

BEFORE THE FAIR WORK COMMISSION

MATTER NO. AM2020/13

S157 – VARIATION OF MODERN AWARDS TO ACHIEVE THE MODERN AWARDS

OBJECTIVE – PAID PANDEMIC LEAVE

SUBMISSION: DRAFT DETERMINATIONS

1. This submission is made by the Australian Council of Trade Unions ('ACTU') on its own behalf and on behalf of the United Workers Union, the Health Services Union of Australia and the Australian Nursing and Midwifery Federation.
2. This submission is made in response to the decision of the Full Bench [2020] FWCFB 3940, released on 27 July 2020 and the draft determinations published on the same date.
3. Subject to three issues, the draft determinations are expressed in terms sufficient and appropriate to implement the reasons of the Full Bench. Those issues are as follows:
 - a) Firstly, there appears to be an error in the cross referencing appearing in clause Y.1 of each of the draft determinations. The correct cross reference in our view should be "Subject to clause Y.2.5..." in the draft determination concerning the *Aged Care Award*, and "Subject to clause Y.4.5..." in the draft determinations concerning the *Nurses Award* and the *Health Professionals and Support Services Award*.
 - b) Secondly, there is some scope for uncertainty in the operation of the Workers Compensation exclusion appearing at Y.2.7 of the determination concerning the *Aged Care Award* and Y.4.7 of the determinations concerning the *Nurses Award* and the *Health Professionals and Support Services Award*. This arises because the issue of whether a worker is "entitled" to Workers Compensation may be disputed. In addition, we consider we consider a disqualification from paid leave based on the receipt of *payment* of a benefit would result in a closer alignment with the reasons expressed in paragraph [56] of the decision than a disqualification based on an assessment of *entitlement* to receive that benefit at some unspecified time. For those reasons, we offer the following alternative formulation:

“An employee cannot take, or continue to take, paid pandemic leave under clause Y.X.X while the employee is receiving workers compensation benefits as a result of contracting COVID-19.”

- c) Thirdly, it appears that the clause envisages that some workers who are entitled to take the leave will be persons who have already undergone a test (for example, full time and part time workers who tested positive and have run out of personal leave). It would not be reasonable to require such persons to agree to undertake a further test. We accordingly suggest that the subclause dealing with the agreement to undertake a test (Y.2.7 in the draft determination concerning the *Aged Care Award* and Y.4.8 in the draft determinations concerning the *Nurses Award* and the *Health Professionals and Support Services Award*) be confined, as follows:

“An employee who has not been tested for COVID-19 prior to and in connection with the giving notice of the taking of leave under this clause will not be entitled to paid pandemic leave unless they agree to undertake a COVID-19 test at the earliest opportunity.”

4. It appears from the form of draft determinations that the Commission has accepted our submission that the paid leave entitlement should co-exist with the existing unpaid leave and other entitlements in Schedule X. We note that Schedule X provides that it operates “..until further or other order of the Commission in matter number AM2020/13” in the awards the subject of the applications originally filed in this matter. However, clause X.2.1(d) of Schedule X provides that the “..period of leave under clause X.2.1(1) **must start before 31 July 2020**, but may end after that date” (emphasis added). This would have the result that unpaid leave is not available to be commenced after Friday of this week. It would be desirable, at least as an interim measure, to vary that date in each of the AM2020/13 Awards to match the 29 October date set in the draft determinations issued yesterday.
5. We acknowledge and appreciate the Commission’s decision to keep these matters on foot and the rapidity with which the Commission has acted on the issues emerging in the residential aged care sector. We would be most grateful if the Commission could raise the issues referred to in paragraph 17 of our outline of 24 July in any correspondence entered into with State and Federal Governments in connection with the continued monitoring of developments by the Commission and the parties.