



# STATEMENT

*Fair Work Act 2009*

s.157 - FWC may vary etc. modern awards if necessary to achieve modern awards objective

**COVID-19 pandemic - Schedule X and**  
(AM2020/34 and others)

**Clerks-Private Sector Award 2020**  
(AM2020/30)

Various industries

JUSTICE ROSS, PRESIDENT  
DEPUTY PRESIDENT CLANCY  
COMMISSIONER BISSETT

MELBOURNE, 26 JUNE 2020

*Section 157(3) of the Fair Work Act 2009 (Cth) – additional measures during COVID-19 pandemic—Schedule X—Additional measures during the COVID-19 pandemic – period of operation expires on 30 June 2020 – Clerks-Private Sector Award 2020 – variation of Schedule 1*

## Schedule X

[1] On 1 April 2020 a Full Bench issued a Statement<sup>1</sup> setting out its *provisional* view that a number of modern awards be varied to insert a new 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.

[2] On 8 April 2020 the Full Bench issued a decision<sup>2</sup> varying 99 modern awards to insert Schedule X. A list of the 99 awards is at **Attachment A**.

[3] Schedule X commenced operation on 8 April 2020 and operates until 30 June 2020. The operation of Schedule X can be extended on application.

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<sup>1</sup> [2020] FWCFB 1760

<sup>2</sup> [\[2020\] FWCFB 1837](#)

[4] A Statement issued on 23 June 2020<sup>3</sup>, indicated that the Commission did not propose to vary Schedule X to extend its operation past 30 June 2020, on its own motion. Parties wishing to extend the operation of the schedule were invited to make an application by Friday 26 June 2020.

[5] A number of applications have since been filed to extend the operation of Schedule X from 30 June 2020 to 31 July 2020, in various awards.

[6] Applications to extend the operation of Schedule X deal with the following awards:

- *Aboriginal Community Controlled Health Services Award 2020*
- *Aged Care Award 2010*
- *Air Pilots Award 2020*
- *Ambulance & Patient Transport industry Award 2020*
- *Fast Food Industry Award 2010*
- *General Retail Industry Award 2010*
- *Hair and Beauty Industry Award 2010*
- *Health Professionals and Support Services Award 2010*
- *Live Performance Award 2010*
- *Medical Practitioners Award 2020*
- *Nurses Award 2010*
- *Pharmacy Industry Award 2010*
- *Storage Services and Wholesale Award 2020*
- *Supported Employment Services Award 2010*

[7] In an application filed on 26 June 2020 (AM2020/32), the ACTU sought the following directions:

1. That the applicant serve the attached application by e-mail on the persons and organisations identified as an “other party” in this application.
2. That, upon completion of the above steps, this application be deemed served.
3. That the FWC list a directions hearing in relation to this matter, for Monday 29 June 2020.
4. That the FWC extend the date by which parties should make an application to extend “Schedule X” (as referred to in paragraph 4 of its statement of 23 June 2020 ([2020] FWCFB 3281)).
5. That the FWC issue such further directions as are required following the directions hearing on Monday 29 June.

[8] The ACTU’s application is listed for Mention by telephone on **Monday 29 June 2020 at 10am.**

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<sup>3</sup> [2020] FWCFB 3281

## Clerks – Private Sector Award

[9] In a decision<sup>4</sup> issued on 28 March 2020, we said:

[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.

[10] Clause I.1.1 of Schedule I to the Clerks—Private Sector Award 2010 states:

'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.'

[11] On 19 June 2020, an application to vary Schedule 1 of the *Clerks – Private Sector Award 2020* (the Clerks Award) was filed jointly by Australian Industry Group (Ai Group) and the Australian Chamber of Industry and Commerce (ACCI). A revised draft determination was filed on 25 June 2020 (the Application)

[12] The Application seeks to vary Schedule I, as inserted on 28 March 2020, in a number of ways. Schedule I, with the proposed variations marked up in red, is set out at **Attachment B**. The revised draft determination filed on 25 June 2020 is set out at **Attachment C**.

[13] Conferences were held on 23 and 24 June 2020, before Commissioner Bisset in an effort to resolve some union concerns in relation to the Application. No resolution was reached.

## Hearings – Schedule X and Clerks – Private Sector Award

[14] The application in respect of the Clerks-Private Sector Award and the various Schedule X applications are listed for hearing via telephone before us on **Tuesday 30 June 2020 commencing at 12noon**. Parties wishing to attend the hearing are to provide the name, direct number and organisation by 12noon Monday, 29 June 2020 to [chambers.ross.j@fwc.gov.au](mailto:chambers.ross.j@fwc.gov.au).

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<sup>4</sup> [2020] FWCFB 1690

[15] To facilitate the hearing, Commission staff have prepared the following Information Notes:

- [COVID-19 situation update June 2020](#);
- [Clerks Award and COVID-19](#).

