



DECISION

Fair Work Act 2009

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

Variation of awards on the initiative of the Commission

(AM2020/12)

Various industries

JUSTICE ROSS, PRESIDENT
VICE PRESIDENT HATCHER
VICE PRESIDENT CATANZARITI
DEPUTY PRESIDENT ASBURY
DEPUTY PRESIDENT CLANCY
COMMISSIONER SPENCER

MELBOURNE, 8 APRIL 2020

Section 157(3) of the Fair Work Act 2009 (Cth) – Commission acting on its own initiative to vary certain modern awards to achieve the modern awards objective – additional measures during COVID-19 pandemic – no submissions received opposing provisional views.

1. Background

[1] On 1 April 2020 we issued a statement¹ (April 2020 Statement) setting out our *provisional* view that a number of modern awards be varied 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. The following documents informed the measures we proposed:

- [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](#).

[2] As noted in the April 2020 Statement we envisage that the variation of modern awards to include proposed Schedule X will occur in more than one phase. In selecting the 103 modern awards to be included in phase 1 we had regard to:

¹ [\[2020\] FWCFB 1760](#)

- 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.

[3] The following awards were excluded from phase 1:

(a) Construction awards

- *Building and Construction General On-site Award 2010*
- *Joinery and Building Trades Award 2010*
- *Mobile Crane Hiring Award 2010*

(b) Maritime sector awards

- *Coal Export Terminals Award 2020*
- *Dredging Industry Award 2010*
- *Marine Towage Award 2010*
- *Port Authorities Award 2020*
- *Ports, Harbours and Enclosed Water Vessels Award 2010*
- *Seagoing Industry Award 2010*
- *Stevedoring Industry Award 2010*

(c) Mining and resource sector awards

- *Black Coal Mining Industry Award 2010*
- *Gas Industry Award 2010*
- *Hydrocarbons Field Geologists Award 2010*
- *Hydrocarbons Industry (Upstream) Award 2020*
- *Maritime Offshore Oil and Gas Award 2010*
- *Mining Industry Award 2010*
- *Oil Refining and Manufacturing Award 2020*
- *Professional Diving Industry (Industrial) Award 2010*

[4] 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.

[5] It is convenient to note here that no party contested the exclusion of the Maritime sector awards or the Mining and Resource sector awards from phase 1. Submissions were made in relation to the exclusion of the Construction awards, and the awards included in this category. We deal with those submissions later.

[6] There are 2 versions of Schedule X. The first version:

1. provides all employees (including full-time, part-time and casual employees) with a new entitlement of up to 2 weeks' unpaid pandemic leave; and
2. provides for employees by agreement with their employer to take twice an amount of their accrued annual leave at half pay.

[7] In the April 2020 Statement we expressed the *provisional* view that the first version be inserted into the modern awards set out at Attachment A (except the *Hospitality Industry (General) Award 2010* (the Hospitality Award), the *Clerks – Private Sector Award 2010* (the Clerks–Private Sector Award and the *Restaurant Industry Award 2010* (the Restaurant Award)); as each of these Awards have already been varied to include the flexibility to take twice as much annual leave at half pay. The second version of the new schedule omits the provision for annual leave at half pay and we expressed the *provisional* view that this version be inserted into the Hospitality Award, Clerks–Private Sector Award and the Restaurant Award.

[8] We also expressed the *provisional* view that the terms proposed to be included in the new schedule may be included in a modern award pursuant to ss.136(1)(a) and (c), and s.139(1)(h) of the Act and that, taking into account the relevant s.134 considerations, the modern award variations proposed are necessary to achieve the modern awards objective.

[9] We note here that no party contested our *provisional* view that the terms proposed to be included in Schedule X may be included in a modern award. Further, no party contested the Commission's power to make the variations proposed on the Commission's own initiative pursuant to s.157 of the *Fair Work Act 2009* (Cth) (the Act). ACCI advanced the following submission in respect of the Commission's power to vary modern awards on its own initiative:

'Section 157(3) of the Act expressly empowers the Commission to act on its own initiative (or otherwise on application) which the Commission in these proceedings is doing.

Prior to the repeal of section 156, the scheme of the Act was that it provided:

- (a) for reviews of modern awards on a 4-yearly cycle at the initiative of the Commission (s 156); and
- (b) a mechanism for the variation, making etc of modern awards outside of this 4 yearly cycle (s 157) at the initiative of the Commission or on application.

Both sections 156 (now repealed) and 157 should be understood in the context of what modern awards are under the Act.

Modern awards are “regulatory instruments” setting minimum standards the Commission has an overarching duty to ensure that they meet the modern awards objective.

This was affirmed by the Commission in *4 yearly review of modern awards – Penalty Rates – Transitional Arrangements* (AM2014/305):

“[27]...As the Commission has observed on a number of occasions, modern awards are very different to awards of the past. Modern awards are not made to prevent or settle industrial disputes between particular parties. Rather, modern awards are, in effect, regulatory instruments that set minimum terms and conditions of employment for the employees to whom the modern award applied.”²

- a. In this context, it should not be seen as controversial that section 157 provides for the Commission to act on its own initiative.

Previously outside of the 4 Yearly Review process but now at large, the Commission may seek to inquire into whether a modern award is meeting the modern awards objective rather than simply stand by awaiting a ‘party’ to apply to agitate such a case if at all.

This squarely fits with the nature of modern awards under the Act, sections 134, 284 and section 3 of the Act.’³

[10] Similarly, the ACTU submits:

‘In the present matter, the Commission is acting on its own initiative. It has foreshadowed with precision the terms it proposes, by determination, to introduce into particular modern awards. It has identified which modern awards it proposes to vary and the period for which the proposed variations will operate. It has offered all potentially affected parties an opportunity to respond to its proposal, which is a reasonable opportunity having regard to the rapidly changing environment and the need to proceed quickly to address it, and has indicated that it will hold a hearing if an affected party opposes its provisional view. The ACTU commends the Commission on this approach and notes that it is responsive to comments made in other proceedings about the proper course to follow where the Commission proposes to act on its own initiative.’⁴ (footnotes omitted)

[11] We agree with the submissions put.

[12] In the April 2020 Statement we said that if no submissions were received opposing our *provisional* views in respect of the proposed variation of a particular award in Attachment A or more generally, we would determine the matter and make the variations proposed without holding a hearing. Any submissions supporting or opposing the *provisional* views set out in the April 2020 Statement were required to be lodged by 4pm on Monday 6 April 2020.

[13] In the April Statement we also said that if we received a submission opposing our *provisional* view the matter would proceed to a hearing and that any party who wished to attend such a hearing was to advise the Commission, specifying a name and contact number, by 4pm

² *4 yearly review of modern awards – penalty rates – hospitality and retail sectors – transitional arrangements* [2017] FWCFB 3001.

³ ACCI submission 6 April 2020 at paras [18] – [24]

⁴ ACTU submission 6 April 2020 at para [4]

Monday 6 April 2020. No party requested an oral hearing and we received no request to attend a hearing if it was to be held. We also note that no party sought an opportunity to respond to any of the submissions filed.

[14] In these circumstances and given the exigencies arising from the impact of the COVID-19 pandemic, we do not propose to conduct an oral hearing in respect of this matter. We will determine any disputed matters on the papers.

[15] We note that the ACCI supported the need for expedition, submitting that:

‘in the context of the pandemic and the Government responses to the pandemic and their material impact on business and employment the truncated but clear process for finalising the matter balances the consideration in section 577 appropriately.’⁵

2. Submissions

[16] The following submissions were received:

- [Australian Council of Trade Unions](#) (ACTU) – 6 April 2020
- [Australian Manufacturing Workers’ Union](#) (AMWU) – 6 April 2020
- [Aruma](#) – 6 April 2020
- [Association of Consulting Architects Australia](#) (ACA) – 6 April 2020
- [Association of Professional Engineers, Scientists and Managers Australia](#) (APESMA) – 6 April 2020
- [Associations of Independent Schools and another](#) (Joint Submission by the Independent Education Union of Australia (IEU) and the Associations of Independent Schools (AIS) – 6 April 2020
- [Australian Chamber of Commerce and Industry](#) (ACCI) – 6 April 2020
- [Australian Chiropractors Association](#) – 6 April 2020
- [Australian Federation of Air Pilots](#) (AFAP) – [6 April 2020](#)
- [Australian Hotels Association](#) (AHA) – 6 April 2020
- [Australian Industry Group](#) (Ai Group) – 6 April 2020
- [Australian Nursing and Midwifery Federation](#) (ANMF) – 6 April 2020
- [Australian Security Industry Association](#) (ASIAL)– 6 April 2020
- [Australian Swim Schools Association](#) (ASSA) – 6 April 2020
- Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia ([CEPU](#)) – 6 April 2020
- [CEPU and others](#) (joint submission by CEPU, CFMMEU, ASU) – 6 April 2020

