

Australian Industry Group

Applications to vary Schedule X

Submission
(AM2021/86)

17 December 2021

Ai
GROUP

AM2021/86 – APPLICATIONS TO VARY SCHEDULE X

1. This submission is made by the Australian Industry Group (**Ai Group**) in accordance with the Statement¹ issued by the Fair Work Commission (**Commission**) on 14 December 2021 relating to applications to vary Schedule X in 67 modern awards and to reinstate Schedule X in one additional award.
2. This submission also addresses the matters referred to in the Commission's subsequent Statement² of 15 December 2021 concerning applications to vary Schedule X in a further five awards.
3. The applications:
 - Seek to extend or renew the operation of the unpaid pandemic leave entitlements in clause X.2.1 of Schedule X from 31 December 2021 to 30 June 2022.
 - Do not seek an extension of clause X.2.2 of Schedule X which provides the flexibility to take twice as much annual leave at half pay.
4. If the Commission is convinced that an extension in the operation of the unpaid pandemic leave entitlements in clause X.2.1 of Schedule X in the relevant awards would be consistent with the modern awards objective and would be necessary to achieve the modern awards objective, we submit that it would be equally consistent and necessary for the annual leave flexibility in clause X.2.2 of Schedule X in each of the awards to be extended.
5. In the Commission's *April 2020 Decision*,³ a 6-member Full Bench of the Commission determined that clauses X.2.1 and X.2.2 in Schedule X were consistent with the modern awards objective and necessary to achieve the modern awards objective for identical reasons. The following extracts from the decision are relevant:

¹ [2021] FWCFB 6606.

² [2021] FWC 6611.

³ [2020] FWCFB 1837.

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

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[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.

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[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.

6. It follows from the reasoning of the Full Bench in the *April 2020 Decision* that, if it is consistent with the modern awards objective and necessary to achieve the modern awards objective for clause X.2.1 in Schedule X to be extended, it would be equally consistent and necessary for clause X.2.2 to be extended.

7. The current applications are analogous to applications filed earlier this year by unions seeking to extend the unpaid leave aspects of Schedule X but not the annual leave flexibility term.⁴ In that instance the Commission acted of its own motion to extend the operation of Schedule X in its entirety in the applicable awards.⁵ In its March Decision⁶ in those proceedings the Commission held:

[12] The observations made in the April 2020 Decision regarding the basis for the initial insertion of Schedule X into the relevant awards remain apposite.

[13] Absent the continued operation of Schedule X there would be a 'regulatory gap' in the award safety net concerning employees who are required to self-isolate. Continuing access to unpaid pandemic leave will enable more people to remain in employment and will support the important public policy objective of encouraging those who should self-isolate to do so. This will assist in limiting the spread of COVID-19 in workplaces and allowing businesses to continue to operate.

[14] In relation to the flexibility to take twice as much annual leave at half pay we note that clause X.2.2 in Schedule X is a term permitted by s.55(4). It is ancillary or incidental to the operation of an entitlement 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.

[15] As noted in the April 2020 Decision, the flexibility to take twice as much annual leave at half pay will facilitate the retention of employees in employment during the pandemic and will have a positive impact on business.

8. It is also relevant that in July 2021, the Commission acted on its own initiative to reinstate the terms of the expired Schedule X in the Graphic Arts Award until 31 December 2021 following a request from a party that did not have standing to make an application.⁷ The reinstated schedule included the unpaid pandemic leave entitlements and the flexible annual leave provision.
9. A consistent approach should be adopted in response to the applications currently before the Commission. The pandemic is continuing and the availability of the flexibility for employees to take twice as much annual leave at half pay will foreseeably be of utility to some employees and employers navigating associated challenges. Such a provision is of potential benefit to employees who may be

⁴ AM2021/9 and Ors

⁵ [2021] FWCFB 1621

⁶ *ibid*

⁷ [2021] FWCFB 4428.

unable to work if they are isolating or otherwise needing to access leave for other COVID-19 related reasons in circumstances where they may have exhausted other paid leave entitlements. There are no reasons for it not to continue to be retained in the relevant awards temporarily.

10. As noted by the Full Bench at paragraph [122] of the April 2020 Decision: *“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”*.
11. In summary, Ai Group does not oppose the extension of clause X.2.1 in Schedule X in the relevant awards until 30 June 2022. However, we submit that clause X.2.2 in Schedule X should also be extended until 30 June 2022 for the reasons outlined above.
12. From a procedural perspective, we submit that the Full Bench should express a provisional view that Schedule X should be extended until 30 June 2022 in all awards the subject of relevant applications and afford parties a short period to advance any opposition, before making a decision.