

Australian Industry Group

Variation to Awards at the FWC's Initiative in Response to the COVID-19 Pandemic

Submission
(AM2020/12)

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Ai
GROUP

VARIATION TO AWARDS AT THE FWC'S INITIATIVE IN RESPONSE TO THE COVID-19 PANDEMIC

INTRODUCTION

1. On 1 April 2020, the Fair Work Commission (**Commission**) published a statement¹ (**Statement**), in which it set out its provisional views regarding the variation of 103 modern awards (**Relevant Awards**) to provide an entitlement to unpaid 'pandemic leave' (**Proposed Unpaid Leave Provision**) and the flexibility to take annual leave at half pay (**Proposed Annual Leave Provision**).
2. The Australian Industry Group (**Ai Group**) files in this submission in accordance with the Commission's direction at paragraph [4] of the Statement, in response to the provisional views expressed in the Statement.

THE PROPOSED UNPAID LEAVE PROVISION

3. The Proposed Unpaid Leave Provision is in the following terms:

X.2.1 Unpaid pandemic leave

- (a) Subject to clauses X.2.1(b) and (c), any employee may elect to take up to 2 weeks' unpaid leave if the employee is required, by government or medical authorities or acting on medical advice, to self-isolate or is otherwise prevented from working by measures taken by government or medical authorities in response to the COVID-19 pandemic in circumstances where the employee is required to work at premises operated by an employer.
- (b) The employee must give their employer notice of the taking of leave under clause X.2.1(a) and of the reason the employee requires the leave, as soon as practicable (which may be a time after the leave has started).
- (c) An employee who has given their employer notice of taking leave under clause X.2.1(a) must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken for a reason given in clause X.2.1(a).

¹ *Variation of awards on the initiative of the Commission* [2020] FWCFB 1760.

- (d) Leave taken under clause X.2.1(a) does not affect any other paid or unpaid leave entitlement of the employee and counts as service for the purposes of entitlements under this Award and the National Employment Standards.

NOTE 1: A employee covered by this Award who is entitled to the benefit of clause X.2.1 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.

4. Ai Group does not oppose the insertion of a provision of the nature contemplated by the Commission in the Relevant Awards; however we make the following submissions about certain elements of the proposed clause which, in our respectful view, may warrant redrafting.
5. The proposed clause would apply where an employee is "required to work at premises operated by an employer". In its statement, the Commission described this element of the application of the clause in broader and, in our submission, more appropriate terms: (our emphasis)

[54] The gaps in leave entitlements and protections against dismissal outlined above could be addressed for employees to whom awards apply, by providing an entitlement to unpaid 'pandemic leave' if employees are required to self-isolate or are otherwise prevented from attending work where they are required by their employer to attend, by measures taken by government or medical authorities in response to the COVID-19 pandemic. As well as providing an entitlement to leave to employees who have no existing leave entitlements available to them in these circumstances, such a new leave entitlement would supplement existing leave entitlements and constitute a 'workplace right' for the purposes of the general protections under the Act.²

² *Variation of awards on the initiative of the Commission* [2020] FWCFB 1760 at [54].

6. Many employees are required to attend for work at premises that are not operated by *their* employer. Examples include:
 - (a) Employees of ground handlers working at airports (covered by the *Airline Operations – Ground Staff Award 2010*);
 - (b) Employees of contract cleaning companies (covered by the *Cleaning Services Award 2010*);
 - (c) Employees in the security services industry (covered by the *Security Services Industry Award 2010*); and
 - (d) Employees covered by a range of awards performing work on construction sites that are not operated by their own employers.
7. We note in this regard that the proposed clause X.2.1(a) refers to premises operated by an employer (not the employer of the employee), and therefore consider that such circumstances are contemplated by the clause.
8. However, some employees are required to perform work at premises that are not operated by *any* employer or to perform the vast majority of their work away from *any* premises. For example:
 - (a) Employees covered by the *Social, Community, Home Care and Disability Services Industry Award 2010* who perform work in the homes of their employer's clients.
 - (b) Employees covered by the *Road Transport (Long Distance Operations) Award 2010* who drive vehicles over extensive distances and as a result, spend most of their time in the vehicle, whilst travelling.
9. We do not understand from the Commission's Statement that such employees are to be excluded from the application of the Proposed Unpaid Leave Provision, nor can we identify any warrant for doing so.