⁵ ACCI submission 6 April 2020 at para [29]

- [CFMMEU - The Maritime Union of Australia Division](#) – 3 April 2020
- [Commonwealth Minister for Industrial Relations](#) – 7 April 2020
- [Community Connections Solutions Australia \(CSSA\)](#) – 6 April 2020
- [Fire Protection Association of Australia \(FPAA\)](#) – 3 April 2020
- [Greenlife Industry Australia](#) – 6 April 2020
- [Health Services Union \(HSU\)](#) – 6 April 2020
- [Housing Industry Association \(HIA\)](#) – 6 April 2020
- [Law Council of Australia](#) – 6 April 2020
- [Local Government Associations](#) – 6 April 2020
- [Master Builders Australia \(MBA\)](#) – 6 April 2020
- [MYCAR](#) – 6 April 2020
- [National Farmers' Federation \(NFF\)](#) – 6 April 2020
- [National Retail Association \(NRA\)](#) – 2 April 2020
- [Pharmacy Guild of Australia](#) – 6 April 2020
- [Real Estate Institute of Australia \(REIA\)](#) – 6 April 2020
- [Real Media Collective](#) – 6 April 2020
- [Rosenlund Contractors](#) – 3 April 2020;
- [South Australian Wine Industry Association \(SAWIA\)](#)– 3 April 2020
- [United Firefighters Union of Australia \(UFU\)](#)– 6 April 2020
- [Victorian Ambulance Union Incorporated \(VAU\)](#) – 6 April 2020

[17] The ACCI, ACTU and Ai Group supported the *provisional* views in the April Statement. ACCI notes that it does not adopt all of the reasoning expressed in the April Statement and it proposes some ‘potential refinements to the drafting’ of the proposed terms. Similarly, Ai Group advances some drafting changes. The ACTU makes some observations about certain awards included in phase 1 and about the need to consider additional measures:

‘in industry and occupational awards covering employees who, as part of their employment, are required to personally attend to the needs of persons who have COVID-19, or are at a recognised high risk of suffering from COVID-19 virus, or work in health and community sector related environments where the risk of exposure to COVID-19 is clearly elevated (such as in disability services and aged care).’⁶

[18] We deal with each of these issues later.

[19] The Minister for Industrial Relations (the Minister) ‘strongly supports’ the making of the proposed variations.

⁶ ACTU submission 6 April 2020 at para [9](a)

[20] Our *provisional* views were also supported (or not opposed) by:

- Aruma (in relation to the SCHADS Award);
- Association of Professional Engineers, Scientists and Managers Australia (APESMA) (in relation to the Airport Employees Award 2020; Ambulance and Patient Transport Industry Award 2020; Animal Care and Veterinary Services Award 2020; Architects Award 2020; Electrical Power Industry Award 2020; Health Professionals and Support Services Award 2020; Health Professionals and Support Services Award 2020; Local Government Industry Award 2020; Pharmacy Industry Award 2020; State Government Agencies Award 2020; and Water Industry Award 2020.
- Association of the Consulting Architects (in relation to the Architects Award);
- Australian Chiropractors Association (in relation to the Health Professionals and Support Services Award);
- Australian Hotels Association;
- AMWU (in relation to the Airline Operations Ground Staff Award 2010; Architects Award 2010; Food, Beverage and Tobacco Manufacturing Award 2010; Graphic Arts, Printing and Publishing Award 2010; Manufacturing and Associated Industries and Occupations Award 2010; Rail Industry Award 2010; Seafood Processing Award 2010; Storage Services and Wholesale Award 2010; Sugar Industry Award 2010; Vehicle Manufacturing, Repair, Services and Retail Award 2010; and Waste Management Award 2010.)
- Australian Security Industry Association (in relation to the Electrical, Electronic and Communications Contracting Industry Award and the Security Services Industry Award);
- Community Connections Solutions (in relation to the Children's Services Award, Clerks - Private Sector Award and Social, Community, Home Care and Disability Services Award);
- CFMMEU (Maritime Division) (in relation to the Marine Tourism and Charter Vessels Award); and the Professional Diving Industry (Recreational) Award;
- Fire Protection Services (in relation to the Electrical, Electronic and Communications Contracting Industry Award and the Plumbing and Fire Sprinklers Award);
- Greenlife Industry Australia (in relation to the Nursery Award 2020)
- Law Council of Australia (in relation to the Legal Services Award);
- Local Government Associations Western Australia, Tasmania and Northern Territory (in relation to the Local Government Industry Award);
- MYCAR (in relation to Vehicle Manufacturing, Repair, Services and Retail Award 2010);
- National Retail Association;
- National Farmers Federation (in principle support in relation to the Horticulture Award and the Pastoral Industry Award);

- Pharmacy Guild;
- Real Media Collective – TRMC (in relation to the Book Industry Award 2010; Broadcasting, Recorded Entertainment and Cinemas Award 2010; Business Equipment Award 2010; Graphic Arts, Printing and Publishing Award 2010; Journalists Published Media Award 2010; and Road Transport and Distribution Award 2010);
- SA Wine Industry Association (in relation to the Wine Industry Award);

[21] We note that a number of specific submissions made highlighted the need for additional flexibility, beyond that contained in Schedule X.⁷ As we mentioned in the April Statement we have decided to adopt a more limited approach, for the moment, to provide a quick response to the current crises. We will continue to monitor developments and respond accordingly. Submissions received in relation to particular awards are dealt with below.

Ambulance and Patient Transport Industry Award

[22] The Victorian Ambulance Union (VAU) supports the provisional views set out in the April 2020 Statement subject to a minor amendment to clause X.2.1(a); by replacing the word ‘premises’ with ‘a workplace’. The VAU contends that ‘most employees in the ambulance and patient transport industry are required to work at a workplace that are not ‘premises’ within the ordinary meaning of that expression’ and the VAU is concerned that the reference to premises may be misinterpreted by some employees. The VAU also notes that the award currently uses the expression ‘workplace’ in clauses 3.3, 14.2, 18.3(b)(ii), 20.5(c) and 30.8(b).

[23] The issue raised by the VAU has been addressed by the changes we propose to make to the unpaid pandemic leave term.

Air Pilots Award

[24] The AFAP submits that the Personal Leave provisions in the *Air Pilots Award 2010* (the Air Pilots Award) should be altered to ensure that a pilot may access Personal Leave, in circumstances where they need to self-isolate as a result of a possible exposure to someone with a COVID-19 infection. The AFAP further submits that unpaid pandemic leave be created as a sub-category of Personal Leave, such that a pilot that is required to self-isolate in relation to a potential COVID-19 infection, could either access paid Personal Leave, if they elect, or to access unpaid pandemic leave. The AFAP also seeks to expand the entitlement to unpaid pandemic leave to a ‘per occasion’ entitlement.

[25] The AFAP also submits that ‘it is critical that a definition of ‘self-isolate’ is included in the draft unpaid Pandemic Leave clause’. We disagree. We have already addressed what we mean by self-isolate at [47] of the April Statement.

[26] We do not propose to make any of the changes sought by the AFAP. The matters raised can be pursued by a s.158 application to vary the Air Pilots Award. We propose to insert Schedule X into the Air Pilots Award.

⁷ For example; MYCAR (formerly known as KMART Tyre and Auto Services); and Aruma.

Construction awards

[27] The ACTU submits that the *Electrical, Electronic and Communications Contracting Award 2010* (the Electrical, Electronic and Communications Contracting Award) and the *Plumbing and Fire Sprinklers Award 2010* (the Plumbing and Fire Sprinklers Award) are closely associated with the construction industry and accordingly may not be appropriate for inclusion in phase 1. The CEPU objects to the variation of the Electrical, Electronic and Communications Contracting Award and submits that ‘at the very least’, it should not be included in phase 1.

