

BRIEFING PAPER (UPDATED 8.4.2020)

PROPOSED FWC CHANGES – COVID 19

OUTDOOR RECREATION SECTOR

WHAT IT MEANS FOR OUTDOOR LEADERS

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Background:

In recent days the Fair Work Commission (FWC) has moved promptly to provide employers and employees more options in addressing the ongoing challenges of the COVID 19 pandemic.

Two widely used Modern Awards – the *Hospitality Industry (General) Award* and the *Clerks – Private Sector Award 2010*, have been varied to address some structural impediments/uncertainties relating to employer and employee rights and entitlements during the pandemic.

The FWC has been mindful of the ongoing impact of both Federal and State Government economic packages, (with the latest initiative being the ‘*Job Keeper*’ subsidising the employers).

On the 1st April Justice Ross, President of the FWC, issued a lengthy statement outlining a proposal to “*act on its own initiative*” to vary 103 Modern Awards (in Phase 1) and possibly a further 18 in Phases 2 and 3 to achieve similar outcomes as in both of these awards.

Award Coverage Outdoor Recreation / Outdoor Leaders:

As history has shown, the breadth and nature of the “*Outdoor Recreation Sector*” is far from universally agreed, concurrently appropriate Modern Award coverage, (specifically in regard to the underpinning of Enterprise Bargaining outcomes). I would have no doubt that the Sector would benefit if there was one award providing minimum rates and conditions for **all** manner of employees.

For the purposes of this discussion, the following would have application to parts of the Sector, (all mentioned appear in the list of awards) to be varied by the FWC in Phase 1:

- *Alpine Resorts Award 2010*
- *Amusements, Events and Recreation Award*
- *Educational services (Schools) General Staff Award*
- *Fitness Industry Award*
- *Miscellaneous Award*
- *Professional Diving Industry (Recreational) Award*

The FWC is seeking the views of interested parties in amending the awards listed (and others), effective from the nominated operational date of any order – likely to be 8th April, (or earlier if the parties require) – through to at least 30th June 2020, by the insertion of a new schedule in the awards nominated.

Process:

Prior to issuing the statement on 1st April the FWC commissioned a study by Professor Jeff Borland of the Department of Economics, University of Melbourne, entitled “*Benefit from Greater Flexibility in Employment*”.

Professor Borland’s objective was to “*assess in which industries (and hence in which Modern Awards) there might be the greatest potential benefit for allowing flexibility in employment arrangements during the period of the COVID 19 Pandemic*”.

He contends that the immediate impact on labour demand has derived from two main sources:

- consumers are being prevented from undertaking activities where they believe they are at risk of contracting COVID 19: and/or
- a range of factors including uncertainty, lower wealth and reduced time available for buying activity.

He further found that effects on labour supply are now likely to commence:

- as schools and childcare centres begin to close with some workers needing to withdraw to care for their children;
- illness will cause workers to need to withdraw from their employment;
- workers will need to provide for family members who become ill;
- workers withdrawing from employment out of concern for becoming ill or due to being required to undergo a quarantine period.

Within the context of Professor Borland’s work, (and this briefing paper), the term “*allowing extra flexibility in employment arrangements is taken to mean that it may be possible to modify award provisions in order to make it easier for a worker’s hours to be varied – fulltime to part-time. Allowing extra flexibility in this way could mean that extra employees are able to retain employment in response to a decrease in labour demand*”.

Benefits Identified:

Retaining extra employees has potential benefits for both employees and employers:

- reduced hours maintain **some** (but not all) income flow for staff;
- Company specific knowledge and skill is preserved for the employer, thereby reducing the need to re-hire and re-train staff once the pandemic has passed;
- Staffing levels are anticipated to return, after some time, to pre-pandemic levels. This process, potentially, will be shortened through retention of skilled and engaged employees, accelerating a return to strength for the economy generally.

Matters to be Addressed:

The FWC, as a consequence of the research undertaken, has identified several areas requiring immediate attention:

- The Commission is concerned that there is uncertainty in relation to employees being given access to *personal/carer's leave* if required to "*self-isolate*" or to look after other family members who are quarantined;
- Employees are not able to extend their annual leave by taking it at half pay, and thereby doubling the duration of their income flow as a result;
- Employers have no automatic capacity to require work from home, vary the ordinary hours of work, or the employment status of individuals.

These matters arise from what the Commission has identified as the "*Regulatory Gap*" – ie: the current prescriptors of the *Fair Work Act*, the *National Employment Standards* and current Modern Awards and the social/health challenges caused by the pandemic.

In order to address these matters a new Schedule "*Award Flexibility During the COVID 19 Pandemic*" will be added to awards.

The contents of the Schedule will:

- amend minimum terms of employment for employees who are not covered by the terms of an Enterprise Agreement; add to
- The terms of an existing Contract or Agreement.

Drawing a line through the *Clerks Award* and points canvassed in the Statement of 1st April, the following will apply prospectively:

- All employees (including casuals) will be granted immediately ten (10) days of unpaid Pandemic Leave in addition to the other available forms of leave;
(The Federal Government has yet to respond to the FWC's enquiry as to whether the proposed *Job Keeper* payment will be paid to employees on unpaid pandemic leave).
- Employers and employees will be able to enter into arrangements that could enable reduction of hours from fulltime to part-time employment;
- Facilitate changes in the spread of ordinary hours without incurring overtime obligations or shift premiums;
- Facilitation of work from home, without incurring overtime or penalties;
- Giving Employees stood down or reduced in hours having the right to seek additional employment elsewhere;
- See Employees being provided with increased protection against unfair or discriminating terminations of employment;
- Assist in Employers having greater flexibility to roster employees across classification strictures providing adequate training is given.

The Goal:

To strike a balance between the various interests of employers and employees, through consultation and consensus building, enabling the greatest number to retain some form of income security for the duration of the pandemic.

NB: These matters are intended to be addressed in a temporary fashion, (ie: for the duration of the pandemic), however, **may** well remain in either the proposed form or developed further as permanent fixtures in Modern Awards.

To follow progress and outcomes you are encouraged to visit the Commission's website: www.fwc.gov.au

Outcomes:

The FWC received over twenty submissions from interested parties, prior to handing down a thirty five page decision on 8th April.

N.B: In its submission to the Commission, the federal government confirmed that *"legislation introducing the proposed JobKeeper payment will ensure that the payment will be made to qualifying employees where they are taking unpaid leave, including the pandemic leave proposed by the award variations."*

All Modern Awards nominated in phase 1, will have the amendments, foreshadowed above, effective immediately.