



DECISION

Fair Work Act 2009

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

Australian Hotels Association and United Workers' Union
(AM2020/8)

Hospitality industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT CLANCY
COMMISSIONER BISSETT

MELBOURNE, 25 MARCH 2020

Application to vary modern award to correct ambiguity or uncertainty – consent of parties – determination made.

1. Background

[1] This decision concerns an application to vary a Modern Award; namely the *Hospitality Industry (General) Award 2010* (MA000009) (the Hospitality Award) filed jointly by the Australian Hotels Association (the AHA) and the United Workers' Union (UWU) on 24 March 2020.

[2] We approved the application in an ex tempore decision at the conclusion of the hearing on Tuesday, 24 March 2020. An award variation determination was published on the same day. These are our reasons for that decision.

[3] The application arises from the unique set of circumstances pertaining to the COVID-19 pandemic.

[4] The AHA and the UWU have reached an agreed position in relation to a proposed set of amendments to the Hospitality Award in response to the COVID-19 pandemic and the associated public health orders.

[5] The application giving effect to the parties' agreement was filed yesterday morning on 24 March 2020, utilising the Commission's COVID-19 website portal. The parties have asked that the application be expedited.

[6] The application was posted on the Commission's website at 10.15am on 24 March 2020. After consulting with the AHA and the UWU, the matter was listed for hearing at 4pm yesterday. A revised variation determination was subsequently filed by the AHA. The notice of listing was sent to all subscribers to the Hospitality Award and posted on the website at 11.30am on 24 March 2020.

[7] The Commission also posted on the website an Information note providing data on the Hospitality Award, which can be accessed [here](#) and an Information note detailing the Government responses to the COVID-19 pandemic, which can be accessed [here](#).

[8] We are conscious that the notice provided to interested parties is much shorter than the Commission's standard practice.

[9] There is no doubt that the Commission is bound to 'act judicially', which includes an obligation to afford parties procedural fairness. But the application and content of the doctrine of procedural fairness is determined by the context. As Mason J observed in *Kioa v West*:

"What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, *inter alia*, the nature of the inquiry, the subject matter, and the rules under which the decision - maker is acting."¹

[10] The following general observation of Buchanan J (with whom Marshall and Cowdrey JJ agreed) in *Coal Allied Mining Services Pty Ltd v Lawler*, is also apposite:

"...it is an important aspect of the work of [the Commission]...that it is to proceed without unnecessary technicality and as informally as the circumstances of the case permit...It is not inappropriate to say that the members of [the Commission] have a statutory mandate to get to the heart of matters as directly and effectively as possible."²

[11] Relevantly, s.577(a) and (b) provide that the Commission must perform its functions and exercise its powers in a manner that:

- (a) Is fair and just; and
- (b) Is quick, informal, and avoids unnecessary technicalities; .

[12] The key contextual considerations in the matter before us are:

- the statutory framework;
- the consent of the key interested parties;
- the parties' joint request for expedition; and
- the need to respond quickly to a rapidly changing industrial environment.

[13] In this instance, the consent of the key industrial parties' is the central consideration.

[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.

¹ (1985) 159 CLR 550 at [32]; see [\[2015\] FWCFB 210](#).

² [(2011) 192 FCR 78 at [25].

[15] We begin by briefly describing the relevant aspects of the response to the COVID-19 pandemic.

2. The COVID-19 Pandemic and the Hospitality Sector

Government responses to the COVID-19 pandemic

[16] The outbreak of the coronavirus (COVID-19) and the responses from governments, both federal and state, initially put restrictions on some businesses and then forced many to close, which has consequences for employees.

(i) Measures taken to restrict gatherings and non-essential business

[17] 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.

[18] 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.

[19] 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;
- Parliaments;
- Food markets, supermarkets and grocery stores, shopping centres; and
- Office buildings, factories, construction sites and mining sites.

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

[21] 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 by 4 square metre rule applies).

(ii) Support for businesses

[22] Assistance to businesses was first announced on 12 March 2020 and included:

- increases to the instant asset write-off and accelerating depreciation deductions;
- payments of between \$2000 and \$25,000 for small to medium-sized businesses making less than \$50 million in turnover; and
- assistance for small business employing trainees and apprentices by supporting 50 per cent of apprentice/trainee wages for 9 months from 1 January 2020 to 30 September 2020.

