

IN THE FAIR WORK COMMISSION

Variation of Awards on the Initiative of the Commission

AM2020/12

SUBMISSIONS OF THE ACTU

1. These submissions are made in response to the Statement [2020] FWCFB 1760, issued on 1 April 2020 (hereafter, ‘the Statement’).

ACTU position

2. The ACTU:

- (a) Supports the *Unpaid pandemic leave* and *Annual leave at half pay* award terms proposed by the Commission;
- (b) Concurs that the *Annual leave at half pay* term proposed by the Commission constitutes an ancillary or incidental term for the purposes of section 55(4)(a) of the *Fair Work Act (2009)* (hereafter, ‘FW Act’) and, insofar as it deals with leave load loading, is permitted by section 55(4)(b);
- (c) Submits that the *Annual leave at half pay* term proposed by the Commission is permitted by section 93(4) of the FW Act as a term about the taking of NES Annual leave and is in any event a term “about...leave, leave loadings and arrangements for taking leave” for the purposes of section 139(1)(h) of the FW Act;
- (d) Submits that the *Unpaid pandemic leave* term proposed by the Commission is a term “about...leave...and arrangements for taking leave” for the purposes of section 139(1)(h) of the FW Act;

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- (e) Submits that the Commonwealth should co-operate with the Commission to achieve an outcome whereby persons taking a period of *Unpaid pandemic leave* or *Annual leave at half pay* may receive (or continue to receive) the *JobKeeper* payment;
- (f) Submits that it is necessary, in the contemporary atypical circumstances, for multiple modern awards to be varied to introduce the *Unpaid pandemic leave* and *Annual leave at half pay* terms proposed by the Commission, and for those terms to operate as an interim measure until 30 June 2020 (unless extended);
- (g) Submits that it is appropriate for the Commission to act on its own initiative to issue the determinations required to give effect those variations;
- (h) Submits that it is not necessary for some of the awards identified as “Phase 1” awards in the Statement to be varied to introduce those terms; and
- (i) Submits that it will be necessary for additional measures to be urgently adopted in particular awards, including the provision of paid pandemic leave on a “per occasion” basis.

Safety Net Variation – General Principles

3. Modern awards may be varied on merit grounds where the Commission is satisfied that it is necessary to do so to achieve the modern awards objective.¹ Variations to modern awards on merit grounds are made by a determination issued by the Commission. Such a determination may be issued either on application, or on the Commission’s own initiative.²
4. In the present matter, the Commission is acting on its own initiative. It has foreshadowed with precision the terms it proposes, by determination, to introduce into particular modern awards.³ It has identified which modern

¹ FW Act s. 134, 138, 157. See generally [2020] FWCFB 1690 at [33]-[39]

² FW Act 2. 157(2).

³ [2020] FWCFB 1760 at [59] and[73]

awards it proposes to vary and the period for which the proposed variations will operate. It has offered all potentially affected parties an opportunity to respond to its proposal, which is a reasonable opportunity having regard to the rapidly changing environment and the need to proceed quickly to address it⁴, and has indicated that it will hold a hearing if an affected party opposes its provisional view. The ACTU commends the Commission on this approach and notes that it is responsive to comments made in other proceedings about the proper course to follow where the Commission proposes to act on its own initiative.⁵

5. The modern awards objective requires the Commission to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms in conditions, taking into account specific matters. The variations proposed by the Commission contribute to achieving that objective in the following ways:

- (a) As explained in paragraphs [10]-[21] of the Statement, there have been a range of public health policy responses to the COVID-19 pandemic which have disrupted social interactions and the “business as usual” operation of trade and commerce and service delivery. These policy responses have culminated in regulatory and normative standards requiring persons to stay in their homes unless purchasing essentials, attending to medical health or compassionate needs, exercising, employment (if it cannot be performed remotely) and education (if it cannot be performed remotely). Coupled with restrictions on the operation of non-essential services and requirements for social distancing, the net effect is that numerous businesses have either been required to close or are facing reduced consumer demand as consequence of regulatory measures, normative measures and reduced consumer incomes. The findings

⁴ See [2020] FWC 1574 at [11]-[12]

⁵ See [2019] FWC 8004

summarised at paragraphs [26]-[27] of the Statement are an early indicator of these factors at play prior to the restrictions reaching their current, more stringent level. The safety net must adjust to these fundamentally changed circumstances, temporarily, in order for it to remain relevant.

