

Australian Industry Group

Applications to vary the  
Health Sector Awards  
– Paid Pandemic Leave  
– Social, Community, Home Care and  
Disability Services Industry Award 2010

**Reply Submission**  
(AM2020/13)

10 August 2020

**Ai**  
GROUP

# **AM2020/13 APPLICATIONS TO VARY HEALTH SECTOR AWARDS – PAID PANDEMIC LEAVE – SOCIAL, COMMUNITY, HOME CARE AND DISABILITY SERVICES INDUSTRY AWARD 2010**

## **1. INTRODUCTION**

1. The Australian Industry Group (**Ai Group**) files this submission in accordance with directions issued by the Fair Work Commission (**Commission**) on 3 August 2020.
2. The submission responds to material filed by the Health Services Union (**HSU**) on 3 August 2020 and the Australian Services Union (**ASU**) on 31 July 2020 (collectively, **Unions**) in relation to the *Social, Community, Home Care and Disability Services Industry Award 2010* (**Award**). The Unions submit that the Award should be varied to include an entitlement to paid pandemic leave in the terms they have proposed.
3. Ai Group strongly opposes the Unions' claims for the reasons set out in this submission.

## 2. THE UNIONS' PROPOSED CLAUSES

4. The HSU has sought the insertion of the following clause in the Award:

### **Schedule Y—Industry Specific Measures During the COVID-19 Pandemic**

- Y.1** Subject to clause Y.2.5, Schedule Y operates from XX MONTH 2020 until 29 October 2020. The period of operation can be extended on application.
- Y.2** Schedule Y applies to employees classified under Schedule B – Classification Definitions – Social and Community Services Employees, Schedule C – Classification Definitions – Crisis Accommodation Employees, or Schedule E – Classification Definitions – Home Care Employees.
- Y.2.1** Subject to clauses Y.2.2 to Y.2.9, an employee engaged in the social and community services sector or home care sector is entitled to take up to 2 weeks' paid pandemic leave on each occasion the employee is prevented from working (including working from home):
- (a)** because the employee is required by government or medical authorities to self-isolate or quarantine;
  - (b)** because the employee is required by their employer to self-isolate or quarantine;
  - (c)** because the employee is required on the advice of a medical practitioner to self-isolate or quarantine because they are displaying symptoms of COVID-19 or are suspected to have come into contact with a person suspected of having contracted COVID-19;
  - (d)** because the employee is in isolation or quarantine while waiting for the results of a COVID-19 test; or
  - (e)** because of measures taken by government or medical authorities in response to the COVID-19 pandemic.
- Y.2.2** Except where clause Y.2.1(b) applies, the employee must give their employer notice of the taking of leave under clause Y.2.1 and of the reason the employee requires the leave, as soon as practicable (which may be a time after the leave has started).
- Y.2.3** Where an employee is required on the advice of a medical practitioner to self-isolate pursuant to clause Y.2.1(c), an employee who has given their employer notice of taking leave under clause Y.2.1 must, if required by the employer, produce a medical certificate.
- Y.2.4** Except where clauses Y.2.1(b) or Y.2.3 apply, an employee who has given their employer notice of taking leave under clause Y.2.1 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 Y.2.1.
- Y.2.5** A period of leave under clause Y.2.1 must start before 29 October 2020, but may end after that date.

- Y.2.6** An employee cannot take paid pandemic leave under clause Y.2.1 if the employee could instead take paid personal/carer's leave.

NOTE: Personal/carer's leave is provided for in the NES. Section 97 of the Act sets out the circumstances in which an employee may take personal/carer's leave. An employee who is prevented from working for one of the reasons set out in Y.2.1 may not be entitled to take personal/carer's leave if they are not unfit for work because of a personal illness or injury.

- Y.2.7** An employee cannot take paid pandemic leave under clause Y.2.1 if the employee becomes entitled to workers compensation benefits as a result of contracting COVID19.

- Y.2.8** An employee will not be entitled to paid pandemic leave unless the employee:

- (a) has undertaken a COVID-19 test in connection with the applicable circumstance in clause Y.2.1; or
- (b) undertakes a COVID-19 test at the earliest opportunity

- Y.2.9** A casual employee is not entitled to leave under clause Y.2.1 unless engaged on a regular and systematic basis.

- Y.2.10** Leave taken under clause Y.2.1 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 NES.