[23] A **second package** of support was announced by the Commonwealth Government on 22 March 2020 and included the following:³

- a boost to cashflow of up to \$100 000 to eligible small and medium-sized businesses, and not-for-profits (NFPs) that employ people, with a minimum payment of \$20,000, to keep business operating, pay rent, electricity and other bill and retain staff. This measure is estimated to benefit around 690,000 businesses employing around 7.8 million people, and around 30,000 NFPs (including charities).
 - Employers will receive a payment equal to 100 per cent of their salary and wages withheld (up from 50 per cent), with the maximum payment being increased from \$25,000 to \$50,000, with the minimum payment being increased from \$2,000 to \$10,000. Additional payments to be introduced during the July–October 2020 period;⁴

³ <https://treasury.gov.au/coronavirus/businesses>

⁴ Fact sheet: https://treasury.gov.au/sites/default/files/2020-03/Fact_sheet-Cash_flow_assistance_for_businesses_0.pdf

- increasing the instant asset write-off threshold from \$30,000 to \$150,000 and expanding access to include businesses with aggregated annual turnover of less than \$500 million (up from \$50 million) until 30 June 2020;⁵
- temporary increase in the threshold at which creditors can issue a statutory demand on a company and the time companies have to respond to statutory demands they receive;⁶
- the introduction of a 15-month investment incentive that will accelerate depreciation deductions for businesses with turnover of less than \$500 million. These businesses will be able to deduct 50 per cent of the cost of an eligible asset on installation, with existing depreciation rules applying to the balance of the asset's cost;⁷
- following the initial support to businesses employing trainees and apprentices, where a small business is not able to retain an apprentice, the subsidy will be available to a new employer that employs that apprentice. Employers will be reimbursed up to a maximum of \$21,000 per eligible apprentice or trainee;⁸
- support of \$1 billion to regions most significantly affected by the Coronavirus outbreak. These funds will be available to assist during the outbreak and the recovery. In addition, assistance has been provided to the airline industry by providing relief from a number of taxes and Government charges estimated to total up to \$715 million;⁹
- a guarantee of 50 per cent to SME lenders to support new short-term unsecured loans to SMEs.¹⁰

[24] State governments have announced adjustments to payroll tax and other measures to assist business, including:

- New South Wales: waiving payroll tax for businesses with payrolls of up to \$10 million for three months, bringing forward the next round of payroll tax cuts by raising the threshold limit to \$1 million in 2020–21, waiving a range of fees and charges for small businesses including bars, cafes, restaurants and tradies.
- Victoria: full payroll refunds for the 2019-20 financial year for small and medium businesses with payroll of less than \$3 million, government to pay to all outstanding supplier invoices within 5 business days, liquor licensing fees for 2020 to be waived for affected venues and small businesses.

⁵ https://treasury.gov.au/sites/default/files/2020-03/Fact_Sheet-Delivering_support_for_business_investment.pdf

⁶ Fact sheet: https://treasury.gov.au/sites/default/files/2020-03/Fact_sheet-Providing_temporary_relief_for_financially_distressed_businesses.pdf

⁷ Fact sheet: https://treasury.gov.au/sites/default/files/2020-03/Fact_Sheet-Delivering_support_for_business_investment.pdf

⁸ Fact sheet: https://treasury.gov.au/sites/default/files/2020-03/Fact_sheet-Cash_flow_assistance_for_businesses_0.pdf

⁹ Fact sheet: https://treasury.gov.au/sites/default/files/2020-03/Fact_sheet-Assistance_for_severely_affected_regions_and_sectors.pdf

¹⁰ Fact sheet: https://treasury.gov.au/sites/default/files/2020-03/Fact_sheet-Supporting_the_flow_of_credit_1.pdf

