



Summary of Decision

28 March 2020

Application to vary an award — Clerks—Private Sector Award 2010— Award flexibility during the COVID-19 Pandemic

AM2020/10
[2020] FWCFB 1690

[1] On Saturday, 28 March 2020 the Commission granted an application made jointly by the Australian Chamber of Commerce and Industry (ACCI) and the Australian Industry Group (Ai Group) to vary the *Clerks—Private Sector Award 2010* (the Clerks award) (the Joint Application). The application seeks to add a new schedule; Schedule I—Award Flexibility during the COVID-19 Pandemic, to the Clerks Award. It is proposed that the new schedule operate until 30 June 2020.

[2] The Joint Application was supported by the Australian Services Union (ASU), the Australian Council of Trade Unions (ACTU) and the Commonwealth Minister for Industrial Relations (Minister).

[3] The parties asked that the application be expedited. After consulting with the major parties, the matter was listed for hearing at 9:30am on Saturday, 28 March 2020.

[4] The Commission published a Statement¹ on 26 March 2020 which outlined the process for dealing with the application.

‘[25] Any submission supporting or opposing the Joint Application and the *provisional* views set out at [21], [23] and [24] must be filed by **4pm on Friday 27 March 2020**. Submissions should be:

- Sent to amod@fwc.gov.au and include the matter number (AM2020/10) in the subject line.
- Filed in Word format.

[26] Any party who wishes to attend the hearing in relation to this matter should send an email to Chambers.Ross.j@fwc.gov.au specifying a name and contact telephone number by **4pm on Friday 27 March 2020**.’

[5] The Joint Application arose from the unique set of circumstances pertaining to the current COVID-19 pandemic and sought to include a new Schedule I to provide for award flexibility on a temporary basis.

¹ [\[2020\] FWCFB 1630](#).

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

[7] ACCI, Ai Group, the ASU and the ACTU reached an agreed position in relation to a proposed set of amendments to the Clerks Award in response to the COVID-19 pandemic and the associated public health orders.

[8] The Full Bench approved the application in a decision published on Saturday, 28 March 2020 [\[2020\] FWCFB 1690](#).

[9] In its decision granting the Joint Application the Commission noted, that ‘the notice provided to parties of the hearing was much shorter than the Commission’s standard practice.’² The Commission also referred to the observation in the Hospitality Decision³ that the application and content of the doctrine of procedural fairness is determined by the context and said that the key contextual considerations in the matter before it were:

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

[10] Similar circumstances arose in relation to the Joint Application. The Full Bench noted at [10]:

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

[11] The Full Bench decided that:

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

[97] For the reasons set out above we will make the variation determination sought. The determination will come into operation on 28 March 2020. As required by s.165(3) the determination does not take effect in relation to a particular employee until the start of the

² [\[2020\] FWCFB 1690](#).

³ [\[2020\] FWCFB 1574](#).

employee's first full pay period that starts on or after the day the determination comes into operation.'

[12] The Full Bench concluded its decision with the following observation:

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

[13] The determination came into operation today, 28 March 2020 and Schedule I operates until 30 June 2020. As required by s.165(3) the determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation. A copy of the variation determination is attached. The Clerks award will be updated with the new Schedule and republished on the Commission's website on Monday 30 March 2020.

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

- ENDS -



DETERMINATION

Fair Work Act 2009

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

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

CLERKS—PRIVATE SECTOR AWARD 2010
[MA000002]

Clerical industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER BISSETT

MELBOURNE, 28 MARCH 2020

Application to vary the Clerks—Private Sector Award 2010.

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

1. By inserting Schedule I as follows:

Schedule I—Award Flexibility During the COVID-19 Pandemic

I.1 The provisions of Schedule I are aimed at preserving the ongoing viability of businesses and preserving jobs during the COVID-19 pandemic and not to set any precedent in relation to award entitlements after its expiry date.

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

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

I.2.1 Operational flexibility

(a) As directed by their employer, where necessary an employee will perform any duties that are within their skill and competency regardless of their classification

under clause 15—Classifications and Schedule B—Classifications, provided that the duties are safe, and that the employee is licensed and qualified to perform them.

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

I.2.2 Part-time employees working from home

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

I.2.3 Casual employees working from home

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

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

- (a) Instead of clause 25.1(b) (Ordinary hours of work (other than shiftworkers), for employees working from home by agreement with the employer where an employee requests and the employer agrees, the spread of ordinary hours of work for day workers is between 6.00 am and 11.00 pm, Monday to Friday, and between 7.00 am and 12.30 pm on Saturday.
- (b) Day workers are not shiftworkers for the purposes of any penalties, loadings or allowances under the award, including for the purposes of clause 28.
- (c) The facilitative provision in clause 25.2 (Ordinary hours of work (other than shiftworkers)), which allows the spread of hours to be altered, will not operate for the employees referred to in clause I.2.4(a).

