



# STATEMENT

*Fair Work Act 2009*

s.157—Variation of a modern award to achieve the modern awards objective

## Variation of awards on the initiative of the Commission

(AM2020/12)

Various industries

JUSTICE ROSS, PRESIDENT  
VICE PRESIDENT HATCHER  
VICE PRESIDENT CATANZARITI  
DEPUTY PRESIDENT ASBURY  
DEPUTY PRESIDENT CLANCY  
COMMISSIONER SPENCER

MELBOURNE, 1 APRIL 2020

*Section 157(3) of the Fair Work Act 2009 (Cth) – Commission acting on its own initiative to vary certain modern awards to achieve the modern awards objective – additional measures during COVID-19 pandemic – provisional views.*

Chapters		Paragraph
1.	Background	[1]
2.	COVID-19 Pandemic	[8]
	<i>Measures taken to restrict gathering and non-essential business</i>	[9]
	<i>The impact on business</i>	[22]
	<i>Professor Borland’s expert report</i>	[27]
3.	Recent variations in modern awards	[36]
4.	The ‘regulatory gap’	[45]
5.	Consideration	[56]
	<i>Unpaid pandemic leave</i>	[57]
	<i>Annual leave at half pay</i>	[67]
	<i>Selected phase 1 awards</i>	[83]
	<i>The selected phase 1 awards</i>	[108]

6.	Unpaid pandemic leave and the social safety net	[112]
7.	Provisional views	[122]
8.	Next steps	[125]

## 1. Background

[1] This Statement is made in the context of the unique circumstances pertaining to the COVID-19 pandemic and sets out our *provisional* views regarding the variation of 103 modern awards to provide an entitlement to unpaid ‘pandemic leave’ and the flexibility to take annual leave at half pay. The variations proposed would operate until 30 June 2020 and the awards we propose to vary are set out at [108].

[2] The variations are proposed on the Commission’s own initiative pursuant to s 157(3) of the *Fair Work Act 2009* (Cth) (the Act) and do not preclude other variation applications being made to modern awards to provide additional measures during the COVID-19 pandemic. Indeed we encourage the industrial parties to continue (or enter into) discussions directed towards consent applications to vary modern awards. The Commission is available to assist in facilitating those discussions on request.

[3] Full Benches of the Commission have recently made variations on an expedited basis to the *Hospitality Industry (General) Award 2010* (the Hospitality Award), the *Clerks –Private Sector Award 2010* (the Clerks–Private Sector Award) and the *Restaurant Industry Award 2010* (the Restaurant Award). Those variation applications had the support of the major industrial parties. Further, these applications were supported by the Australian Council of Trade Unions (the ACTU) and the Minister for Industrial Relations (the Minister).

[4] This matter will also be expedited, given the exigencies of the impact of the COVID-19 pandemic. Any interested person wishing to respond to the *provisional* views in this Statement is to lodge a written submission by **4pm on Monday 6 April 2020**. Instructions for filing submissions are in ‘Next steps’ below.

[5] If no submissions are received opposing our *provisional* views, in respect of the proposed variation of a particular award or more generally, we will determine the matter and make the variations proposed without holding a hearing.

[6] If a submission is received opposing our *provisional* views in respect of the proposed variation of a particular award or more generally, a hearing will be held at **2pm on Wednesday 8 April 2020** by telephone.

[7] The following documents have been published and inform the measures we propose to take:

- [Information Note on modern awards and industries](#);
- [Information Note on bargaining by business size](#);
- [Information Note on Government responses to the COVID-19 pandemic](#); and
- [Expert report by Professor Borland](#).

## 2. COVID-19 Pandemic

[8] The COVID-19 pandemic and the responses from governments, both federal and state, initially put restrictions on some businesses and then forced many to close, with consequential impacts on employees.

### *Measures taken to restrict gatherings and non-essential business<sup>1</sup>*

[9] The Commission has published an [information note on the Government responses to the COVID-19 pandemic](#) on its website. The information note outlines the measures taken by both federal and state governments to put restrictions on social gatherings and non-essential businesses, as well as the assistance provided to support businesses and households. The Commission regularly updates the Information Notes to take account of recent developments. The information below is taken from the Commission's Information Note.

[10] The Commonwealth Government has initiated the following [guidelines](#) for social distancing in order to stop or slow the spread of the disease:

- avoid handshaking and kissing;
- visit shops sparingly;
- consider whether outings and travel are necessary;
- reconsider non-essential business travel; and
- the suspension of non-essential gatherings for an initial period of 4 weeks.

[11] On 13 March 2020, the Commonwealth and State Governments [agreed](#) to advise against all non-essential organised public gatherings of more than 500 persons, effective from 16 March 2020. This did not impact schools, workplaces, hospitals, public transportation, domestic travel and universities as well as public transient places such as shopping centres.

[12] In [addition](#), on 18 March 2020, non-essential indoor gatherings of more than 100 people (including staff) and outdoor activities of more than 500 people were not to be permitted. Essential gatherings include:

- public transport;
- medical and health care facilities, pharmacies, emergency service facilities;
- correctional facilities, youth justice centres or other places of custody, courts and tribunals;

---

<sup>1</sup> See Media Statement, 24 March 2020, Prime Minister: <https://www.pm.gov.au/media/update-coronavirus-measures-24-March-2020>; Media Statement, 26 March 2020, Prime Minister: <https://www.pm.gov.au/media/further-statement-hairdressers-barbers-and-funerals-national-cabinet>; Media Statement, 27 March 2020, Prime Minister: <https://www.pm.gov.au/media/update-coronavirus-measures-270320>; Media Statement, 29 March 2020, Prime Minister: <https://www.pm.gov.au/media/national-cabinet-statement>; Media Statement, 30 March 2020, Prime Minister: <https://www.pm.gov.au/media/130-billion-jobkeeper-payment-keep-australians-job>; <https://www.pm.gov.au/media/statement-update-coronavirus-measures>

- Parliaments;
- food markets, supermarkets and grocery stores, shopping centres; and
- office buildings, factories, construction sites and mining sites.

[13] For outdoor gatherings of fewer than 500 people, there must be no more than 1 person per 4 square metres of ground space.

[14] On 20 March 2020, the Commonwealth [announced](#) that there must be a density of no more than 1 person per 4 square metres of floor space for indoor gatherings.

[15] On 29 March 2020, the Commonwealth Government also [announced](#) a range of short-term interventions within commercial and residential rental markets that involved a moratorium on evictions of both residential and commercial tenancies for the next 6 months, in cases where tenants are unable to meet their rental commitments due to the impact of COVID-19. The Government also encouraged commercial tenants and landlords to engage in discussions, supporting the survival of businesses and continuation of tenancies, including:

- tenants and landlords are encouraged to agree on rent relief or temporary amendments to the lease;
- the reduction or waiver of rental payment for a defined period for impacted tenants;
- the ability for tenants to terminate leases and/or seek mediation or conciliation on the grounds of financial distress;
- commercial property owners should ensure that any benefits received in respect of their properties should also benefit their tenants in proportion to the economic impact caused by coronavirus;
- landlords and tenants not significantly affected by coronavirus are expected to honor their lease and rental agreements; and
- cost-sharing or deferral of losses between landlords and tenants, with Commonwealth, state and territory governments, local government and financial institutions to consider mechanisms to provide assistance.

[16] The [guidelines](#) also explain that, from midday local time on 23 March 2020, restrictions on opening were placed on the following facilities:

- pubs, registered and licensed clubs (excluding bottle shops attached to these venues), hotels (excluding accommodation);
- gyms and indoor sporting venues;
- cinemas, entertainment venues, casinos and night clubs;
- restaurants and cafes restricted to takeaway and/or home delivery; and
- religious gatherings, places of worship or funerals (in enclosed spaces and other than very small groups and where the 1 person per 4 square metre rule applies).

