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Sent: Thursday, April 23, 2020 4:48 PM

To: Chambers - Lee C <Chambers.Lee.c@fwc.gov.au>

Cc: Nick Ruskin <nick.ruskin@klgates.com>; Linda White <lwhite@asu.asn.au>; Sophie Ismail <sismail@actu.org.au>; Robert Potter <rpotter@asu.asn.au>

Subject: ASU amendments to employer proposed Legal Services Award variation

Dear Commissioner, In accordance with your instructions in the Conference held last Monday, I am sending 2 attached documents which show the ASU amendments to the proposed variation from Mr. Ruskin. The first attachment is a clean copy of our amendments while the second attachment highlights the changes to Mr Ruskin's document in red.

I have copied in Mr.Ruskin representing the Law Firms and Ms.Ismail representing the ACTU. Cheers, Michael.

Regards

Michael Rizzo

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P Think green before you print.

ANNEXURE A

DETERMINATION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

(AM2020/___)

LEGAL SERVICES AWARD 2020

[\[MA000116\]](#)

JUSTICE ROSS, PRESIDENT

XXXXX

XXXXX

MELBOURNE, _____ 2020

Application to vary the Legal Services Award 2020.

A. Further to decision [_____] issued by the Full Bench on _____ 2020, the above award is varied as follows:

1. By inserting Schedule I as follows:

Schedule I—Award Flexibility During the COVID-19 Pandemic

I.1 The provisions of Schedule I are aimed at preserving the ongoing viability of businesses and preserving jobs during the COVID-19 pandemic and not to set any precedent in relation to award entitlements after its expiry date.

I.1.1 Schedule I operates from _____ 2020 until 30 June 2020. The period of operation can be extended on application to the Fair Work Commission.

I.1.2 Schedule I does not apply to employers and employees who are receiving ‘JobKeeper’ payments pursuant to the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*.

I.1.3 A direction under this schedule ceases to have effect when it is withdrawn, revoked or replaced by the employer, or not later than 30 June 2020, whichever is earlier.

I.1.4 A direction given by an employer under this Schedule does not apply to the employee if the direction is unreasonable in all of the circumstances.

I.1.5 A direction given by an employer under this Schedule does not apply to the employee unless the employer reasonably believes the direction is necessary to deal with the impacts of COVID-19.

I.1.6 The implementation of all directions and requests under this Schedule must be safe, having regard to (without limitation) the nature and spread of COVID-19.

I.1.7 Any direction given by an employer under this Schedule must be given in writing and is not valid unless it contains a written consent by the employer to arbitration under clause 31.5 of this award in respect of any dispute arising from the direction.

I.1.8 This schedule is expressed not to cover any employee to whom an enterprise agreement applies, within the meaning of s 48 of the *Fair Work Act 2009*. For the avoidance of doubt, this means the provisions of this Schedule are not relevant for the purposes of determining whether or not an agreement, an agreement variation or an individual flexibility arrangement passes the better off overall test.

I.2 During the operation of Schedule I, the following provisions apply:

I.2.1 Operational flexibility

(a) As directed by their employer, where necessary an employee will perform any duties that are within their skill and competency regardless of their classification under clause 12—Classifications and Schedule A—Classifications, provided that the duties are safe, and that the employee is licensed and qualified to perform them.

(b) An employer must not reduce an employee's pay if the employee is directed to perform duties in accordance with clause I.2.1(a).

(c) Clause 15.3—Higher duties will apply to employees directed to perform duties carrying a higher rate than their ordinary classification in accordance with clause I.2.1(a).

I.2.2 Part-time employees working from home

Instead of clause 10.4 (Part-time employees), the minimum period of engagement applying to part-time employees who are working from home by agreement with the employer, is 2 hours per day.

I.2.3 Casual employees working from home

Instead of clause 11.3 (Casual employees), an employer must pay a casual employee who is working from home by agreement with the employer, a minimum payment of 2 hours' work at the appropriate rate for each day that the casual employee is engaged.

I.2.4 Ordinary hours of work for employees working from home

(a) Instead of clause 13.1(c)(i) (Ordinary hours of work and rostering), for employees working from home by agreement with the employer where an employee requests and the employer agrees, the spread of ordinary hours of work for day workers is between 6.00 am and 11.00 pm, Monday to Friday.

(b) Day workers are not shiftworkers for the purposes of any penalties, loadings or allowances under the award, including for the purposes of clause 21.