- Y.2.11** For a full-time employee, leave taken under clause Y.2.1 shall be paid at the employee's base rate of pay for the employee's ordinary hours of work in the period of the leave.

NOTE: The base rate of pay has the meaning given in section 16 of the Act.

- Y.2.12** For a part-time employee, pay for leave taken under clause Y.2.1 will be the greater of:

- (a) their agreed ordinary hours of work under clause 10.3(b); or
- (b) the average of their weekly ordinary hours of work for the previous 6 weeks;

- Y.2.13** For a casual employee, pay for leave taken under clause Y.2.1 shall be calculated on the average weekly pay received by the employee in the previous 6 weeks, or where the employee has been employed for less than 6 weeks, for the duration of their employment.

NOTE 1: A employee covered by this award who is entitled to the benefit of Schedule Y 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.

**(HSU Proposed Clause)**

5. The ASU has sought the insertion of the following clause in the Award:

**Schedule Y—Industry Specific Measures During the COVID-19 Pandemic**

**Y.1** Subject to clause Y.4.4, Schedule Y operates from XX MONTH 2020 until 29 October 2020. The period of operation can be extended on application.

**Y.2** Schedule Y applies to employees classified under Schedule B – Classification Definitions – Social and Community Services Employees ('Social and Community Services') or Schedule C – Classification Definitions – Crisis Accommodation Employees ('Crisis Accommodation').

**Y.3 Paid pandemic leave**

**Y.3.1** Subject to clauses Y.4 to Y.4.9, an employee engaged in the social and community services sector or crisis accommodation services is entitled to take up to 2 weeks' paid pandemic leave on each occasion the employee is prevented from working (including working from home):

- (a)** because the employee is required by government or medical authorities to self-isolate or quarantine;
- (b)** because the employee is required by their employer to self-isolate or quarantine;
- (c)** because the employee is required on the advice of a medical practitioner to self-isolate or quarantine because they are displaying symptoms of COVID-19 or are suspected to have come into contact with a person suspected of having contracted COVID-19;
- (d)** because the employee is in isolation or quarantine while waiting for the results of a COVID-19 test; or
- (e)** because of measures taken by government or medical authorities in response to the COVID-19 pandemic.

**Y.3.2** Except where clause Y.4.1(b) applies, the employee must give their employer notice of the taking of leave under clause Y.4.1 and of the reason the employee requires the leave, as soon as practicable (which may be a time after the leave has started).

**Y.3.3** Where an employee is required on the advice of a medical practitioner to self-isolate pursuant to clause Y.4.1(c), an employee who has given their employer

notice of taking leave under clause Y.4.1 must, if required by the employer, produce a medical certificate.

**Y.3.4** Except where clauses Y.4.1(b) or Y.4.3 apply, an employee who has given their employer notice of taking leave under clause Y.4.1 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 Y.4.1.

**Y.3.5** A period of leave under clause Y.4.1 must start before 29 October 2020, but may end after that date.

**Y.3.6** An employee cannot take paid pandemic leave under clause Y.4.1 if the employee could instead take paid personal/carer's leave.

NOTE: Personal/carer's leave is provided for in the NES. Section 97 of the Act sets out the circumstances in which an employee may take personal/carer's leave. An employee who is prevented from working for one of the reasons set out in Y.4.1 may not be entitled to take personal/carer's leave if they are not unfit for work because of a personal illness or injury.

**Y.3.7** An employee cannot take paid pandemic leave under clause Y.4.1 if the employee becomes entitled to workers compensation benefits as a result of contracting COVID19.

**Y.3.8** An employee will not be entitled to paid pandemic leave unless they agree to undertake a COVID-19 test at the earliest opportunity.

**Y.3.9** A casual employee is not entitled to leave under clause Y.4.1 unless engaged on a regular and systematic basis.

**Y.3.10** Leave taken under clause Y.4.1 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 NES.

**Y.3.11** For a full-time employee, leave taken under clause Y.4.1 shall be paid at the employee's base rate of pay for the employee's ordinary hours of work in the period of the leave.

NOTE: The base rate of pay has the meaning given in section 16 of the Act.