[17] Further [measures](#), along with clarification of current guidelines, were announced on 24 March 2020 by the Commonwealth Government, which applied from 11.59pm local time on 25 March 2020. Restrictions on opening were placed on the following facilities:

- food courts (takeaway and/or home delivery remain operational);
- auction houses, real estate auctions and open house inspections (with the exception of private appointments for inspection);
- outdoor and indoor markets, which will be decision for each state/territory (food markets continue to remain operational);
- beauty therapy, tanning, waxing, nail salons, tattoo parlours, spa, and massage parlours;
- hairdressers and barber shops to only have appointments of up to 30 minutes and to abide by the 1 person per 4 square metre rule;
  - On 26 March 2020, the Commonwealth Government [announced](#) that appointments would no longer be limited to 30 minutes per patron (effective immediately) for barbers and hairdressers, but the 1 person per 4 square metre rule must be strictly observed.
- gaming or gambling venues;
- strip clubs, brothels and sex on premises venues;
- concert venues, theatre, arenas, auditoriums, stadiums (live streaming of a performance by a small group can be permissible with social distancing observed);
- amusement parks, arcades and play centres (indoor and outdoor);
- community and recreation centres except for those that host essential voluntary or public services, such as food banks or homeless services;
- health clubs, fitness centres, yoga, barre and spin facilities, saunas, bathhouses and wellness centres;
- boot camps, personal training operating inside (for outside events, limited to groups of no more than 10 people and social distancing must be exercised);
- social-sporting based activities and swimming pools;
- residential facilities, such as hotels, hostels, bed and breakfasts, campsites, caravan parks, and boarding houses to be a decision for each state and territory (excludes permanent residents and workers);
- galleries, museums, national institutions and historic sites;
- libraries, community centres, and youth centres;
- local government non-essential facilities and services (i.e., libraries and pools)
- community facilities (i.e., community halls, RSLs, PCYCs);
- weddings restricted to a maximum attendance of 5 people and where the 1 person per 4 square metre rule applies; and

- funerals restricted to a maximum attendance of 10 people and where the 1 person per 4 square metre rule applies.

[18] In addition, a ‘do not travel’ ban on Australians travelling overseas has been implemented, with exemptions to citizens that ordinarily live overseas, where travel is essential or necessary, where travel is in the national interest, and on compassionate and humanitarian grounds.

[19] On 27 March 2020, the Commonwealth Government [announced](#) additional restrictions for return travellers and enforcement that require travellers returning from overseas to undertake a mandatory 14 days of self-isolation at designated facilities, to be enforced with increasing compliance checks by state and federal police. Beginning from 11.59pm on Saturday 28 March 2020, anyone who returns to Australia will be forced to quarantine in a hotel or other accommodation for 14 days before being allowed to return home.

[20] On 29 March 2020, further measures from the Commonwealth Government [advised](#) people to stay at home unless partaking in one of the following:

- shopping for what you need - food and necessary supplies;
- medical or health care needs, including compassionate requirements;
- exercise in compliance with the public gathering requirements;
- work and study, if it cannot be done remotely.

[21] The announcement limited both indoor and outdoor gatherings to a maximum of 2 persons with exceptions limited to the following:

- people of the same household;
- funerals – a maximum of 10 people;
- weddings – a maximum of 5 people; and
- family units.

### *The impact on business*

[22] On 26 March 2020, the ABS released the first results from a survey of businesses on the impacts of COVID-19.<sup>2</sup>

[23] The ‘Business Impacts of COVID-19’ publication surveyed 3000 businesses between 16 and 23 March 2020 using a subsample from the *Business Indicators Survey*. Stage 1 restrictions on social gatherings had been announced on 22 March 2020. The survey had a response rate of 41 per cent, or 1217 businesses.

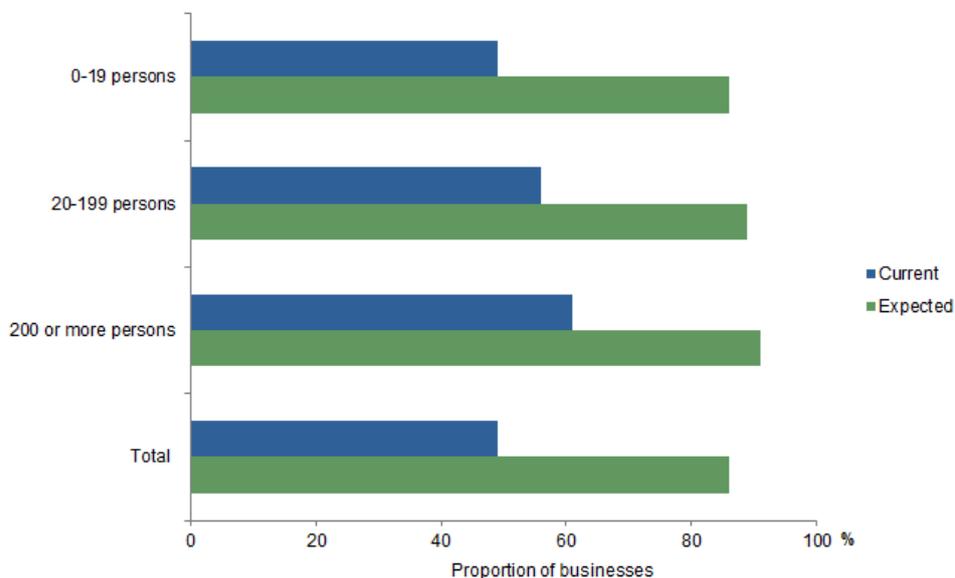
[24] Businesses were asked whether they were adversely impacted by COVID-19 in the previous 2 weeks and if they anticipated adverse impacts in the coming months. Around half (49 per cent) of businesses had experienced an adverse impact as a result of COVID-19 in the

---

<sup>2</sup> ABS, [Business Indicators, Business Impacts of COVID-19, March 2020](#), Catalogue No. 5676.0.55.003.

preceding 2 weeks, while 86 per cent of businesses expected to be impacted in the coming months (Chart 1).

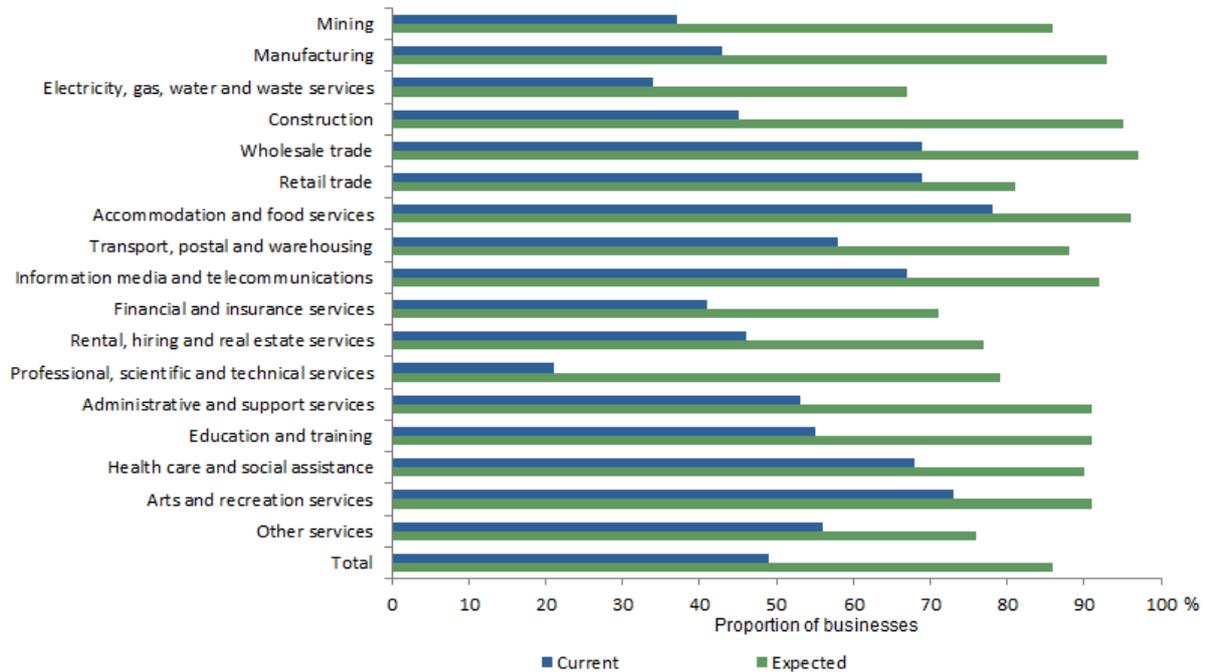
**Chart 1: Businesses adversely impacted by Coronavirus (COVID-19), current and expected, by employment size, March 2020**



Source: ABS, *Business Indicators, Business Impacts of COVID-19, March 2020*, Catalogue No. 5676.0.55.003,

**[25]** Adverse effects were most prevalent within the Accommodation and food services industry, with 78 per cent of businesses reporting being impacted in the previous 2 weeks and 96 per cent expecting to be impacted in the coming months (Chart 2). A relatively high proportion of businesses within the Arts and recreation services, Retail trade and Wholesale trade industries also reported being adversely affected, as well as businesses in Health care and social assistance and Information media and telecommunications. Conversely, the industries least likely to report being adversely affected in the previous 2 weeks were Professional, scientific & technical services (21 per cent), Electricity, gas and water supply (34 per cent) and Mining (37 per cent).

