



STATEMENT

Fair Work Act 2009

s.157—Variation of a modern award to achieve the modern awards objective

Joint application by Independent Schools Victoria and Independent Education Union of Australia

(AM2020/17)

Educational Services

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER BISSETT

MELBOURNE, 23 APRIL 2020

Application to vary the Educational Services (Schools) General Staff Award 2010 to achieve the modern awards objective – provisional views.

1. Background

[1] This statement concerns an application to vary the *Educational Services (Schools) General Staff Award 2010* (MA000076) (the Schools – General Staff Award) filed by Independent Schools Victoria (ISV) earlier today (the Application).

[2] ISV and Independent Education Union (IEU) have been in discussions directed at reaching a consent position on changes to the Schools – General Staff Award to mitigate the impact of COVID-19 on employees and employers covered by the award. The Application is the product of those discussions and is supported by the IEU and the Association of Independent Schools New South Wales, Association of Independent Schools South Australia, Association of Independent Schools Western Australia and Independent Schools Tasmania.

[3] The Application seeks to insert a new Schedule – Schedule J – into the Schools – General Staff Award. Schedule J:

- allows an employer to direct an employee to reduce their hours by up to 25% (subject to a number of protections);
- contains a clause regarding operational flexibility; and
- provides that any dispute regarding the operation of the Schedule may be referred to the Commission in accordance with clause 9 of the award.

[4] At the request of the parties, the Commission’s consideration of the application will be expedited. Any party wishing to respond to the Application and the *provisional* views set out in this statement is to file a submission by **4pm on Friday, 24 April 2020**. Instructions for the filing these submissions are in ‘Next steps’ below.

[5] The application will be *provisionally* listed for hearing at **10am on Sunday, 26 April 2020 by telephone**.

[6] The hearing will only take place in the event that there are any submissions filed by **4pm Friday, 24 April 2020** opposing the *provisional* views in this statement. Further details of the process for this hearing are set out under ‘Next steps’ below.

2. COVID-19 Pandemic

[7] The application arises from the unique set of circumstances pertaining to the COVID-19 pandemic. The Commission has published an Information Note about measures taken in response to the COVID-19 pandemic, which can be accessed [here](#).

[8] In a series of decisions we have granted consent applications to vary the:

- *Hospitality Industry (General) Award 2010*¹
- *Clerks – Private Sector Award 2010*²
- *Restaurant Industry Award 2010*³

[9] These decisions inserted short term measures to provide additional flexibilities to address the consequences of the COVID-19 pandemic.

[10] On 8 April 2020 a Full Bench of the Commission issued a decision⁴ (the April 2020 Decision) varying 99 modern awards to insert the new Schedule – ‘Schedule X: Additional measures during the COVID-19 pandemic’. Schedule X provides an entitlement to unpaid ‘pandemic leave’ and the flexibility to take twice as much annual leave at half pay. The following documents informed the Commission’s decision:

- [Information Note on modern awards and industries](#);
- [Information Note on bargaining by business size](#);
- [Information Note on Government responses to the COVID-19 pandemic](#); and
- [Expert report by Professor Borland](#).

[11] In the April 2020 Decision the Full Bench also encouraged industrial parties to continue (or enter into) discussions directed towards consent applications to vary modern awards.

¹ [\[2020\] FWCFB 1574](#)

² [\[2020\] FWCFB 1690](#)

³ [\[2020\] FWCFB 1741](#)

⁴ [\[2020\] FWCFB 1837](#)

3. The Application

[12] As mentioned earlier, the Application seeks to add a new schedule – Schedule J – to the Schools – General Staff Award. It is proposed that the new schedule operate until 1 August 2020. Schedule J proposes flexibilities in the relation to:

- the capacity to direct a full time or part time employee to reduce their hours by up to 25%; and
- certain operational flexibilities

[13] We note that the proposed ability of an employer to direct a full time or part time employee to reduce their ordinary hours by up to 25% will be subject to a number of safeguards including:

- the notice of intention must be in writing;
- the direction comes into effect 5 days after the notice of intention is issued to the employee and remains in force for a period of no more than 12 weeks;
- immediately after issuing a notice of intention the employer must discuss the reason behind the direction with the employee (or their representative) and must notify the IEU;
- an employee given a direction will continue to accrue annual leave, personal/carers leave and other accruals based on their ordinary hours of work prior to the reduction in hours resulting from the direction;
- a full time employee directed to work part time retains their substantive full time position; and
- any redundancy payment will be made at the employees substantive fraction prior to the issuing of the direction.

[14] Clause J.3.2(a) of Schedule J provides:

‘As directed by their employer, where necessary an employee will perform any duties that are within their skills and competency regardless of their classification under clause 14 and Schedule B – Classification, provided that the duties are safe, and that the employee is licensed and qualified to perform them.’

[15] The capacity to make directions under clause J.3.2(a) is subject to the following safeguards:

- the duties must be safe and the employee must be licensed and qualified to perform them;
- the employee’s pay must not be reduced; and
- where employees are directed by their employer to perform duties at a higher level than their substantive classification, the higher level classification rates of pay will apply.

[16] The draft award variation determination in the Application is attached.

4. Provisional views

[17] The Commission may make a determination varying a modern award if the Commission is satisfied that the determination is necessary to achieve the modern awards objective. 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).

[18] 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.⁵

[19] We have set out at [12]-[15] above what is proposed through the Application. We note that proposed Schedule J is about matters that may be included in a modern award pursuant to ss.136(1)(a) and (c), and ss.139(1)(a), (c) and (h) of the Act.

[20] It is our *provisional* view, taking into account the relevant s.134 considerations, that the variation of the Schools – General Staff Award as proposed in the Application is necessary to achieve the modern awards objective.

5. Next steps

Submissions

[21] Any submission supporting or opposing the Application and our *provisional* views set out above must be filed by **4pm on Friday, 24 April 2020**. Submissions should be:

- sent to chambers.ross.j@fwc.gov.au and include the matter number (AM2020/17) in the subject line.
- filed in Word format.

[22] If no submissions are filed opposing the Application and our *provisional* view we will grant the Application and vary the Schools – General Staff Award accordingly.

Provisional hearing

[23] If any submissions are filed opposing the Application and our *provisional* view, then a hearing will take place at **10am on Sunday, 26 April 2020, by telephone**.

⁵ See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227

[24] Any party who wishes to attend the hearing in relation to this matter should send an email to Chambers.Ross.j@fwc.gov.au specifying a name and contact telephone number by **4pm on Friday, 24 April 2020**.

[25] In the event that no submissions are filed opposing our *provisional* view then the hearing proposed for the morning of **Sunday, 26 April 2020** will not be necessary and will be vacated.

PRESIDENT

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