

Australian Industry Group

Application to vary the
Clerks - Private Sector Award
2020

Comments on the FWC proposed
survey
(AM2020/95)

26 October 2020

Ai
GROUP

AM2020/95 - APPLICATION TO VARY THE CLERKS – PRIVATE SECTOR AWARD 2020

INTRODUCTION

1. The Australian Industry Group (**Ai Group**) files this submission commenting on the proposed survey of employers covered by the Clerks - Private Sector Award 2020 (**Clerks Award**) in response to the invitation contained in the Full Bench Statement of 14 October 2020.¹ It also addresses our willingness to survey our members, as requested.²

Ai GROUP'S PARTICIPATION IN THE SURVEY

2. There has been a significant increase in the adoption of working from home arrangements since the start of the pandemic. It has also been observed by the Full Bench that it is likely that there will be a continuing need for flexible work arrangements to assist employees in adapting to the changed circumstances and to assist the recovery.³
3. Notwithstanding this context, we agree with the following comments of the President:

[40] While working from home is currently possible and permissible in many workplaces, the absence of express provisions to facilitate working from home can impose practical constraints on these arrangements. For example, absent an express provision, other award provisions such as the span of hours within which ordinary hours can be worked, continue to apply. This can constrain the utility of working from home arrangements from both the employee and employer perspective as it requires the employer to pay overtime or penalty payments in circumstances where the employee has sought the additional flexibility in order to meet their preferences."⁴

4. The extraordinary circumstances flowing from the pandemic mean that it is more important than ever that Australia's workplace relations system enables employers and employees to alter their working practices to suit contemporary circumstances. Awards should not be a barrier to the implementation of mutually

¹ [2020] FWCFB 5484

² Ibid at 22

³ [2020] FWCFB 5199

⁴ Ibid at 8

beneficial working arrangements that have been entered into by genuine agreement between an employer and employee in order to suit the circumstances of the employee.

5. Given the context outlined above, Ai Group is keen to assist the Commission to obtain information about industry practices relevant to working from home arrangements so as to assist it to continue to assess what reform to awards may be necessary to ensure a fair and relevant safety net in the contemporary circumstances.
6. We are willing to facilitate our members' participation in a Fair Work Commission coordinated survey, subject of course to being given an opportunity to consider the final form of any such survey and the specific steps that will be required to be undertaken.
7. We anticipate that some of our members may be anxious about their participation in the survey, or their membership of Ai Group, being identifiable.
8. In addition, Ai Group has a longstanding policy of not provide a list of our members to any external party.
9. We are open to the idea of sending a link to a Commission survey questionnaire to the principal contact of each of our members and inviting them to complete it. Such involvement would be conditional upon members being able to participate on a voluntary and anonymous basis and Ai Group not being required to providing the names of its members to the Commission or any other interested party.

COMMENTS IN RELATION TO SPECIFIC PROPOSED QUESTIONS

10. In the section below we seek to constructively comment on specific aspects of the proposed survey.
11. Before addressing such matters, we note that the response rate for similar surveys is often poor. In the context of the pandemic, employers have frequently been subjected to requests to participate in surveys about various aspects of the

current circumstances. Given this context, in order to enhance the response rate the questionnaire should be as short as possible and should not require that participants provide information that is either not known to them or not very easily ascertainable.

Comments in relation to question 9

12. Question 9 addresses additional payments or support that has been provided to employees working from home.
13. We propose that question 9 be amended to include a reference to both an “allowance” and a “reimbursement” for purchasing of office equipment or home internet and electricity costs.

Comments in relation to question 10

14. Ai Group has concerns related to the request in question 10 for employers to provide their working from home policies.
15. We propose that the request be deleted. If this approach is adopted there is little utility in retaining question 10 and as such it should be deleted.
16. It is likely that many policies will, in some way, identify the relevant employer. This is either because the policy will be on the employer’s letterhead or include references to the name of the employer or other material that may reveal the identity of the employer in the body of the policy.
17. Also, given the widespread implementation and expansion of working from home arrangements since March of this year, we expect that many policies developed prior to this time will be out of step with practices that have been implemented. It is trite to observe that an employer’s written policies do not always accord with what occurs in practice and it is likely that many working from home policies have not kept pace with the rapid, and in some instances mandatory, implementation of working from home arrangements since the start of the pandemic. This limits the utility of collecting such policies.

18. We also expect that many employers will not want to provide their policies to an external party, especially if there is a risk that such policies may ultimately be made available to parties including competitors or unions.
19. In addition, some survey participants may simply not be able to easily email the policy to an external organisation (especially if the individual completing the survey needs to obtain authority to provide it to an external party). Employer reluctance to provide a policy may limit their willingness to participate in the survey.
20. If question 10 and the request for the provision of the relevant policy is to be retained within the survey, it should be made clear that provision of the material is optional and that it will not be released to any party other than the Commission. The Commission should also potentially issue an order pursuant to s.594 prohibiting the publication of any such material.

Comments on the approach adopted in question 12 and 13

21. We raise two concerns regarding questions 12 and 13.
22. Firstly, given questions 12 and 13 call for an assessment of whether employees are “regularly” starting or working during the relevant times they unduly narrow the assessment of the extent to which the flexibilities may have been used. There would be merit in retaining a level of flexibility akin to that provided by clause I.2.1 of Schedule I to the Clerks Award even if it is utilised less frequently than once per week by employees. The survey should capture information about sporadic or ad hoc use of the flexibilities provided under clause I.2.1 by employees.
23. Secondly, questions 12 and 13 require the provision of very specific information that a survey participant will likely not be able to easily obtain and provide. This difficulty is likely to be compounded in circumstances where the participants are themselves potentially working remotely.
24. It would accordingly be appropriate for the questions to either ask for more generalised responses or an estimate. For example, one option may be to reword

questions 12 and 13 so that the approach taken in question 8 of seeking general responses (rather than detailed information) is adopted. That is, in response to each question (and for each time referred to in question 13) the participant should merely be asked to answer from the options of “All”, “Most”, “Some”, “None” or “Don’t know”.

25. The following amendments would give effect to these suggestions:

12. In the period since 1 July, have any of your employees who are covered by the Clerks Award worked ordinary hours before 7am whilst working from home?

If yes – go to question 13

If no – go to question 14

13. Of your employees who are covered by the Clerks Award and are working from home since July 2020, how many are regularly starting ordinary hours of work before 7 am on weekdays

All

Most

Some

None

Don't know

14. In the period since 1 July, have any of your employees who are covered by the Clerks Award worked ordinary hours between 7pm and 10pm whilst working from home?

If yes – Go to question 15

If no – End Survey. Thank you for participating

15. And of those, how many are regularly working until:

a.10pm:

All

Most

Some

None

Don't know

b. 9pm

All

Most

Some

None

Don't know

8pm

All

Most

Some

None

Don't know

d. Another time (please specify)