

Australian Industry Group

Application to vary the *Professional
Employees Award 2020*

Submission
(AM2021/74)

1 October 2021

Ai
GROUP

AM2021/74 APPLICATION TO VARY THE PROFESSIONAL EMPLOYEES AWARD 2020

1. INTRODUCTION

1. An application has been made by Mr Andrew Donnellan (**Applicant**) in the Fair Work Commission (**Commission**) in relation to the *Professional Employees Award 2020* (**Award**). Specifically, the Applicant seeks to vary the Award by inserting a new clause in ‘*Schedule X—Additional Measures During the COVID-19 Pandemic*’ to the Award (**Schedule X**), which would provide employees with an entitlement to paid COVID-19 vaccination leave (**Application**).
2. The proposed clause sought by the Applicant reads as follows:

X.2.3 COVID vaccination leave

- (a) An employee, including a casual employee, is entitled to up to 4 hours of paid leave, per occasion, in order to obtain a COVID-19 vaccination.
- (b) Leave may be taken under clause X.2.3(a) for a period agreed between an employee and their employer. The employer must not unreasonably refuse to agree to a request by the employee to take leave under clause X.2.3(a).
- (c) An employee, including a casual employee, is entitled to up to 2 days of paid leave immediately following a COVID-19 vaccination if they are not fit for work because of a personal illness or injury connected with the COVID-19 vaccination.
- (d) An employee must give their employer notice of the taking of leave under clause X.2.3(c). The notice:
 - (i) must be given to the employer as soon as practicable (which may be a time after the leave has started); and
 - (ii) must advise the employer of the period, or expected period of the leave.
- (e) An employee who has given their employer notice of the taking of leave under clause X.2.3(a) or clause X.2.3(c) must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for the purpose specified in clause X.2.3(a) or clause X.2.3(c) respectively.
- (f) An employer must not fail to re-engage a casual employee because the employee has accessed an entitlement under this clause.

(Proposed Clause)

3. The Application is made pursuant to ss.157 – 158 of the *Fair Work Act 2009* (**Act**).

4. The Australian Industry Group (**Ai Group**) files this submission in accordance with paragraph [4](1) of the statement and directions issued by the Commission on 20 September 2021¹ (**Statement**). In particular, this submission responds to the issue of whether there is any utility in the Commission hearing and determining the Application in the following circumstances outlined at paragraph [3] of the Statement:

[3] A number of issues were discussed at the conference including the utility of proceeding to hear and determine the application in circumstances where:

(i) The application seeks to insert a new subclause in Schedule X. Schedule X expires on 31 December 2021, unless an application is made and granted to extend its operation. I am not aware of any such application having been made date. These circumstances raise an issue as to the utility in proceeding to hear and determine the application at this time, or whether the application should be adjourned, with a right to have it brought back on if the operation of Schedule X is extended.

(ii) The factual context is very dynamic. According to government reports, vaccination levels have doubled since the application lodged. As at 18 September 2021, vaccination levels of persons over 16 years of age are 71.7% having received at least one dose, and 46.7% being fully vaccinated.

(iii) In these circumstances, by the time the application is heard and determined, there may be little, if any, work for the proposed clause to do, if the application was granted.

5. It is Ai Group's position that there is very limited if any utility in the matter being heard and determined, because:

(a) The Proposed Clause would expire on 31 December 2021 (**Expiry Date**). It appears that by the time the matter is heard and determined, there would be a very short period of time, if any, that would lapse between the Commission's determination of the matter and the Expiry Date.

¹ Application by Mr Andrew Donnellan [2021] FWC 5959.

- (b) The very vast majority of the eligible population will have received one if not both doses of a COVID-19 vaccine (**COVID Vaccine**) by the time that the matter is heard and determined. Moreover, it is anticipated that the requisite proportion of the population will be vaccinated in order for public health restrictions to be eased within weeks, absent the Proposed Clause.
- (c) On its face, the Proposed Clause is not necessary to ensure that the Award achieves the modern awards objective.