**Y.3.12** For a part-time employee, pay for leave taken under clause Y.4.1 will be the greater of:

- (a)** their agreed ordinary hours of work under clause 10.3(b); or
- (b)** the average of their weekly ordinary hours of work for the previous 6 weeks;

**Y.3.13** For a casual employee, pay for leave taken under clause Y.4.1 shall be calculated on the average weekly pay received by the employee in the previous 6 weeks, or where the employee has been employed for less than 6 weeks, for the duration of their employment.

NOTE 1: A employee covered by this award who is entitled to the benefit of Schedule Y 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.

**(ASU Proposed Clause)**

6. We refer to the HSU Proposed Clause and the ASU Proposed Clause collectively as the **Proposed Clauses**.
7. The Proposed Clauses are in broadly similar terms, subject to the following:
  - (a) The ASU Proposed Clause would apply to employees classified under Schedule B of the Award ('Social and Community Services Employees'), and Schedule C ('Crisis Accommodation Employees'). The HSU Proposed Clause would apply to such employees as well as employees classified under Schedule E ('Home Care Employees').
  - (b) Various cross-references (most if not all of which appear to be incorrect in the ASU Proposed Clause); and
  - (c) Clause Y.2.8 of the HSU Proposed Clause vis-à-vis clause Y.3.8 of the ASU Proposed Clause, which limits an employee's entitlement to the proposed paid leave in certain circumstances:

<b>HSU Proposed Clause</b>	<b>ASU Proposed Clause</b>
<p><b>Y.2.8</b> An employee will not be entitled to paid pandemic leave unless the employee:</p> <p><b>(a)</b> has undertaken a COVID-19 test in connection with the applicable circumstance in clause Y.2.1; or</p> <p><b>(b)</b> undertakes a COVID-19 test at the earliest opportunity</p>	<p><b>Y.3.8</b> An employee will not be entitled to paid pandemic leave unless they agree to undertake a COVID-19 test at the earliest opportunity.</p>

### **3. THE UNIONS' CASE, IN SUMMARY**

8. In support of its position, the HSU submits as follows:
  - (a) It has been reported that three residents and seven staff in a Victorian disability group home operated by Aruma Services have contracted COVID-19.
  - (b) There are confirmed positive cases of COVID-19 across 13 disability group homes which were formerly operated by DHSS and have been transferred to private providers.
  - (c) A survey conducted by researchers from the University of Melbourne supports the grant of the claim.
  - (d) There is evidence that the 'elevated risk' purportedly facing the relevant employees covered by the Award is manifesting itself in a discernible way.
  - (e) There is a demonstrated threat to the resilience of the system of care of the disabled.
9. In support of its position, the ASU submits as follows:
  - (a) It has been reported that three residents and seven staff in a Victorian disability group home operated by Aruma Services have contracted COVID-19.
  - (b) There is evidence that the 'elevated risk' purportedly facing the relevant employees covered by the Award is manifesting itself in a discernible way.
  - (c) An entitlement to paid leave would "help prevent an outbreak in the SACS sector like that in Aged Care".
10. We deal with each of the Unions' key contentions in the submissions that follow.

#### 4. AI GROUP'S POSITION, IN SUMMARY

11. Ai Group's opposition to the Unions' claims is based on the following key contentions.
12. *First*, there is no evidence of an 'elevated risk' being manifested in actual or suspected infections amongst any significant number of employees covered by the Award.
13. *Second*, there is no evidence or other information before the Commission that would enable it to conclude that the circumstances of the relevant sectors covered by the Award are analogous to those of the residential aged care sector covered by the *Aged Care Award 2010 (AC Award)* in respect of the rate of infection amongst employees and / or the existence of an 'elevated risk' of the nature contemplated above.
14. *Third*, employers providing disability support services rely on NDIS funding. They do not have *any* scope to recover the significant additional employment costs that would flow from the grant of the claim. No additional funding has been released by any Government in this regard. This factor tells strongly against the grant of the claims.
15. *Fourth*, the funding arrangements applying to employers covered by the Award further distinguishes the circumstances of the relevant sectors covered Award from the residential aged care sector covered by the AC Award.
16. *Fifth*, there is no demonstrated threat to the resilience of the disability care system and therefore no basis for the grant of the proposed entitlement to casual employees.
17. *Sixth*, there is no evidence that employees will fail to be tested for COVID-19 or self-isolate in the absence of the Proposed Clauses.
18. *Seventh*, in a broad range of circumstances, employees required to self-isolate or quarantine will not be materially financially disadvantaged, having regard to the various other entitlements and forms of support available to them.

