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**AM2020/12 - VARIATION
OF AWARDS AT THE
INITIATIVE OF THE
COMMISSION:
ADDITIONAL MEASURES
DURING THE COVID-19
PANDEMIC**

Fair Work Commission

6 April 2020



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Chamber of Commerce
and Industry**

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1 INTRODUCTION

1. This submission on behalf of the Australian Chamber of Commerce and Industry (ACCI) responds to the Statement of the Full Bench of the Commission issued on 1 April 2020 ([2020] FWCFB 1960) (the **Statement**), and the provisional views regarding the variation of 103 modern awards in the terms set out in [59] and [73].

1.1 Position on the provisional views and proposed variations

2. ACCI supports the provisional views in the Statement in so far as the Commission seeks to vary the named modern awards to provide for:
 - (a) Double annual leave at half pay (the **Annual Leave Provision**); and
 - (b) 2 weeks' unpaid leave for employees required to 'self-isolate' etc (the **Pandemic Leave Provision**).
3. ACCI:
 - a. does not adopt all of the reasoning expressed by the Commission in its Statement;
 - b. makes certain observations concerning potential refinements to the drafting proposed by the Commission; and
 - c. makes certain observations concerning the modern awards chosen.
4. ACCI has adopted its position on the basis makes certain observations concerning the modern awards chosen makes certain observations concerning the modern awards chosen makes certain observations concerning the modern awards chosen that this matter is but one of makes certain observations concerning the modern awards chosen a series of matters that the Commission has and will hopefully deal with allowing employers and employees to navigate the business and employment uncertainty presented by COVID-19 and Government responses to it.
5. In this regard we emphasise the comments of the Commission at [1] to [3] of its Statement.
6. We emphasise the importance of the Commission not only recalling recent agreed variations ([36] to [42]), but also the indication at [44] that:

“The measures we are proposing to take are not intended to disturb the initiatives that are being taken by businesses to ameliorate the impact of the COVID-19 pandemic on employees”.
7. It is important for on-going collaborative action with the support of the Commission to continue and we would encourage the Commission to ensure greater flexibility is achieved than is proposed in the Statement, as contemplated at [80].

8. All industrial parties need to remain vigilant to ensure that nothing inadvertently has the effect of dampening momentum towards a wider range of options being considered for inclusion in modern awards.
9. The preservation of jobs and businesses, particularly small businesses, is an imperative secondary only to preserving the health of Australians, and there has quite rightly been a unified national view on the importance of ensuring that a health crisis does not become a jobs and business survival crisis.
10. Accordingly, ACCI thanks the Commission, the ACTU, trade unions and our employer colleagues for the attitude of collective cooperation contributing to Australia's response to the COVID-19 pandemic.
11. We thank the Commission in particular for responding to the pandemic and its impact on jobs and businesses with extraordinary expedition and its orientation towards facilitation, support and adaptation, consistent with its statutory framework.

1.2 Hearing

12. ACCI does not oppose the course of action outlined from [126] to [128] and does not request or propose a hearing.
13. This written submission seeks to assist the finalisation of the wording, and perhaps scope, of modern award variations consistent with the provisional views as envisaged at [127].
14. ACCI will seek to provide any clarification that may be required expeditiously and in writing, to assist the Commission in expediting this matter and the variation of modern awards.

2 STATUTORY CONSIDERATIONS

15. The matter requires a consideration of sections 157, 139, 134 and 55 (and 93) of the *Fair Work Act* 2009 (Cth) (the **Act**).

2.1 Section 157

16. The proceedings are being conducted under section 157 of the Act. Section 157 is in the following terms:

“FWC may vary etc. modern awards if necessary to achieve modern awards objective

(1) The FWC may:

- (a) make a determination varying a modern award, otherwise than to vary modern award minimum wages or to vary a default fund term of the award; or*
 - (b) make a modern award; or*
 - (c) make a determination revoking a modern award;*
- if the FWC is satisfied that making the determination or modern award is necessary to achieve the modern awards objective.*

Note 1: Generally, the FWC must be constituted by a Full Bench to make, vary or revoke a modern award. However, the President may direct a single FWC Member to make a variation (see section 616).

Note 2: Special criteria apply to changing coverage of modern awards or revoking modern awards (see sections 163 and 164).

Note 3: If the FWC is setting modern award minimum wages, the minimum wages objective also applies (see section 284).