10. To ensure that the provision applies to such employees, we submit that clause X.2.1(a) should be amended as follows:

- (a) Subject to clauses X.2.1(b) and (c), any employee may elect to take up to 2 weeks' unpaid leave if the employee is required, by government or medical authorities or acting on medical advice, to self-isolate and is consequently prevented from working or is otherwise prevented from working by measures taken by government or medical authorities in response to the COVID-19 pandemic. ~~in circumstances where the employee is required to work at premises operated by an employer.~~

THE PROPOSED ANNUAL LEAVE PROVISION

11. The proposed annual leave provision is in the following terms:

X.2.2 Annual leave at half pay

- (a) Instead of an employee taking paid annual leave on full pay, the employee and their employer may agree to the employee taking twice as much leave on half pay.
- (b) Any agreement to take twice as much annual leave at half pay must be recorded in writing and retained as an employee record.

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 (including leave loading under the Annual Leave clause of this award); and
- one week of leave is deducted from the employee's annual leave accrual. (Underlining added).

NOTE 1: A employee covered by this Award who is entitled to the benefit of clause X.2.2 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.

12. Ai Group supports the insertion of the Proposed Annual Leave Provision in the Relevant Awards.
13. However, we suggest that the more flexible approach taken in the recent variations to the *Clerks – Private Sector Award 2010*, *Hospitality Industry (General) Award 2010* and the *Restaurant Industry Award 2010* be adopted. The relevant provisions in these awards provide more options than just twice the annual leave for half the pay (e.g. an employer and employee could agree to 25% more annual leave for 25% less pay). Consistent with this approach, we suggest the following amendment:
 - (a) Instead of an employee taking paid annual leave on full pay, the employee and their employer may agree to the employee taking up to twice as much leave at ~~half pay~~ a proportionately reduced rate of pay.
 - (b) Any agreement to take twice as much annual leave at ~~half~~ a proportionately reduced rate of pay must be recorded in writing and retained as an employee record.

14. Also, we suggest that in the proposed example following the substantive terms of the provision, the word 'full' be deleted as proposed below, in order to make the provision simple and easy to understand:

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 (including leave loading under the Annual Leave clause of this award); and
- one week of leave is deducted from the employee's annual leave accrual.

SECTIONS 134, 136, 138 AND 139 OF THE *FAIR WORK ACT 2009*

15. Ai Group does not oppose the provisional views reached by the Commission at paragraphs [123] – [124] of the Statement regarding ss.134, 136, 138 and 139 of the *Fair Work Act 2009*.

THE IMPORTANCE OF FURTHER AWARD FLEXIBILITIES TO ASSIST BUSINESSES AND EMPLOYEES TO COPE WITH THE COVID-19 PANDEMIC

16. We urge the Full Bench to make it clear in its decision that these award variations are not intended to interfere with the discussions that are taking place between employer groups and unions over the inclusion of additional flexibilities in awards to address the impacts of the COVID-19 pandemic.

17. We note the following comments in the Commission’s Statement: (emphasis added)

[80] We have considered whether to include a broader range of measures to provide greater flexibility, such as:

- the capacity for employers to direct employees to take annual leave; and
- measures to facilitate reductions in the working hours of full-time and part-time employees.

[81] But, as we have mentioned, we have adopted a more limited approach at this stage to provide a quick response to the current crisis and in an effort to attract broad support for the measures proposed. We would also observe that most awards which provide for part-time employment allow for changes in the hours of part-time employees by agreement. Also, in most modern awards there is no impediment to an employee reaching an agreement with their employer to move from full-time to part-time employment. Further, drafting a model term about reducing working hours would be complicated by the range of existing terms dealing with working hours in modern awards.

[82] For the moment, we think that these matters are best addressed by discussions between the industrial parties and consent variations of modern awards. As has been our practice to date, we will continue to expedite the determination of such applications.³

³ *Variation of awards on the initiative of the Commission* [2020] FWCFB 1760 at [80] – [83].

18. The variations recently made to the *Clerks – Private Sector Award 2010*, *Hospitality Industry (General) Award 2010* and the *Restaurant Industry Award 2010* have been very worthwhile, and similar variations to other relevant awards would be equally worthwhile.