(c) The facilitative provision in clause 13.1(c)(ii) (Ordinary hours of work and rostering), which allows the spread of hours to be altered, will not operate for the employees referred to in clause I.2.4(a).

I.2.5 Agreed temporary reduction in ordinary hours

(a) An employer must not request an employee to reduce their hours unless the employee cannot be usefully employed for the employee's normal days or hours for the relevant period because of changes to business attributable to the COVID-19 pandemic.

(b) An employer and the full-time and part-time employees in a workplace or section of a workplace, may agree to temporarily reduce ordinary hours of work for the employees in the workplace or section for a specified period while Schedule I is in operation.

(c) At least 75% of the full-time and part-time employees in the relevant workplace or section must approve any agreement to temporarily reduce ordinary hours.

(d) For the purposes of clause I.2.5(a), ordinary hours of work may be temporarily reduced:

(i) For full time employees, to not fewer than 75% of the full-time ordinary hours applicable to an employee immediately prior to the implementation of the temporary reduction in ordinary hours.

(ii) For part-time employees, to not fewer than 75% of the part-time employee's agreed hours immediately prior to the implementation of the temporary reduction in ordinary hours.

(e) Where a reduction in hours takes effect under clause I.2.5(a), the employee's ordinary hourly rate will be maintained but the weekly wage will be reduced by the same proportion, subject to I.2.5(f).

(f) The employer must ensure that the total amount payable to the employee is not less than an amount equivalent to the 'JobKeeper' payment that would be payable to an eligible employer for the employee.

(g) Nothing in Schedule I prevents an employer and an individual employee agreeing in writing (including by electronic means) to reduce the employee's hours or to move the employee temporarily from full-time to part-time hours of work, with a commensurate reduction in the minimum weekly wage.

(h) If an employee's hours have been reduced in accordance with clause I.2.5(a):

(i) the employer must not unreasonably refuse an employee request to engage in reasonable secondary employment; and

(ii) the employer must consider all reasonable employee requests for training, professional development and/or study leave.

(i) For the purposes of clause I.2.5(a), where there is any reduction in the ordinary hours of work for full-time or part-time employees in a workplace or section during the period Schedule I is in operation, all relevant accruals and all entitlements on termination of employment will continue to be based on each employee's weekly ordinary hours of work prior to the commencement of Schedule I.

(j) For the purposes of clause I.2.5(a), the approval of employees shall be determined by a vote of employees. In order for the vote to be valid, the employer must comply with the following requirements:

(i) Where any of the employees are known to be members of the Australian Services Union or another organisation, the ASU or other organisation shall be informed before the vote takes place.

(a) Prior to the vote of employees, the employer shall provide the employees with the contact details of the ASU, should they wish to contact the ASU for advice; and

(b) The employer must notify the Fair Work Commission by emailing XXXX@fwc.gov.au that the employer proposes to conduct a vote under Schedule I. The employer shall provide the work email addresses of the employees who will be participating in the vote, to the Commission. The Commission will then distribute the ASU COVID-19 Information Sheet to the employees prior to the vote. The Commission shall list the name of the business on a register which will be accessible to the ASU, upon request, for the period when Schedule I is in operation.

(c) The vote shall not take place until at least 24 hours after the requirements of clause I.2.5(i)(a), (b) and (c) have been met.

I.2.6 Annual leave

(a) Employers and individual employees may agree to take up to twice as much annual leave at a proportionately reduced rate for all or part of any agreed or directed period away from work, including any close-down.

(b) Instead of clauses 22.8, 22.9 and 22.10 (Annual Leave), an employer may request an employee to take any annual leave that has accrued, subject to considering the employee's personal circumstances, by giving at least one week's notice, or any shorter period of notice that may be agreed. An employee must consider (and must not reasonably refuse) their employer's request to take annual leave, provided that it would not result in the employee having a balance of paid annual leave of fewer than 2 weeks.

I.2.7 Close down

(a) Instead of clause 22.7 (Annual leave), and subject to clause I.2.7(b), an employer may:

(i) require an employee to take annual leave as part of a close-down of its operations, or part of its operations, by giving at least one week's notice or any shorter period of notice that may be agreed; and

(ii) where an employee who has not accrued sufficient leave to cover part or all of the close-down, the employee is to be allowed paid annual leave for the period for which they have accrued sufficient leave and given unpaid leave for the remainder of the closedown.

(b) Clause I.2.7(a) does not permit an employer to require an employee to take leave for a period beyond the period of operation of Schedule I.