(2) The FWC may make a determination varying modern award minimum wages if the FWC is satisfied that:

- (a) the variation of modern award minimum wages is justified by work value reasons; and*
- (b) making the determination outside the system of annual wage reviews is necessary to achieve the modern awards objective.*

Note: As the FWC is varying modern award minimum wages, the minimum wages objective also applies (see section 284).

(2A) Work value reasons are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

- (a) the nature of the work;*
- (b) the level of skill or responsibility involved in doing the work;*
- (c) the conditions under which the work is done.*

(3) The FWC may make a determination or modern award under this section:

- (a) on its own initiative; or*
- (b) on application under section 158.”*

17. Enough has been said on the notion of “necessary” in past Commission decision such that the term now has settled usage.
18. Section 157(3) of the Act expressly empowers the Commission to act on its own initiative (or otherwise on application) which the Commission in these proceedings is doing.
19. Prior to the repeal of section 156, the scheme of the Act was that it provided:
 - a. for reviews of modern awards on a 4-yearly cycle at the initiative of the Commission (s 156); and
 - b. a mechanism for the variation, making etc of modern awards outside of this 4 yearly cycle (s 157) at the initiative of the Commission or on application.
20. Both sections 156 (now repealed) and 157 should be understood in the context of what modern awards are under the Act.
21. Modern awards are “regulatory instruments” setting minimum standards the Commission has an overarching duty to ensure that they meet the modern awards objective (**MAO**).
22. This was affirmed by the Commission in *4 yearly review of modern awards – Penalty Rates – Transitional Arrangements* (AM2014/305):

“[27]...As the Commission has observed on a number of occasions, modern awards are very different to awards of the past. Modern awards are not made to prevent or settle industrial disputes between particular parties. Rather, modern awards are, in effect, regulatory instruments that set minimum terms and conditions of employment for the employees to whom the modern award applied.”¹

 - a. In this context, it should not be seen as controversial that section 157 provides for the Commission to act on its own initiative.
23. Previously outside of the 4 Yearly Review process but now at large, the Commission may seek to inquire into whether a modern award is meeting the modern awards objective rather than simply stand by awaiting a ‘party’ to apply to agitate such a case if at all.
24. This squarely fits with the nature of modern awards under the Act, sections 134, 284 and section 3 of the Act. In exercising its powers under section 157 the Commission must have regard to:
 - (a) *Chapter 5, Part 5-1, Division 3 of the Act,*
 - (b) *Section 577 and 578 of the Act; and*
 - (c) *Section 3 of the Act.*
25. Nothing in the Act prevents the Commission hearing matters concurrently or from joining matters being dealt with pursuant to section 157 of the Act.

¹ *4 yearly review of modern awards – penalty rates – hospitality and retail sectors – transitional arrangements* [2017] FWCFB 3001.

26. Nothing in the Act prevents the Commission from dealing with more than one modern award in a matter being dealt with pursuant to section 157 of the Act.
27. What is apparently most relevant regarding such procedural issues is section 577 of the Act.
28. The Commission is required in exercising its powers under section 157 to have regard to section 577. In this regard the Commission will need to conduct itself with care to ensure that the process adopted accords with section 577.
29. These considerations are always contextual and in the context of the pandemic and the Government responses to the pandemic and their material impact on business and employment the truncated but clear process for finalising this matter balances the consideration in section 577 appropriately.

2.2 Section 139

30. It should be uncontroversial that both the Pandemic Leave Provision and the Annual Leave Provision are about forms of leave or arrangements for taking leave, we otherwise comment on section 93 and 55 below.

2.3 Section 134

31. The question arises as to whether the proposed variations are necessary to achieve the Modern Awards Objective (section 134).
32. The Commission has already found as much in relation to the Annual Leave Provision in *Clerks - Private Sector Decision* [2020] FWCFB 1690 so little more needs to be said on this other than the same rationale for the Clerks - Private Sector Modern Award is applicable here in regard to the Annual Leave Provision.
33. In regard to the Pandemic Leave Provision, a little more needs to be said.
34. At [45] of the Statement the Commission introduce the notion of the “regulatory gap”.
35. In the context of the MAO, what is “fair” and “relevant” is a ‘relativist’ consideration.
36. What may be “fair” outside of the current situation is likely to be different to what is “fair” in the current situation.
37. “Relevant” is again a contextual consideration. What may have been relevant 6 months ago is no longer relevant now in the context of the current situation.
38. The notion of the safety net must always be contextually calibrated.

