



STATEMENT

Fair Work Act 2009

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

The Australian Industry Group and Australian Chamber of Commerce and Industry (AM2020/105)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
DEPUTY PRESIDENT MILLHOUSE
COMMISSIONER BISSETT
COMMISSIONER BOOTH

MELBOURNE, 18 DECEMBER 2020

Clerks—Private Sector Award 2020—joint application to vary Schedule I-Award flexibility during the COVID-19 pandemic – provisional view.

[1] On 28 March 2020 the Commission issued a decision¹ (the *March 2020 Decision*) granting a joint application filed by the Australian Industry Group (Ai Group) and the Australian Chamber of Commerce and Industry (ACCI) and supported by the Australian Council of Trade Unions (ACTU) and the Australian Services Union (ASU), to insert a new schedule, ‘Schedule I-Award flexibility during the COVID-19 pandemic’, into the Clerks – Private Sector Award 2020 (the Clerks Award). The new schedule came into operation on 28 March 2020 and was to cease to operate on 30 June 2020, unless extended.

[2] Since the *March 2020 Decision* the Commission has granted three applications to extend the operation of Schedule I.² The Schedule is due to cease operation on 29 March 2021.

[3] In a decision on 6 October 2020,³ the Full Bench said:

‘...the terms of Schedule I reflect the extraordinary circumstances arising from the restrictions imposed to contain the COVID-19 virus. The restrictions are now easing but the direct economic and social impacts of the pandemic will be felt for some time to come. It also seems likely that there will be a continuing need for flexible work arrangements to assist employers and employees in adapting to the changed conditions

¹ [\[2020\] FWCFB 1690](#)

² [\[2020\] FWCFB 3443](#), [\[2020\] FWCFB 5199](#), [\[2020\] FWCFB 6078](#)

³ [\[2020\] FWCFB 5199](#)

and to support the recovery. The facilitation of agreed working from home arrangements looms large in this context...

These circumstances suggest that there is a need to consider whether it is necessary to vary the Clerks Award to provide more enduring means of facilitating agreed working from home arrangements. The extension of Schedule I provides the parties with an opportunity to consider whether a more enduring solution is necessary and if so, the form of that solution...

We direct the ASU, ACTU, Ai Group and ACCI to confer in respect of the variations to the Clerks Award (if any) which are necessary to facilitate agreed working from home arrangements. In this regard we refer the parties to the model Flexibility Schedule attached to the [President's Statement](#) of 31 August 2020 as a starting point for those discussions. We would also refer the parties to the updated Information Note on Working from Home published on 1 October 2020.

The Commission will convene a conference in the week commencing 9 November 2020 to receive a report on the discussions...⁴

[4] Since that decision, there have been a number of conferences of the parties and discussions have been ongoing. On 17 December 2020, Ai Group and ACCI filed a joint application to vary Schedule I (the [Joint Application](#)). The Joint Application is the product of the discussions between the parties and is not opposed by the ACTU or the ASU.

[5] The Joint Application seeks to extend the operation of Schedule I until 30 June 2021 and to replace the current clause I.2.1 with a new provision dealing with remote working arrangements. The proposed clause defines remote work as follows:

‘For the purposes of clause I.2.1, Remote Work means work undertaken by an employee from their home or any other location of their choosing that is not the premises of their employer.’

[6] The proposed clause retains the same extended span of hours for day workers undertaking remote work as the current Schedule I, that is from 6.00 am to 10.00 pm, Monday to Friday, and from 7.00 am to 12.30 pm on Saturday. It also provides for the following additional flexibilities:

- employees may elect to work their hours in a non-continuous manner while undertaking remote work;
- part-time employees may select their own starting and finishing times when undertaking remote work, with agreement from their employer;
- flexibility in relation to the taking of meal or rest breaks by employees undertaking remote work, subject to agreement with the employer.