19. *Eighth*, any perceived deficiencies in the financial support and / or entitlements available to employees must be weighed against countervailing considerations such as the impact that the Proposed Clauses would have on employers.
20. *Ninth*, the variations sought by the Unions are in various respects contrary to or expand beyond findings and conclusions previously reached by the Commission in the context of this matter.
21. *Tenth*, the Proposed Clauses are in various respects unfair to employers.
22. *Finally*, neither the variations proposed nor the Proposed Clauses are *necessary* to ensure that the Award achieves the modern awards objective.

## 5. THE COMMISSION'S EARLIER DECISIONS

23. On 8 July 2020, the Commission issued a decision<sup>1</sup> (**First Decision**) in relation to applications made by various unions to introduce an entitlement to paid pandemic leave in a number of awards covering employers and employees in the health and care sectors. The Commission decided not to grant those applications, however it indicated that it would be prepared to create an entitlement to paid pandemic leave in certain circumstances: (emphasis added)

**[130]** However, we will not dismiss the applications at this time. As Professor MacIntyre emphasised, the position in respect of the COVID-19 pandemic has the potential to radically change in a matter of weeks. The significant and rapid reversal of positive trends in countries such as the United States and Israel is demonstrative of this. Events which are currently occurring in Victoria are disturbing and, although the recent increase in cases has been the result of incidences of community transmission, the most recent information to which we have earlier referred suggests that there may have been some spread of infection into the hospital system. We think the appropriate course is to stand the matter over on the basis that it may be relisted on request as short notice if there continues to be a significant deterioration of the position. We will ourselves monitor events and we may relist the matter of our own initiative if we consider it necessary. In the event that the matter is relisted, the parties may rely on the findings we have already made unless these have been overtaken by further events.

**[131]** We indicate that we may be prepared if necessary to grant the application on the following bases:

- there is evidence that the elevated risk to which we have earlier referred is manifesting itself amongst health and care workers in a discernible way;
- the leave entitlement is for workers who are required to self-isolate because they display COVID-19 symptoms or have come into contact with a person suspected of having contracted COVID-19;
- the leave entitlement is limited to up to two weeks' paid leave on each occasion of self-isolation;
- the entitlement is targeted at workers who are not working at home or working remotely and who are covered by the *Aboriginal Community Controlled Health Services Award 2020*, the *Aged Care Award 2010*, the *Ambulance and Patient Transport Industry Award 2020*, the *Health Professionals and Support Services Award 2020*, the *Medical Practitioners Award 2020*, the *Nurses Award 2010* or the *Social, Community, Home Care and Disability Services Industry Award 2010*; and

---

<sup>1</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3561.

- we would only apply the leave entitlement to casual employees if there was a demonstrated threat to the resilience of the health care system and the systems for the care of the aged and the disabled.<sup>2</sup>

24. In its reasons for the decision made, the Commission said as follows: (emphasis added)

**[122]** We make the following findings based on the evidence and other material before us. First, we are satisfied based on the evidence, particularly that of Professor MacIntyre and Mr McLean that, at a high level of generality, workers in the health and social care sectors are at a higher risk of infection by COVID-19 (and other infectious diseases) than workers in the rest of the economy and this in turn may lead to more frequent and widespread requirements for them to self-isolate because they have been exposed to actual or suspected COVID-19 patients or have displayed COVID-19 symptoms. However the following important caveats must be attached to this finding:

(1) As earlier stated, much of the expert evidence was directed at the position of “frontline” health care workers – that is, workers in public hospitals and emergency-response paramedics actually treating or providing services to confirmed or suspected COVID-19 patients. These workers are either generally not covered by modern awards at all because they are not in the federal system, or modern awards do not apply to them because they are covered by enterprise agreements. We accept that an elevated risk may exist in private hospitals (noting that a private hospital in Tasmania was shut down in April 2020 because of a COVID-19 cluster), but the private hospital sector is largely covered by enterprise agreements. Although there may be an elevated level of risk at private medical clinics and practices, this is unlikely to be to the same extent as for hospital workers.

(2) The degree of elevated risk varies greatly elsewhere in employment covered by the Health awards. For some workers covered by these awards, the risk has been removed because they can work at home or remotely. Outside of the health system proper, the biggest area of concern is in the areas of aged care and care for the disabled.