6. Accordingly, the Application should be dismissed.

7. We explain each of the bases for our position below.

2. THE PERIOD OF TIME REQUIRED TO DEAL WITH THE APPLICATION

8. The Proposed Clause seeks to:

- (a) Provide employees with up four hours of paid leave, per occasion, in order to obtain a COVID Vaccine.
- (b) Provide employees with up to an additional two days of leave after a COVID Vaccine, if they are not fit for work because of a personal illness or injury connected with the vaccine.
- (c) Create a paid leave entitlement for casual employees covered by the Award, in circumstances where casual employees are generally not entitled to receive any form of paid leave under the Award or the NES. Rather, casual employees are entitled to receive a 25% casual loading as compensation for, amongst other entitlements, a '*lack of... paid leave*'².

9. If the substance of the Application is to be heard and determined by the Commission, Ai Group intends to strongly oppose it. The Proposed Clause would have an adverse impact on employers, including by increasing employment

² Clause 11.2 of the Award.

costs, increasing the regulatory burden and by potentially undermining the efficient and productive performance of work.³

10. The Applicant argues that the Proposed Clause is necessary to achieve the modern awards objective because it would *'support the critical public policy objective of increasing the Australian vaccination rate, which has been identified as a prerequisite for loosing public health restrictions'*⁴.
11. Ai Group contends that in order to make good the aforementioned proposition, it would be necessary for the Applicant to establish, in an evidentiary sense that:
 - (a) There is in fact a causal connection between:
 - (i) The absence of an entitlement to paid leave in the minimum safety net in relation to COVID Vaccines; and
 - (ii) The reason why a proportion of the eligible population, who are covered by the Award, have not accessed, and do not intend to access, a COVID Vaccine (if in fact such a cohort of employees exists).
 - (b) The Proposed Clause would result in an increased uptake of COVID Vaccines by Award-covered employees.
12. It appears that the aforementioned matters would require expert evidence, based on robust and carefully undertaken research. We envisage that the preparation of such evidence would likely require a substantial period of time.
13. Further, by virtue of s.138 of the Act, the Award can only contain provisions that are necessary to achieve the modern awards objective. Section 134(1) of the Act requires that the Commission must ensure that the Award, *together with the National Employment Standards (NES)*, provides a fair and relevant minimum safety net.

³ Sections 134(1)(d) and 134(1)(f) of the Act.

⁴ Paragraph 20 of the Applicant's response to section 2.3 of the Application.

14. It would therefore be squarely relevant to the Commission's consideration of the Application that the NES provides for rights and entitlements that can be accessed by employees in relation to obtaining a COVID Vaccine. For instance:
- (a) Full-time and part-time employees can request to take annual leave. Such a request cannot unreasonably be refused by an employer⁵.
 - (b) Full-time and part-time employees are eligible to take personal / carer's leave if they are not fit to attend work due to personal illness or injury⁶, including if that illness or injury was caused by or associated with a COVID Vaccine.
15. In addition:
- (a) Significant proportions of the Australian population have already received one dose or both doses of a COVID Vaccine. We return to this issue in further detail, later in this submission. The proportion of the population that has accessed one or both doses of a COVID Vaccine is increasing each day. This of itself suggests that the absence of a specific paid leave entitlement in relation to COVID Vaccines has not affected, and is not affecting, the number or proportion of the eligible population accessing COVID Vaccines.
 - (b) Employers have demonstrated a willingness to afford, and have in fact afforded, significant flexibility to employees in order to ensure that they are able to obtain a COVID Vaccine. The nature of that flexibility and the arrangements made between individual employers and employees necessarily varies, depending on the circumstances of the relevant employers and employees.
 - (c) Many employees are able to obtain a COVID Vaccine outside their ordinary working hours. Many State / Territory Government vaccination 'hubs' as well as other providers, such as medical practitioners and pharmacies,

⁵ Section 88(2) of the Act.

⁶ Section 97(a) of the Act.

administer the vaccines outside of normal business hours, including on weekends.

(d) A casual employee is generally at liberty to refuse to attend for work, including for reasons associated with a COVID Vaccine.