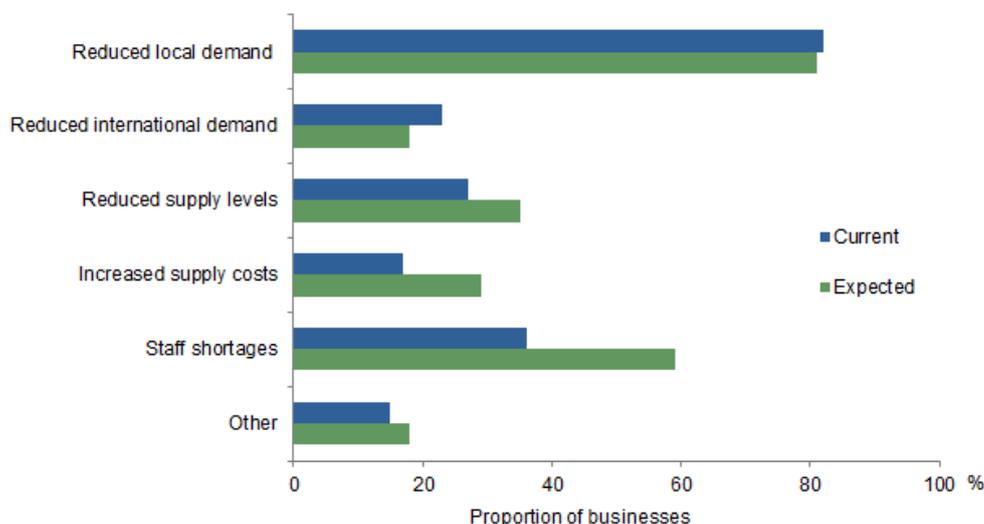
**Chart 2: Businesses adversely impacted by Coronavirus (COVID-19), current and expected, by industry, March 2020**



Source: ABS, *Business Indicators, Business Impacts of COVID-19, March 2020*, Catalogue No. 5676.0.55.003,

[26] Of those businesses that reported being adversely affected, the most commonly cited impact was a reduction in local demand (82 per cent), which was also the most commonly cited impact anticipated in the coming months (81 per cent) (Chart 3). This was followed by staff shortages, which was reported by 36 per cent of businesses, while 59 per cent expected to experience staff shortages in coming months.

**Chart 3: Businesses adversely impacted by Coronavirus (COVID-19), current and expected, by type of impact, March 2020**



Source: ABS, *Business Indicators, Business Impacts of COVID-19, March 2020*, Catalogue No. 5676.0.55.003,

*Professor Borland’s expert report*

[27] Recently the Commission briefed Professor Borland (Truby Williams Professor of Economics, University of Melbourne) to provide an [expert report](#) on the industries and sectors most likely to be adversely affected in the short term by the response to the COVID-19 pandemic.

[28] The objective of the report was to assess which industries (and hence in which modern awards) there might be the greatest potential immediate benefit from allowing extra flexibility in employment arrangements during the period in which the COVID-19 pandemic is impacting on the Australian labour market.

[29] The structure of the report is as follows:

- Section 2 presents a brief background on the labour market impact of COVID-19 in Australia.
- Section 3 describes benefits from allowing greater flexibility in employment arrangements during the pandemic.
- Section 4 identifies industries where those benefits appear potentially most likely to exist.
- Section 5 translates the industry-level analysis to the framework of modern awards.

[30] In the report the term ‘allowing extra flexibility in employment arrangements’ means that it may be possible to modify award provisions in order to make it easier for a worker’s hours of work to be varied – for example, from full-time to part-time. The report notes:

‘Allowing extra flexibility in this way could mean that extra employees are able to be retained in employment in response to a decrease in labour demand. For example, a business which used

to hire three workers for 40 hours per week, and which during the pandemic only requires 40 hours of labour in total, might then be able to retain each of the three workers for 13 ½ hours per week, rather than needing to lay off two workers and retaining one worker in a full-time position.

Retaining extra employees in employment has potential benefits for both the employee and an employer. Employees who are laid off experience a variety of costs that do not occur (or are smaller than) when they are retained at reduced hours – including loss of income; loss of firm-specific human capital and skill atrophy; negative psychological effects; and the need to undertake search activity to find a new job. Similarly, employers who layoff a worker and subsequently need to hire a new worker to fill the vacancy created when demand conditions improve will experience costs that do not occur when they can retain employees at reduced hours – including loss of the value of firm-specific human capital accumulated by the worker; and costs of searching for new worker and retraining.

The potential benefits of retaining employees during episodes such as the current pandemic seems to represent are especially large. Many firms are experiencing a substantial decrease in their demand for labour, but as the pandemic is controlled are likely to have the same level of labour demand as before the pandemic. That reversal of the effect on labour demand, together with what will hopefully be a shorter duration than an average downturn, makes it more valuable for firms to retain an already trained worker and to not have to search for a new worker.<sup>3</sup>

**[31]** The report first identifies industries in which there is the largest potential immediate negative impacts on employment. As the report notes, identifying where the largest negative effects on employment are likely to occur is not straightforward. No data on recent changes in employment are yet available. Hence, it has been necessary to make the identification based on the degree to which workers are likely to have been affected by government regulations and other consequences of COVID-19.

**[32]** At table 1 of the report, industries that seem most likely to experience decreases in employment as an immediate consequence of COVID-19 are listed. For each industry a brief rationale is provided for why a decrease might be expected and the level of employment in November 2019 (ABS, Labour Force Survey) is recorded.

**[33]** Broadly, the industries fall into three categories. The first category are industries where there has been a decrease in labour demand due to government restrictions. The second category are industries affected by a decrease in labour demand due to households reducing their spending - for example, on semi-durable and durable goods. The third category are industries where there have not yet been major decreases in labour demand, but where more stringent government restrictions or other factors may cause a decrease in labour demand in the future.

**[34]** The report links industries where adjustment to the decrease in labour demand might occur via changes to hours of work as provided for in the modern award structure. The report notes that the mapping is shown in the final column in Table 1 of the report.

**[35]** From the mapping it is possible to nominate a set of modern awards to prioritise for the provision of additional flexibility given the number of workers affected.

---

<sup>3</sup> Borland J (2020), [\*Benefit from greater flexibility in employment arrangements\*](#), a report to the Fair Work Commission at pp. 2–3.

- From the first category of industries, the main modern awards are: *Restaurant Industry Award 2010*; *Fast Food Industry Award 2010*; and *Hospitality Industry (General) Award 2010*.
- From the second category of industries, the main modern awards are: *General Retail Industry Award 2010*; *Vehicle Manufacturing, Repair, Services and Retail Award 2010*.
- For possible consideration in the longer-term, depending on the evolution of labour demand, the *Building and Construction General on-site Award 2010*.

### 3. Recent variations of modern awards

[36] On 24 March 2020, a Full Bench granted an application to vary the Hospitality Award. The reasons for that decision were published on 25 March 2020<sup>4</sup> (the Hospitality Decision). On 28 March 2020, a Full Bench granted an application to vary the Clerks–Private Sector Award and the reasons for that decision were published on 28 March 2020<sup>5</sup> (the Clerks–Private Sector Decision).

[37] The Hospitality Decision varied the Hospitality Award with effect from 24 March 2020 to provide additional award flexibility during the COVID-19 pandemic in relation to:

- the range of duties employees can be required to perform;
- reduction of ordinary hours of work for full-time and part-time employees; and
- employees being directed to take annual leave, and employees by agreement taking twice the amount of annual leave at half pay.