[28] The HIA submitted that two of the Construction Awards – the *Building and Construction, (General Onsite) Award 2010* and the *Joinery and Building Trades Award 2010* should not be excluded from phase 1 of the variation of modern awards to include Schedule X. The HIA submission highlights the adverse impact, both economically and on an individual basis, that COVID-19 is having on the residential building industry. HIA submits that the flexibility provided by the proposed variations ‘would be a significant benefit to employers and their employees in the residential building industry during this difficult time’.⁸

[29] The HIA concludes its submissions as follows:

‘As indicated at the outset, HIA will have discussions with other industrial parties with the view to a consent position on the proposed variations. However, if these discussion are unsuccessful HIA submit that the Onsite Award and the Joinery Award be included in the Phase 1 Awards and varied as proposed by the Commission in its Statement.’⁹

[30] The MBA provides ‘in principle’ support for the terms in Schedule X and the drafting proposals advanced by ACCI. Further, the MBA submits that:

‘the proposed variations will be of benefit to workplaces covered by the Construction Awards and have identified no barriers to their inclusion in Phase One, were the Commission minded to adopt this approach.

In the alternative, and noting that the Commission has encouraged the Construction Awards parties to engage in discussions about measures to respond to the impacts of the COVID-19 pandemic, we submit that the parties would collectively be assisted were the Commission to consider determining a timeframe by which these should occur. We submit this will ensure discussions are undertaken efficiently.’¹⁰

[31] We also note that FPAA supports the variation of the Electrical, Electronic and Communications Contracting Award and the Plumbing and Fire Sprinklers Award.

[32] It is apparent that the exclusion of certain Construction awards from the phase 1 variations is contested. Further, differing views have been expressed about the awards characterised as ‘Constructions Awards’ for this purpose. We agree with the proposition that the Electrical, Electronic and Communications Contracting Award and the Plumbing and Fire

⁸ HIA submission 6 April 2020 at para 1.14

⁹ HIA submission 6 April 2020 at para 4.2

¹⁰ MBA Submission at [5] and [6].

Sprinklers Award are closely associated with the construction industry and should be considered as part of the Construction group of awards for present purposes.

[33] We do not propose to vary any of these awards at this stage. We will adopt 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.

Educational Services (Teachers) Award

[34] The Association of Independent Schools (AIS) and the Independent Education Union of Australia (IEU) made a joint submission in relation to the *Educational Services (Teachers) Award 2010* (the Teachers Award).¹¹ Both parties support the inclusion of the unpaid pandemic leave provision but submit that the annual leave at half pay provision should only apply to teachers employed in early childhood services operating for at least 48 weeks per year pursuant to Schedule B of the Teachers Award. The Joint Submission is supported by:

- Association of Independent Schools of New South Wales
- Association of Independent Schools of South Australia
- Association of Independent Schools of Western Australia
- Independent Schools Queensland
- Independent Schools Tasmania
- Independent Schools Victoria

[35] The AIS and the IEU submit that:

‘Under the Award, the taking of annual leave is not at a time of a teacher’s choosing, rather a teacher “*must take annual leave during non-term weeks.*” (cl.21.2). Further, cl.19.8 states “... *The employee’s absence from school during non-term weeks is deemed to include their entitlement to annual leave.*”

[36] During the 4 yearly review of modern awards the Annual Leave Full Bench decided not to insert the annual leave model terms into the Teachers Award and concluded:

‘Having considered the material submitted by all parties we have determined that due to the nature of the education industry, including the particular leave arrangements for school teachers, the annual leave model terms should not apply to employees under the Teachers Award other than to teachers employed in early childhood services that operate for at least 48 weeks per year.’¹²

[37] The AIS and IEU submit that, similarly, the annual leave at half pay provision has no work to do in the body of the Teachers Award. The CCSA supports the Joint Submission.

[38] We agree with the Joint Submission. The variation determination for the Teachers Award will be amended so that the unpaid pandemic leave provision will apply to both the body

¹¹ AIS and IEU [submission](#)

¹² [\[2017\] FWCFB 2098](#)

of the award and Schedule B and the annual leave at half pay provision will only apply to teachers employed in early childhood services operating for at least 48 weeks per year pursuant to Schedule B.

Electrical Power Industry Award

[39] The CEPU (Electrical Energy and Services Division), the CFMMEU and the ASU (collectively the Unions) submit that the *Electrical Power Industry Award 2020* (the Electrical Power Industry Award) should not be varied to include Schedule X. The thrust of the Unions' submissions is that the award does not meet the criteria identified for inclusion in the first tranche of award variations. In addition, the Unions submit that given the existing regulatory arrangements applying to the industries covered by the award the proposed variations 'will do little or nothing to assist employers and employees in meeting the challenges of the COVID-19 pandemic'.

[40] The Unions¹³ advanced the following reasons in support of its contention that the Electrical Power Industry Award not be varied at this time:

(a) The electrical power industry has not yet experienced a significant downturn in demand.¹⁴ In fact, there is some evidence of an increased demand for skilled labour with the major power companies looking to secure and even supplement the existing workforce to meet this demand.¹⁵

(b) The electrical power industry is an essential service in which the greatest challenge in the coming period will be to maintain the existing skilled workforce required in order to keep power stations and associated infrastructure operating at a sufficient level. There is for the foreseeable future, very little prospect of the power industry employers seeking to stand-down or demobilise employees falling within the scope of the Power Award in response to the COVID-19 pandemic.

(c) The electrical power industry is covered by the 'electricity, gas, water and waste services' industry.¹⁶ Therefore, the electrical power industry is one of the least adversely impacted industry as identified at paragraph [25] of the Statement.

(d) The electrical power industry is not an award reliant industry. Electrical power workers are engaged in the 'electricity, gas, water and waste services' industry, as identified in the Statement.¹⁷ In fact, the electrical power industry has blanket enterprise agreement coverage, with all major power stations subject to enterprise agreements to which the Unions are party.

¹³ [CEPU and others](#) (joint sub CEPU, CFMMEU, ASU) – 6 April 2020 at para [10]

¹⁴ "The global energy industry responds to COVID-19" *Australian Energy Market Regulator* 2 April 2020: <https://aemo.com.au/news/global-energy-industry-responds-to-covid19>.

¹⁵ Given the confidential nature of these discussions, we have chosen not to cite specific examples in this submission. However, if necessary such information can be provided confidentially to the Commission.

¹⁶ In award terms, the brown coal mining operations in Victoria are not regarded as part of the coal mining industry. It has always been regarded and regulated as part of the electrical power industry.

¹⁷ See paragraph [90] of the April 2020 Statement and Chart 4.

[41] The Unions also submit that:

‘productive and cooperative discussions between the Unions, electrical power industry employers and employees are already occurring at an enterprise and company level with the aim of ensuring a consistent supply of electrical power to the Australian community whilst at the same time protecting the health and safety of power industry workers’.¹⁸

[42] The ACTU submits that the Electrical Power Industry Award ‘does not seem to meet the criteria identified for inclusion in phase 1’ and has other characteristics that suggest that it may not be appropriate for inclusion in phase 1:

‘The Electrical Power Industry Award significantly covers power generation, distribution and supply and well as brown coal mining for the purposes of generating power. There is nothing in the Statement or the material accompanying it to suggest COVID-19 effects are impacting that industry. Mining and Electricity, Gas, Water and Waste Services rank as the two lowest industries for award reliance the Information Note – Modern Awards and Industries published with the Statement.’¹⁹

[43] We accept the submission put by the Unions and do not propose to vary the Electrical Power Industry Award at this time.

Fire Fighting Industry Award

[44] The United Fire Fighters Union of Australia submits that the Fire Fighting Industry Award 2010 (the Fire Fighting Industry Award) be excluded from the awards to be varied to include Schedule X. The UFU submits that ‘

‘all fire fighters covered by the award, either in the public sector in Victoria and the ACT or in the private sector in various states, are employed under and covered by Enterprise Agreements. There is no indication that this will change in the time period targeted by the Commission.’

[45] The ACTU submits that the Fire Fighting Award ‘does not seem to meet the criteria identified for inclusion in phase 1’ and has other characteristics that suggests it may not be appropriate for inclusion in phase 1:

‘The Firefighting Industry Award operates in an essential service, the provision of which is not driven by demand but by ever present risk. The firefighting industry is not one which has been identified in the Statement, or the material in or accompanying it, as one which is experiencing or facing a downturn as consequence of COVID-19. The award predominantly covers large, public sector organisations and has been mapped in the Information Note – Modern Awards and Industries to a sector with over 80% collective agreement coverage. In addition, the firefighters covered by that award overwhelmingly work a “10/14” roster pattern which programs blocks of annual leave in a manner that is ill suited to the proposed Annual leave at half pay clause.’²⁰
(footnotes omitted)

¹⁸ [CEPU and others](#) (joint sub CEPU, CFMMEU, ASU) – 6 April 2020 at para [12]

¹⁹ ACTU submission 6 April 2020 at para [14](c).