- Queensland: deferral of payroll tax for 6 months, grants of up to \$7 500 (excl. GST) to support new equipment purchases
- Western Australia: one-off grants of \$17,000 to small businesses, applications to defer payment of 2019–20 payroll tax, and the \$1 million payroll tax threshold brought forward by 6 months to 1 July 2020.
- Tasmania: waiving of payroll tax for the last four months of 2019–20 for hospitality, tourism and seafood industry businesses, introduction of a youth employment payroll tax rebate scheme for young people from 1 April 2020, additional \$5000 grants for businesses that hire an apprentice or trainee.
- ACT: a 12-month waiver on food business registration and on-licence liquor licencing fees from 1 April 2020, a one-off 6 month payroll tax waiver for hospitality (cafes, pubs, hotels, clubs and restaurants), creative arts and entertainment industries from April to September 2020, deferral of 2020-21 payroll tax (interest free to 1 July 2022) for all ACT business with nation-wide wages of up to \$10 million.
- NT: eligible businesses will get a grant of \$10 000 for upgrades and a further \$10 000 if they contribute \$10 000 of their own funds.

[25] A list of references relating to the above matters is at **Attachment A**.

(iii) *Support for individuals and households*

[26] Assistance for employees and households initially included one-off payments of \$750 to be made from 31 March 2020 to selected income support recipients.

[27] 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, Parenting Payment, Farm Household Allowance and Special Benefit recipients are eligible;¹¹
- a second payment of \$750 to social security, veteran and other income support recipients and eligible concession card holders made from 13 July 2020;¹²
- 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;¹³
- 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

¹¹ Fact sheet: https://treasury.gov.au/sites/default/files/2020-03/Fact_sheet-Payments_to_support_households.pdf

¹² Fact sheet: https://treasury.gov.au/sites/default/files/2020-03/Fact_sheet-Payments_to_support_households.pdf

¹³ Fact sheet: https://treasury.gov.au/sites/default/files/2020-03/Fact_sheet-Early_Access_to_Super_1.pdf

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.¹⁴

Impact on the Hospitality sector

[28] As noted in the Information note on the Hospitality Award, the profile of employees in the Hospitality industry differs from the profile of employees across ‘all industries’ in five respects:

- employees in the Hospitality industry are more likely to be female (54.9 per cent compared to 50 per cent of employees across all industries);
- around three in five (58.1 per cent) employees in the Hospitality industry are employed on a part-time basis (i.e. work fewer than 35 hours per week), compared with only 34.2 per cent of employees across all industries;
- around one quarter (24.0 per cent) of employees in the Hospitality industry work 1–15 hours per week compared with only 11.6 per cent of employees across all industries;
- over one third (36.4 per cent) of employees in the Hospitality industry are aged between 15 and 24 years compared with only 16.6 per cent of employees across all industries; and
- around three in ten (30.1 per cent) employees in the Hospitality industry are students (23.9 per cent are full-time students and 6.3 per cent study part time) compared with 13.7 per cent of employees across all industries.

[29] The recent Government announcements in response to COVID-19 are likely to have a substantial impact on businesses in the hospitality sector and their employees, many of which are employed part time. The Commonwealth Government guidelines restrict pubs, registered and licensed clubs (excluding bottle shops attached to these venues) and hotels (excluding accommodation) from opening from midday local time on 23 March 2020. These will inevitably include many businesses covered by the Hospitality Award.

[30] Businesses that are permitted to and able to provide take away meals or drinks are likely to have fewer customers and reduced employee numbers as a result. Those businesses that already perform this function may receive some benefit,¹⁵ although this may likely be only in the short-term and depend on the different stages of lockdown experienced in the weeks and months ahead.

[31] Some of these businesses, particularly small and medium-sized businesses, will receive assistance from the state and Commonwealth governments packages, including from direct payments and reduced payroll tax, with the view of helping business retain workers.

¹⁴ Fact sheet: https://treasury.gov.au/sites/default/files/2020-03/Fact_sheet_Providing_support_for_retirees_to_manage_market_volatility.pdf

¹⁵ Westpac Banking Corporation (2020), Unemployment rate set to reach 11% by June. Economy to contract by 3.5% in June quarter. Sustained recovery not expected until Q4, Bulletin, 24 March.

[32] The impact of these restrictions will affect businesses and their employees immediately and into the foreseeable future.

3. The Application

[33] The application seeks to add a new schedule – Schedule L Award Flexibility during the COVID-19 Pandemic – to the Hospitality Award. The proposed Schedule L has five key components.