(b) The proposed variation for annual leave at half pay directly addresses how modern awards interact with the National Employment Standards. This form of annual leave flexibility has been agreed by the major industrial parties and granted by the Commission in each of the three modern awards which have been varied in the last two weeks, specifically to address COVID-19 circumstances. It is a highly relevant and targeted intervention to introduce flexibility that can directly contribute to maintaining workforce participation, provided agreement is reached with each employee proposing to embark on annual leave. The social inclusion and personal well-being impacts of remaining in employment, particularly at a time when all persons are reasonably feeling highly vulnerable, cannot be understated. The proposed variation is accordingly supported by the considerations identified at paragraphs (c),(d) and (f) of subsection 134(1) the FW Act.

(c) As referred to in paragraph [43] of the Statement, numerous employers in Australia have agreed with workers and their unions to provide paid leave and additional supports to workers who are affected by the COVID-19 pandemic. Whilst we consider this to be the most appropriate arrangement, the proposed variation to introduce unpaid pandemic leave is likewise a highly relevant intervention which will directly contribute to making the safety net fairer. It would be entirely unacceptable for an employee to be dismissed from their employment, and potentially be deprived of a remedy against that dismissal, merely because they complied with a

public health directive designed to protect members of the public from the spread of a pandemic disease that is potentially fatal. By providing a pathway for employees who are required to self-isolate to remain in employment, the proposed term likewise serves the broader benefits of social inclusion and personal well being referred to above. It also supports the public health objective of “flattening the curve”, which will accordingly shorten the duration and extent of the negative effects of the pandemic on the national economy. The proposed variation is supported by paragraph (c) and (h) of subsection 134(1) of the FW Act.

- (d) The report prepared by Professor Borland referenced at paragraphs [27]-[35] of the Statement refers to costs facing employers should they be required to search for replacement employees rather than retain them. It likewise refers to the costs incurred by employees to in job search and the negative income and psychological effects of the loss of employment. These are relevant considerations which support the introduction of the terms proposed by the Commission having regard to paragraphs (a) and (f) of subsection 134(1) of the FW Act.
- (e) Both of the proposed terms are designed to support continued employment and income in the period prior to the availability of the *JobKeeper* payment, and to operative comfortably with the announced features of that payment once it becomes available. They are accordingly supported by paragraph (a) of subsection 134(1) of the FW Act.
- (f) The proposal of the Commission is to vary a multitude of awards to include the proposed terms. There are clear benefits in doing so in terms of the objectives stated at paragraph (g) of subsection 134(1) of

the FW Act, although this principle is not without its limits.⁶ In recognition of this, the Commission does not propose to vary *all* modern awards, nor does it propose to vary all of the modern awards it has identified in identical terms⁷. Later in this submission, we propose some refinements to the selection of the modern awards proposed to be varied.

(g) Whilst the modern awards objective requires the Commission to consider the need to encourage collective bargaining, the Statement identifies that smaller businesses have a much lower incidence of collective bargaining and, accordingly, would be unlikely to be in a position to access the provisions the Commission now proposes in the absence of variations to modern awards⁸. We would add that the fact that FW Act seeks to meet its broad objectives through an “emphasis on enterprise-level collective bargaining”⁹ likely contributes to this state of affairs. This tends to suggest that paragraph (b) of subsection 134(1) of the FW Act is a neutral consideration in this matter.

6. For the above reasons, we support the Commission moving to urgently issue determinations varying multiple modern awards to include the proposed terms.

Unpaid pandemic leave – Additional considerations

7. The proposed term is self-evidently is a term “about...leave...and arrangements for taking leave” for the purposes of section 139(1)(j) of the FW Act and accordingly is permitted to be included in modern award.

⁶ [2017] FWCFB 2290 at [6](i) and (ii); [2014] FWCFB 1788 at [60](7).

