

IN THE FAIR WORK COMMISSION

AM2021/86

COVID-19 Award Flexibility - Schedule X

SUBMISSIONS OF THE AUSTRALIAN CHAMBER OF COMMERCE AND INDUSTRY

INTRODUCTION

1. The Australian Chamber files these submissions arising from the Statement issued by the Fair Work Commission on 14 December 2021.¹
2. The Statement concerns “Schedule X - Additional measures during the COVID-19 pandemic” which was originally inserted into 99 modern awards in April 2020.²
3. Schedule X originally operated until 30 June 2020 and this was subsequently extended to 31 December 2021.³
4. Schedule X had two limbs:
 - (a) it provided for a right to certain leave related to the COVID-19 pandemic; and
 - (b) allowed an employer and an employee to agree to take a period of annual leave on the basis of double the period of leave at half pay.
5. Various unions have sought to further extend the operation of Schedule X but only in so far as the Schedules concern the right to certain leave.
6. In its Statement the Fair Work Commission has expressed a preliminary view that unless an interested party expresses opposition to the applications it will deal with the union applications ‘on the papers’.
7. The Australian Chamber does not express opposition per se but proposes that the Fair Work Commission considers taking a comparatively more expansive approach to dealing with the impending cessation of Schedule X than the course proposed by various unions.
8. In doing this we note that the Fair Work Commission may act of its own motion in varying a modern award⁴ and is not in any event bound by the terms of an application when deciding a matter.⁵
9. The Australian Chamber proposes that, for abundant caution in the current uncertain and changeable circumstances faced by employers and employees, if Schedule X is to be retained in modern awards the Fair Work Commission should:
 - (a) retain it in all current modern awards that contain Schedule X; and
 - (b) retain it in its current form (in full).

¹ [2021] FWC 6606

² [2020] FWCFB 1837

³ [2020] FWCFB 3490, [2020] FWCFB 5137, [2020] FWCFB 1621

⁴ S 157(3)

⁵ S 599

10. A not dissimilar approach was adopted by the Fair Work Commission in March 2021.⁶
11. The state of the COVID-19 pandemic is now one of flux but also of entering uncharted territory and transition.
12. In general terms Australia is moving from a strategy of containment and eradication (characterised by government directed lock-downs and stringent related regulation) to a strategy of cohabitation with the SARS-CoV-2 virus and the COVID-19 disease (characterised by opening-up and a return to normal functioning social interactions).
13. It should be uncontroversial that the SARS-CoV-2 virus will likely spread at a higher frequency than previously experienced⁷ and as such a number of employees may be required to isolate in some fashion from contracting SARS-CoV-2 during coming months.
14. Alongside this the Australian economy is slowly recovering (although not uniformly) and while some governments have heralded an end to lock-downs the path forward for business operations is far from clear and may yet see further challenges and changes.
15. The reasoning that supported Schedule X in April 2020 and March 2021 is in large respects apposite today including the notion of a regulatory-gap and s 134 considerations.
16. The need for the annual leave flexibility may have reduced but given that:
 - (a) the flexibility is only enlivened by mutual agreement;
 - (b) business is only now experiencing opening-up in a largely pre-pandemic form;
 - (c) collectively the parties to these matters and the Commission cannot be confident that this flexibility will not be relevant in workplaces and that it may not be a useful option for employers and employees; and
 - (d) the Omicron variant appears to now be taking dominance from the Delta strain of SARS- CoV-2some caution should be exercised in removing the flexibility too soon.
17. It may be the case that in mid-2022 the need for Schedule X will fall away or it may be that while Australia learns to 'live with COVID', parts of the economy recover soundly and the need for retaining the leave flexibility component ceases. This will be a matter for the next of these reviews. Respectfully, the Fair Work Commission should have greater clarity in the early part of 2022 having experienced several months of the operation of opening-up than it has today.
18. In this context the Fair Work Commission should consider retaining Schedule X:
 - (a) in all modern awards it currently exists in; and
 - (b) in its current form in those awards;until 30 June 2022, with such position being reviewed at a conference convened with relevant parties at a time in advance of expiry of the Schedule, perhaps in May of 2022.

⁶ [2021] FWCFB 1621

⁷ [2021] FWCFB 6059

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