⁴ Ibid at [89], [94], [101] and [102]

[7] The Joint Application also seeks to vary clause I.1.3 as follows:

I.1.3 ~~Any An employer who issues a direction or makes a request given by an employer under the provisions of Schedule I, or who makes an any agreement made pursuant to clause I.2.1, from 1 July 2020, is not valid unless the employee is advised in writing that the employer provides~~ consents to a dispute about the direction, request or agreement being settled by the Fair Work Commission through arbitration in accordance with clause 40.5—Dispute resolution and section 739(4) of the Act.

[8] The applicants submit that removing the requirement for an employee to be advised in writing will ‘relieve employers of the administrative burden of needing to prepare and provide such documentation to an employee’. They submit further that, it does not dilute the access to consent arbitration of relevant disputes by the Commission. The proposed amendments would provide that an employer consents to this if they issue the relevant direction or request under the Schedule or enter an agreement pursuant to the Schedule. This will improve the workability of the Schedule.

[9] The grounds in support of the proposed variation are set out at [4] – [6] of the Joint Application:

‘4. The application is made because of the ongoing challenges facing employers due to the COVID-19 pandemic (Pandemic). As a result, in order to ensure that the Award achieves the modern awards objective, it is necessary to include the proposed flexibilities.

5. The application is also made in recognition of the desire of some employees, in the context of the pandemic, to undertake their hours of work in a flexible manner while working from their home or other location away from their employer’s premises, and that in many instances such desires will be acceptable to their employer.

6. The variation is necessary, in the relevant sense, for reasons which include the following overarching considerations:

i) Australia remains at risk from the health crisis resulting from the Pandemic.

ii) The threat to health posed by the Pandemic, developments in the international trading environment and Government initiatives to stop the spread of the virus have resulted in an exceptional decline in current economic conditions and cast a long shadow over conditions in the foreseeable future.

iii) The proposed Schedule I is necessary notwithstanding the extension of the Jobkeeper Scheme, subject to certain amendments, until 29 March 2021. This is because:

- A large group of employers and employees do not fall within the scope of the JobKeeper scheme despite experiencing economic distress.

- The proposed Schedule I would continue beyond the cessation of the Jobkeeper scheme.

iv) Schedule I would continue to expressly contemplate that the period of operation may be extended by the Commission:

I.1.1 ... The period of operation can be extended on application to the Fair Work Commission.

v) There continues to be an increased adoption of arrangements involving employees working from home, or other locations remote to the premises of their employer, relative to historical norms.

vi) Many of the present relevant circumstances justifying the operation of the Schedule appear likely to persist until at least 30 June 2021 and it is important and fair to provide both employers and employees with certainty as to the availability of the proposed flexibilities until this date. The requirement under s.131(1)(g) that the Commission take into account the need for a stable modern awards system provides a powerful justification granting the application.

[10] It is our *provisional* view that Schedule I should be varied and extended until 30 June 2021 in accordance with the Joint Application.

[11] The extension of Schedule I until 30 June 2021 will provide time for the parties to give further consideration to the form of an award term to operate after the expiry of Schedule I.

Next steps

[12] As mentioned above, it is our *provisional* view that Schedule I should be varied in the terms sought in the Joint Application and extended until 30 June 2021. A draft variation determination giving effect to that *provisional* view is set out at **Attachment A**.

[13] Any interested party opposing this *provisional* view must file a submission setting out their views by no later than **4pm on Tuesday 22 December 2020**. Submissions are to be sent to chambers.ross.j@fwc.gov.au.

[14] If no submissions are filed opposing our *provisional* view, we will issue a variation determination in the same terms as the draft determination at **Attachment A**.

[15] If any submissions are filed opposing our *provisional* view then a hearing will take place at **12noon on Thursday 24 December 2020**, by telephone. Parties wishing to appear at the hearing are to provide the name, direct number and organisation by **10am on Wednesday 23 December 2020** to chambers.ross.j@fwc.gov.au. If no submissions are filed opposing our *provisional* view then the hearing will not be necessary and will be vacated.