[38] The Clerks–Private Sector Decision varied the Clerks–Private Sector Award with effect from 28 March 2020 to provide additional award flexibility during the COVID-19 pandemic in relation to:

- the range of duties employees can be required to perform;
- the minimum engagement for part-time and casual employees working from home;
- the spread of ordinary hours of work of day workers working from home;
- temporary reduction of ordinary hours by agreement;
- employees being directed to take annual leave, and employees by agreement taking up to twice the amount of annual leave at a proportionately reduced pay rate; and

---

<sup>4</sup> [\[2020\] FWCFB 1574](#)

<sup>5</sup> [\[2020\] FWCFB 1690](#)

- a reduced notice period for close-down.

[39] It is important to note that these variation applications were made with the consent of the major unions and with the support of both the ACTU and the Minister. As noted in the Hospitality Decision the consent of the key industrial parties was the central consideration in adopting a truncated hearing process. In that decision the Full Bench also said:

‘[14] In the event that this application had been contested then, plainly, different considerations would have been enlivened, necessitating a more protracted hearing process than the one we have adopted in this matter.’<sup>6</sup>

[40] On 30 March 2020 Restaurant and Catering Industrial made an application to vary the Restaurant Award, with the support of the UUU and the ACTU. It sought a variation to provide additional award flexibilities during the COVID-19 pandemic in relation to:

- the range of duties employees can be required to perform;
- the reduction of ordinary hours of work for full-time and part-time employees;
- employees being directed to take accrued annual leave with 24 hours’ notice, subject to considering an employees’ personal circumstances;
- employees, by agreement, taking up to twice the amount of the accrued annual leave at half pay; and
- a reduction in the notice period for a close-down.

[41] At about 4:30pm on 30 March 2020, a Full Bench of the Commission published a statement<sup>7</sup> setting out its *provisional* view that the Restaurant Award be varied in the terms sought in the application.

[42] No submissions were filed opposing the Full Bench’s *provisional* view and on 31 March 2020 the Full Bench published a decision<sup>8</sup> varying the Restaurant Award in the terms sought in the application.

[43] In addition to these variations of modern awards the ACTU’s website records that a number of businesses have granted employees access to special paid sick leave and additional support. The businesses listed on the website include:

- Officeworks;
- Telstra;
- Woolworths;
- Target;

---

<sup>6</sup> [2020] FWCFB 1574 at [14]

<sup>7</sup> [2020] FWCFB 1715

<sup>8</sup> [2020] FWCFB 1741

- Kmart;
- Westpac;
- CBA;
- ANZ;
- SBS;
- Google;
- BUPA;
- Crown Resorts (Crown Melbourne & Crown Perth);
- Port Waratah Coal Service;
- Port of Newcastle;
- Komatsu;
- Thales;
- Stramit;
- Aurizon;
- SA Power networks;
- Australia Post;
- NAB;
- ME Bank;
- DHL Logistics;
- NewsCorp;
- Nestle;
- Boeing;
- Nando's; and
- a number of universities.

[44] 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.

#### **4. The 'regulatory gap'**

[45] During March 2020 the media has reported many business close-downs or partial close-downs, with employees being laid off or stood down, taking or being required to take paid or unpaid leave, working reduced hours, or working from home.

[46] To contain the spread of COVID-19 and to 'flatten the curve' in order to reduce pressure on the health system, employees may be requested or required to self-isolate for 14 days.

[47] 'Self-isolation' is generally used in Australia to refer to circumstances both where a person may have been exposed to COVID-19 but is not known to be infected and where a person has been diagnosed with COVID-19 but is not ill enough to require hospitalisation (see [Dept of Health](#)) — although strictly speaking, the former is 'quarantine' and the latter is 'isolation' (see [RACGP](#)).

[48] Employees who have contracted COVID-19 may have an entitlement to paid personal/carer's leave under the National Employment Standards (NES) (see ss 95–101 of the Act). But the number of employees able to utilise paid personal/carer's leave to cover a period of self-isolation is likely to be limited, because:

- the NES entitlement does not apply to casuals (s 95);
- the NES entitlement is to 10 days' paid leave for each year of service and it is likely that a significant proportion of employees will have used some of their entitlement and have less than 10 days' paid leave available;
- the NES entitlement accrues progressively during a year of service (hence employees with less than 12 months' service will have an entitlement to less than 10 days' paid leave); and
- under the NES an employee may take paid personal/carer's leave if the leave is taken, relevantly, 'because the employee is not fit for work because of personal illness' (s 97(a)). However, an employee may be required to self-isolate because they have been exposed to someone infected with COVID-19, although the employee has not tested positive to COVID-19, is not displaying any symptoms and is not unfit for work 'because of personal illness.'

[49] Some employees required to self-isolate may be able to access paid or unpaid leave.

[50] But for most award-covered employees this will depend upon the agreement of their employer. If the employer does not consent the employee may be placed in the invidious position of either contravening public health directions or guidelines, or placing their employment in jeopardy.

[51] Unfair dismissal protections do not extend to all employees, being limited to those employees 'protected from unfair dismissal' within the meaning of s.382 of the Act. A wider range of employees may be protected from dismissal under the general protections in the Act, if they have actually contracted COVID-19. Section 352 of the Act provides:

Temporary absence--illness or injury

An employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.

Note: This section is a civil remedy provision (see Part 4-1).

[52] The *Fair Work Regulations 2009* (the Regulations) prescribe kinds of illness or injury for the purposes of s 352. Regulation 3.01 provides:

Temporary absence--illness or injury

(1) For section 352 of the Act, this regulation prescribes kinds of illness or injury.

Note: Under section 352 of the Act, an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.

(2) A prescribed kind of illness or injury exists if the employee provides a medical certificate for the illness or injury, or a statutory declaration about the illness or injury, within:

(a) 24 hours after the commencement of the absence; or

(b) such longer period as is reasonable in the circumstances.

Note: The Act defines medical certificate in section 12.

(3) A prescribed kind of illness or injury exists if the employee:

(a) is required by the terms of a workplace instrument:

(i) to notify the employer of an absence from work; and

(ii) to substantiate the reason for the absence; and

(b) complies with those terms.

(4) A prescribed kind of illness or injury exists if the employee has provided the employer with evidence, in accordance with paragraph 107(3)(a) of the Act, for taking paid personal/carer's leave for a personal illness or personal injury, as mentioned in paragraph 97(a) of the Act.

Note: Paragraph 97(a) of the Act provides that an employee may take paid personal/carer's leave if the leave is taken because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee.

(5) An illness or injury is not a prescribed kind of illness or injury if:

(a) either:

(i) the employee's absence extends for more than 3 months; or

(ii) the total absences of the employee, within a 12 month period, have been more than 3 months (whether based on a single illness or injury or separate illnesses or injuries); and

(b) the employee is not on paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act for the duration of the absence.

(6) In this regulation, a period of paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act does not include a period when the employee is absent from work while receiving compensation under a law of the Commonwealth, a State or a Territory that is about workers' compensation.

[53] As with paid personal leave, it appears that the protection against dismissal under s 352 may not apply to an employee required to self-isolate because they have been exposed to someone infected with COVID-19, if the employee has not tested positive to COVID-19, is not displaying any symptoms and is not unfit for work because of personal illness.

[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.

[55] The unpaid pandemic leave we are proposing is intended to be a short-term measure to address the 'regulatory gap' outlined above.

## **5. Consideration**

[56] We are proposing to insert a new Schedule: Schedule X – Additional measures during the COVID-19 pandemic into selected modern awards. The new schedule will operate until 30 June 2020 (unless extended on application or on the initiative of the Commission). The two additional measures in the Schedule are unpaid pandemic leave and the ability to take twice the amount of annual leave at half pay.

### ***Unpaid pandemic leave***

[57] As we have mentioned there is a 'gap' in the award safety net concerning employees who are required to self-isolate.

[58] We have drafted a model term to address that gap.

[59] The proposed provision for unpaid pandemic leave is as follows:

#### **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).
- (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.

**[60]** The proposed term seeks to strike a balance between the various interests and has been drafted so that the unpaid pandemic leave entitlement:

- will be available in full immediately, rather than accruing progressively during a year of service;
- will only be available until 30 June 2020 (unless extended by further variation dependant on the duration of the COVID-19 pandemic);
- will be available to full-time, part-time and casual employees (*not* pro-rated); and
- it will *not* be necessary for employees to exhaust their paid leave entitlements before accessing unpaid pandemic leave.

