

IN THE FAIR WORK COMMISSION

Matter No.: AM2020/12

Matter: Variation of awards on the initiative of the Commission

MINISTER'S SUBMISSIONS

Introduction and background

1. These submissions are filed on behalf of The Hon Christian Porter, MP, Minister for Industrial Relations in response to the Statement¹ issued by the Commission on 1 April 2020.
2. In that Statement, the Commission sought submissions on the provisional views that it expressed in relation to variations to 103 modern awards that the Commission is proposing to make on its own initiative.² As a result of the COVID-19 pandemic and various resulting public health orders, the Commission has proposed that flexibility schedules be inserted into those awards to provide, on a temporary basis, for unpaid '*pandemic leave*' as well as for employers and employees to agree to the taking of annual leave at half pay for double the time.
3. The COVID-19 pandemic is having unpredictable and unprecedented impacts on the Australian economy. This is first and foremost a public health issue, and the two additional measures in the award variations proposed by the Commission will facilitate the compliance of employees and employers with requirements to self-isolate where this is required by government or medical authorities.
4. The Minister relies on s 597 of the FW Act in order to make these submissions on behalf of the Commonwealth. The Minister submits that, given the extraordinary nature of the current circumstances, it is in the public interest for the Minister to be permitted to do so.
5. The Minister would like to thank the Full Bench as constituted for its preparedness to respond to events with these two additional measures in a practical, flexible and timely way so as to reduce the hardship suffered by employers and employees under modern awards in this extraordinary crisis.
6. The Minister also acknowledges the variations already made to specific provisions in three awards – the *Hospitality Industry (General) Award 2010*, the *Clerks – Private Sector Award 2010* and the *Restaurant Industry Award 2010*.
7. The focus of the Minister and Government is on saving people's lives and their livelihoods, enhancing the safety net for those who are not in work and keeping businesses alive so that they can get to the other side of this crisis with the capacity to return to normal activity and eventually to full employment. In response to the COVID-19 pandemic, the Australian Government has announced a consolidated package of \$320 billion across the forward estimates, representing

¹ *Variation of awards on the initiative of the Commission* [2020] FWCFB 1760

² See s 157(3)(a) of the *Fair Work Act 2009* (Cth).

16.4 per cent of annual Gross Domestic Product. This support is designed to help businesses and households, and to keep Australians in jobs through the period ahead. A range of other measures are being implemented including free childcare services for parents in essential jobs and the JobKeeper payment to ensure employees remain connected to the workplace.

8. The Commonwealth Government is also monitoring the effectiveness of the industrial relations framework closely and will seek to implement additional measures to facilitate flexibility at the workplace level.

JobKeeper payments

9. In response to the Commission's invitation at paragraph 115 of the Statement, the Minister confirms that legislation introducing the proposed JobKeeper payment will ensure that the payment will be made to qualifying employees where they are taking unpaid leave, including the pandemic leave proposed by the award variations. It will also confirm that the payment will be available to both full-time and part-time employees, as well as casual employees who have been with their eligible employer on a regular and systematic basis for at least the previous 12 months.

Select phase 1 awards

10. The Minister acknowledge that some industries will be hit harder and sooner than others as a result of the COVID-19 pandemic. The Minister therefore supports the Commission's intent to vary awards in those industries that are more likely to be impacted in the short and medium term, and industries that have a significant proportion of award reliant employees. The Commission's assessment of which industries fall within the latter category is supported by the Australian Bureau of Statistics, Employee Earnings and Hours report (see **Attachment A**).
11. Modern awards, together with the National Employment Standards, provide a fair and relevant safety net for Australia. Up to 2.2 million workers, representing up to 21 per cent of all employees,³ are engaged under modern awards and would be able to access the two new entitlements inserted by the Commission. Modern award covered employees who are engaged on more generous individual arrangements, would also have access to the proposed variations.
12. The Commission's proposed variations also focus on modern awards that cover and apply to employees in industries with a high proportion of small businesses. Small businesses are critical to our economic capacity and the Government is focussed on ensuring that they receive the support and assistance they need now and to bounce back from this pandemic. Small businesses make up 97% of all businesses⁴, account for 34% of Australia's private sector value added and employ 44% of Australia's private sector workforce.⁵