16. Given the significance of the matters raised by the Application, as well as the other factual propositions that would likely need to be established and rebutted by interested parties, it appears that a significant period of time would be required to hear and determine the matter.
17. For instance, Ai Group would seek a period of at least 4 – 6 weeks after the Applicant files his material in support of the Application to review and consider that material, consult with its members covered by the Award and prepare submissions and evidence in response. In addition, we would propose that in order to ensure the fair and efficient conduct of the hearing in relation to the matter, the Applicant should be directed to file submissions and any evidence in reply after respondent parties have filed their material.
18. Having regard to the need to ensure that interested parties are provided with a sufficient opportunity to file material in relation to the claim, to prepare for the hearing (including the potential cross-examination of witnesses) and for the matter to subsequently be determined by the Commission, it appears that even if the Commission granted the Application, the Proposed Clause would operate for a very limited period of time or, indeed, the matter would not be determined until after the Expiry Date.
19. For these reasons:
 - (a) There is very limited if any utility in the matter being heard and determined; and
 - (b) The Proposed Clause cannot be said to be *necessary*, in the sense contemplated by s.138 of the Act, in circumstances where it will operate for a very limited (if any) duration.

3. VACCINATION RATES

Vaccination Targets

20. On 30 July 2021, the Federal Government announced that the National Cabinet⁷ had received a detailed briefing from the Doherty Institute regarding modelling undertaken in respect of COVID-19 infections and vaccination target levels⁸. The modelling prepared by the Doherty Institute⁹ was used to inform the National Cabinet on its four phase '*National Plan to Transition Australia's National COVID-19 Response*'¹⁰ (**National Plan**). The National Plan was subsequently adopted by the National Cabinet on 6 August 2021¹¹.
21. The National Plan outlines the measures which may be included in each of the four phases and the vaccination target levels which would need to be reached in order to move to the next phase. As at the time of preparing this submission, Australia is still in the first phase of the National Plan.¹²
22. To enable Australia to move to the next phases of the National Plan, 70% of the eligible population would need to be fully vaccinated in order to move to the '*Vaccination Transition Phase*' (**Phase B**), and 80% of the eligible population would need to be fully vaccinated in order to move to the '*Vaccination Consolidation Phase*' (**Phase C**).¹³ The vaccination target for the final phase ('*Post-Vaccination Phase*'¹⁴) has not yet been determined as at the date of filing this submission.

⁷ The National Cabinet comprises of the Prime Minister and the Premiers of each state and Chief Ministers of each territory of the Commonwealth, as detailed [here](#).

⁸ Prime Minister of Australia, [National Cabinet Statement](#), dated 30 July 2021.

⁹ Doherty Institute, [Doherty Modelling Report for National Cabinet 30 July 2021](#), published on 3 August 2021.

¹⁰ Prime Minister of Australia, [National Plan to transition Australia's National COVID-19 Response](#), as adopted by National Cabinet on 6 August 2021.

¹¹ Prime Minister of Australia, [National Cabinet Statement](#), dated 6 August 2021.

¹² Prime Minister of Australia, [National Plan](#), as adopted by National Cabinet on 6 August 2021.

¹³ Prime Minister of Australia, [National Plan](#), as adopted by National Cabinet on 6 August 2021.

¹⁴ Prime Minister of Australia, [National Plan](#), as adopted by National Cabinet on 6 August 2021.

23. Phase B of the National Plan indicates that upon achieving the 70% vaccination rate in Australia, the suite of measures that would likely be in place would be significantly less restrictive than those currently in place (i.e. in Phase A). In particular, in Phase B, there would likely be '*low-level restrictions*' in place with '*lockdowns less likely but possible*'.
24. Moreover, Phase C of the National Plan indicates that upon achieving the 80% vaccination rate, further restrictions would be lifted with only '*base line restrictions*' and '*highly targeted lockdowns*' in place.
25. Having regard to the measures outlined in the National Plan, it is apparent that upon achieving the 70% vaccination rate in Australia, the level of restrictions including those imposed on workplaces would be substantially lifted in Phase B, with further restrictions being eased upon achieving the 80% vaccination rate in Phase C.

Expected Dates of Achieving the Vaccination Targets

26. On 10 August 2021, the Doherty Institute released a revised Modelling Report (**Doherty Report**).¹⁵ As at the date of preparing this submission, the Doherty Report of 10 August 2021 is the most up-to-date version of the Doherty Institute's COVID-19 modelling in respect of the expected dates for achieving the relevant vaccination targets.
27. The Doherty Report states that the 70% and 80% COVID-19 vaccination targets (in respect of achieving Phase B and Phase C of the National Plan) could be reached between 18 October 2021 – 1 November 2021, and between 8 November 2021 – 22 November 2021, respectively.¹⁶

¹⁵ Doherty Institute, [Doherty Modelling Report Revised 10TH August 2021](#), published on 10 August 2021.