(i) Period of operation

[34] The Schedule has a limited life and operates from 24 March 2020 until 30 June 2020. The period of operation can be extended on application.

(ii) Classification flexibility

[35] Clause L.2.1(a) and (b) provide that employees may be directed to perform duties outside the scope of their classification subject to:

- such duties being within their skill and competency;
- the duties being ‘safe and the employee is licensed and qualified to perform them;’ and
- the Higher Duties provision in the award.

(iii) Flexibility in hours of work

[36] The proposed clause L.2.2(a) provides, in effect that an employer can direct a full time employee to work shorter hours – ‘an average of between 22.8 and 38 ordinary hours per week’ and the ‘employee will be paid on a pro rata basis’. The arrangements for working ordinary hours in clause 29 will apply on a pro rata basis.

[37] Proposed clause L.2.2(b) provides that part time employees may be directed to work shorter hours – ‘an average of between 60% and 100% of their guaranteed hours per week, or on average of between 60% and 100% of the guaranteed hours per week over the roster cycle’.

[38] Proposed clause L.2.2(c) and (d) provides a number of safeguards that condition the exercise of an employer’s power to direct such shorter full time or part time hours:

‘(c) Prior to any employer issuing any direction under clause L2.2(a) or clause L2.2(b) an employer must:

- (i) consult with the affected employee/s in accordance with clause 8A – Consultation about changes to rosters or hours of work and provide as much notice as practicable; and

- (ii) if the affected employee/s are members of the United Workers Union, notify the United Workers Union of its intention to implement these arrangements.
- (d) An employee given a direction under clause L2.2(a) or (b) will continue to accrue annual leave and personal leave, and any other applicable accruals under this Award, based on each full-time or part-time employee's ordinary hours of work prior to the commencement of Schedule L.'

(iv) Annual leave flexibility

[39] Proposed clause L.2.3 states:

L2.3 Annual leave

- (a) Despite clauses 34.3, 34.7, 34.8 and 34.9 (Annual leave), an employer may, subject to considering an employees' personal circumstances, direct the employee to take annual leave with 24 hours' notice.
- (b) Clause L2.3(a) does not prevent an employer and an employee agreeing to the employee taking annual leave at any time.
- (c) During the period of operation of Schedule L an employer and an employee may agree to the employee taking twice as much annual leave at half the rate of pay for all or part of any period of annual leave instead of taking paid annual leave at the rate of pay required by s.90 of the *Fair Work Act 2009 (Cth)*.

(v) Dispute Resolution

[40] Proposed clause L.2.4 provides, that any dispute regarding the operation of Schedule L may be referred to the Fair Work Commission in accordance with Clause 9—Dispute Resolution.

[41] The amended application proposes that the '*determination comes into effect on 24 March 2020.*'

[42] We note that s.165 of the *Fair Work Act 2009 (Cth)* (the Act) prescribes when variation determinations come into operation (other than determinations setting, varying or revoking modern award minimum wages), it provides:

'When variation determinations come into operation, other than determinations setting, varying or revoking modern award minimum wages'

Determinations come into operation on specified day

- (1) A determination under this Part that varies a modern award (other than a determination that sets, varies or revokes modern award minimum wages) comes into operation on the day specified in the determination.

Note 1: For when a modern award, or a revocation of a modern award, comes into operation, see section 49.

Note: For when a determination under this Part setting, varying or revoking modern award minimum wages comes into operation, see section 166.

(2) The specified day must not be earlier than the day on which the determination is made, unless:

- (a) the determination is made under section 160 (which deals with variation to remove ambiguities or correct errors); and
- (b) the FWC is satisfied that there are exceptional circumstances that justify specifying an earlier day.

Determinations take effect from first full pay period

(3) The determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation.'

4. Consideration

[43] The Commission may make a determination varying a modern award if the Commission is satisfied the determination is necessary to achieve the modern awards objective. The modern awards objective is in s.134 of the Act and provides as follows:

'What is the modern awards objective?

134(1) The FWC must 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:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (da) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts; and
- (e) the principle of equal remuneration for work of equal or comparable value; and

- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.'

This is the **modern awards objective**.

When does the modern awards objective apply?

- (2) The modern awards objective applies to the performance or exercise of the FWC's **modern award powers**, which are:
 - (a) the FWC's functions or powers under this Part; and
 - (b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).¹⁶

[44] 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).