³ ABS, *Employee Earnings and Hours*, Cat. No. 6306.0, May 2018

⁴ ABS, *Counts of Australian Businesses*, Cat. No. 8165.0, June 2015 to June 2019

⁵ ABS, *Australian Industry*, Cat. No. 8155.0, 2017-2018

Additional measures taken by businesses

13. As the Commission notes, the measures proposed are not intended to disturb initiatives that are already being taken by businesses to provide additional leave – including paid leave – to support their employees during this time. The Government commends those businesses and encourages others to consider the provision of paid leave measures where they have the capacity to do so.

Application consistent with the modern awards objective

14. Section 134(1) of the FW Act requires the Fair Work Commission to ensure that Modern Awards (along with the NES) provide a 'fair and relevant' minimum safety net of terms and conditions, taking into account the factors identified in the balance of the section.
15. What is 'fair and relevant' must be judged from time to time taking into account all relevant matters including, but not limited to, the identified factors.
16. In this case, the extraordinary circumstances associated with COVID-19, and in particular the particular risk to security of employment identified in the Statement justify the measures proposed in the Statement, and will contribute positively to the 'fairness' and 'relevance' of the safety net represented by the identified modern awards. It is appropriate they be introduced on a temporary basis as a specific and time-limited response to the current circumstances.
17. The measures are also consistent with several of the key factors as identified in sub-paragraphs (a) – (h) of section 134(1), and are not inconsistent with any of them.
18. In that regard, the Minister notes the relevance of the objective in s 134(1)(a) of the FW Act, which refers to relative living standards and the needs of the low paid. The protection which the availability of pandemic leave will provide supports this objective, noting that vulnerable cohorts in the labour market, such as the low skilled are particularly vulnerable to the prospect of loss of employment.
19. The objective in section 134(1)(h), which includes the sustainability, performance and competitiveness of the national economy remains relevant. The provision allowing flexibility in the taking of annual leave will assist in maintaining employment and the viability of businesses.
20. Finally, the variation is supported by s 134(1)(c) of the FW Act, which refers to the need to promote social inclusion through increased workforce participation. Short term shocks to the economy have long term impacts on the most vulnerable workers. There is ample evidence that workforce participation rates take many years to recover following severe economic downturns. This emphasises the critical importance of the Full Bench supporting an approach that, in combination with Government initiatives such as the JobKeeper payment scheme, will encourage employers to retain as many workers as possible in jobs until the immediate crisis passes.
21. For the reasons summarised above, the Minister strongly supports the making of the proposed variations.

Date: 7 April 2020

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Solicitors for the Minister

Attachment A

Table 1: Award reliance across industries (proportion of award-reliant employees in each industry, all employees), May 2018

Industry	Award-reliance (%)	Award-reliance (no. of employees)
Accommodation and food services	43.2%	346,999
Administrative and support services	39.5%	258,085
Other services	34.1%	128,641
Health care and social assistance	31.0%	454,851
Retail trade	29.3%	320,261
Rental, hiring and real estate services	26.4%	54,109
Arts and recreation services	21.1%	35,901
Manufacturing	19.4%	137,225
Wholesale trade	14.6%	68,011
Construction	14.1%	111,787
Transport, postal and warehousing	11.3%	50,119
Public administration and safety	10.6%	78,778
Education and training	9.5%	99,692
Professional, scientific and technical services	6.8%	57,593
Information media and telecommunications	6.5%	9,791
Financial and insurance services	4.7%	19,126
Electricity, gas, water and waste services	3.9%	3,918
Mining	0.9%	1,435
Agriculture, forestry and fishing	N/A*	N/A*
All industries	21.0%	2,236,323

Source: ABS, *Employee Earnings and Hours, May 2018*, all employees.

* This survey does not cover enterprises primarily engaged in Agriculture, forestry and fishing.

Note: Other services' includes a broad range of personal services, religious, civic, professional and other interest group services, selected repair and maintenance, and private households employing staff. Services provided include hair, beauty, diet and weight management, death care, religious events promotion and administration and repair and maintenance of equipment and machinery.