[16] It is our preliminary view that there is a degree of overlap between the various applications we have listed for hearing. Each application arises out of the COFID-19 pandemic and each application seeks to extend the date of operation of existing award schedules. At this stage there is no indication as to whether any of the Schedule X applications will be opposed.

[17] To facilitate the efficient determination of these matters we direct the relevant peak bodies (the ACTU, ACCI and Ai Group) to confer with a view to arriving at a consent position in respect of *all* of the matters before us. The Commission is available to facilitate such discussions, upon request.

**PRESIDENT**

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**ATTACHMENT A: Modern Awards varied to insert Schedule X**

- *Aboriginal Community Controlled Health Services Award 2010*
- *Aged Care Award 2010*
- *Air Pilots Award 2010*
- *Aircraft Cabin Crew Award 2010*
- *Airline Operations-Ground Staff Award 2010*
- *Airport Employees Award 2010*
- *Alpine Resorts Award 2010*
- *Aluminium Industry Award 2020*
- *Ambulance and Patient Transport Industry Award 2020*
- *Amusement, Events and Recreation Award 2010*
- *Animal Care and Veterinary Services Award 2020*
- *Aquaculture Industry Award 2020*
- *Architects Award 2010*
- *Asphalt Industry Award 2010*
- *Banking, Finance and Insurance Award 2020*
- *Book Industry Award 2020*
- *Broadcasting, Recorded Entertainment and Cinemas Award 2010*
- *Business Equipment Award 2010*
- *Car Parking Award 2020*
- *Cement, Lime and Quarrying Award 2010*
- *Cemetery Industry Award 2020*
- *Children's Services Award 2010*
- *Cleaning Services Award 2010*
- *Clerks - Private Sector Award 2010*
- *Commercial Sales Award 2010*
- *Concrete Products Award 2010*
- *Contract Call Centres Award 2010*
- *Corrections and Detention (Private Sector) Award 2020*
- *Cotton Ginning Award 2020*
- *Dry Cleaning and Laundry Industry Award 2010*
- *Educational Services (Post-Secondary Education) Award 2010*
- *Educational Services (Schools) General Staff Award 2010*
- *Educational Services (Teachers) Award 2010*
- *Fast Food Industry Award 2010*
- *Fitness Industry Award 2010*
- *Food, Beverage and Tobacco Manufacturing Award 2010*
- *Funeral Industry Award 2010*
- *Gardening and Landscaping Services Award 2020*
- *General Retail Industry Award 2010*
- *Graphic Arts, Printing and Publishing Award 2010*
- *Hair and Beauty Industry Award 2010*

- *Health Professionals and Support Services Award 2010*
- *Higher Education Industry-Academic Staff-Award 2010*
- *Higher Education Industry-General Staff-Award 2010*
- *Horse and Greyhound Training Award 2010*
- *Horticulture Award 2010*
- *Hospitality Industry (General) Award 2010*
- *Journalists Published Media Award 2010*
- *Labour Market Assistance Industry Award 2010*
- *Legal Services Award 2020*
- *Live Performance Award 2010*
- *Local Government Industry Award 2010*
- *Mannequins and Models Award 2010*
- *Manufacturing and Associated Industries and Occupations Award 2010*
- *Marine Tourism and Charter Vessels Award 2010*
- *Market and Social Research Award 2020*
- *Meat Industry Award 2010*
- *Medical Practitioners Award 2020*
- *Miscellaneous Award 2010*
- *Nursery Award 2020*
- *Nurses Award 2010*
- *Passenger Vehicle Transportation Award 2010*
- *Pastoral Award 2010*
- *Pest Control Industry Award 2010*
- *Pharmaceutical Industry Award 2010*
- *Pharmacy Industry Award 2010*
- *Poultry Processing Award 2010*
- *Premixed Concrete Award 2020*
- *Professional Diving Industry (Recreational) Award 2010*
- *Professional Employees Award 2010*
- *Racing Clubs Events Award 2010*
- *Racing Industry Ground Maintenance Award 2020*
- *Rail Industry Award 2010*
- *Real Estate Industry Award 2020*
- *Registered and Licensed Clubs Award 2010*
- *Restaurant Industry Award 2010*
- *Road Transport (Long Distance Operations) Award 2010*
- *Road Transport and Distribution Award 2010*
- *Salt Industry Award 2010*
- *Seafood Processing Award 2020*
- *Security Services Industry Award 2010*
- *Silviculture Award 2020*
- *Social, Community, Home Care and Disability Services Industry Award 2010*
- *Sporting Organisations Award 2020*
- *State Government Agencies Award 2020*

- *Storage Services and Wholesale Award 2010*
- *Sugar Industry Award 2010*
- *Supported Employment Services Award 2010*
- *Surveying Award 2020*
- *Telecommunications Services Award 2010*
- *Textile, Clothing, Footwear and Associated Industries Award 2010*
- *Timber Industry Award 2010*
- *Transport (Cash in Transit) Award 2010*
- *Travelling Shows Award 2020*
- *Vehicle Manufacturing, Repair, Services and Retail Award 2010*
- *Waste Management Award 2010*
- *Water Industry Award 2020*
- *Wine Industry Award 2010*
- *Wool Storage, Sampling and Testing Award 2010*

## **ATTACHMENT B**

### **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 September 2020~~~~30 June 2020~~. The period of operation can be extended on application to the Fair Work Commission.