²⁰ ACTU submission 6 April 2020 at para [14](a).

[46] As the Fire Fighting Industry Award does not appear to presently apply to any employee we do not propose to vary the award at this time.

Fitness Industry Award

[47] The Australian Swim Schools Association (ASSA) submitted, in respect of the *Fitness Industry Award 2010* (Fitness Award) that the proposed quantum of unpaid pandemic leave should be increased to a maximum of 20 days per individual employee because individuals are likely to find themselves in circumstances requiring multiple periods of self isolation, and that 10 days' leave would prove to be 'manifestly insufficient' and was 'not consistent with current medical practice regulatory requirements'.

[48] We do not accept the submission put. The self-isolation rules published by the Commonwealth Department of Health²¹ require that persons who have COVID-19, or have been in close contact with a confirmed case of COVID-19, or have arrived in Australia after midnight on 15 March 2020, must for a period of 14 days stay at their home or hotel except in an emergency, must not go to public places including, relevantly, work, and not receive visitors. The proposed pandemic leave provision is consistent with these rules, in that it would allow an employee to take unpaid leave from work in respect of all working days falling within the requisite 14 day self-isolation period, regardless of the employee's roster pattern. We are not aware of any case, in respect of an employee covered by the Fitness Industry Award in which multiple periods of self-isolation have been required.

[49] The ASSA also submitted that any new pandemic leave entitlement should be extended for a period of six rather than three months.

[50] We consider in the current circumstances that the leave should be available for a three month period but, as we indicated in our April 2020 Statement,²² we may extend the period by a subsequent variation depending on the duration of the COVID-19 pandemic. Further, we note that restrictions on opening have been placed on many of the businesses covered by the Fitness Award. In particular, restrictions have been placed on the following facilities:

- Gyms and indoor sporting venues;
- Health clubs, fitness centres, yoga, barre and spin facilities, saunas, bath houses and wellness centres;
- Boot camps, personal training operating inside (for outside events, limited to groups of no more than 10 people and social distancing must be exercised); and
- Social-sporting based activities and swimming pools.

[51] We do not propose to make any of the changes sought by ASSA. The matters raised can be pursued by a s.158 application to vary the award. We propose to insert Schedule X into the Fitness Industry Award.

²¹ <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/how-to-protect-yourself-and-others-from-coronavirus-covid-19/self-isolation-self-quarantine-for-coronavirus-covid-19>.

²² [2020] FWCFB 1760 at [60]

Health Care Workers

[52] The ACTU, AMNF and the HSU made submissions regarding the particular circumstances of health care workers. The relevant awards are:

- *Aboriginal Community Controlled Health Services Award 2010*
- *Aged Care Aware 2010*
- *Ambulance and Patient Transport Industry Award 2010*
- *Health Professionals and Support Services Award 2010*
- *Medical Practitioners Award 2010*
- *Nurses Award 2010*
- *Pharmacy Industry Award 2010*
- *Social, Community, Home Care and Disability Services Industry Award 2010*
- *Supported Employment Services Award 2010*

[53] The ACTU, AMNF and the HSU support the variations of the above awards to include Schedule X. The ACTU goes on to submit that:

We consider it critical that the Commission allow a further matter to be ventilated urgently and as soon as practicable after the determinations to vary modern awards are issued in the current proceeding. That further matter relates to what additional measures might be fair, relevant and necessary to meet the modern awards objective in industry and occupational awards covering employees who, as part of their employment, are required to personally attend to the needs of persons who have COVID-19, or are at a recognised high risk of suffering from COVID-19 virus, or work in health and community sector related environments where the risk of exposure to COVID-19 is clearly elevated (such as in disability services and aged care). We anticipate that such employees would have a much greater likelihood of being required to self-isolate on more than one occasion. Such employees may be covered by a number of the awards identified as “phase 1” awards in paragraph [108] of the Statement, including the Aboriginal Community Controlled Health Services Award, Aged Care Award, Ambulance and Patient Transport Industry Award, Health Professionals and Support Services Award, Medical Practitioners Award, Nurses Award, Pharmacy Industry Award, and Social, Community, Home care and Disability Services Industry Award. It is our strong view that workers in those industries should be entitled to paid leave on multiple occasions. To be clear, we do not suggest that the “quick response” proposed by the Commission should be delayed pending the initiation of this further matter.’²³

[54] Further, the ANMF contends that:

‘it is critical that the Commission allows representatives of health care workers to be heard as a matter of urgency on making further amendments to the relevant awards to provide for paid pandemic leave on a per occasion basis.’

[55] The ANMF advances the following submission in support of its contention:

²³ ACTU submission 6 April 2020 at para [9](a).

‘As is evident in countries throughout the world, front-line health care workers, of whom nurses make up a large proportion of the workforce, are contracting the COVID-19 virus due to high levels of exposure.

There is evidence to indicate that health care workers are being infected at higher rates than the general public – even acknowledging that testing rates are also higher. In addition, there is evidence that health care workers are experiencing more serious symptoms as a result of contracting COVID-19 than the general public.

As the pandemic progresses in the coming months, it will be essential that health care workers are available to work treat patients infected with COVID-19. Periods of self- isolation to minimise the spread of infection for front-line health care workers will be an ongoing necessity to ensure the workforce remains healthy. Prevention of spread of the virus must be a forefront consideration.

Other health services, such as emergency departments, cancer wards, aged care and disability services are essential services that must continue to operate. Recipients of care in these environments are highly vulnerable to the impact of contracting COVID-19. Staff who care for these vulnerable people who have been exposed to COVID-19 are and will continue to be required to self-isolate to minimise the risk of infection in vulnerable groups of people.

It is highly likely that health care workers may be required to self-isolate on more than one occasion to minimise the spread of infection.’²⁴

[56] It is on this basis that the ANMF contends that it is ‘a matter of public health importance’ that health workers be provided with paid pandemic leave on a per occasion basis.

[57] Similarly, the HSU urges the Commission to convene an urgent separate process so they can be provided with an opportunity to be heard on additional proposed variations to these awards. In support of that proposition the HSU submits:

‘However, for employees working in the health, aged care and social and community services, including disability support (SACS) sectors, and covered by the nine awards listed above, we submit that further temporary award variations are required in order to provide these employees access to paid leave per occasion they are required to isolate. We outline the reasons for this below:

- (a) There is an significant public health interest to ensure that health, aged care and SACS workers do not attend work while carrying the SARS-CoV-2 virus as these workers are in contact with the most vulnerable members of the community, including people with disabilities, elderly people, and patients who are sick or immunocompromised.
- (b) Due to the nature of their work and workplaces, health, aged care and SACS workers are more likely to be exposed to the virus, and exposed multiple times, compared to employees in the general population.
- (c) The need for additional personal leave for health, aged care and SACS workers has been reflected historically in awards. There are numerous examples of premodern awards in the health, aged care and SACS sectors which provided employees with increased

²⁴ ANMF submission 6 April 2020 at paras [10] – [14]

personal leave,²⁵ leave for dangerous medical conditions,²⁶ infectious disease leave,²⁷ or responded to specific health crises with additional leave provisions, such as tuberculosis leave.²⁸

- (d) There is emerging evidence that healthcare workers are at risk of contracting more severe forms of COVID-19.²⁹
- (e) It is in the public interest to promote adequate leave for health, aged care and SACS workers to ensure retention of staff in the health care workforce as the number of confirmed COVID-19 cases continue to rise and the workforce demand surges.³⁰

[58] APESMA submits pharmacists are in the ‘front line’ and run the higher than usual risk of being exposed to COVID-19 in delivering ‘a vital service to customers’ and believes that workers employed under the Pharmacy Award and other health awards should be entitled to paid leave on multiple occasions and seek to be part of a separate process that considers this.

[59] We will shortly convene a conference of interested parties with a view to establishing a separate process to address the issues raised by the ACTU, ANMF, APESMA and HSU.

Real Estate Award

[60] The Real Institute of Australia (REIA) did not oppose our *provisional* views in respect of the *Real Estate Industry Award 2020* (the Real Estate Industry Award); but also advanced a proposal to change the current minimum income threshold amount (MITA) in the award. The MITA is a requirement before an agent can be employed on a commission only basis. The REIA’s submission was supported by letters from a number of real estate businesses covered by the award. All of the letters were in similar terms and contained the following statement:

‘If this is agreed to, in my agency alone, this would mean that I would be able to hold on to XXX salespeople which I would otherwise have to let go as we attempt to stay open as long as we can.’