(c) Where an employee is placed on unpaid leave pursuant to clause I.2.7(a), the period of unpaid leave will count as service for the purposes of relevant award and NES entitlements.

I.2.8 Protection of workplace rights

For the avoidance of doubt, each of the following is a workplace right within the meaning of Part 3-1 of the *Fair Work Act 2009* (Cth):

- (a) agreeing, or not agreeing, to perform any duties that are within an employee's skill and competency regardless of their classification in accordance with clause I.2.1.
- (b) agreeing, or not agreeing, to take paid annual leave in compliance with a request under clause I.2.6(b).
- (c) agreeing, or not agreeing, to take twice as much annual leave at half the rate of pay for all or part of any period of leave in accordance with clause I.2.6(a).

I.2.9 Relationship with other laws etc.

This Schedule will at all times operate subject to the following:

- (a) Part 3-1 of the *Fair Work Act 2009* (Cth) (general protections);
- (b) Part 3-2 of the *Fair Work Act 2009* (Cth) (unfair dismissal);
- (c) section 772 of the *Fair Work Act 2009* (Cth) (employment not to be terminated on certain grounds);
- (d) an anti-discrimination law;
- (e) a law of the Commonwealth, a State or a Territory, so far as the law deals with health and safety obligations of employers or employees; and
- (f) a law of the Commonwealth, a State or a Territory, so far as the law deals with workers' compensation.

B. This determination comes into effect on _____ 2020. In accordance with s.165(3) of the *Fair Work Act 2009* this determination does not take effect until the start of the first full pay period that starts on or after _____ 2020.

PRESIDENT

ANNEXURE A

DETERMINATION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

(AM2020/___)

LEGAL SERVICES AWARD 2020

[\[MA000116\]](#)

JUSTICE ROSS, PRESIDENT

XXXXX

XXXXX

MELBOURNE, _____ 2020

Application to vary the Legal Services Award 2020.

A. Further to decision [_____] issued by the Full Bench on _____ 2020, the above award is varied as follows:

1. By inserting Schedule I as follows:

Schedule I—Award Flexibility During the COVID-19 Pandemic

I.1 The provisions of Schedule I are aimed at preserving the ongoing viability of businesses and preserving jobs during the COVID-19 pandemic and not to set any precedent in relation to award entitlements after its expiry date.

I.1.1 Schedule I operates from _____ 2020 until 30 June 2020. The period of operation can be extended on application to the Fair Work Commission.

I.1.2 Schedule I does not apply to employers and employees who are receiving ‘JobKeeper’ payments pursuant to the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*.

I.1.3 A direction under this schedule ceases to have effect when it is withdrawn, revoked or replaced by the employer, or not later than 30 June 2020, whichever is earlier.

I.1.4 A direction given by an employer under this Schedule does not apply to the employee if the direction is unreasonable in all of the circumstances.

I.1.5 A direction given by an employer under this Schedule does not apply to the employee unless the employer reasonably believes the direction is necessary to deal with the impacts of COVID-19.

I.1.6 The implementation of all directions and requests under this Schedule must be safe, having regard to (without limitation) the nature and spread of COVID-19.

I.1.7 Any direction given by an employer under this Schedule must be given in writing and is not valid unless it contains a written consent by the employer to arbitration under clause 31.5 of this award in respect of any dispute arising from the direction.

I.1.8 This schedule is expressed not to cover any employee to whom an enterprise agreement applies, within the meaning of s 48 of the *Fair Work Act 2009*. For the avoidance of doubt, this means the provisions of this Schedule are not relevant for the purposes of determining whether or not an agreement, an agreement variation or an individual flexibility arrangement passes the better off overall test.

I.2 During the operation of Schedule I, the following provisions apply:

I.2.1 Operational flexibility

(a) As directed by their employer, where necessary an employee will perform any duties that are within their skill and competency regardless of their classification under clause 12—Classifications and Schedule A—Classifications, provided that the duties are safe, and that the employee is licensed and qualified to perform them.

(b) An employer must not reduce an employee's pay if the employee is directed to perform duties in accordance with clause I.2.1-(a).

(c) Clause 15.3—Higher duties will apply to employees directed to perform duties carrying a higher rate than their ordinary classification in accordance with clause I.2.1(a).

I.2.2 Part-time employees working from home

Instead of clause 10.4 (Part-time employees), the minimum period of engagement applying to part-time employees who are working from home by agreement with the employer, is 2 hours per day.