[45] The modern awards objective is very broadly expressed.¹⁶ It is a composite expression which requires that modern awards, together with the NES, provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss.134(1)(a)–(h).¹⁷ Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.¹⁸

[46] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.¹⁹ No particular primacy is attached to any of the s.134 considerations²⁰ and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

¹⁶ *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35].

¹⁷ (2017) 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44]

¹⁸ [\[2018\] FWCFB 3500](#) at [21]–[24].

¹⁹ *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]–[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56].

²⁰ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33].

[47] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.²¹ Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.²² In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[48] Section 138 of the Act emphasises the importance of the modern awards objective:

'Section 138 Achieving the modern awards objective'

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.'

[49] 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.²³

[50] The variations proposed are directed at providing targeted flexibility in relation to:

- the range of duties employees can be required to perform;
- the hours of work of full-time and part-time employees; and
- the taking of annual leave.

[51] We note that terms about such matters may be included in a modern award pursuant to ss.136(1)(a) and (c), and ss.139(1)(a), (c) and (h) of the Act.

[52] As Mr Redford, on behalf of the UWU, put it, this is a short-term variation to deal with the current crisis and represents a measured and appropriate response to unique circumstances. This sentiment was echoed by Mr Ryan on behalf of the AHA, who submitted that the package would facilitate the retention of employees in employment as the sector comes to terms with the scale of the crisis.

[53] The application was strongly supported by the Minister who commended the parties on the agreement reached.

[54] We now turn to the modern awards objective.

²¹ *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106].

²² See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review.

²³ See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.

[55] It was common ground that the consideration in s 134(b), (da), (e) and (g) were not relevant. We deal with the other considerations below.

s. 134(1)(a): relative living standards and the needs of the low paid

[56] A threshold of two-thirds of median full-time wages provides ‘a suitable and operational benchmark for identifying who is low paid’,²⁴ within the meaning of s.134(1)(a).

[57] The most recent data for median earnings is for August 2019 from the ABS Characteristics of Employment (CoE) survey. Data on median earnings are also available from the Survey of Employee Earnings and Hours (EEH) for May 2018.

[58] As set out in the [Information Note](#), the data show that the full-time weekly wage for all classifications in the Hospitality Award was below the EEH measure of two-thirds of median full-time earnings. Most classifications were also below the CoE measure of two-thirds of median full-time earnings, except for General employee Level 6, Casino gaming employee Levels 5 and 6, and Managerial staff (Hotels).

[59] We accept that the proposed variation may result in low paid employees working less hours and consequently receiving less pay. It is axiomatic that such a reduction in pay will mean that they are less able to meet their needs. But the employers and employees in the Hospitality sector face an invidious choice. The retention of as many employees as possible in employment, albeit on reduced hours, is plainly a priority. We also note the agreed measures to mitigate the impact of reduced hours, particularly by maintaining leave and other accruals based on existing hours.

s. 134(1)(c) the need to promote social inclusion through increased workforce participation

[60] This consideration is directed at obtaining employment. The package of measures will facilitate the parties’ shared objective of retaining as many employees in employment as practicable in the current crisis.

s. 134(1)(d) and (f) the need to promote flexible modern work practices and the efficient and productive performance of work and the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.

[61] It is convenient to deal with these considerations together. The variation proposed will have a positive impact on business. It will promote flexibility and the ‘efficient and productive performance of work’ and will reduce the regulatory burden on business.

s.134(1)(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

²⁴ [\[2017\] FWCFB 1001](#) at [166].

[62] Noting that the hospitality sector is a significant component of the economy, the Minister submitted the variations sought by the parties would have a positive impact on ‘the sustainability, performance and competitiveness of the national economy’. We accept that this is so.

[63] We are satisfied that the variation proposed is necessary to achieve the modern awards objective (s.157). Further, once varied the Hospitality award will only include terms to the extent necessary to achieve the modern awards objective (s.138).

[64] In deciding that the variation proposed is necessary to achieve the modern awards objective we have taken into account the considerations in s.134(1)(a) to (h) insofar as they are relevant.

