



AM2020/20 - Clerks - Private Sector Award 2010

1. This submission is made in support of the Joint Application filed on 26 March 2020 to vary the Clerks-Private Sector Modern Award (the **Award**) by the Australian Chamber of Commerce and Industry and the Australian Industry Group (the **Joint Applicants**).
2. The Joint Application sets out detailed grounds and reasons (**Annexure B**) in support of the Joint Application and the Joint Applicants rely on these and the following submissions.

The Statutory Context

3. In *Hospitality Industry (General) Award 2010* ([2020] FWCFB 1574) the Fair Work Commission said:

[44] The modern awards objective is to 'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions', taking into account the particular considerations identified in ss.134(1)(a)–(h) (the s.134 considerations).

[45] The modern awards objective is very broadly expressed. It is a composite expression which requires that modern awards, together with the NES, provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss.134(1)(a)–(h). Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.

[46] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a

matter of significance in the decision-making process. No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[47] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award. Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterized as broad social objectives. In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[48] Section 138 of the Act emphasizes the importance of the modern awards objective:

‘Section 138 Achieving the modern awards objective

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.’

[49] What is ‘necessary’ to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.

[50] The variations proposed are directed at providing targeted flexibility...

[51] We note that terms about such matters may be included in a modern award pursuant to ss.136(1)(a) and (c), and ss.139(1)(a), (c) and (h) of the Act.

4. Those considerations are applicable to the Joint Application and are apposite with paragraphs 70 to 74 of Annexure B (the Grounds) to the Joint Application.
5. The Joint Application seeks variations to:
 - (a) ensure employees perform the broadest ambit of work provided that it is safe and they hold any necessary mandatory qualifications without reduction of pay;
 - (b) provide for increased operational flexibility for employees working from home;
 - (c) allow permanent employees to agree to reduce their working hours to not fewer than 75% of current hours (for the workplace or a section of the workplace) without displacing the common right for an employer and employee to individually agree to change hours of work;
 - (d) subject to considering the employees personal circumstances and giving one weeks' notice, direct the taking of annual leave;
 - (e) allowing a general right to close down the business provided that employees must access any accrued annual leave.
6. The variations in the Joint Application have the following character, they:
 - (a) are temporary in nature;
 - (b) are advanced by consent;
 - (c) are seen as necessary, based on the party's experience of the COVID-19 Pandemic, the Governments response and the impact these are cumulatively having on employment, employment relationships and working arrangements;
 - (d) are aimed at providing employers and employees with the various flexibilities in working arrangements that are now seen as necessary options to preserve, as best as can be, on-going employment, paid hours of work and alternatives to standing down employees without

pay or making employees redundant; and

- (e) seek to assist employers in accessing balance sheet provisions rather than placing further burden on cash flows to aid, in some part, to the survival of businesses which in the medium term will be critical for the recovery (and its speed) once the Pandemic and the Governments restrictions on the operation of business and working arrangements are removed.
7. It should be uncontroversial, in the unique and compelling situation confronting employers and employees, that the variations are permissible pursuant to section 139 of the *Fair Work Act 2009* and necessary pursuant to section 157 to meet the requirements of section 134.
 8. The only 'unique' element of the variations is set out in clause 1.2.5 (g).
 9. The Commission is able to include this type of provision in a modern award on multiple grounds.
 10. Specifically, the clause:
 - a. is about 'consultation' and 'representation' as contemplated by section 139(1)(j); and
 - b. addresses matters identified in section 145A(1) and (2) of the Act, which obliges modern awards to contain provisions about consultation and allow for representation in that regard.
 11. The Award is special in that it operates for an occupation of broad reach and will apply to many if not most businesses of any scale in Australia.
 12. The procedures contemplated by clause 1.2.5(g) operate in a unique circumstance; the wholesale reduction of working hours and with it pay.
 13. The procedures operate to ensure that the employees concerned are informed, can consult with or seek representation from the Australian Services Union or otherwise access information about the process.

14. As such they would fall within the ambit of conditions contemplated by section 139(1)(j).
15. In the alternative, these provisions can be taken to attract section 142.
16. They are incidental to a matter otherwise permitted by section 139 (1) (c): hours of work.
17. They are also essential for such a unique term to operate effectively in the context of:
 - (a) the broad nature of the occupational basis of the Award;
 - (b) the unique nature of the operative clause itself providing for a reduction in working hours and pay by a vote rather than individual agreement; and
 - (c) the need to ensure, in the unique circumstances of the Pandemic that employers and employees can act expeditiously while ensuring that employees are informed of their rights and can access representation from the Australian Services Union should they so desire in a timely manner.
18. The consent of the parties to the Joint Application, in itself, demonstrates the critical situation the parties and their constituencies find themselves in.
19. That the Australian Services Union (supported by the Australian Council of Trade Unions) has taken the lead in such an important occupation-based award affecting many if not most businesses in Australia is to be acknowledged and commended.