PRESIDENT

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Attachment A

MA000002 PRXXXXXX



DRAFT DETERMINATION

Fair Work Act 2009

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

The Australian Industry Group and Australian Chamber of Commerce and Industry
(AM2020/105)

CLERKS—PRIVATE SECTOR AWARD 2020
[MA000002]

Clerical industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
DEPUTY PRESIDENT MILLHOUSE
COMMISSIONER BISSETT
COMMISSIONER BOOTH

MELBOURNE, XX DECEMBER 2020

Application to vary the Clerks—Private Sector Award 2020 – Schedule I – Award Flexibility During the COVID-19 Pandemic

A. Further to the decision [[2020] FWCFB XXXX] issued by the Full Bench on XX December 2020, the above award is varied as follows:

1. By deleting the words “29 March 2021” appearing in clause I.1.1 and inserting “30 June 2021.”

2. By deleting clause I.1.3 and inserting the following:

I.1.3 An employer who issues a direction or makes a request under the provisions of Schedule I, or who makes an agreement pursuant to clause I.2.1, provides consent to a dispute about the direction, request or agreement being settled by the Fair Work Commission through arbitration in accordance with clause 40.5—Dispute resolution and section 739(4) of the Act.

3. By deleting clause I.2.1 and inserting the following:

I.2.1 Remote Working Arrangements

(a) Application of clause I.2.1

Clause I.2.1 applies when an employee is undertaking Remote Work as defined in clause I.2.1(b).

(b) Definition of Remote Work

For the purposes of clause I.2.1, Remote Work means work undertaken by an employee from their home or any other location of their choosing that is not the premises of their employer.

(c) Extended spread of ordinary hours for day workers

(i) Instead of clause 13.3, if an employee engaged on day work is undertaking Remote Work by agreement with their employer and the employee requests and the employer agrees, the spread of ordinary hours of work for the day worker may be between 6.00 am and 10.00 pm, Monday to Friday, and between 7.00 am and 12.30 pm on Saturday.

(ii) Day workers are not shiftworkers for the purposes of any penalties, loadings or allowances under the award, including for the purposes of Part 6—Shiftwork.

(iii) The facilitative provision in clause 13.4, which allows the spread of hours to be altered, will not operate for the employees referred to in clause I.2.1(c)(i).

(d) Ability for employees to elect not to work ordinary hours continuously

An employee undertaking Remote Work is not required by this award to work their ordinary hours continuously as specified by clause 13.6, if this is agreed between the employer and employee.

(e) Flexible starting and finishing times for part-time employees

(i) Notwithstanding clause 10.2(c), an employer and part-time employee are not required to reach agreement as to the starting and finishing times of an employee for any day that the employee will be undertaking Remote Work, if:

(A) they have instead agreed that the employee may choose their starting and finishing times on those days; or

(B) they have instead agreed to start and finish within a specific range of times.

(ii) Clause 10.3 does not require an employer and employee to reach separate agreements regarding changes to the times at which an employee will start or finish work each day if clause I.2.1(e)(i) applies.

(f) **Ability for part-time employees to work non-consecutive hours**

(i) Notwithstanding clause 10.5, an employer is not required to roster a part-time employee so that their hours of work are consecutive, provided that:

(A) It has been agreed between the employer and employee that the work does not need to be undertaken continuously; and

(B) The employee is provided with at least 3 hours of work on that shift.

(g) **Arrangements for taking meal and rest break while undertaking Remote Work**

(i) An employee who is undertaking Remote Work may take any meal or rest break referred to in clause 15 at any time that suits their personal circumstances, instead of taking them at the times prescribed by clause 15, provided that this is agreed to by their employer.

Example: An employee who is working more than 5 hours may elect to take their break at a point in their shift after the first 5 hours of work.

(ii) An employee who is undertaking Remote Work may alter the configuration of the meal or rest breaks referred to in clause 15 in order to suit their person circumstances instead of taking the breaks in the manner contemplated by clause 15, provided that this is agreed by their employer.

Example: An employee who is entitled to take a meal break of between 30 and 60 minutes under clause 15.3 may instead take 3 breaks of 20 minutes duration.

4. By deleting the words “29 March 2021” appearing in clause I.2.3(e) and inserting “30 June 2021”.

B. This determination comes into effect on XX December 2020. In accordance with s.165(3) of the *Fair Work Act 2009* (Cth) this 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 XX December 2020.

PRESIDENT

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