39. In terms of the matters the Commission has regard to in setting the safety net the following is now relevant:
- a. “Relative living standards and the needs of the low paid”; this must now be seen in the context of seeking to maintain employment rather than losing employment even if this means some employees chose to temporarily maintain employment while accepting reduced employment benefits and take-home pay.
 - b. “the need to promote social inclusion through increased workforce participation”; this must be seen in the context of seeking to maintain employment rather than losing employment.
 - c. “the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden”; this must be seen in the context of allowing business to survive the pandemic and the measures so that they can operate to sustain what employment they can and be in an effective position to recover and maintain and then grow employment once the pandemic passes.
 - d. “the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy”; again this must be seen in the context of allowing business to survive the pandemic and the measures so that they can operate to sustain what employment they can and be in an effective position to recover and maintain and then grow employment once the pandemic passes.
40. We agree with the observations at [48] that employees who are not “ill” but otherwise must self-isolate etc would not, absent legislative change, be entitled to personal leave under the NES.
41. Such employees may be provided some form of discretionary paid leave or otherwise seek to take unpaid leave or another form of statutory leave such as annual leave.
42. The question correctly arises as to whether, in circumstances where employees are not “ill” but are being required (by force of Public Health Orders) to self-isolate, the Commission should re-evaluate the “fair and relevant minimum safety net” by providing a right to unpaid leave rather than leaving this to the discretion of the employer or the employers internal policies; this is effectively the commentary at [49] and [50] of the Statement.
43. In another context we would say that the test for this has not been met but in the very unusual circumstances we say the test has been met.

44. These unusual circumstances are:
- a. Employees are being compelled by enforceable Public Health Orders to self-isolate etc.
 - b. No modern award was constructed in the current context.
 - c. It would be both fair and relevant (to employers and employees) in the current context to have clarity and simplicity of understanding in regard to this issue.
 - d. The leave being unpaid but available as of right is a balanced approach in the current context (fairness).
 - e. Varying a large number of modern awards to deal with a common issue promotes simplicity and stability in the current context.
45. For these reasons the test of “necessary” in section 157 is met.
46. There is however an inference made in the Statement concerning section 134 which we see as respectfully unhelpful and improper in the context of section 134.
47. [51] through to [54] suggest that one of the considerations as to why the Pandemic Leave Provision is “necessary” in the context of section 157 concerns the “gaps in ... and protections against unfair dismissal”.
48. This consideration is not a proper consideration in the context of section 157 and 134.
49. The proper consideration when setting modern award conditions is the conditions themselves not whether or not an employee obtains a specific secondary or collateral benefit such as unfair dismissal rights etc.
50. Nothing in the MAO could be taken to be a warrant for expanding unfair dismissal rights or adverse action rights *per se*.
51. Nothing in section 139 would suggest that such a consideration should be properly contemplated in determining what can and should go into a modern award.
52. Respectfully, it seems unclear why the Commission appears to have strayed into this issue which is not required to ground the “necessary” test in section 157 or meet the MAO in section 134.

2.4 Section 55 (and Section 93)

53. At [79] the Commission forms the provisional view that the Annual Leave Provision is permitted by section 55(4) as an ancillary or incidental term. This is an uncontroversial view and one we adopt.

3 UNPAID PANDEMIC LEAVE - DRAFTING

3.1 The proposed clause

54. We make the following suggested changes to the drafting of the Isolation Leave Provision which could aid understanding, clarity and application.
55. The clause states that an “employee may elect to take up to 2 weeks’ unpaid leave”. ACCI recommends that this be amended to “any employee *is entitled* to take up to 2 weeks’ unpaid pandemic leave”.
56. Some members have expressed concern that employees may want to attend work when they are required to self-isolate and the word “elect” suggests that the employee has a right to attend work despite the Government and medical directives. This ambiguity could introduce unnecessary health problems and risks.
57. The clause also states that the pandemic leave can be accessed when “acting on medical advice”. ACCI recommends that this be amended to “acting on advice of an appropriately qualified medical practitioner”.
58. The clarification is intended to ensure that the medical advice needs to be provided by a person who suitably understands risks associated with COVID-19. There is a risk of substantial misconceptions amongst regarding what constitutes medical advice and it is appropriate to clarify it in these circumstances.

3.2 Timing

59. Regarding the following from [60] “*will only be available until 30 June 2020 (unless extended by further variation dependent on the duration of the COVID-19 pandemic)*”, there appears to be some room for ambiguity.
60. For instance, does this mean that an employee can commence two weeks of unpaid pandemic leave at any point up until 30 June, or that any period of unpaid leave must terminate on 30 June 2020? It must be the former, and it would be illogical to have a provision that purported to see persons forced to isolate asked to return to work.