(3) Australia has to this point in time been highly successful in controlling the spread of COVID-19, to the extent that there remain only a small number of COVID-19 cases, and very few of these are being treated in the hospital system. There has been a serious recent upturn in new cases in Victoria, although the available information suggests that this has been the result of community transmission and not from infection in institutional settings. Accordingly the elevated risk of infection of health and care workers is not currently being manifested in actual or suspected infections of any significant number of such workers.

...

**[123]** Second, we are satisfied that there is a very real risk that employees who have no paid leave entitlements to access (whether because they cannot access their personal leave, or have exhausted their leave entitlements, or are engaged on a casual basis) in

---

<sup>2</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3561 at [130] – [131].

the event they are required to self-isolate, may not report any COVID-19-like symptoms or contact with someone suspected of having COVID-19 out of concern that they will suffer significant financial detriment. This presents a significant danger to infection control at workplaces covered by the Health awards – particularly in the aged care sector, where the statistics re have referred to earlier demonstrate a very high fatality rate amongst the COVID-19 cases which have occurred.

**[124]** Third, employers covered by the Health awards generally appear by this time to have successfully adopted work procedures and provided PPE such as to minimise the risk of infection in institutional settings. We observe that much of the evidence given by the ACTU employee witnesses dealt with the early phase of the pandemic in the March-April 2020 period, when employers and the community generally were struggling in a short space of time to prepare an adequate response to the pandemic. Thus much of the witness evidence reflected the confusion and initial inadequacy of PPE and infection-control procedures in this period. That evidence does not fairly represent the current position. We wish to emphasise that in making this observation, we do not intend any criticism of the evidentiary case advanced by the ACTU and the unions, which was comprehensive and assembled with impressive rapidity, but rather to underline that events during the pandemic have moved rapidly.

**[125]** Fourth, there appears to have been a widespread recognition amongst employers in the health and care sectors that where employees have been required to self-isolate in order to ensure that the workplace is protected from infection, it may be necessary to make special arrangements for the payment of such employees where they have no or insufficient leave entitlements to access. This may arise both from a consideration of fairness to employees and the necessity to protect the workplace from infection by ensuring that workers know they are financially protected if they report COVID-19 symptoms or exposure to a person suspected of having COVID-19 and are to self-isolate as a result. The information provided by the ACTU which is set out in the Schedule to this decision, demonstrates that the provision of various forms of paid pandemic leave has been adopted on a widespread basis in the State and Territory public sectors, including the health sector. The evidence of the ACTU/union witnesses demonstrates that, when forced to self-isolate, most were eventually paid by their employers. ...

**[126]** Fifth, as Ms Allanson’s evidence quoted above indicates, the establishment of a paid pandemic leave provision would potentially cause significant financial difficulty for some employers, particularly those in the subsidised aged care sector and the NDIS-funded disability sector, because such employers will have little or no capacity to recover the cost.

**[127]** Having regard to these findings, we turn to the merits of the applications. We do not consider that there is a necessity to establish a paid pandemic leave entitlement for any employee who has actually contracted COVID-19 as a result of infection in the workplace and has to take time off work, since the employee (even if engaged on a casual basis) will be entitled to payment under the applicable workers’ compensation scheme in that circumstance. Workers’ compensation entitlements are a long-established feature of the safety net for employees in Australia, and there is no evidence before us that the various statutory workers’ compensation schemes have dealt inadequately with any employee who has contracted COVID-19. In this connection, we note that in some jurisdictions there have been adjustments to workers compensation schemes in response to the pandemic; for example, the *Workers’ Compensation Act 1987* (NSW) has been amended so that for workers in certain areas of employment, including the health care sector and in disability and aged care facilities, it will be presumed that a worker who has tested positive for COVID-19 has contracted it in the

workplace unless proven otherwise. We likewise do not consider that paid pandemic leave is justified for health and care workers who test positive for COVID-19 as a result of community transmission (that is, it is not contracted at or in connection with work) since, in that case, the position is no different from that of a worker in any other sector of employment.