[61] The reference to ‘XXX’ was replaced by a number, save in one instance where ‘XXX’ was retained.

[62] We would observe that the submission advanced by the REIA was not directed at the *provisional* views expressed in the April Statement and the ‘letter campaign’ in support of the submission unnecessarily tied up Commission resources.

²⁵ See, eg, *Nurses (Victorian Health Services) Award 2000*, clause 19.23 which provided up to 159 hours and 36 minutes paid personal leave; clause 30.1.2(c) of the *Ambulance Services and Patient Transport Employees Award, Victoria 2002* provided up to 168 hours paid personal leave.

²⁶ See, eg, *Victorian Health and Community Services (Psychiatric, Disability and Alcohol and Drug Services) Award 2003*, clause 26.4.

²⁷ See, eg, *Nursing Homes Award (Tasmania) 2009*, clause 33(f) – Personal leave and infectious diseases; *Hospitals Award (Tasmania) 2009*, clause 39(f) – Personal leave and infectious diseases.

²⁸ See, eg, *Victorian Health and Community Services (Psychiatric, Disability and Alcohol & Drug Services) Award (1995)*, clause 25.5; *Nurses (Tasmanian Private Sector) Award (2007)* clause 25.3.3.

²⁹ The Centre for Evidence-Based Medicine, Oxford University, *SARS-CoV-2 viral load and the severity of COVID-19* (April 2020) <<https://www.cebm.net/covid-19/sars-cov-2-viral-load-and-the-severity-of-covid-19/>>.

³⁰ HSU submission 6 April 2020 at para [5]

[63] If the REIA wishes to pursue a variation to the MITA arrangements in the Real Estate Industry Award it is invited to file a s.158 application to vary the award. Schedule X will be inserted into the award.

The Phase 1 Awards

[64] For the reasons set out above, the following awards will be removed from the phase 1 list set out in the April 2020 Statement:

- *Electrical, Electronic and Communications Contracting Award 2010*
- *Electrical Power Industry Award 2020*
- *Fire Fighting Industry Award 2020*
- *Plumbing and Fire Sprinklers Award 2010*

[65] The Awards to be varied to insert Schedule X are set out at **Attachment A** to this decision.

3. Schedule X

[66] We first set out the terms we propose to include in the first version of Schedule X and our rationale for these measures. We begin with the proposal in relation to unpaid pandemic leave.

Unpaid pandemic leave

[67] To contain the spread of COVID-19 and to ‘flatten the curve’ in order to reduce pressure on the health system, employees may be requested or required to self-isolate for 14 days. ‘Self-isolation’ is generally used in Australia to refer to circumstances both where a person may have been exposed to COVID-19 but is not known to be infected and where a person has been diagnosed with COVID-19 but is not ill enough to require hospitalisation (see [Dept of Health](#)) — although strictly speaking, the former is ‘quarantine’ and the latter is ‘isolation’ (see [RACGP](#)). In the April 2020 Statement we referred to a ‘regulatory gap’ in the award safety net concerning employees who are required to self-isolate.

[68] Employees who have contracted COVID-19 may have an entitlement to paid personal/carer’s leave under the National Employment Standards (NES) (see ss 95–101 of the Act). But the number of employees able to utilise paid personal/carer’s leave to cover a period of self-isolation is likely to be limited. And so, while some employees required to self-isolate may be able to access paid or unpaid leave; for most award-covered employees this will depend upon the agreement of their employer. If the employer does not consent then an employee required to self-isolate may be placed in the invidious position of either contravening public health directions or guidelines, or placing their employment in jeopardy.

[69] Nor do the statutory protections against dismissal provide a complete solution to this problem. Unfair dismissal protections do not extend to all employees. A wider range of employees may be protected from dismissal under the general protections provisions in the Act, in particular s.352. But, as with paid personal leave, the protection against dismissal under s 352

may not apply to an employee required to self-isolate because they have been exposed to someone infected with COVID-19, if the employee has not tested positive to COVID-19; is not displaying any symptoms; and is not unfit for work because of personal illness.

[70] The gaps in leave entitlements and protections against dismissal can be addressed, for employees to whom awards apply, by providing an entitlement to unpaid ‘pandemic leave’ to employees who are required to self-isolate or are otherwise prevented from working by measures taken by government or medical authorities in response to the COVID-19 pandemic. As well as providing an entitlement to unpaid leave to employees who have no existing leave entitlements available to them in these circumstances, such a new leave entitlement would supplement existing leave entitlements and constitute a ‘workplace right’ for the purposes of the general protections under the Act.

[71] ACCI submits that [51] to [54] of the April Statement suggest that one of the considerations as to why the unpaid pandemic leave term is ‘necessary’ in the context of s.157 concerns the ‘gaps in ... and protections against unfair dismissal’. ACCI contends that this is not a proper consideration in the context of ss 134 and 157, submitting that:

‘The proper consideration when setting modern award conditions is the conditions themselves not whether or not an employee obtains a specific secondary or collateral benefit such as unfair dismissal rights etc.

Nothing in the MAO could be taken to be a warrant for expanding unfair dismissal rights or adverse action rights *per se*.

Nothing in section 139 would suggest that such a consideration should be properly contemplated in determining what can and should go into a modern award.

Respectfully, it seems unclear why the Commission appears to have strayed into this issue which is not required to ground the “necessary” test in section 157 or meet the MAO in section 134.’³¹

[72] We note that ACCI also submits that the test of ‘necessity’ in s.157 is met, given the following ‘unusual circumstances’.

- (a) Employees are being compelled by enforceable Public Health Orders to self-isolate etc.
- (b) No modern award was constructed in the current context.
- (c) It would be both fair and relevant (to employers and employees) in the current context to have clarity and simplicity of understanding in regard to this issue.
- (d) The leave being unpaid but available as of right is a balanced approach in the current context (fairness).
- (e) Varying a large number of modern awards to deal with a common issue promotes simplicity and stability in the current context.³²

³¹ ACCI submission 6 April 2020 at paras [49] – [52]

³² Ibid at para [44]

[73] It is unnecessary to address ACCI's contention that the modern awards objective provides no warrant for expanding unfair dismissal protections because, as ACCI concedes, the variations proposed meet the test of necessity in s.157 for the reasons set out in the paragraph above. Further, there is a clear connection between the measures proposed and the modern awards objective.

[74] Importantly, access to unpaid pandemic leave will enable more people to remain in employment. The proposed entitlement will also support the important public policy objective of encouraging those who should self-isolate, to do so and thereby limit the spread of COVID-19 in workplaces allowing businesses to continue to operate.

[75] Further, as the Minister submitted:

'In this case, the extraordinary circumstances associated with COVID-19, and in particular the particular risk to security of employment identified in the Statement justify the measures proposed in the Statement, and will contribute positively to the 'fairness' and 'relevance' of the safety net represented by the identified modern awards. It is appropriate they be introduced on a temporary basis as a specific and time-limited response to the current circumstances.'³³

[76] The proposed unpaid pandemic leave provision is as follows:

X.2.1 Unpaid pandemic leave

- (a) Subject to clauses X.2.1(b) and (c), any employee may elect to take up to 2 weeks' unpaid leave if the employee is required, by government or medical authorities or acting on medical advice, to self-isolate or is otherwise prevented from working by measures taken by government or medical authorities in response to the COVID-19 pandemic in circumstances where the employee is required to work at premises operated by an employer.
- (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).
- (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) 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 1: A employee covered by this Award who is entitled to the benefit of clause X.2.1 has a workplace right under section 341(1)(a) of the Act.

³³ Ibid at para [16]

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

[77] ACCI proposes three changes to the drafting of the unpaid pandemic leave term, which are said to 'aid understanding, clarity and application'.

[78] The first proposed change concerns clause X.2.1(a), which states that 'any employee may elect to take up to 2 weeks' unpaid leave' (emphasis added). ACCI proposes that this be amended to 'any employee is entitled to take up to 2 weeks' unpaid pandemic leave'. ACCI advances the following submission in support of the proposed changed:

'Some members have expressed concern that employees may want to attend work when they are required to self-isolate and the word "elect" suggests that the employee has a right to attend work despite the Government and medical directives. This ambiguity could introduce unnecessary health problems and risks.'³⁴

[79] We had included the words 'may elect' to make it clear that it is not necessary for employees to exhaust their paid leave entitlements before accessing unpaid pandemic leave. As we said in the April Statement:

'As a practical matter, we think that award-reliant employees are likely to access any available paid leave entitlements before utilising an entitlement to unpaid pandemic leave but we do not think it appropriate to mandate such an approach. Further, to require employees to access any paid leave entitlement before accessing unpaid pandemic leave would introduce an unwarranted degree of complexity into the proposed award term.'³⁵

[80] We take ACCI's point about the potential for ambiguity arising from the use of the words 'may elect' and will make the change proposed. In doing so, we reiterate that it is not necessary for an employee to exhaust their paid leave entitlements before accessing unpaid pandemic leave. If an employee has an entitlement to personal/carers leave and unpaid pandemic leave it will be a matter for the employee to elect which entitlement to use.