[61] In relation to the last point we note that the approach proposed is consistent with that taken by the Commission in relation to unpaid domestic violence leave.<sup>9</sup>

[62] As a practical matter, we think that award-reliant employees are likely to access any available paid leave entitlements before utilising an entitlement to unpaid pandemic leave but we do not think it appropriate to mandate such an approach. Further, to require employees to access any paid leave entitlement before accessing unpaid pandemic leave would introduce an unwarranted degree of complexity into the proposed award term.

[63] By addressing the ‘regulatory gap’ the new entitlement to unpaid pandemic leave will enable more people to remain in employment. We note that the common objective of the participants in the recent Hospitality, Private-Sector Clerical and Restaurant proceedings (including ACCI, ACTU, Ai Group and the Minister) has been to retain as many employees in employment as practicable in the current crisis.

[64] The proposed entitlement will also support the important public policy objective of encouraging those who should self-isolate, to do so and thereby limit the spread of COVID-19 in workplaces allowing businesses to continue to operate.

[65] We acknowledge that the proposed unpaid pandemic leave may be regarded, by some, as a minimalist measure. It does not operate on a ‘per occasion’ basis and hence may not assist those employees compelled to self-isolate on more than one occasion. Nor does it provide an entitlement to those caring for others who are compelled to self-isolate. But the proposed term is intended to provide a quick response to the current crisis and, in our view, the limited measure we propose is likely to attract broader support.

[66] Further consideration can be given to the scope of the proposed term at a later stage, if the circumstances so warrant.

### *Annual leave at half pay*

[67] Annual leave was dealt with as a common issue during the 4 yearly review of modern awards. In decisions issued in July 2015<sup>10</sup> and September 2015,<sup>11</sup> the Full Bench determined model terms in respect of, relevantly:

- granting annual leave in advance; and
- excessive annual leave.

[68] The Annual Leave Full Bench inserted a new annual leave in advance clause into 121 awards.<sup>12</sup> Under the annual leave in advance clause, an employee can take a period of annual leave in advance if all of the following conditions are met:

---

<sup>9</sup> [2018] FWCFB 1691 at [253] – [269]

<sup>10</sup> [\[2015\] FWCFB 3406](#)

<sup>11</sup> [\[2015\] FWCFB 5771](#)

<sup>12</sup> At the time there were 122 modern awards. There are now 121. Only 1 award does not include an annual leave in advance provision.

- the employer and the employee must make a written agreement to the employee taking the period of leave in advance
- the written agreement must state the amount of leave to be taken in advance and the date on which the leave will commence and
- the written agreement must be signed by both the employer and employee (and a parent/guardian if the employee is under 18).

[69] The employer must keep a copy of the written agreement as an employee record.

[70] The Annual Leave Full Bench also inserted a model term in relation to excessive leave in 112 modern awards. Under the excessive leave award clause an employee has an excessive leave accrual if:

- the employee has accrued more than 8 weeks' paid annual leave, or
- for a shiftworker if they have accrued more than 10 weeks' paid annual leave.

[71] Where an employee has an excessive leave accrual, the employer must seek to confer with the employee and genuinely try to reach agreement on how to reduce or eliminate the excessive leave accrual. If an agreement cannot be reached, an employer can direct an employee to take one or more periods of annual leave subject to certain conditions. The direction:

- must be in writing;
- is of no effect if it would result at any time in the employee's remaining paid annual leave balance being less than 6 weeks when any other paid annual leave arrangements are taken into account;
- must not require the employee to take any period of paid annual leave of less than one week;
- must not require the employee to take a period of annual leave beginning less than 8 weeks or more than 12 months, after the direction is given; and
- must not be inconsistent with any leave arrangement agreed by the employer and employee.

[72] The proposed Schedule X includes a model term providing additional flexibility in respect of annual leave. In short it provides that an employer and employee may agree to take up to twice as much annual leave at half the rate of pay. We note that such a provision has recently been inserted into the Hospitality Award, the Clerks – Private Sector Award and the Restaurant Award.

[73] The term we are proposing to insert in the selected modern awards is as follows:

#### **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.

[74] Proposed clause X.2.2(b) is to ensure that there is a record of the agreement in order to protect the interests of both parties and to minimise the risk of subsequent disputation. We note that Regulation 3.36 (with s. 535) requires employers to keep a record of any leave taken by an employee entitled to leave and to record the balance of the employee's entitlement to that leave from time to time.

[75] The underlined words in the example in the proposed clause X.2.2 would only be included in those modern awards that currently contain a term providing for annual leave loading.

[76] Subsection 93(4) of the Act provides:

*Terms about taking paid annual leave*

(4) A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave.' (emphasis added)

[77] Section 93 is part of the NES. Modern awards and the NES interact in different ways:

- A modern award may include any terms that the award is expressly permitted to include by a provision of Part 2-2 (which deals with the NES) (ss.55(2) and 136(1)(c)).<sup>13</sup>
- A modern award may include terms that:
  - (i) are ancillary or incidental to the operation of an entitlement of an employee under the NES; or
  - (ii) terms that supplement the NES (s.55(4)).

[78] In relation to X.2.2(a) we note section 55(4) of the Act provides:

*Ancillary and supplementary terms may be included*

(4) A modern award or enterprise agreement may also include the following kinds of terms:

- (a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;
- (b) terms that supplement the National Employment Standards;

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

- (a) **under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay;** or
- (b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

- (a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

---

<sup>13</sup> Section 127 provides that the Regulations may permit modern awards to include terms that would or might otherwise be contrary to Part 2-2 or s.55, or prohibit modern awards from including terms that would or might otherwise be permitted by Part 2-2 or s.55. No such regulations have been made

- (b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74. [Emphasis added]

[79] It is our *provisional* view that the proposed annual leave on half pay provision is permitted by s.55(4) as an ancillary or incidental term and, insofar as the provision deals with annual leave loading, as a term that supplements the NES. The proposed term is consistent with the example given in Note 1 to s.55(4).

[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.

#### *Selected phase 1 awards*

[83] We envisage that the variation of modern awards to include proposed Schedule X will occur in more than one phase.

[84] In selecting the awards to be included in phase 1 we have had regard to:

- the industries (and associated modern awards) that are likely to be impacted by the COVID-19 pandemic in the short and medium term (the ABS data and Professor Borland's expert report are relevant in this regard);
- awards which have a significant proportion of award-reliant employees; and
- awards with a high proportion of small businesses.

[85] We expand on each of these issues below.

(i) *Industries (modern awards) impacted in the short and medium term*

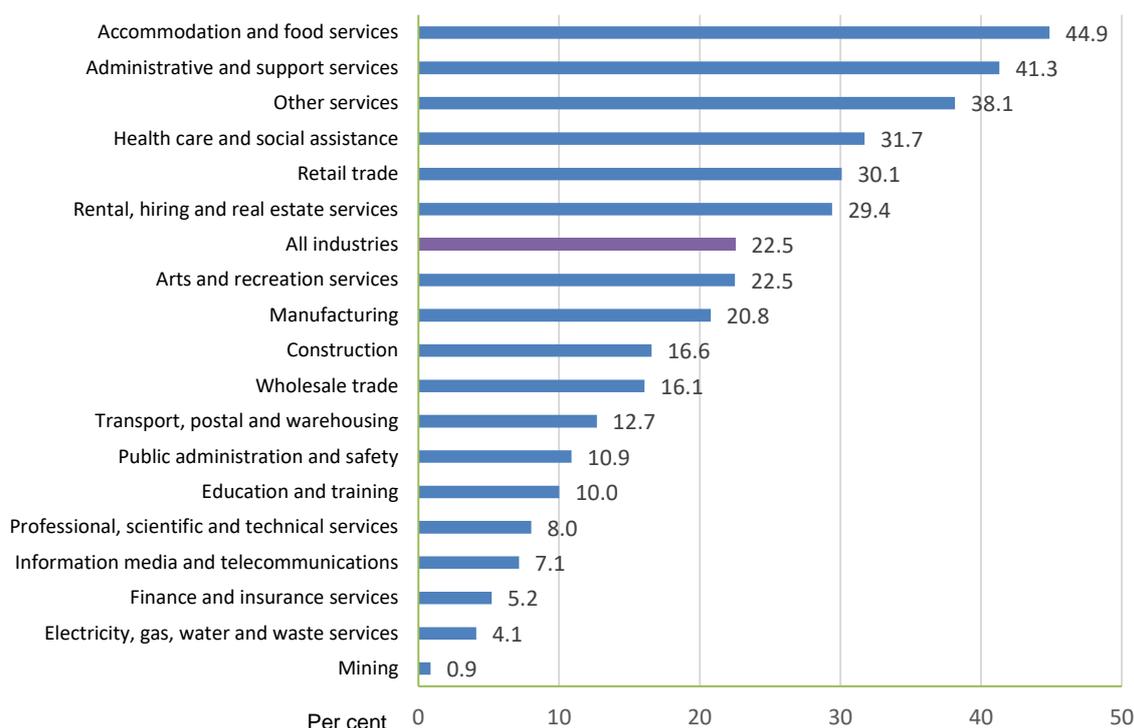
**[86]** The ABS publication *Business Impacts of COVID-19* referred to earlier notes that around half of businesses had experienced an adverse impact as a result of COVID-19 in the two weeks preceding 23 March 2020. Adverse effects were most prevalent in Accommodation and food services with 78% of businesses reporting an adverse impact and 96% expecting to be impacted in the coming months. A relatively high proportion of businesses within Arts and recreation services, Retail trade and Wholesale trade industries also reported being adversely affected, as well as businesses in Health care and social assistance and Information media and telecommunications. Of the businesses that reported being adversely affected, the most prominently cited impact was a reduction in local demand. Professor Borland’s report is broadly consistent with the ABS data.

