

Summary of Decision

8 April 2020



Section 157(3) of the Fair Work Act 2009 (Cth) – Variation of awards on the initiative of the Commission

AM2020/12

[\[2020\] FWCFB 1837](#)

[1] On 1 April 2020 a Full Bench of the Commission issued a statement¹ (April 2020 Statement) setting out its *provisional* view that a number of modern awards be varied to insert a new Schedule – ‘Schedule X: Additional measures during the COVID-19 pandemic’. Parties were invited to comment on the *provisional* views set out in the April 2020 Statement. The ACCI, ACTU and Ai Group supported the *provisional* views in the April Statement and the Minister for Industrial Relations ‘strongly supports’ the making of the proposed variations. A number of other parties also supported (or did not oppose) the Full Benches *provisional* views.

[2] Today the Full Bench varied the 99 modern awards set out in **Attachment A** to insert a 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, as follows:

Schedule X—Additional measures during the COVID-19 pandemic

X.1 Subject to clauses X.2.1.(d) and X.2.2(c), Schedule X operates from 8 April 2020 until 30 June 2020. The period of operation can be extended on application.

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

X.2.1 Unpaid pandemic leave

(a) Subject to clauses X.2.1(b), (c) and (d), any employee is entitled to take up to 2 weeks’ unpaid leave if the employee is required, by government or medical authorities or acting on the advice of a medical practitioner, to self-isolate and is consequently prevented from working, or is otherwise prevented from working by measures taken by government or medical authorities in response to the COVID-19 pandemic.

(b) The employee must give their employer notice of the taking of leave under clause X.2.1(a) and of the reason the employee requires the leave, as soon as practicable (which may be a time after the leave has started).

¹ [\[2020\] FWCFB 1760](#)

(c) An employee who has given their employer notice of taking leave under clause X.2.1(a) must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason given in clause X.2.1(a).

(d) A period of leave under clause X.2.1(a) must start before 30 June 2020, but may end after that date.

(e) Leave taken under clause X.2.1(a) does not affect any other paid or unpaid leave entitlement of the employee and counts as service for the purposes of entitlements under this Award and the National Employment Standards.

NOTE: The employer and employee may agree that the employee may take more than 2 weeks' unpaid pandemic leave.

X.2.2 Annual leave at half pay

(a) Instead of an employee taking paid annual leave on full pay, the employee and their employer may agree to the employee taking twice as much leave on half pay.

(b) Any agreement to take twice as much annual leave at half pay must be recorded in writing and retained as an employee record.

(c) A period of leave under clause X.2.2(a) must start before 30 June 2020, but may end after that date.

EXAMPLE: Instead of an employee taking one week's annual leave on full pay, the employee and their employer may agree to the employee taking 2 weeks' annual leave on half pay. In this example:

- the employee's pay for the 2 weeks' leave is the same as the pay the employee would have been entitled to for one week's leave on full pay (where one week's full pay includes leave loading under the Annual Leave clause of this award);² and
- one week of leave is deducted from the employee's annual leave accrual.

NOTE 1: A employee covered by this Award who is entitled to the benefit of clause X.2.1 or X.2.2 has a workplace right under section 341(1)(a) of the Act.

NOTE 2: Under section 340(1) of the Act, an employer must not take adverse action against an employee because the employee has a workplace right, has or has not exercised a workplace right, or proposes or does not propose to exercise a workplace right, or to prevent the employee exercising a workplace right. Under section 342(1) of the Act, an employer takes adverse action against an employee if the employer dismisses the employee, injures the employee in his or her employment, alters the position of the employee to the employee's prejudice, or discriminates between the employee and other employees of the employer.

NOTE 3: Under section 343(1) of the Act, a person must not organise or take, or threaten to organise or take, action against another person with intent to coerce the person to exercise or not exercise, or propose to exercise or not exercise, a

² The bracketed words will only appear in those awards which currently provide for annual leave loading

workplace right, or to exercise or propose to exercise a workplace right in a particular way.

[3] It is estimated that about half of private sector employees in the federal jurisdiction (or about 4.36 million private sector employees) will be able to access the new provision.

[4] The Commission envisages that the variation of modern awards to include proposed Schedule X will occur in more than one phase. In selecting the 99 modern awards to be included in phase 1 the Full Bench had regard to:

- the industries (and associated modern awards) that are likely to be impacted by the COVID-19 pandemic in the short and medium term (the ABS data and Professor Borland's expert report are relevant in this regard);
- awards which have a significant proportion of award-reliant employees; and
- awards with a high proportion of small businesses.

[5] Awards in the Construction, Maritime and Mining and Resource sectors were excluded from phase 1. These awards were not included because:

- the businesses in these sectors have not been as adversely impacted (to date) by the COVID-19 pandemic as some other sectors. For example the ABS survey reported that 37% of businesses in mining had been adversely affected, compared to 78% of businesses within the accommodation and food services industry. Further, on the basis of Professor Borland's report, the Construction sector is not likely to be affected in the short term; and
- these sectors do not have a high level of award-reliance and enterprise agreements are relatively common.

[6] No party contested the exclusion of the Mining and Resource awards or the Maritime sector awards from phase 1.

[7] Submissions were made in relation to the exclusion of the Construction awards, and the awards included in this category. The Full Bench does not propose to vary any of the Construction awards at this stage and adopted the suggestion advanced by the MBA and direct the parties to enter into discussions in relation to the matters raised in the submissions. The MBA is to provide a report on the outcome of those discussions by no later than **4pm on Friday 17 April 2020**. A conference of interested parties will be convened in the week commencing 20 April 2020.

[8] The Full Bench considered whether to include a broader range of measures to provide greater flexibility, such as:

- the capacity for employers to direct employees to take annual leave; and
- measures to facilitate reductions in the working hours of full-time and part-time employees.

[9] However, the Full Bench decided to take a more limited approach at this stage in order to provide a quick response to the current crisis and in an effort to attract broad support for the measures proposed. The Full Bench said:

‘[134] These variations are made on the Commission’s own initiative pursuant to s 157(3) of the Act and do not preclude other variation applications being made to vary modern awards to provide additional measures during the COVID-19 pandemic. Indeed, we encourage the industrial parties to continue (or enter into) discussions directed towards consent applications to vary modern awards. The Commission is available to assist in facilitating those discussions on request ...

[144] ... We would also observe that most awards which provide for part-time employment allow for changes in the hours of part-time employees by agreement. Also, in most modern awards there is no impediment to an employee reaching an agreement with their employer to move from full-time to part-time employment. For the moment, we think that these matters are best addressed by discussions between the industrial parties and consent variations of modern awards. We will continue to expedite the determination of such applications and the Commission is available to facilitate discussions, on request.’

[145] As we have mentioned, the variations we will make do not preclude other variation applications being made to vary modern awards to provide additional measures during the COVID-19 pandemic.’

[10] 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] The determination came into operation today, 8 April 2020 and Schedule X operates until 30 June 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.

[12] Each of the 99 modern awards at Attachment A will be updated and republished on the Commission’s website as soon as possible.

This summary is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission’s reasons.

- ENDS -

ATTACHMENT A: Modern Awards to be 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 2020*
- *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*