[81] We do not think it necessary to add the word 'pandemic' between the words 'unpaid' and 'leave' as the meaning is clear from the context.

³⁴ ACCI submission 6 April 2020 at para [56]

³⁵ [2020] FWCFB 1760 at [62]

[82] The second proposed change concerns the part of clause X.2.1(a) which states that unpaid pandemic leave can be accessed when ‘acting on medical advice’ the employee is required to self-isolate. ACCI proposes that this expression be amended to ‘acting on advice of an appropriately qualified medical practitioner’.

[83] We will vary the term by deleting the expression ‘acting on medical advice’ and replacing it with ‘on the advice of a medical practitioner’. We note that ‘medical practitioner’ is defined in s.12 of the Act to mean:

‘a person registered, or licensed, as a medical practitioner under a law of a State or Territory that provides for the registration or licensing of medical practitioners’

[84] Given the definition of medical practitioner the proposed words ‘appropriately qualified’ are otiose.

[85] The final change proposed by ACCI concerns the observation in the April Statement that the variations ‘would operate until 30 June 2020’. ACCI contends that this formulation may give rise to some ambiguity:

‘For instance, does this mean that an employee can commence two weeks of unpaid pandemic leave at any point up until 30 June, or that any period of unpaid leave must terminate on 30 June 2020? It must be the former, and it would be illogical to have a provision that purported to see persons forced to isolate asked to return to work.’³⁶

[86] ACCI proposes the addition of the following subclause X.2.1(d) to the standard term:

- (d) Any period of unpaid pandemic leave under this clause must commence during the period this schedule is in operation, and extend only for a maximum of 2 weeks, provided that:
 - (i) An employer and employee may agree to extend unpaid pandemic leave.
 - (ii) The period of 2 weeks unpaid leave may in whole or part extend beyond the period this clause is in operation.
 - (iii) Nothing in this clause compels or encourages any employee to attend work contrary to medical directions or where it would not be safe to do so.

[87] In our view the issue raised can be satisfactorily addressed by adding the following paragraph to clause X.2.1.

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

[88] A similar amendment will be made to the annual leave at half pay term.

[89] We will also include a note under clause X.2.1 as follows:

‘The employer and employee may agree that the employee may take more than 2 weeks’ unpaid pandemic leave.’

³⁶ ACCI submission 6 April 2020 at para [60].

[90] A note in similar terms is in the standard unpaid leave to deal with family and domestic violence term in modern awards. The note is also consistent with the NES entitlement to unpaid family and domestic violence leave at s.106A(5):

‘To avoid doubt, this section does not prevent the employee and the employer agreeing that the employee may take more than 5 days of unpaid leave to deal with the impact of family and domestic violence.’

[91] Ai Group generally did not oppose the award variations proposed but in respect of the proposed unpaid pandemic leave provision, Ai Group submitted that the qualification in clause X.2.1(a) that the employee be prevented from working ‘in circumstances where the employee is required to work at premises operated by an employer’ (underlining added) was flawed because in many cases employees work at premises that were either not operated by their employer or by any employer at all. The Ai Group gave as examples of this employees of ground handlers working at airports, employees of contract cleaning and security services companies, employees of contractors working on construction sites, long distance truck drivers and social care workers performing work in the homes of their employer’s clients. It proposed that clause X.2.1(a) be redrafted as follows:

(a) Subject to clauses X.2.1(b) and (c), any employee may elect to take up to 2 weeks’ unpaid leave if the employee is required, by government or medical authorities or acting on medical advice, 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. ~~in circumstances where the employee is required to work at premises operated by an employer.~~

[92] We consider that the submission put has merit. It was not our intention to confine the operation of the proposed pandemic leave provision by reference to the identity of the operator of the employee’s place of work; rather, as we made clear in the Statement, it is intended to operate where a period of self-isolation or some other pandemic-related restriction prevents the employee from being able to attend their place of work.

[93] Accordingly clause X.2.1(a) will be modified consistent with the amendment proposed by Ai Group. In the event that this amendment gives rise to any unforeseen consequences it can be the subject of further consideration, on application by an interested party.

[94] The NFF raise an issue concerning whether an employee would have an entitlement to unpaid pandemic leave if they can work in isolation, for example from home or in a remote paddock. In our view this issue is addressed by the amendment we propose to make.

[95] The unpaid pandemic leave entitlement also interacts with the broader social safety net; in particular the proposed JobKeeper payment.

[96] On 30 March 2020 a third stimulus package was announced,³⁷ requiring legislation to take effect, that included the following:

³⁷ Reference: <https://www.pm.gov.au/media/130-billion-jobkeeper-payment-keep-australians-job>.

- The introduction of the JobKeeper payment. This payment is a \$1500 wage subsidy (before tax) per eligible employee, paid directly to businesses who then use it to subsidise the payment of their employee's wage and pay directly to eligible employees. It is designed to maintain the employment relationship between employers and employees.
 - Affected employers will be able to claim a fortnightly payment of \$1500 per eligible employee from 30 March 2020, for a maximum of 6 months
 - Eligibility is dependent on employers having suffered a significant reduction in revenue – 30 per cent for small businesses and 50 per cent for businesses with a turnover of \$1 billion or more.
 - Full-time workers; part-time workers, sole traders, casuals who have been with their employer for 12 months or more, not for profit entities, New Zealanders on 444 visas, and migrants who are eligible for JobSeeker Payment or Youth Allowance (Other) will be eligible for the subsidy.
 - Employees who have been stood down by their employer since 1 March 2020 will be eligible.
 - If workers ordinarily received \$1500 or more income per fortnight before tax, they will continue to receive regular income according to the prevailing workplace instrument, the JobKeeper Payments will subsidise part or all of their income.
 - The payment is a minimum of \$1500 per fortnight, before tax.
 - Employees cannot access both the JobSeeker and JobKeeper payments.
- The \$1500 payment will be issued from 1 May 2020 and backdated to 30 March 2020. The subsidy represents around 70 per cent of the median wage and 100 per cent of the median wage in the industries most heavily affected (such as retail and hospitality). The Government predicts around 6 million workers will access the payment over 6 months.
- Superannuation payments will not be made on the JobKeeper payment, it will be up to employers if they want to pay superannuation or any additional wage paid because of JobKeeper Payments.
- JobSeeker recipients will have their partner's income test threshold temporarily increased to \$79,762 per annum (\$3068 per fortnight), thereby increasing the amount of people who will be eligible for the JobSeeker payment.

[97] In the April 2020 Statement³⁸ we asked the Commonwealth to clarify whether the proposed JobKeeper payment will be paid to employees on unpaid pandemic leave. In putting that question we noted that:

‘In our view, if the proposed payment is not available to employees on unpaid pandemic leave that fact would mitigate against employees using the proposed new entitlement and may also have the adverse public policy consequence that some employees may choose not to self-isolate when they should do so.’³⁹

[98] The Minister responded to the invitation to clarify whether the proposed JobKeeper payment will be paid to employees on unpaid pandemic leave, as follows:

‘the Minister confirms that legislation introducing the proposed JobKeeper payment will ensure that the payment will be made to qualifying employees where they are taking unpaid leave, including the pandemic leave proposed by the award variations. It will also confirm that the payment will be available to both full-time and part-time employees, as well as casual employees who have been with their eligible employer on a regular and systematic basis for at least the previous 12 months.’⁴⁰

[99] We now turn to the other element of the first version of Schedule X.

Twice as much annual leave at half pay

[100] The first version of Schedule X includes a model term providing additional flexibility in respect of annual leave. In short it provides that an employer and employee may agree to take up to twice as much annual leave at half the rate of pay. Such a provision has recently been inserted into the Hospitality Award, the Clerks – Private Sector Award and the Restaurant Award. The term proposed is as follows:

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.⁴¹

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:

³⁸ [\[2020\] FWCFB 1760](#)

³⁹ Ibid, at [116].