61. ACCI therefore suggests the variation of the proposed standard clause through the addition of a new X.2.1(d):

- (d) *Any period of unpaid pandemic leave under this clause must commence during the period this schedule is in operation, and extend only for a maximum of 2 weeks, provided that:*
 - (i) *An employer and employee may agree to extend unpaid pandemic leave.*
 - (ii) *The period of 2 weeks unpaid leave may in whole or part extend beyond the period this clause is in operation.*
 - (iii) *Nothing in this clause compels or encourages any employee to attend work contrary to medical directions or where it would not be safe to do so.*

4 ANNUAL LEAVE AT HALF PAY - DRAFTING

62. The Statement from [73] to [79] outlines the proposal for an additional 'standard' sub-clause on entitled "Annual leave at half pay".
63. ACCI has strongly advocated for the option of (double) annual leave at half pay in our productive and cooperative discussions with the ACTU and Ai Group, as recalled elsewhere in the Statement.
64. We raise a small number of operational issues for the Commission's consideration.

Written record

65. As outlined in [74] of the Statement, ACCI supports the inclusion of proposed clause X.2.2(b) to ensure there is a record of the agreement in order to protect the interests of both parties.
66. ACCI members will encourage their individual employer members to ensure there is an appropriate written record / ideally an exchange of emails or completion of online forms to facilitate this arrangement. The way the Commission has proposed this is practical because given the nature of various Public Health Orders a circumstance could arise where discussions may be via telephone. Employers' diary notes of a verbal / telephone discussion retained in the time and wages records should satisfy this obligation.

Terms of the standard clause

67. We thank the Commission for the proposed clause, and in relation to the clause proper (preceding the three notes). For the clause proper, preceding the notes, we raise only the wording regarding leave loading.
68. The intention seems clear, where one week's annual leave would attract a single week's pay, plus 17.5%, two week's leave under the proposed provision would be payable at the same total figure, i.e. 38 hours ordinary pay plus 17.5%. We consider the proposed terms wording in [73] risks creating ambiguity, through the use of the word "including". We therefore propose a variation to the 'EXAMPLE' as follows:

EXAMPLE: Instead of an employee taking one week's annual leave on full pay, the employee and their employer may agree to the employee taking 2 weeks' annual leave on half pay. In this example:

- *the employee's full pay for the 2 weeks' leave is the same as the pay the employee would have been entitled to for 1 weeks' leave on full pay. Annual leave loading, under the Annual Leave clause of this award, shall continue to be payable on the basis of 1 week's leave on full pay, regardless of any extended period of leave taken by agreement; and*
- *one week of leave is deducted from the employee's annual leave accrual. (Underlining added).*

5 PROPOSED NOTES TO THE CLAUSES

69. ACCI is not clear what potential mischief is being addressed by the three proposed statutory notes to the two model terms, as set out in [59] and [73], which are advanced as follows:

NOTE 1: A employee covered by this Award who is entitled to the benefit of clause X.2.1/2 has a workplace right under section 341(1)(a) of the Act.

NOTE 2: Under section 340(1) of the Act, an employer must not take adverse action against an employee because the employee has a workplace right, has or has not exercised a workplace right, or proposes or does not propose to exercise a workplace right, or to prevent the employee exercising a workplace right. Under section 342(1) of the Act, an employer takes adverse action against an employee if the employer dismisses the employee, injures the employee in his or her employment, alters the position of the employee to the employee's prejudice, or discriminates between the employee and other employees of the employer.

NOTE 3: Under section 343(1) of the Act, a person must not organise or take, or threaten to organise or take, action against another person with intent to coerce the person to exercise or not exercise, or propose to exercise or not exercise, a workplace right, or to exercise or propose to exercise a workplace right in a particular way.

70. We note the FWC has indicated that the one of the reasons for the notes to the clause in relation to unpaid pandemic leave is due to the concern that some employers will not consent to the employee's absence due to the requirement to self-isolate, and for some employees they will have no recourse.
71. It is the experience of ACCI members that this is not the case, with most employers being very concerned about allowing employees to attend work where the employee/s is at a higher risk of being exposed to COVID-19, understanding the impact that the virus would have on their workplace and their ability to continue operations should their workforce be generally infected.
72. There are also some generally unwelcome and inappropriately timed suggestions of employers being liable in WHS and Workers' Compensation for workplace exposures to the COVID-19; even allowing for the challenge in proving a causative link to a given workplace.
73. In these circumstances, the notes to the clause relating to the general protections provisions are unnecessary.
74. More relevantly, it seems undesirable to start to put notations into modern awards setting out what secondary rights and penalties may apply should a modern award not be complied with.
75. Respectfully, if the Commission starts down this course, where does it stop?