**[87]** In addition to the impact on business, employees interacting with the public are more likely to be exposed to COVID-19 and hence more likely to benefit from the provision of pandemic leave. Such employees would include those in health care, social assistance, education and retail.

(ii) *Awards with a significant degree of award-reliance*

**[88]** The Commission has published an Information Note – Modern awards and industries, which sets out the modern awards and their corresponding industries, as determined by the Australian and New Zealand Standard Industrial Classification (ANZSIC). This classification allows for statistics to be provided across a consistent definition of industries. The note also provides information on award reliance and business size within each industry.

**[89]** Chart 4 ranks the 19 industries by award reliance. This refers to employees paid exactly the award rate, and no more than this rate. The industries with the highest proportions paid the award rate (award reliant) are Accommodation and food services; Administrative and support services; Other services; Health care and social assistance; and Retail trade.

**Chart 4: Award reliance by industry**

Note: Data are for non-managerial employees. Source: ABS, *Employee Earnings and Hours, May 2018*, Catalogue No. 6306.0.

**[90]** The Fair Work Commission Research Report 6/2013—*Award reliance* (Award reliance report), undertaken by the Workplace Research Centre at the University of Sydney in collaboration with ORC International, reported findings from the Award reliance survey.<sup>14</sup> The survey was undertaken between January and April 2013 and comprised a sample of non-public sector organisations that operated in the national workplace relations system.<sup>15</sup> The focus of the Award reliance survey was to quantitatively investigate award reliance across and within Australian non-public sector organisations that operated under the national workplace relations system, and to identify the mix or ‘categories’ of award-reliant employees and their location on award classification scales.

**[91]** As part of the report, the survey found that the most common modern awards among employees were:

- *Hospitality Industry (General) Award 2010*;
- *Clerks Private Sector Award 2010*;
- *General Retail Industry Award 2010*; and

<sup>14</sup> Wright S and Buchanan J (2013), *Award reliance*, Fair Work Commission, Research Report 6/2013 can be found on the Fair Work Commission website: <https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews/annual-wage-review-2013-14-2>.

<sup>15</sup> Wright S and Buchanan J (2013), *Award reliance*, Fair Work Commission, Research Report 6/2013, December, Melbourne, p. 29. See section 2.3 for a detailed discussion on sample design and selection.

- *Cleaning Services Award 2010*.<sup>16</sup>

[92] In 2012, the Commission undertook a project that ‘mapped’ modern awards to the industries categorised by the ANZSIC to assist with statistical analysis of modern awards.<sup>17</sup>

[93] The Information Note lists the 19 ANZSIC industries and the modern awards assigned to each industry. Most modern awards are only mapped to one industry, however, there are some instances where certain modern awards are mapped to multiple industries. This is because the modern awards and ANZSIC industries do not have a direct correlation, and some overlap exists. It highlights that the relationships between ANZSIC and modern awards is not perfect.

[94] The mapping exercise was undertaken at the 4-digit, or industry class, level which is more detailed than the 1-digit industry level. Firstly, the industries were selected. Those modern awards deemed to be ‘primary awards’ for that industry were allocated to the corresponding industry. In some instances, modern awards were not allocated as a ‘primary award’ to any of the 19 industries listed and instead the modern award itself rather than the industry was first selected and from there the ‘primary’ or ‘secondary’ industry for that modern award was determined. For more detail see <https://www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews/previous-wage-reviews/annual-wa-0>.

[95] For each industry, the Information Note sets out the proportion of businesses by size (at June 2019, excluding non-employing businesses)<sup>18</sup> and the proportion of employees by method of setting pay.<sup>19</sup>

[96] Modern awards exhibiting a significant level of award-reliance have been prioritised for variation.

(iii) *Small businesses*

[97] The objects of the Act require that we take into account ‘the special circumstances of small and medium sized businesses’ (s 3(g)).

[98] Absent the insertion of the proposed annual leave on half pay term, such businesses could only permit their award-covered employees to take twice their annual leave at half pay by entering into an enterprise agreement. As the Commission noted in the 4 yearly review of modern awards – Annual Leave Decision<sup>20</sup> there are a number of practical impediments to small businesses engaging in collective bargaining.

---

<sup>16</sup> See Table F.36 in Appendix F, p. 181.

<sup>17</sup> Preston M, Pung A, Leung E, Casey C, Dunn A and Richter O (2012) ‘*Analysing modern award coverage using the Australian and New Zealand Industrial Classification 2006: Phase 1 report*’, Research Report 2/2012, Fair Work Australia

<sup>18</sup> ABS, *Counts of Australian Businesses, including Entries and Exits, June 2015 to June 2019*, Catalogue No. 8165.0.

<sup>19</sup> ABS, *Employee Earnings and Hours, May 2018*, Catalogue No. 6306.0.

<sup>20</sup> [2015] FWCFB 3406

**[99]** The Commission published an Information Note – Bargaining by business size which provides data on employee bargaining by business size using the Australian Bureau of Statistics (ABS) Employee Earnings and Hours (EEH) publication.

**[100]** The ABS’s EEH publication collects information on a range of data including the number of employees by method of setting pay and in what business sizes they are employed in Australia.

**[101]** The methods of setting pay collected are:

- award only;
- collective agreement;
- individual arrangement; and
- owner manager of incorporated enterprise.

**[102]** The ABS’s EEH publication collects business size data according to the following size splits:

- Under 20 employees;
- 20-49 employees;
- 50-99 employees;
- 100-999 employees; and
- 1000 and over employees.

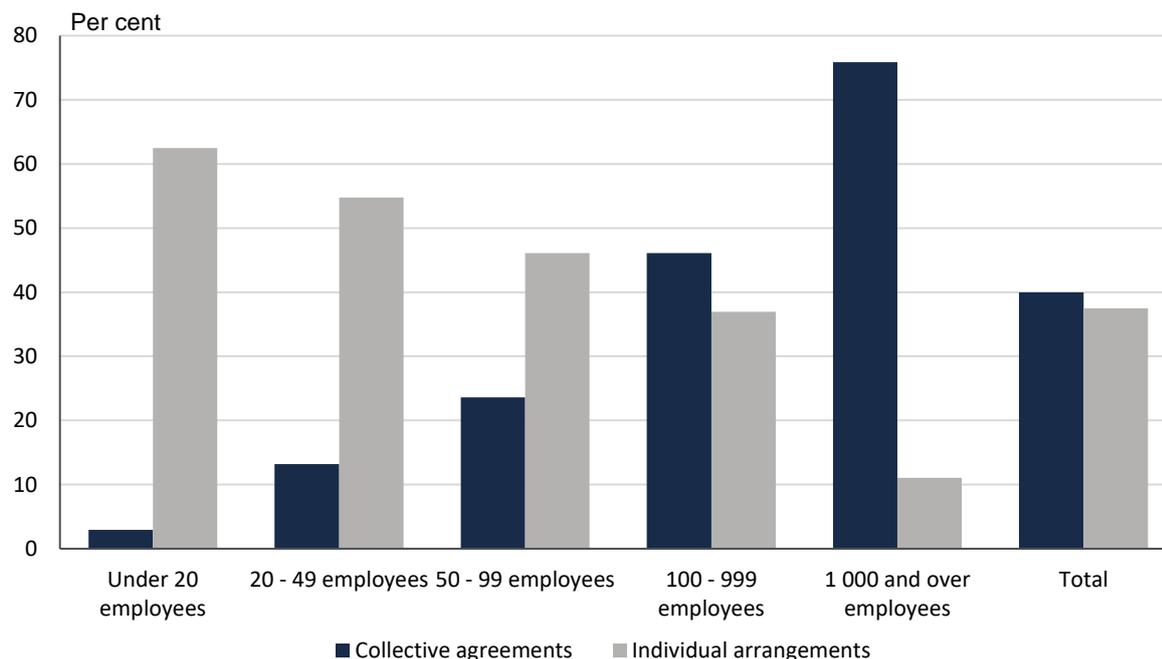
**[103]** The size splits collected reflect the ABS’s definition of a small business which is defined by the ABS as a business that employs fewer than 20 persons. Accordingly, this is the definition adopted in the Information note. We note that the Act has a different definition of ‘small business;’ s.23 of the Act defines a national system employer as small business employer if the employer employs fewer than 15 employees.<sup>21</sup>