⁷ Statement at [75], [109]-[110], [119].

⁸ At [97]-[107]

⁹ FW Act s. 3(f). Emphasis in underline is added.

8. At paragraph [65] of the Statement, the Commission acknowledges that the proposed unpaid pandemic leave “...may be regarded, by some, as a minimalist measure”. The ACTU does regard the measure as minimalist one, but this does not detract from our view that it is *necessary* for the purposes of sections 134 and 138 of the Act. Consistent with what was observed in in the *Preliminary Issues* decision, there is no singular truth as to what is necessary in the requisite sense, and there could be a variety of outcomes which meet that requirement.¹⁰ The Statement refers to the fact that a number of employers have agreed to provide paid leave supports to employees in connection with the COVID-19 pandemic and it is the strong view of the ACTU that all employers should do so. Consistent with Commission’s encouragement to the industrial parties to consider further responses to the COVID-19 pandemic at paragraphs [2] and [111] of the Statement, the provision of paid leave on a multiple occasion basis is a matter we will continue to pursue. However, we commend the Commission on its intent to “...provide a quick response to the current crisis”, the necessity of which is unlikely to be disputed.

9. Without detracting from our support for the clause as drafted being inserted in multiple awards, it is vital that the Commission consider three further issues:
 - (a) Firstly, we consider it critical that the Commission allow a further matter to be ventilated urgently and as soon as practicable after the determinations to vary modern awards are issued in the current proceeding. That further matter relates to what additional measures might be fair, relevant and necessary to meet the modern awards objective in industry and occupational awards covering employees who, as part of their employment, are required to personally attend to the needs of persons who have COVID-19, or are at a recognised high risk of suffering from COVID-19 virus, or work in health and

¹⁰ [2014] FWCFB 1788 at [34]-[35]

community sector related environments where the risk of exposure to COVID-19 is clearly elevated (such as in disability services and aged care). We anticipate that such employees would have a much greater likelihood of being required to self-isolate on more than one occasion. Such employees may be covered by a number of the awards identified as “phase 1” awards in paragraph [108] of the Statement, including the *Aboriginal Community Controlled Health Services Award*, *Aged Care Award*, *Ambulance and Patient Transport Industry Award*, *Health Professionals and Support Services Award*, *Medical Practitioners Award*, *Nurses Award*, *Pharmacy Industry Award*, and *Social, Community, Home care and Disability Services Industry Award*. It is our strong view that workers in those industries should be entitled to paid leave on multiple occasions. To be clear, we do not suggest that the “quick response” proposed by the Commission should be delayed pending the initiation of this further matter.

(b) Secondly, we note the direction at paragraph [115] of the Statement to the Commonwealth to clarify that its proposed *JobKeeper* payment will be payable where employees are on unpaid pandemic leave. In our view, it is critical that employees be concurrently entitled to both the proposed *JobKeeper* payment and the proposed *Unpaid pandemic leave* provision, for the reasons given in paragraph [116] of the Statement. This Commonwealth must be strongly urged to support that outcome.

(c) Thirdly, there are identified categories of people who are at elevated risk of serious illness or death in the event that they contract COVID-19, such as persons undergoing chemotherapy.¹¹ Persons living in

¹¹ <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/advice-for-people-at-risk-of-coronavirus-covid-19>

households with at risk persons (‘co-habitants’) would be understandably concerned about their own social and workplace interactions so as to avoid bringing COVID-19 into the home. For example, an oncologist managing the chemotherapy treatment of a patient would be expected to advise that patient about the need for members of the patient’s household to self-isolate, but would not directly convey that advice to those other members of the household. The clause presently appears to permit co-habitants who are employees to access unpaid pandemic leave, provided they are required or advised by medical advice, medical authorities or government authorities to self-isolate. The proposed clause does not require that the advice or requirement that applies to the co-habitant be directly conveyed to the co-habitant. We regard this as appropriate, as in many if not most cases, like in the example we have given, it might be presumed that such advice or requirement would only be conveyed to the at-risk person.

