An employer must not reduce an employee's pay if the employee is directed to perform duties in accordance with clause I.2.1.

I.2.2 Part-time employees working from home

Instead of clause 11.5 (Part-time employment), an employer is required to roster a part-time employee who is working from home by agreement with the employer, for a minimum of 2 consecutive hours on any shift.

I.2.3 Casual employees working from home

Instead of clause 12.4 (Casual employment), an employer must pay a casual employee who is working from home by agreement with the employer, a minimum payment of 2 hours' work at the appropriate rate.

I.2.4 Ordinary hours of work for employees working from home

(a) Instead of clause 25.1(b) (Ordinary hours of work (other than shiftworkers), for employees working from home by agreement with the employer where an employee requests and the employer agrees, the spread of ordinary hours of work for day workers is between 6.00 am and 11.00 pm, Monday to Friday, and between 7.00 am and 12.30 pm on Saturday.

(b) Day workers are not shiftworkers for the purposes of any penalties, loadings or allowances under the award, including for the purposes of clause 28.

(c) The facilitative provision in clause 25.2 (Ordinary hours of work (other than shiftworkers)), which allows the spread of hours to be altered, will not operate for the employees referred to in clause I.2.4(a).

I.2.5 Agreed temporary reduction in ordinary hours

(a) An employer and the full-time and part-time employees in a workplace or section of a workplace, may agree to temporarily reduce ordinary hours of work for the employees in the workplace or section for a specified period while Schedule I is in operation.

(b) At least 75% of the full-time and part-time employees in the relevant workplace or section must approve any agreement to temporarily reduce ordinary hours.

(c) For the purposes of clause I.2.5(a), ordinary hours of work may be temporarily reduced:

(i) For full time employees, to not fewer than 75% of the full-time ordinary hours applicable to an employee immediately prior to the implementation of the temporary reduction in ordinary hours.

(ii) For part-time employees, to not fewer than 75% of the part-time employee's agreed hours immediately prior to the implementation of the temporary reduction in ordinary hours.

(d) Where a reduction in hours takes effect under clause I.2.5(a), the employee's ordinary hourly rate will be maintained but the weekly wage will be reduced by the same proportion.

(e) Nothing in Schedule I prevents an employer and an individual employee agreeing in writing (including by electronic means) to reduce the employee's hours or to move the employee temporarily from full-time to part-time hours of work, with a commensurate reduction in the minimum weekly wage.

(f) If an employee's hours have been reduced in accordance with clause I.2.5(a):

(i) the employer must not unreasonably refuse an employee request to engage in reasonable secondary employment; and

(ii) the employer must consider all reasonable employee requests for training, professional development and/or study leave.

(g) For the purposes of clause I.2.5(a), where there is any reduction in the ordinary hours of work for full-time or part-time employees in a workplace or section during the period Schedule I is in operation, all relevant accruals and all entitlements on termination of employment will continue to be based on each employee's weekly ordinary hours of work prior to the commencement of Schedule I.

(h) For the purposes of clause I.2.5(a), the approval of employees shall be determined by a vote of employees. In order for the vote to be valid, the employer must comply with the following requirements:

(i) Where any of the employees are known to be members of the Australian Services Union or another organisation, the ASU or other organisation shall be informed before the vote takes place.

(ii) Prior to the vote of employees, the employer shall provide the employees with the contact details of the ASU, should they wish to contact the ASU for advice; and

(iii) The employer must notify the Fair Work Commission by emailing clerksaward@fwc.gov.au that the employer proposes to conduct a vote under Schedule I. The employer shall provide the work email addresses of the employees who will be participating in the vote, to the Commission. The Commission will then distribute the ASU COVID-19 Information Sheet to the employees prior to the vote. The Commission shall list the name of the business on a register which will be accessible to the ASU, upon request, for the period when Schedule I is in operation.

(iv) The vote shall not take place until at least 24 hours after the requirements of clause I.2.5(h)(i), (ii) and (iii) have been met.

I.2.6 Annual leave

(a) Employers and individual employees may agree to take up to twice as much annual leave at a proportionately reduced rate for all or part of any agreed or directed period away from work, including any close-down.

(b) Instead of clauses 29.6, 29.7 and 29.8 (Annual leave), an employer may direct an employee to take any annual leave that has accrued, subject to considering the employee's personal circumstances, by giving at least one week's notice, or any shorter period of notice that may be agreed. A direction to take annual leave shall not result in an employee having less than 2 weeks of accrued annual leave remaining.

I.2.7 Close down

(a) Instead of clause 29.5 (Annual leave), and subject to clause I.2.7(b), an employer may:

(i) require an employee to take annual leave as part of a close-down of its operations by giving at least one week's notice, or part of its operations, or any shorter period of notice that may be agreed; and

(ii) where an employee who 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.

(b) Clause I.2.7(a) does not permit an employer to require an employee to take leave for a period beyond the period of operation of Schedule I.

(c) Where an employee is placed on unpaid leave pursuant to clause I.2.7(a), the period of unpaid leave will count as service for the purposes of relevant award and NES entitlements.

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

B. This determination comes into effect on 28 March 2020. 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 28 March 2020.

PRESIDENT

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