[65] The annual leave flexibility in proposed clause L.2.3 requires separate consideration. Subsections 93(3) and (4) of the Act are relevant in this regard and provide as follows:

“Terms about requirements to take paid annual leave

(3) A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.

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)

[66] 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)).²⁵
- 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)).

[67] Subject to the requirement to take leave being reasonable, a modern award term which provides that an employee can be required to take a period of annual leave is a term of the type contemplated by s.93(3) of the Act.

[68] Clause L.2.3(a) provides:

²⁵ 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.

(a) Despite clauses 34.3, 34.7, 34.8 and 34.9 (Annual leave), an employer may, subject to considering an employees' personal circumstances, direct the employee to take annual leave with 24 hours' notice.

[69] The issue before us is whether clause L.2.3(a) is 'reasonable' within the meaning of s 93(3).

[70] The Full Bench in *Australian Federation of Air Pilots v HNZ Australia Pty Ltd*²⁶ observed that in assessing the reasonableness of a requirement to take leave, "all relevant considerations needed to be taken into account including those which are set out in paragraph [382] of the Explanatory Memorandum to the Fair Work Bill 2008".²⁷ The Explanatory Memorandum at paragraphs 381-382 states:

'381. Subclause 93(3) permits terms to be included in an award or agreement that require an employee, or that enable an employer to require or direct an employee, to take paid annual leave in particular circumstances, but only if the requirement is reasonable. This may include the employer requiring an employee to take a period of annual leave to reduce the employee's excessive level of accrual or if the employer decides to shut down the workplace over the Christmas/New Year period.

382. In assessing the reasonableness of a requirement or direction under this subclause it is envisaged that the following are all relevant considerations:

- the needs of both the employee and the employer's business;
- any agreed arrangement with the employee;
- the custom and practice in the business;
- the timing of the requirement or direction to take leave; and
- the reasonableness of the period of notice given to the employee to take leave.'

[71] The Full Bench noted that:

'It is apparent that the nature of these considerations, so far as they concern an employee, is personal to the employee the subject of the direction. It follows that generalised assessments about the impact of a requirement on employees will be insufficient. Moreover, the reasonableness of a requirement is to be assessed at the time that the requirement is to be fulfilled because self evidently the factual circumstances which underpin any consideration will change, as for example, the needs of both the employer and the employee are subject to change.'²⁸

[72] The term in clause L.2.3(a) is of limited duration to address an extraordinary set of circumstances. Further, in issuing a direction to take annual leave the employer is required to consider an employees' personal circumstances. We are satisfied that the term proposed is a permitted term and that it is 'reasonable' within the meaning of s.93(3).

²⁶ [2015] FWCFB 3124

²⁷ Ibid at [25]

²⁸ Ibid at [26]

[73] Clause L.2.3(c) provides:

(c) During the period of operation of Schedule L, instead of taking paid annual leave at the rate of pay required by s.90 of the *Fair Work Act 2009 (Cth)*, an employer and an employee may agree to the employee taking twice as much annual leave at half the rate of pay for all or part of any period of annual leave.

[74] We note that, the statutory notes to s.55(4) provide examples. Note 1 states:

“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.

[75] We are satisfied that clause L.2.3(c) is an ancillary or incidental term permitted by s.55 (4).

[76] For the reasons set out above we made the variation determination sought on 24 March 2020. The determination came into operation on 24 March 2020. As required by s.165(3) the determination does not take effect in relation to a particular employee until the start of the employee’s first full pay period that starts on or after the day the determination comes into operation.

[77] The measures encompassed in the variation strike an appropriate balance between the provision of additional flexibility and treating affected employees fairly. We commend the parties on the balanced nature of the agreed package. As demonstrated by the actions of the AHA and the UWU, this is a time for co-operation, not conflict.

PRESIDENT

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Appearances:

Mr P Ryan – Australian Hotels Association

Mr B Redford – United Workers Union

Mr D Williams – for the Commonwealth Minister for Industrial Relations

Hearing details:

Melbourne
2020
24 March 2020

Attachment A

Reference list:

- Berejiklian G (2020), \$2.3 billion health boost and economic stimulus, NSW Government media release, 20 March.
- Department of Premier and Cabinet (2020), Economic survival package to support businesses and jobs, Victorian Government, 21 March.
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