Annual leave at half pay – Additional considerations

10. The proposed term is self-evidently is a term “about...leave...and arrangements for taking leave” for the purposes of section 139(1)(h) of the FW Act. In those awards where leave loading is payable, it also a term about “leave loadings” as referred to in that section.
11. The Commission has decided that terms allowing annual leave to be taken at half pay are permitted in modern awards as a matter incidental or ancillary to NES annual leave in each of the recent COVID-19 related award variations.¹² It should follow those decisions.
12. Consistent with what we have said at paragraph 9(b) above, we regard it as essential that employees be concurrently entitled to both the proposed

¹² [2020] FWCFB 1741 at [54]; [2020] FWCFB 1690 at [69]; [2020] FWCFB at [74].

JobKeeper payment and the proposed *Annual leave at half pay* provision. An employee's entitlement to receive or continue to receive the *JobKeeper* payment should not be diminished by reason of them electing to go on any form of leave. The Commonwealth should be strongly urged to support that outcome.

Selection of Awards

13. The Statement sets out a logical basis for the inclusion or exclusion of particular awards in “phase 1”, based on consideration of:
 - (a) The industries and associated awards that are likely to be impacted by the COVID-19 pandemic in the short and medium term;
 - (b) Awards which have a significant proportion of award reliant employees; and
 - (c) Awards with a high proportion of small businesses¹³

14. In our view, there are some awards identified for variation in “phase 1” which seem not to meet those criteria and have other characteristics that suggest they may not be appropriate for inclusion in phase 1 :
 - (a) The *Firefighting Industry Award* operates in an essential service, the provision of which is not driven by demand but by ever present risk. The firefighting industry is not one which has been identified in the Statement, or the material in or accompanying it, as one which is experiencing or facing a downturn as consequence of COVID-19. The award predominantly covers large, public sector organisations and has been mapped in the *Information Note – Modern Awards and Industries* to a sector with over 80% collective agreement coverage. In addition, the firefighters covered by that award overwhelmingly work a “10/14” roster pattern which programs

¹³ At paragraph [84].

blocks of annual leave in a manner that is ill suited to the proposed *Annual leave at half pay* clause.¹⁴

(b) The *Electrical, Electronic and Communications Contracting Award* covers a workforce that is closely associated with the construction industry, which has been otherwise excluded by paragraph [110] of the Statement. The industry does not rank among those more significantly affected by the COVID-19 pandemic at this time, and has relatively high density of collective bargaining. The industry covered by the Award predominantly covers the maintenance of the power distribution network and the installation and maintenance of electrical equipment including fibre optic networks, fire alarms, television and radio transmitters, security systems and other electrical systems and appliances.¹⁵ None of the activities covered by the Award have been identified as non-essential¹⁶. In addition, the Electricity, Gas, Water and Waste Services Industry has very low levels of award reliance (4.1%) and the Construction Industry is well below average levels of award reliance (16.6%) as indicated by the *Information Note – Modern Awards and Industries* published with the Statement.

(c) The *Electrical Power Industry Award* significantly covers power generation, distribution and supply and well as brown coal mining for the purposes of generating power. There is nothing in the Statement or the material accompanying it to suggest COVID-19 effects are impacting that industry. Mining and Electricity, Gas, Water and Waste Services rank as the two lowest industries for award reliance the *Information Note – Modern Awards and Industries* published with the Statement.

¹⁴ See clause 28.3 of the Fire Fighting Industry Award.

¹⁵ See clauses 4.1 and 4.8 of the Electrical, Electronic and Communications Contracting Award.

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(d) The *Plumbing and Fire Sprinklers Award* is closely associated with the construction industry. The construction industry is the only industry this award has been mapped to in the *Information Note – Modern Awards and Industries*. The construction industry has been otherwise excluded by paragraph [110] of the Statement on the basis that it has not been adversely affected to date by COVID-19, is not likely to be affected in the short term, does not have a high level of enterprise agreements and enterprise agreements are relatively common in the industry.

15. We request that the Commission exclude awards referred to at paragraphs (a)-(d) above from the current proceedings for the reasons there given and for such further reasons as may be advanced by our affiliates.

Australian Council of Trade Unions
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