



# STATEMENT

*Fair Work Act 2009*

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

## **Health sector awards – Pandemic Leave**

(AM2020/13)

VICE PRESIDENT HATCHER  
DEPUTY PRESIDENT CLANCY  
DEPUTY PRESIDENT DEAN  
COMMISSIONER SPENCER  
COMMISSIONER LEE

SYDNEY, 22 JULY 2020

### *Health sector awards – Pandemic Leave*

[1] In our decision issued on 8 July 2020,<sup>1</sup> we determined that we would not at that time grant applications made by a number of unions to vary identified “Health awards”<sup>2</sup> to provide for paid pandemic leave. On a fairly fine balance, we determined that we were not at that time satisfied that the grant of the unions’ application was necessary to achieve the modern awards objective in s 134(1) of the *Fair Work Act 2009* (FW Act). The overriding factor in reaching that conclusion was the degree of success at that point in time in controlling the COVID-19 pandemic, which meant that the elevated potential risk to health and care workers of actual or suspected exposure to infection had not manifested itself in actuality. However, we did not dismiss the application because we accepted expert evidence that the position in respect of the COVID-19 pandemic has the potential to radically change in a matter of weeks, and we pointed to then-recent developments in Victoria as representing a disturbing development. We determined that the appropriate course was to stand the matter over on the basis that it might be relisted on the request of any party at short notice. We also stated that we would ourselves monitor developments and might relist the matter of our own initiative if we considered it necessary. We also indicated that we might be prepared to grant the application at least in part in respect of some of the Health awards (including the *Aged Care Award 2010*) if evidence emerged that an elevated risk of health and care workers being infected or having to self-isolate emerged.

[2] There has been a significant change in circumstances since our 8 July 2020 decision was issued. Information at hand as at 21 July 2020 discloses the following:

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<sup>1</sup> [2020] FWCFB 3561

<sup>2</sup> *Aboriginal Community Controlled Health Services Award 2010; Aged Care Award 2010; Ambulance and Patient Transport Industry Award 2010; Health Professionals and Support Services Award 2010; Medical Practitioners Award 2010; Nurses Award 2010; Pharmacy Industry Award 2010; Social, Community, Home Care and Disability Services Industry Award 2010; Supported Employment Services Award 2010.*

- there were 296 new cases in the last 24 hours, of which 275 were in Victoria;
- there have been 17 additional deaths since 8 July 2020;
- of the total of 123 deaths in Australia, 106 have been aged 70 years or over, and 40 have been residents of Australian government-subsidised residential aged care;
- there are currently 3,026 active COVID-19 cases, of which 156 are hospitalised and 33 are in intensive care;
- there are 125 active cases in Australian government-subsidised residential aged care, all of which are in Victoria;
- at least 40 different aged care homes in Victoria have at least one active case, which number has doubled in 5 days;
- 216 active cases in Victoria have been connected to aged care facilities, of which 112 are residents, 93 are staff and 11 are household contacting residents, staff and household contacts; and
- the Australian Government announced on 20 July 2020 that federal and state governments would provide funding to help aged care facilities ensure that aged care staff do not work across multiple centres or homes without such staff being disadvantaged as a result.

[3] There has additionally been an announcement published on 20 July 2020 of a one-off \$1,500 payment to financially support Victorian aged care workers who have been instructed to self-isolate or quarantine at home because they are either diagnosed with COVID-19 or are a close contact of a confirmed case, but cannot rely on sick leave while absent from work.<sup>3</sup>

[4] Our provisional view is that the developments described in paragraph [2] above would justify the grant of a paid pandemic leave provision in the *Aged Care Award 2010* of the type foreshadowed in paragraph [131] of our decision of 8 July 2020 – that is, a provision entitling employees to up to two weeks’ paid leave on each occasion they are required to self-isolate because they display symptoms of COVID-19 or have come into contact with a person suspected of having contracted COVID-19. We consider that the “elevated risk” that is discussed in our earlier decision has clearly manifested itself in the aged care industry, at least in Victoria. We have also formed the provisional view that it would be necessary to extend any such entitlement to casual employees, since we consider that the developments we have set out indicate the existence of a demonstrated threat to the aged care system in Victoria. In that connection we have in mind that if such an entitlement was established, it would apply to casual employees engaged on a regular and systematic basis, and would entitle them to payment based on an average of their earnings over the previous six weeks. The entitlement would initially be established for a temporary period of three months.

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<sup>3</sup> Media release of the Hon Greg Hunt MP, Commonwealth Minister for Health, published 20 July 2020

[5] However, in determining whether we should proceed to vary the *Aged Care Award 2010* in accordance with our provisional view, it will be necessary to take into account the announcement described in paragraph [3] above. It may be that the contemplated scheme of payment referred to in the announcement would constitute an adequate substitute for any award variation to provide for paid pandemic leave that we might make and/or that the announcement reflects an industry consensus reached between governments, employers and unions as to how the current situation in the aged care industry in Victoria should appropriately be dealt with. Further information is required to allow us to properly assess the position in that respect.

[6] We invite interested parties, and relevant government ministers and authorities, to file written submissions responding to the provisional views expressed in paragraph [4] and [5] above, and to provide further information concerning the contemplated scheme of payment referred to in the announcement of 20 July 2020. Because of the obvious urgency in this matter, we direct that any such submissions and information be filed by 12.00pm on Friday 24 July 2020.



VICE PRESIDENT

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