76. Any and every term of a modern award is conceptually a workplace right to which someone is entitled, and which could give rise to adverse action against an employee, from the most substantive to the most trivial or incidental. An employer could take an adverse action against an employee in relation to the posting of the award or the maintenance of a notice board, right through to an adverse action against someone wanting to be paid in accordance with award minima. The proposed three notes could be argued to apply to every award provision.
77. It also seems to suggest that the Commission has exercised some judgement and formed the conclusion that an employer may be more inclined to breach some clauses rather than others.
78. With respect the Commission could not have reached such a conclusion.
79. Lastly, while only “notes”, their inclusion would not accord with section 142 as they are not “essential” for the purpose of making the term operate.
80. Ultimately, ACCI struggles to see why such notations are required or the basis for them. It is very clear that this clause is designed to operate by agreement, and that trying to force this on an employee in an absence of agreement would be an award breach, and actionable.
81. Such a clause is designed to be used rapidly, specifically by agreement and with confidence in response to a rapidly evolving situation which risks jobs and businesses. We note in this regard the following from [65] “*the proposed term is intended to provide a quick response to the current crisis*”.
82. The three notes will have the opposite effect and send the opposite signal to many employers (and perhaps employees); it carries the clear implication of serious legal liability if an employer even tries to use this option, to meet an employee request, or to identify this option to employees.
83. To be plain, the three notes risk scaring employers out of using the proposed variation designed to help them and their employees navigate the most serious threat to businesses and jobs they will ever confront.
84. The three statutory notes canvassed at [59] and [73] in the model or standard term X.2.1 and X.2.2 should not be included in any clause.

6 APPLICATION TO SPECIFIC AWARDS – INCLUSIONS AND EXCLUSIONS

85. We note the proposed application to 103 modern awards [108], the list of excluded awards at [109], and the explanation for proposed exclusion at [110].
86. The inclusion or exclusion of specific modern awards may be addressed by ACCI member organisations, as they may also be by unions, and the two may wish to discuss the inclusion of any currently excluded awards in the process. ACCI has circulated the Statement to members for their consideration in this regard.
87. The Commission should however proceed with a level of caution in making general observations about the spread of the pandemic and its effect given the nature of the pandemic and the increasingly apparent cumulative effect of the Government response in, across and through industries.
88. While stark comparisons are likely available between an industry shut down by way of a Public Health Order and one that continues to operate, less confidence can be applied to distinctions between industries still operating.
89. We make a number of points in regard to assist the Commission in future deliberations:
 - a. Any industry is less homogenous than the ANZSIC codes, and ANZSIC code level analysis may indicate.
 - b. There may be regional and small business dimensions to particular industries that are masked or obscured by more high profile and larger enterprises. There is for example small mining and small construction which can be lost against the usual characterisation of these sectors by way of major companies. Awards are far more relevant and salaries lower in such cases than consideration of some of the higher profile miners may indicate, and there is a comparable heterogeneity in smaller regional construction.
 - c. There can be complex supply chains of award reliance in industries such as those identified in [109], with numerous far smaller enterprises forming part of them.
 - d. There may be labour hire dimensions to particular industries, which are not taken into account solely in consideration of the ANZSIC coding.
90. Furthermore, the fact that COVID-19 appears to be largely spread by social contact, the social network of an individual employee may be more relevant to exposure than their employing industry.
91. Ultimately, the Commission may benefit from hearing from specific excluded industries, or elements of excluded industries, in which there would be value in the two amendments or other amendments. We appreciate that the views in the statement are provisional, and this should extend to the inclusion or exclusion of particular awards from the 103/122 award approach.

ABOUT ACCI

ACCI is Australia's largest and most representative business network.

Our vision is to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

Our purpose is to mobilise the ideas, influence and passion of people in business to achieve policy outcomes in the national interest.

Our membership includes all state and territory chambers of commerce and over 70 industry associations. Together we represent hundreds of thousands of businesses in every state and territory and across all industries.

Ranging from small and medium enterprises to the largest companies, our network employs millions of people.

We focus on issues that impact on business, including economic reform, industry policy, trade and investment, workplace relations, work health and safety, and employment, migration, education and training.

We give Australian businesses a platform to advocate for free trade and open markets and influence policy decisions affecting business in national and global forums.

OUR MEMBERS

CHAMBER



INDUSTRY ASSOCIATION

