

**Henry William Lawyers**  
Workplace Law Update  
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## Industrial Relations Reform

On 26 May 2020, Prime Minister Scott Morrison announced an Industrial Relations reform consultation process as part of the Federal Government's JobMaker Plan which aims to strengthen the Australian economy following the COVID-19 pandemic, with the focus of finding "a pathway to sensible, long-lasting reform" to create jobs and to get Australians back into work.

Since June 2020, Attorney-General and Minister for Industrial Relations Christian Porter led the IR reform consultation process alongside five working groups comprised of key stakeholders from employer, industry and employee groups, which involved discussions regarding potential reforms to Australia's IR system.

Each of the working groups focused on one of the following five key areas:

- **Casuals and fixed term employees** (including clarification regarding casual employment arrangements post *Workpac v Rossato*)
- **Award simplification** (including simplification of Modern Awards particularly for industries significantly impacted by the COVID-19 pandemic)
- **Enterprise Agreements** (including potential improvements to the enterprise agreement making system)
- **Compliance and enforcement** (including addressing wage underpayments and the effectiveness of workplace relations compliance framework)
- **Greenfields Agreements** (including simplifying negotiation processes)

The IR working group consultation process concluded in September 2020 and the Federal Government is currently considering reforms it will adopt. A legislative package of proposed IR reforms is expected to be introduced to Parliament later this year, with consultation with State and Territory governments expected to take place prior.

While the content of the proposed legislative package remains unclear, the most highly anticipated issue for reform undoubtedly relates to what constitutes a "casual employee" following the controversial Full Federal Court decision in *Workpac v Rossato*. In *Rossato*, an employee engaged as a casual and paid a casual loading was held to be a permanent employee. The High Court of Australia will shortly hear an application for special leave to appeal the *Rossato* decision.

## Fair Work Commission extends flexibility provisions of Modern Awards

In April 2020, the Fair Work Commission varied the majority of Modern Awards by inserting "Schedule X", which temporarily operated to provide an entitlement to 2 weeks of unpaid pandemic leave. While the initial end date was 30 September 2020, "Schedule X" for the majority of Modern Awards has been **extended** to 29 March 2021.

"Schedule X":

- Applies until **29 March 2021**.
- Allows an employee to take up to 2 weeks of unpaid pandemic leave if the employee is required by government or medical authorities or on the advice of a medical practitioner to self-isolate and is consequently prevented from working, or is otherwise prevented from working by measures taken by government or medical authorities in response to the COVID-19 pandemic.
- This type of leave does not need to be accrued before being taken, and is available each time a person requires it e.g. if required to self-isolate on more than one occasion.
- Contains evidentiary requirements such that an employee taking unpaid pandemic leave must give notice to the employer of taking leave and the reason for the leave, as soon as practicable (may be after leave has started).
- Unpaid pandemic leave does not affect any other paid or unpaid leave entitlement of the employee and counts as service for the purposes of entitlements under the relevant Modern Award and the National Employment Standards.
- Employer and employee may agree that the employee may take more than 2 weeks' unpaid pandemic leave.

Some (but not all of the varied) Modern Awards, including the *General Retail Industry Award 2010* and the *Banking, Finance and Insurance Award 2020*, also contain the ability for employers and employees to agree on employees taking **annual leave at half pay**

The annual leave at half pay provisions:

- Allow for employees to **take annual leave at half pay** by agreement, where instead of an employee taking paid annual leave on full pay, the employee takes twice as much leave on half pay.

- Any such agreement must be recorded in writing and retained as an employee record.
- This means that an employee gets 1 week of annual leave pay for every 2 weeks of annual leave they take.
- An employee on leave at half pay **accumulates** annual leave and sick and carer's leave **as if they were on leave at full pay**.

### Working from Home and Changes to the Clerks – Private Sector Award 2020

A snapshot of a survey undertaken by the Australian Bureau of Statistics entitled *Business Impacts of COVID-19* revealed the growth in working from home arrangements from pre-COVID-19 to mid-September 2020:

Industry	Employees working from home	
	Prior to COVID-19	Mid-September 2020
Information, media and telecommunications	51.5%	80.8%
Professional, scientific and technical services	59.0%	74.7%
Financial and Insurance services	45.3%	71.7%
Education and training	29.2%	65.3%
Administrative and support services	45.5%	61%

Against this background, with the likelihood of ongoing working from home arrangements as employers begin to manage the return of employees to some workplaces (where reasonably practicable), some industrial instruments such as the *Clerks – Private Sector Award 2020* (**Clerks Award**) are being amended.

Workers classified under the Clerks Award do not have the ability to take unpaid pandemic leave or leave at half pay, as the Clerks Award was not included in the list of those Modern Awards where Schedule X was extended.

Instead, the Clerks Award contains “Schedule I”, which operates until 30 November 2020, and gives employers and employees working from home the ability to agree to flexible working from home hours. Specifically, the spread of ordinary hours for employees who are working from home by agreement has been temporarily extended, to between 6.00 am and 10.00 pm, Monday to Friday, and between 7.00 am and 12.30 pm on Saturday.

Furthermore, whilst Schedule I remains in operation, employers and full-time and part-time employees may agree to temporarily reduce ordinary hours of work, although may only do so by not less than 75% of ordinary hours worked prior to the reduction.

If such a reduction occurs, the weekly wage due to the employee will be reduced by the same proportion, yet all relevant accruals and all entitlements on termination of employment will continue to be based on the ordinary hours of work prior to Schedule I commencing.

Whilst a reduction in hours can be agreed with an individual employee, if an employer wishes to reduce the hours of all employees, at least 75% of employees must vote in favour of the temporary reduction.

An additional flexibility provision in the Clerks Award is the ability of the employer to request, subject to considering an employee's personal circumstances, that an employee take paid annual leave, provided that the request does not result in the employee retaining a balance of less than 2 weeks annual leave after the leave requested is taken.

The employer can only request that the employee take annual leave if the request is made for reasons attributable to COVID-19, and to assist the employer to avoid or minimise the loss of employment. An employee must consider and may not unreasonably refuse a request to take annual leave.

Please contact us if we can provide any further assistance.



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