**I.1.2** ~~Any direction or request given by an employer under Schedule I must be given in writing and does not apply to the employee if the direction is unreasonable in all of the circumstances.~~

**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 I.2.1 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)(e).

### **I.2.5I.2.2 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.2.25(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.2.25(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.2.25(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.2.25(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.~~25~~(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](mailto: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) This clause only applies to employers who implemented a temporary reduction in ordinary hours under Schedule I in this Award before 30 June 2020.**

#### **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.2.3 Annual leave**

- ~~(a) Subject to clause I.2.3(f) and despite clauses 32.6, 32.7 and 32.8 (Annual leave), an employer may, subject to considering an employee's personal circumstances, request an employee to take paid annual leave, provided that the request does not result in the employee retaining a balance of less than 2 weeks annual leave after~~

the leave is taken. Such a request must be made a minimum of 72 hours before the date on which the annual leave is to commence.

- (b) An employee must consider and may not unreasonably refuse a request to take annual leave made pursuant to clause I.2.3.
- (c) Clauses I.2.3(a) and (b) do not prevent an employer and an employee agreeing to the employee taking annual leave at any time.
- (d) 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.
- (e) The period of annual leave must commence before 30 September 2020 but may end after this date.
- (f) 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.
- (g) An employee is not required to take leave under clause I.2.3 unless the employee is advised in writing that the employer consents to a dispute about whether the employer's request is reasonable in all the circumstances being settled by the Fair Work Commission through arbitration in accordance with clause 40.5—Dispute Resolution and section 739(4) of the Act.

#### **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.

## ATTACHMENT C



FairWork  
Commission

## DRAFT DETERMINATION

*Fair Work Act 2009*

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

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

### **CLERKS—PRIVATE SECTOR AWARD 2020**

[MA000002]

Clerical industry

JUSTICE ROSS, PRESIDENT

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MELBOURNE, XX JUNE 2020

*Application to vary the Clerks—Private Sector Award 2020.*

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

1. By deleting the words “until 30 June 2020” in clause I.1.1 in Schedule I – Award Flexibility During the COVID-19 Pandemic, and replacing them with the words “until 30 September 2020”.
2. By adding a new clause I.1.2 in Schedule I - Flexibility During the COVID-19 Pandemic as follows:

**I.1.2** Any direction or request given by an employer under Schedule I must be given in writing and does not apply to the employee if the direction is unreasonable in all of the circumstances.

3. By deleting clause I.2.1 – Operational flexibility, clause I.2.2 – Part-time employees working from home and clause I.2.3 – Casual employees working from home.
4. By renumbering clause I.2.4 – Ordinary hours of work for employees working from home, as clause I.2.1, and changing the cross-reference “I.2.5(e)” to “I.2.1(a)”.
5. By renumbering clause I.2.5 – Agreed temporary reduction in ordinary hours, as clause I.2.2, with consequential renumbering of the cross-references in the clause.

6. By adding a new clause I.2.2(h) as follows:
    - (h) This clause only applies to employers who implemented a temporary reduction in ordinary hours under Schedule I in this Award before 30 June 2020.
  7. By deleting clause I.2.6 – Annual leave, and adding the following clause I.2.3 – Annual leave:

### I.2.3 Annual leave

    - (a) Subject to clause I.2.3(f) and despite clauses 32.6, 32.7 and 32.8 (Annual leave), an employer may, subject to considering an employee's personal circumstances, request an employee to take paid annual leave, provided that the request does not result in the employee retaining a balance of less than 2 weeks annual leave after the leave is taken. Such a request must be made a minimum of 72 hours before the date on which the annual leave is to commence.
    - (b) An employee must consider and may not unreasonably refuse a request to take annual leave made pursuant to clause I.2.3.
    - (c) Clauses I.2.3(a) and (b) do not prevent an employer and an employee agreeing to the employee taking annual leave at any time.
    - (d) 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.
    - (e) The period of annual leave must commence before 30 September 2020 but may end after this date.
    - (f) 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.
    - (g) An employee is not required to take leave under clause I.2.3 unless the employee is advised in writing that the employer consents to a dispute about whether the employer's request is reasonable in all the circumstances being settled by the Fair Work Commission through arbitration in accordance with clause 40.5— Dispute Resolution and section 739(4) of the Act.
  8. By deleting clause I.2.7 – Close-down.
- B. This determination comes into effect on 30 June 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 30 June 2020.

PRESIDENT