**[104]** To examine the extent of employee bargaining by business size, an analysis of the ‘collective agreement’ and ‘individual arrangement’ categories was undertaken using ABS EEH data. The data show that in May 2018, the majority of non-managerial employees in small businesses were employed on individual arrangements, with a small proportion on collective agreements (Chart 5). The number of non-managerial employees in small businesses on collective agreements and individual arrangements were 65 400 and 1 379 100, respectively.

---

<sup>21</sup> *Fair Work Act 2009*, s.23.

**Chart 5: Proportion of non-managerial employees with their pay set by collective agreements and individual arrangements by business size, May 2018**



Note: Data on method of setting pay by business size exclude owner managers of incorporated businesses. Source: ABS, *Employee Earnings and Hours, Australia, May 2018*, Catalogue No. 6306.0.

[105] Chart 5 shows that there is a positive correlation between business size and collective agreements, with an increase in business size associated with an increase in the proportion of non-managerial employees on collective agreements. Conversely, there is a negative correlation between business size and individual arrangements, with an increase in business size associated with a decrease in the proportion of non-managerial employees on individual arrangements.

[106] Relatively few employees employed in small businesses are covered by a collective agreement. This supports our earlier observation about the practical impediments facing small businesses that wish to enter into such agreements. A modern award variation of the type we propose will ensure that small businesses and their employees have access to the additional annual leave flexibility and to unpaid pandemic leave.

[107] We have prioritised those modern awards which cover a high proportion of small businesses.

*The selected phase 1 modern awards*

*Phase 1 modern awards*

[108] Taking into account the considerations set out above we propose to vary the following modern awards:

- *Aboriginal Community Controlled Health Services Award 2010*
- *Aged Care Award 2010*

- *Air Pilots Award 2010*
- *Aircraft Cabin Crew Award 2010*
- *Airline Operations-Ground Staff Award 2010*
- *Airport Employees Award 2010*
- *Alpine Resorts Award 2010*
- *Aluminium Industry Award 2020*
- *Ambulance and Patient Transport Industry Award 2020*
- *Amusement, Events and Recreation Award 2010*
- *Animal Care and Veterinary Services Award 2020*
- *Aquaculture Industry Award 2020*
- *Architects Award 2010*
- *Asphalt Industry Award 2010*
- *Banking, Finance and Insurance Award 2020*
- *Book Industry Award 2020*
- *Broadcasting, Recorded Entertainment and Cinemas Award 2010*
- *Business Equipment Award 2010*
- *Car Parking Award 2020*
- *Cement, Lime and Quarrying Award 2010*
- *Cemetery Industry Award 2020*
- *Children's Services Award 2010*
- *Cleaning Services Award 2010*
- *Clerks - Private Sector Award 2010*
- *Commercial Sales Award 2010*
- *Concrete Products Award 2010*
- *Contract Call Centres Award 2010*
- *Corrections and Detention (Private Sector) Award 2020*
- *Cotton Ginning Award 2020*
- *Dry Cleaning and Laundry Industry Award 2010*
- *Educational Services (Post-Secondary Education) Award 2010*
- *Educational Services (Schools) General Staff Award 2010*
- *Educational Services (Teachers) Award 2010*
- *Electrical, Electronic and Communications Contracting Award 2010*
- *Electrical Power Industry Award 2020*
- *Fast Food Industry Award 2010*
- *Fire Fighting Industry Award 2010*
- *Fitness Industry Award 2010*
- *Food, Beverage and Tobacco Manufacturing Award 2010*
- *Funeral Industry Award 2010*
- *Gardening and Landscaping Services Award 2020*
- *General Retail Industry Award 2010*
- *Graphic Arts, Printing and Publishing Award 2010*
- *Hair and Beauty Industry Award 2010*

- *Health Professionals and Support Services Award 2010*
- *Higher Education Industry-Academic Staff-Award 2010*
- *Higher Education Industry-General Staff-Award 2010*
- *Horse and Greyhound Training Award 2010*
- *Horticulture Award 2010*
- *Hospitality Industry (General) Award 2010*
- *Journalists Published Media Award 2010*
- *Labour Market Assistance Industry Award 2010*
- *Legal Services Award 2020*
- *Live Performance Award 2010*
- *Local Government Industry Award 2010*
- *Mannequins and Models Award 2010*
- *Manufacturing and Associated Industries and Occupations Award 2010*
- *Marine Tourism and Charter Vessels Award 2010*
- *Market and Social Research Award 2020*
- *Meat Industry Award 2010*
- *Medical Practitioners Award 2020*
- *Miscellaneous Award 2010*
- *Nursery Award 2020*
- *Nurses Award 2010*
- *Passenger Vehicle Transportation Award 2010*
- *Pastoral Award 2010*
- *Pest Control Industry Award 2010*
- *Pharmaceutical Industry Award 2010*
- *Pharmacy Industry Award 2010*
- *Plumbing and Fire Sprinklers Award 2010*
- *Poultry Processing Award 2010*
- *Premixed Concrete Award 2020*
- *Professional Diving Industry (Recreational) Award 2010*
- *Professional Employees Award 2010*
- *Racing Clubs Events Award 2010*
- *Racing Industry Ground Maintenance Award 2020*
- *Rail Industry Award 2010*
- *Real Estate Industry Award 2020*
- *Registered and Licensed Clubs Award 2010*
- *Restaurant Industry Award 2010*
- *Road Transport (Long Distance Operations) Award 2010*
- *Road Transport and Distribution Award 2010*
- *Salt Industry Award 2010*
- *Seafood Processing Award 2020*
- *Security Services Industry Award 2010*
- *Silviculture Award 2020*

- *Social, Community, Home Care and Disability Services Industry Award 2010*
- *Sporting Organisations Award 2020*
- *State Government Agencies Award 2020*
- *Storage Services and Wholesale Award 2010*
- *Sugar Industry Award 2010*
- *Supported Employment Services Award 2010*
- *Surveying Award 2020*
- *Telecommunications Services Award 2010*
- *Textile, Clothing, Footwear and Associated Industries Award 2010*
- *Timber Industry Award 2010*
- *Transport (Cash in Transit) Award 2010*
- *Travelling Shows Award 2020*
- *Vehicle Manufacturing, Repair, Services and Retail Award 2010*
- *Waste Management Award 2010*
- *Water Industry Award 2020*
- *Wine Industry Award 2010*
- *Wool Storage, Sampling and Testing Award 2010*

[109] The following awards have been excluded from phase 1:

(a) Construction awards

- *Building and Construction General On-site Award 2010*
- *Joinery and Building Trades Award 2010*
- *Mobile Crane Hiring Award 2010*

(b) Maritime sector awards

- *Coal Export Terminals Award 2020*
- *Dredging Industry Award 2010*
- *Marine Towage Award 2010*
- *Port Authorities Award 2020*
- *Ports, Harbours and Enclosed Water Vessels Award 2010*
- *Seagoing Industry Award 2010*
- *Stevedoring Industry Award 2010*

(c) Mining and resource sector awards

- *Black Coal Mining Industry Award 2010*
- *Gas Industry Award 2010*
- *Hydrocarbons Field Geologists Award 2010*
- *Hydrocarbons Industry (Upstream) Award 2020*

- *Maritime Offshore Oil and Gas Award 2010*
- *Mining Industry Award 2010*
- *Oil Refining and Manufacturing Award 2020*
- *Professional Diving Industry (Industrial) Award 2010*

[110] These awards have not been included in phase 1 because:

- the businesses in these sectors have not been as adversely impacted (to date) by the COVID-19 pandemic as some other sectors. For example the ABS survey reported that 37% of businesses in mining had been adversely affected, compared to 78% of businesses within the Accommodation and food services industry. Further, on the basis of Professor Borland's report, the construction sector is not likely to be affected in the short term; and
- these sectors do not have a high level of award-reliance and enterprise agreements are relatively common.