¹⁶ Doherty Institute, [Doherty Modelling Report Revised 10TH August 2021](#), page 6, published on 10 August 2021.

28. More recently, on 22 September 2021, the ABC estimated that based on the ‘7-day moving average of second doses’, Australia is on track for achieving the 70% and 80% COVID-19 vaccination targets by 25 October 2021 and 9 November 2021, respectively.¹⁷ These dates are in line with the expected dates predicted by the Doherty Institute. In some states, such as NSW, it is expected that those targets will be reached even sooner.

Utility of Hearing and Determining the Application

29. As identified at paragraph [3](ii) of the Statement, the factual context underpinning this Application is highly dynamic. In particular, given the high (and increasing) level of vaccination in Australia against COVID-19, the 70% and 80% vaccination targets are expected to be reached in approximately 2 - 4 weeks and 5 - 7 weeks, respectively, from the date of filing this submission. In some states, such as NSW, those targets are expected to be reached even sooner. Given the nature and significance of the Application, it is not, in our submission, practicable for the matter to be heard and determined before those vaccination targets are reached.
30. In his Application, the Applicant argues that vaccination rates have been *‘identified as a prerequisite for loosening public health restrictions ... [which] have come at an enormous cost to most sectors of the Australian economy and resulted in large scale job losses’*¹⁸. It would appear that the requisite vaccination levels required to facilitate the loosening of public health restrictions will have been reached by the time that the Application can be heard and determined.
31. For these reasons, the key purposes for which the Proposed Clause is being sought will likely have been achieved by the time the matter is heard and determined. In those circumstances, there is clearly very limited if any utility in the matter being heard and determined. Further, the Commission could not be satisfied that the Proposed Clause, in that context, is a *necessary* part of the safety net, for the purposes of s.138 of the Act.

¹⁷ ABC News, [Charting Australia’s Covid Vaccine Rollout](#), webpage accessed 23 September 2021.

¹⁸ Paragraph [20] of Section 2.3 of the Application.

4. THE MODERN AWARDS OBJECTIVE

32. On its face, the Proposed Clause is not necessary to achieve the modern awards objective. As submitted earlier, the minimum safety net already provides for various forms of paid leave that could be accessed by permanent employees if they seek to be absent from work in order to be vaccinated or because they are unfit to attend work due to side-effects suffered from a COVID Vaccine. In addition, the high rates of vaccination amongst the eligible population suggest that the absence of the Proposed Clause, or a similar paid leave entitlement, has not deterred employees from being vaccinated.
33. Further, by reference to s.134(1) of the Act:
- (a) The Proposed Clause is unlikely to have a significant impact (if any) on the relative living standards and the needs of the low paid¹⁹; noting that the Award covers employees who are degree-qualified professional employees.
 - (b) The Proposed Clause is unlikely to encourage collective bargaining²⁰.
 - (c) There is no apparent basis for finding that the Proposed Clause would promote social inclusion through increased workforce participation²¹.
 - (d) The Proposed Clause will undermine the need to promote flexible modern work practices and the efficient and productive performance of work²².
 - (e) The need to provide additional remuneration for employees working overtime, unsocial, irregular or unpredictable hours, weekends, public holidays or shifts, is a neutral consideration²³.

¹⁹ Section 134(1)(a) of the Act.

²⁰ Section 134(1)(b) of the Act.

²¹ Section 134(1)(c) of the Act.

²² Section 134(1)(d) of the Act.

²³ Section 134(1)(da) of the Act.

- (f) The principle of equal remuneration for work of equal or comparable value is a neutral consideration²⁴.
- (g) The Proposed Clause will likely have a negative impact on employers, by reducing productivity, increasing the regulatory burden and increasing employment costs²⁵.
- (h) The introduction of the Proposed Clause would be inconsistent with the need to ensure a sustainable modern awards system²⁶.

²⁴ Section 134(1)(e) of the Act.

²⁵ Section 134(1)(f) of the Act.

²⁶ Section 134(1)(g) of the Act.