I.2.3 Casual employees working from home

Instead of clause 11.3 (Casual employees), an employer must pay a casual employee who is working from home by agreement with the employer, a minimum payment of 2 hours' work at the appropriate rate for each day that the casual employee is engaged.

I.2.4 Ordinary hours of work for employees working from home

(a) Instead of clause 13.1(c)(i) (Ordinary hours of work and rostering), for employees working from home by agreement with the employer where an employee requests and the employer agrees, the spread of ordinary hours of work for day workers is between 6.00 am and 11.00 pm, Monday to Friday.

(b) Day workers are not shiftworkers for the purposes of any penalties, loadings or allowances under the award, including for the purposes of clause 21.

(c) The facilitative provision in clause 13.1(c)(ii) (Ordinary hours of work and rostering), which allows the spread of hours to be altered, will not operate for the employees referred to in clause I.2.4(a).

I.2.5 Agreed temporary reduction in ordinary hours

~~(a)~~ [An employer must not request an employee to reduce their hours unless the employee cannot be usefully employed for the employee's normal days or hours for the relevant period because of changes to business attributable to the COVID-19 pandemic.](#)

(b) An employer and the full-time and part-time employees in a workplace or section of a workplace, may agree to temporarily reduce ordinary hours of work for the employees in the workplace or section for a specified period while Schedule I is in operation.

(bc) At least 75% of the full-time and part-time employees in the relevant workplace or section must approve any agreement to temporarily reduce ordinary hours.

(ed) For the purposes of clause I.2.5(a), ordinary hours of work may be temporarily reduced:

(i) For full time employees, to not fewer than 75% of the full-time ordinary hours applicable to an employee immediately prior to the implementation of the temporary reduction in ordinary hours.

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~~(e)~~ Where a reduction in hours takes effect under clause I.2.5(a), the employee's ordinary hourly rate will be maintained but the weekly wage will be reduced by the same proportion, subject to I.2.5(f).

~~(f)~~ [The employer must ensure that the total amount payable to the employee is not less than an amount equivalent to the 'JobKeeper' payment that would be payable to an eligible employer for the employee.](#)

(g) Nothing in Schedule I prevents an employer and an individual employee agreeing in writing (including by electronic means) to reduce the employee's hours or to move the employee temporarily from full-time to part-time hours of work, with a commensurate reduction in the minimum weekly wage.

(fh) If an employee's hours have been reduced in accordance with clause I.2.5(a):

(i) the employer must not unreasonably refuse an employee request to engage in reasonable secondary employment; and

(ii) the employer must consider all reasonable employee requests for training, professional development and/or study leave.

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(~~hj~~) For the purposes of clause I.2.5(a), the approval of employees shall be determined by a vote of employees. In order for the vote to be valid, the employer must comply with the following requirements:

(i) Where any of the employees are known to be members of the Australian Services Union or another organisation, the ASU or other organisation shall be informed before the vote takes place.

(~~ha~~) Prior to the vote of employees, the employer shall provide the employees with the contact details of the ASU, should they wish to contact the ASU for advice; and

(~~hb~~) The employer must notify the Fair Work Commission by emailing XXXX@fwc.gov.au that the employer proposes to conduct a vote under Schedule I. The employer shall provide the work email addresses of the employees who will be participating in the vote, to the Commission. The Commission will then distribute the ASU COVID-19 Information Sheet to the employees prior to the vote. The Commission shall list the name of the business on a register which will be accessible to the ASU, upon request, for the period when Schedule I is in operation.

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I.2.6 Annual leave

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(b) Instead of clauses 22.8, 22.9 and 22.10 (Annual ~~leave~~Leave), an employer may ~~direct request~~ an employee to take any annual leave that has accrued, subject to considering the employee's personal circumstances, by giving at least one week's notice, or any shorter period of notice that may be agreed. ~~A direction~~An employee must consider (and must not reasonably refuse) their employer's request to take annual leave ~~shall, provided that it would not result in an~~the employee having less than 2 weeksa balance of ~~accrued~~paid annual leave ~~remaining of fewer than 2 weeks~~.

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- (d) an anti-discrimination law;
- (e) a law of the Commonwealth, a State or a Territory, so far as the law deals with health and safety obligations of employers or employees; and
- ~~(f)~~ a law of the Commonwealth, a State or a Territory, so far as the law deals with workers' compensation.

B. This determination comes into effect on _____ 2020. In accordance with s.165(3) of the Fair Work Act 2009 this determination does not take effect until the start of the first full pay period that starts on or after _____ 2020.

PRESIDENT