I.2.5 Agreed temporary reduction in ordinary hours

- (a) An employer and the full-time and part-time employees in a workplace or section of a workplace, may agree to temporarily reduce ordinary hours of work for the employees in the workplace or section for a specified period while Schedule I is in operation.
- (b) At least 75% of the full-time and part-time employees in the relevant workplace or section must approve any agreement to temporarily reduce ordinary hours.
- (c) For the purposes of clause I.2.5(a), ordinary hours of work may be temporarily reduced:
 - (i) For full time employees, to not fewer than 75% of the full-time ordinary hours applicable to an employee immediately prior to the implementation of the temporary reduction in ordinary hours.

- (ii) For part-time employees, to not fewer than 75% of the part-time employee's agreed hours immediately prior to the implementation of the temporary reduction in ordinary hours.
- (d) Where a reduction in hours takes effect under clause I.2.5(a), the employee's ordinary hourly rate will be maintained but the weekly wage will be reduced by the same proportion.
- (e) Nothing in Schedule I prevents an employer and an individual employee agreeing in writing (including by electronic means) to reduce the employee's hours or to move the employee temporarily from full-time to part-time hours of work, with a commensurate reduction in the minimum weekly wage.
- (f) If an employee's hours have been reduced in accordance with clause I.2.5(a):
 - (i) the employer must not unreasonably refuse an employee request to engage in reasonable secondary employment; and
 - (ii) the employer must consider all reasonable employee requests for training, professional development and/or study leave.
- (g) For the purposes of clause I.2.5(a), where there is any reduction in the ordinary hours of work for full-time or part-time employees in a workplace or section during the period Schedule I is in operation, all relevant accruals and all entitlements on termination of employment will continue to be based on each employee's weekly ordinary hours of work prior to the commencement of Schedule I.
- (h) For the purposes of clause I.2.5(a), the approval of employees shall be determined by a vote of employees. In order for the vote to be valid, the employer must comply with the following requirements:
 - (i) Where any of the employees are known to be members of the Australian Services Union or another organisation, the ASU or other organisation shall be informed before the vote takes place.
 - (ii) Prior to the vote of employees, the employer shall provide the employees with the contact details of the ASU, should they wish to contact the ASU for advice; and
 - (iii) The employer must notify the Fair Work Commission by emailing clerksaward@fwc.gov.au that the employer proposes to conduct a vote under Schedule I. The employer shall provide the work email addresses of the employees who will be participating in the vote, to the Commission. The Commission will then distribute the ASU COVID-19 Information Sheet to the employees prior to the vote. The Commission shall list the name of the business on a register which will be accessible to the ASU, upon request, for the period when Schedule I is in operation.

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

I.2.6 Annual leave

- (a) Employers and individual employees may agree to take up to twice as much annual leave at a proportionately reduced rate for all or part of any agreed or directed period away from work, including any close-down.
- (b) Instead of clauses 29.6, 29.7 and 29.8 (Annual leave), an employer may direct an employee to take any annual leave that has accrued, subject to considering the employee's personal circumstances, by giving at least one week's notice, or any shorter period of notice that may be agreed. A direction to take annual leave shall not result in an employee having less than 2 weeks of accrued annual leave remaining.

I.2.7 Close down

- (a) Instead of clause 29.5 (Annual leave), and subject to clause I.2.7(b), an employer may:
 - (i) require an employee to take annual leave as part of a close-down of its operations by giving at least one week's notice, or part of its operations, or any shorter period of notice that may be agreed; and
 - (ii) where an employee who has not accrued sufficient leave to cover part or all of the close-down, the employee is to be allowed paid annual leave for the period for which they have accrued sufficient leave and given unpaid leave for the remainder of the closedown.
- (b) Clause I.2.7(a) does not permit an employer to require an employee to take leave for a period beyond the period of operation of Schedule I.
- (c) Where an employee is placed on unpaid leave pursuant to clause I.2.7(a), the period of unpaid leave will count as service for the purposes of relevant award and NES entitlements.

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

B. This determination comes into effect on 28 March 2020. In accordance with s.165(3) of the Fair Work Act 2009 this determination does not take effect until the start of the first full pay period that starts on or after 28 March 2020.

PRESIDENT

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