[111] We encourage the industrial parties in these sectors to enter into discussions about measures to respond to the impacts of the COVID-19 pandemic (if they have not already done so). We will expedite any consent application to vary these awards.

## 6. Unpaid pandemic leave and the social safety net

[112] Assistance for employees and households initially included one-off payments of \$750 to be made from 31 March 2020 to selected income support recipients. The eligibility was extended to those receiving an eligible payment on any day from 12 March to 13 April 2020.<sup>22</sup>

[113] Further assistance for households was [announced](#) by the Commonwealth Government on 22 March 2020:

- temporarily expanding eligibility for income support payments and establishing a new, temporary Coronavirus supplement, paid at \$550 per fortnight. Both existing and new Jobseeker Payment, Youth Allowance Jobseeker payment, Parenting Payment, Farm Household Allowance and Special Benefit recipients are eligible;<sup>23</sup>
- a second payment of \$750 to social security, veteran and other income support recipients and eligible concession card holders made from 13 July 2020;<sup>24</sup>
- individuals to access up to \$10 000 of their superannuation in 2019–20 and \$10 000 in 2020–21 without needing to pay tax on the amounts released;<sup>25</sup>

---

<sup>22</sup> See: <https://www.servicesaustralia.gov.au/individuals/news/more-financial-support-people-affected-coronavirus>

<sup>23</sup> Fact sheet: [https://treasury.gov.au/sites/default/files/2020-03/Fact\\_sheet-Payments\\_to\\_support\\_households.pdf](https://treasury.gov.au/sites/default/files/2020-03/Fact_sheet-Payments_to_support_households.pdf)

<sup>24</sup> Fact sheet: [https://treasury.gov.au/sites/default/files/2020-03/Fact\\_sheet-Payments\\_to\\_support\\_households.pdf](https://treasury.gov.au/sites/default/files/2020-03/Fact_sheet-Payments_to_support_households.pdf)

<sup>25</sup> Fact sheet: [https://treasury.gov.au/sites/default/files/2020-03/Fact\\_sheet-Early\\_Access\\_to\\_Super\\_1.pdf](https://treasury.gov.au/sites/default/files/2020-03/Fact_sheet-Early_Access_to_Super_1.pdf)

- on 12 March 2020, the Government announced a 0.5 percentage point reduction in both the upper and lower social security deeming rates. The Government will reduce these rates by another 0.25 percentage points. As of 1 May 2020, the upper deeming rate will be 2.25 per cent and the lower deeming rate will be 0.25 per cent.<sup>26</sup>

[114] On 30 March 2020 a third stimulus package was announced,<sup>27</sup> requiring legislation to take effect, that included the following:

- The introduction of the JobKeeper payment. This payment is a \$1500 wage subsidy (before tax) per eligible employee, paid directly to businesses who then use it to subsidise the payment of their employee's wage and pay directly to eligible employees. It is designed to maintain the employment relationship between employers and employees.
  - Affected employers will be able to claim a fortnightly payment of \$1500 per eligible employee from 30 March 2020, for a maximum of 6 months
  - Eligibility is dependent on employers having suffered a significant reduction in revenue – 30 per cent for small businesses and 50 per cent for businesses with a turnover of \$1 billion or more.
  - Full-time workers; part-time workers, sole traders, casuals who have been with their employer for 12 months or more, not for profit entities, New Zealanders on 444 visas, and migrants who are eligible for JobSeeker Payment or Youth Allowance (Other) will be eligible for the subsidy.
  - Employees who have been stood down by their employer since 1 March 2020 will be eligible.
  - If workers ordinarily received \$1500 or more income per fortnight before tax, they will continue to receive regular income according to the prevailing workplace instrument, the JobKeeper Payments will subsidise part or all of their income.
  - The payment is a minimum of \$1500 per fortnight, before tax.
  - Employees cannot access both the JobSeeker and JobKeeper payments.
- The \$1500 payment will be issued from 1 May 2020 and backdated to 30 March 2020. The subsidy represents around 70 per cent of the median wage and 100 per cent of the median wage in the industries most heavily affected (such as retail and

---

<sup>26</sup> Fact sheet: [https://treasury.gov.au/sites/default/files/2020-03/Fact\\_sheet-Providing\\_support\\_for\\_retirees\\_to\\_manage\\_market\\_volatility.pdf](https://treasury.gov.au/sites/default/files/2020-03/Fact_sheet-Providing_support_for_retirees_to_manage_market_volatility.pdf)

<sup>27</sup> Reference: <https://www.pm.gov.au/media/130-billion-jobkeeper-payment-keep-australians-job>

hospitality). The Government predicts around 6 million workers will access the payment over 6 months.

- Superannuation payments will not be made on the JobKeeper payment, it will be up to employers if they want to pay superannuation or any additional wage paid because of JobKeeper Payments.
- JobSeeker recipients will have their partner's income test threshold temporarily increased to \$79,762 per annum (\$3068 per fortnight), thereby increasing the amount of people who will be eligible for the JobSeeker payment.

[115] The Commonwealth is asked to clarify whether the proposed JobKeeper payment will be paid to employees on unpaid pandemic leave.

[116] In our view, if the proposed payment is not available to employees on unpaid pandemic leave that fact would mitigate against employees using the proposed new entitlement and may also have the adverse public policy consequence that some employees may choose not to self-isolate when they should do so.

## 7. Provisional views

[117] The Commission may make a determination varying a modern award if the Commission is satisfied that the determination is necessary to achieve the modern awards objective. 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).

[118] 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.<sup>28</sup>

[119] There are 2 versions of Schedule X. The first version will:

1. provide all employees (including full-time, part-time and casual employees) with a new entitlement of up to 2 weeks' unpaid pandemic leave; and
2. provide for employees by agreement with their employer to take twice the amount of their accrued annual leave at half pay.

[120] It is our *provisional* view that the first version be inserted into the phase 1 modern awards set out at [108] above (except the Hospitality Award, Clerks–Private Sector Award and the Restaurant Award).

---

<sup>28</sup> See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.

[121] The second version of the new schedule will omit the provision for annual leave at half pay and will be inserted into the Hospitality Award, Clerks–Private Sector Award and the Restaurant Award.

[122] The new schedule will operate until 30 June 2020, the period of operation may be extended on application or on the initiative of the Commission.

[123] It is our *provisional* view that the terms proposed to be included in the new schedule may be included in a modern award pursuant to ss.136(1)(a) and (c), and s.139(1)(h) of the Act.

[124] It is our *provisional* view, taking into account the relevant s.134 considerations, that the modern award variations described above are necessary to achieve the modern awards objective.

## 8. Next steps

### *Submissions*

[125] Any submission supporting or opposing the *provisional* views set out above must be lodged by **4pm on Monday 6 April 2020**. Submissions should be:

- sent to [chambers.ross.j@fwc.gov.au](mailto:chambers.ross.j@fwc.gov.au) and include the matter number (AM2020/12) in the subject line; and
- lodged in Word format.

### *Hearing*

[126] We will determine this matter without holding a hearing unless a submission is received opposing our *provisional* views, in respect of the proposed variation of a particular award or more generally.

[127] In the event that a submission is received opposing our *provisional* views the matter will proceed to a hearing. If a hearing is required, it will take place at **2pm on Wednesday 8 April 2020** by telephone.

[128] Any party who wishes to attend the hearing in relation to this matter should send an email to [chambers.ross.j@fwc.gov.au](mailto:chambers.ross.j@fwc.gov.au) specifying a name and contact telephone number by **4pm on Monday 6 April 2020**.

PRESIDENT

Printed by authority of the Commonwealth Government Printer

<PR718005>