⁴⁰ Commonwealth Minister for Industrial Relations submission 7 April 2020 at [9]

⁴¹ Proposed clause X.2.2(b) is to ensure that there is a record of the agreement in order to protect the interests of both parties and to minimise the risk of subsequent dispute. We note that Regulation 3.36 (with s. 535) requires employers to keep a record of any leave taken by an employee entitled to leave and to record the balance of the employee’s entitlement to that leave from time to time.

- the employee’s full pay for the 2 weeks’ leave is the same as the pay the employee would have been entitled to for one weeks’ leave on full pay (including leave loading under the Annual Leave clause of this award);⁴² and
- one week of leave is deducted from the employee’s annual leave accrual. (Underlining added).

NOTE 1: A employee covered by this Award who is entitled to the benefit of clause 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 workplace right, or to exercise or propose to exercise a workplace right in a particular way.

[101] In the April 2020 Statement we note that the proposed term is consistent with the example given in Note 1 to s.55(4) and expressed the *provisional* view that the term is permitted by s.55(4). No party contested this *provisional* view. We confirm that the proposed term is permitted by s.55(4). It is ancillary or incidental to the operation of an entitlement of an employee under the NES (namely, the rate of pay required by s.90). Further, the effect of the term is not detrimental to an employee in any respect, when compared to the NES.

[102] ACCI raises an issue regarding leave loading, as follows:

‘The intention seems clear, where one week’s annual leave would attract a single week’s pay, plus 17.5%, two week’s leave under the proposed provision would be payable at the same total figure, i.e. 38 hours ordinary pay plus 17.5%. We consider the proposed terms wording in [73] risks creating ambiguity, through the use of the word “including”. We therefore propose a variation to the ‘EXAMPLE’ as follows:

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 full pay for the 2 weeks’ leave is the same as the pay the employee would have been entitled to for 1 weeks’ leave on full pay. Annual leave loading, under the Annual Leave clause of*

⁴² The underlined words in the example in the proposed clause X.2.2 would only be included in those modern awards that currently contain a term providing for annual leave loading.

this award, shall continue to be payable on the basis of 1 week's leave on full pay, regardless of any extended period of leave taken by agreement; and

- *one week of leave is deducted from the employee's annual leave accrual.*⁴³ (Underlining added).

[103] We accept that the present reference to leave loading may not be entirely clear. We will amend the wording of the first point in the example to make it clearer that the employee's pay for the 2 weeks' leave in this example, is one week's full pay inclusive of leave loading for that one week:

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 ~~full~~ pay for the 2 weeks' leave is the same as the pay the employee would have been entitled to for ~~one~~ week's² leave on full pay (where one week's full pay includes including leave loading under the Annual Leave clause of this award); and
- one week of leave is deducted from the employee's annual leave accrual.

[104] ACCI also raises an issue regarding the proposed notes to this term (and the corresponding notes proposed in relation to unpaid pandemic leave) and submit that they not be included:

'the notes to the clause relating to the general protections provisions are unnecessary. More relevantly, it seems undesirable to start to put notations into modern awards setting out what secondary rights and penalties may apply should a modern award not be complied with. Respectfully, if the Commission starts down this course, where does it stop.'⁴⁴

[105] We would observe that similar notes are contained in the standard modern award terms dealing with 'cashing out of annual leave' and TOIL. We are satisfied that the notes proposed are necessary and appropriate. We will however rationalise the notes so they appear at the end of the Schedule rather than after each of the terms.

[106] In relation to the proposed annual leave provision, Ai Group submitted that there should be more options as to the taking of annual leave than just taking twice as much leave at half pay. In this respect, the Ai Group pointed to the approach taken in the recent variations made to the Clerks – Private Sector Award, the Hospitality Award and the Restaurant Award. It proposed that paragraphs (a) and (b) of the proposed clause X.2.2 be amended as follows:

- (a) Instead of an employee taking paid annual leave on full pay, the employee and their employer may agree to the employee taking up to twice as much leave at ~~half pay~~ a proportionately reduced rate of pay.

⁴³ ACCI submission 6 April 2020 at para [68]

⁴⁴ ACCI submission 6 April 2020 at paras [73] – [75]

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

[107] It also proposed that the examples in the proposed clause be modified consistent with this.

[108] Ai Group's submission has merit in a theoretical sense. However in practical terms it is necessary for us to make award variations which have a consensus of support as soon as practicable in order to provide early measures of mitigation to employers and employees. The Ai Group's proposal is a substantive change to our proposed provision which would, in the interests of procedural fairness, require further submissions to be invited from interested parties. It would also require consideration as to the reasonable limits to be placed on the options to be afforded so as to exclude *de minimis* extensions to the annual leave and the corresponding adjustment to pay. We do not consider that the delay this would necessarily cause is justifiable in the present circumstances. Accordingly we do not intend to adopt the Ai Group's proposal at this time.

[109] The NFF raises some issues regarding the ramifications which the proposed term may have for the accumulation of leave submitting that:

'without more all of the time that the employee is on 'double annual leave at half pay' contribute [sic] in full toward the accumulation of annual and personal leave.

If this conclusion is correct and, as it appears, it is an unintended consequence of the proposal, then it is our submission that the amount of leave which accrues during this period of 'double annual leave at half pay' should also be halved.'⁴⁵

[110] We do not propose to make the change suggested by the NFF as the term is facilitative only and access to twice as much annual leave at half pay is dependent upon agreement between the employer and employee. We also note the NFF's submission that:

'We stress that our support for the Commission's proposal does not hinge on these issues. On balance, it is our view that the intent of the proposal is sound and that it should be adopted irrespective of the observations we make above.'⁴⁶

[111] The revised version 1 of Schedule X is as follows (changes in mark-up):

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), ~~and (c)~~ and (d), any employee is entitled ~~may elect~~ to take up to 2 weeks' unpaid leave if the employee is required; by

⁴⁵ NFF submission 6 April 2020 at paras [8] – [9].

⁴⁶ NFF submission 6 April 2020 at para [12].

government or medical authorities or ~~acting on medical~~ 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 ~~in circumstances where the employee is required to work at premises operated by an employer~~.

(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).

(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.

~~(de)~~ 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.

~~NOTE 1: A employee covered by this Award who is entitled to the benefit of clause X.2.1 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 workplace right, or to exercise or propose to exercise a workplace right in a particular way.~~

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 ~~full~~ 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 including leave loading under the Annual Leave clause of this award); 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 workplace right, or to exercise or propose to exercise a workplace right in a particular way.

The modern awards objective

[112] 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 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).

[113] The modern awards objective is very broadly expressed.⁴⁷ 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).⁴⁸ Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.⁴⁹

⁴⁷ *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35]

⁴⁸ (2017) 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44]

⁴⁹ [2018] FWCFB 3500 at [21]–[24]

[114] 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.⁵⁰ No particular primacy is attached to any of the s.134 considerations⁵¹ and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[115] 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.⁵² 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.⁵³ 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.

[116] 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.’

[117] 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.⁵⁴

[118] We now turn to the s.134 considerations, noting that, in our view, the considerations in s.134(da), (e) and (g) are not relevant in the present context. Further, we note the ACTU submission that s.134(1)(b) is a neutral consideration in this matter and no other party contended to the contrary. We deal with the other considerations below.

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

[119] A threshold of two-thirds of median full-time wages provides ‘a suitable and operational benchmark for identifying who is low paid’,⁵⁵ within the meaning of s.134(1)(a).

⁵⁰ *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]

⁵¹ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33]

⁵² *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]–[106]

⁵³ See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]–[110]; albeit the Court was considering a different statutory context.

⁵⁴ See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227

⁵⁵ [\[2017\] FWCFB 1001](#) at [166]

[120] 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.

[121] Using the two-thirds of median full-time wages as the benchmark, there are employees in the awards we propose to vary who are ‘low paid’ within the meaning of s.134(1)(a).

[122] The measures we propose will not adversely impact on the capacity of low paid employees to meet their needs. The unpaid pandemic leave term will provide an additional entitlement for such employees, at the election of the employee. As to the annual leave flexibility term, this is a facilitative provision which may only be utilised by agreement between the employee and their employer.

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

[123] This consideration is directed at obtaining employment. The measures we propose will facilitate the retention of employees in employment during 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.

[124] It is convenient to deal with these considerations together. The variations proposed will have a positive impact on business. The proposed entitlement to unpaid pandemic leave will support the public policy objective of encouraging those who should self-isolate to do so and thereby limit the spread of COVID-19 in workplaces, allowing businesses to continue to operate. Similarly, the annual leave term will facilitate the retention of employees in employment. 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.

[125] At the outset we note that the decision to vary conditions in modern awards affects more employees than those considered by the ABS to be ‘award reliant’.

[126] The (EEH) ABS- Employee Earnings and Hours Publication collects data on the different methods of setting pay—awards, collective agreements and individual arrangements. The 2018 EEH found that 21.0 per cent of employees were award reliant—that is those that are paid at exactly the rate specified in the award, 37.9 per cent had their pay set by a collective agreement and 37.3 per cent had their pay set by an individual arrangement but, importantly this data only concerns how pay is set. It says nothing about the impact of the modern award system in setting minimum conditions such as leave and hours of work.

[127] It has been estimated that about 96 per cent of all private sector employees are covered by the federal industrial relations system.⁵⁶ Approximately 30 percent of all Australian employees are covered by federal enterprise agreements and are consequently not directly subject by federal awards;⁵⁷ consequently about two-thirds of private sector employees are directly subject to federal awards or individual arrangements, which may include over-award payments that refer to award terms and conditions.⁵⁸ However a significant proportion of enterprise agreements incorporate by reference the entirety of the provisions of particular modern awards (subject to any direct inconsistency with a provision of the agreement) and consequently it is likely that the provisions we make will be “picked up” in many enterprise agreements. The only other major categories of employees in the federal system who are not currently subject to modern awards are:

(1) High income employees to whom federal awards do not apply under s.47(2) of the Act. A high income employee is one who has guaranteed annual earnings of \$148,700 (see ss.329 and 333 and reg.2.13. Note: this amount was increased to \$148,700 from 1 July 2019.)⁵⁹

(2) Employees excluded from award coverage by s 143(7) of the Act – that is, employees who because of the nature or seniority of their role have traditionally not been covered by awards or who perform work that is not of a similar nature to work that has traditionally been regulated by awards.

[128] The proportion of employees encompassed by these two categories is small. Employees in the first category constitute well under 10 per cent of the workforce.⁶⁰ The second category is almost entirely composed of managerial and professional employees,⁶¹ and is likely to overlap to a considerable degree with the first category.

[129] We have also deducted the number of employees covered by the modern awards not in phase 1 who are not covered by enterprise agreements.

[130] Further, as a result of Full Bench decisions issued on 12 February 2020⁶² and 25 March 2020,⁶³ the coverage of the *Miscellaneous Award 2010* will be expanded effective from 1 July 2020. Clause 4.3 of the *Miscellaneous Award* in its current form excludes from the coverage of

⁵⁶ *Towards more productive and equitable workplaces - An evaluation of the Fair Work legislation* - Fair Work Act Review 2012, [3.6.1]

⁵⁷ 30.4% as at May 2018: *Trends in Federal Enterprise Bargaining Report*, Attorney-General’s Department, September quarter 2019

⁵⁸ This is not to be confused with the lower proportion of employees who derive their rate of pay from federal awards.

⁵⁹ This amount was increased to \$148,700 from 1 July 2019, see: <https://www.fwc.gov.au/unfair-dismissals-benchbook/coverage-unfair-dismissal/high-income-threshold>

⁶⁰ ABS, *Employee Earnings and Hours, Australia, May 2018*, Catalogue No. 6306.0, Data Cube 3, Table 1

⁶¹ In proceedings concerning the *Miscellaneous Award 2010*, the Full Bench was unable to clearly identify any employee group apart from managers and professionals that was excluded from award coverage by s 143(7) – see [2020] FWCFB 754. The *Miscellaneous Award* will cover all employees who are not excluded from award coverage and are not covered by another modern award, except for managerial and profession employees, from 1 July 2020 – see [2020] FWCFB 1589.

⁶² [2020] FWCFB 754

⁶³ [2020] FWCFB 1589

the award employees who are employed in an industry covered by a modern award who are not within a classification in that modern award or who are in a class exempted by a modern award from its operation. In the 12 February 2020 decision, the Full Bench found that the effect of this exclusion was that lower-paid employees in some occupations such as cleaners and security guards who are employed in industries other than contract cleaning or security respectively will not be covered by any modern award, and that there was no intelligible industrial rationale for this outcome.⁶⁴ The variation to the coverage of the *Miscellaneous Award* will be to remove the current clause 4.3, and the effect of this will be that there will be no federal system employees at the advanced trade level or below who will not be covered by a modern award, unless they are excluded from award coverage by s 143(7) of the Act. As the Full Bench in that case observed, no party was able to identify any category of employees in that class who are so excluded.

[131] On the basis of these calculations we estimate 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.

[132] By assisting in maintaining employment and the viability of businesses these measures will directly contribute to the sustainability and performance of the national economy. This is a factor that weighs in favour of making the variation sought.

[133] We confirm our *provisional* view that taking into account the s.134 considerations, the modern award variations we propose to make to the awards set out at **Attachment A** are necessary to achieve the modern awards objective.

3. Next steps

[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.

[135] Full Benches of the Commission have recently made variations on an expedited basis to the Hospitality Award,⁶⁵ the Clerks–Private Sector Award⁶⁶ and the Restaurant Award.⁶⁷ Those variation applications had the support of the major industrial parties. Further, those applications were supported by the Australian Council of Trade Unions (the ACTU) and the Minister for Industrial Relations (the Minister).

[136] On 24 March 2020, a Full Bench granted an application to vary the Hospitality Award. The reasons for that decision were published on 25 March 2020⁶⁸ (the Hospitality Decision).

⁶⁴ [2020] FWCFB 754 at [45]-[46]

⁶⁵ [\[2020\] FWCFB 1574](#)

⁶⁶ [\[2020\] FWCFB 1690](#)

⁶⁷ [\[2020\] FWCFB 1741](#)

⁶⁸ [\[2020\] FWCFB 1574](#)

On 28 March 2020, a Full Bench granted an application to vary the Clerks–Private Sector Award and the reasons for that decision were published on 28 March 2020⁶⁹ (the Clerks–Private Sector Decision). On 31 March 2020, a Full Bench granted an application to vary the Restaurant Award (the Restaurant Decision)⁷⁰.

[137] The Hospitality Decision varied the Hospitality Award with effect from 24 March 2020 to provide additional award flexibility during the COVID-19 pandemic in relation to:

- the range of duties employees can be required to perform;
- reduction of ordinary hours of work for full-time and part-time employees; and
- employees being directed to take annual leave, and employees by agreement taking twice the amount of annual leave at half pay.

[138] The Clerks–Private Sector Decision varied the Clerks–Private Sector Award with effect from 28 March 2020 to provide additional award flexibility during the COVID-19 pandemic in relation to:

- the range of duties employees can be required to perform;
- the minimum engagement for part-time and casual employees working from home;
- the spread of ordinary hours of work of day workers working from home;
- temporary reduction of ordinary hours by agreement;
- employees being directed to take annual leave, and employees by agreement taking up to twice the amount of annual leave at a proportionately reduced pay rate; and
- a reduced notice period for close-down.

[139] The Restaurant Industry Decision varied the Restaurant Award to provide additional award flexibility during the COVID-19 pandemic in relation to:

- the range of duties employees can be required to perform;
- the reduction of ordinary hours of work for full-time and part-time employees;
- employees being directed to take accrued annual leave with 24 hours’ notice, subject to considering an employees’ personal circumstances;
- employees, by agreement, taking up to twice the amount of the accrued annual leave at half pay; and
- a reduction in the notice period for a close-down.

[140] It is important to note that these variation applications were made with the consent of the major unions and with the support of both the ACTU and the Minister. As noted in the Hospitality Decision the consent of the key industrial parties was the central consideration in adopting a truncated hearing process. In that decision the Full Bench also said:

⁶⁹ [\[2020\] FWCFB 1690](#)

⁷⁰ [\[2020\] FWCFB 1741](#)

‘[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.’⁷¹

[141] In addition to these variations of modern awards the ACTU’s website records that a number of businesses have granted employees access to special paid sick leave and additional support.

[142] The measures we are proposing to take are not intended to disturb the initiatives that are being taken by businesses to ameliorate the impact of the COVID-19 pandemic on employees. We note the submission of the Minister in this regard that:

‘As the Commission notes, the measures proposed are not intended to disturb initiatives that are already being taken by businesses to provide additional leave – including paid leave – to support their employees during this time. The Government commends those businesses and encourages others to consider the provision of paid leave measures where they have the capacity to do so.’⁷²

[143] We have 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.

[144] However, we have 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. 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.

PRESIDENT

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⁷¹ [2020] FWCFB 1574 at [14]

⁷² Minister for Industrial Relations submission 7 April 2020 at para [13].

[2020] FWCFB 1837

<PR718109>

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 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*