[128] However, the position is distinguishable with respect to the situation where a health or care worker has to spend time off work because they are self-isolating as a result of potential contact with a suspected COVID-19 carrier in the course of employment or the display of potential COVID-19 symptoms. In neither case would workers' compensation entitlements apply if the worker ultimately tested negative for the virus. As was pointed out in the April decision, employees in that position might not be able to access personal carer's leave (even if they have an entitlement to it) without the agreement of their employer because they are not unfit to work because of personal illness. This is the "regulatory gap" referred to in the April decision. On the basis of our earlier findings, we consider that this regulatory gap has greater significance for employees covered by the Health awards (excluding the *Pharmacy Industry Award 2020* and the *Supported Employment Services Award 2020* for the reasons earlier stated) because of the greater risk and likelihood that they will be required to self-isolate and because of the critical importance of ensuring that employees self-isolate where necessary rather than not disclosing their position and continuing to work out of financial need. In that respect, we note that some categories of workers who are paid in accordance with the *Aged Care Award 2010* and the *Social, Community, Home Care and Disability Services Industry Award 2010* meet the definition of being low paid.

[129] On a fairly fine balance, we are not presently satisfied that the grant of the unions' applications is necessary to achieve the modern awards objective. In respect of the matters required to be taken into account under s 134(1), the most critical considerations are those in paragraphs (a) and (f). In respect of paragraph (a), we consider that the needs of the low paid have particular significance in respect of the necessity for employees under the Health awards to report circumstances which may require self-isolation rather than avoiding doing this for reasons of financial need. In relation to paragraph (f), we have placed significant weight upon the potential non-recoverable costs to employers in the aged care and disability sectors of a new paid pandemic leave provision. The other matters in s 134(1) appear to us to be of limited relevance. The overriding factor we have taken into account is that, in the current circumstances, the degree of success in controlling the COVID-19 pandemic means that the elevated potential risk to health and care workers of actual or suspected exposure to infection has not manifested itself in actuality.<sup>3</sup>

---

<sup>3</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3561 at [122] – [129].

25. On 22 July 2020, the Commission issued a statement<sup>4</sup> concerning the prospect of introducing a paid pandemic leave entitlement in the AC Award: (emphasis added)

[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:

...

- 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.

[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

---

<sup>4</sup> *Health sector awards – Pandemic Leave* [2020] FWCFB 3834.

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.<sup>5</sup>

26. After various parties filed submissions in relation to the Commission's provisional view, as expressed at paragraph [4] extracted above, the Commission issued a decision<sup>6</sup> on 27 July 2020, in which it confirmed that the AC Award would be varied: (emphasis added)

[56] As we have earlier found, employees in the residential aged care sector are exposed to an elevated risk of being required to self-isolate that is currently manifesting itself at least in Victoria. As explained in our 8 July Decision as well as in the April Decision, an employee required to self-isolate may not have access to paid personal leave because, in the case of full-time and part-time employees, they may not be unfit for work such as to qualify for such leave or may have exhausted their leave entitlement or, in the case of casual employees, they do not have an entitlement to such leave. The requirement for self-isolation is primarily to prevent the spread of infection which, in the aged care sector is especially critical because of the vulnerability of aged persons to COVID-19 fatalities. Thus, the requirement to self-isolate may be said to be in the public interest. However, absent a paid pandemic leave entitlement or access to other leave entitlements, the employee bears the cost of this. For low-paid employees, this is likely to place them in significant financial difficulty and even distress. Further, as we found in our 8 July Decision at paragraph [123], there is a real risk that employees who do not have access to leave entitlements might not report COVID-19 symptoms which might require them to self-isolate, but rather seek to attend for work out of financial need. This represents a significant risk to infection control measures. These matters weigh significantly in favour of the introduction of a paid pandemic leave entitlement.

[57] The matters in paragraphs (b), (c), (d), (da) and (e) of s 134(1) have little or no relevance to the issue of paid pandemic leave and accordingly we do not assign them weight in our consideration. As to s 134(1)(f), we place significant weight on the effect that any exercise of award powers to establish a paid pandemic leave entitlement might have on employment costs and the regulatory burden. However, the financial assistance measures announced by the Commonwealth Government which we have earlier described will substantially reduce if not wholly remove the cost of any paid pandemic leave entitlement which might be established for the most affected residential aged care employers. That is a significant change from the position as it was at the time of the 8 July Decision, and largely removes the weight this consideration bears against the grant of a paid pandemic leave entitlement. We accept that a requirement to administer a paid pandemic leave entitlement is likely to increase the regulatory burden on residential aged care employers in what are undoubtedly already extremely demanding circumstances, and this must be taken as weighing against the award of a paid pandemic leave entitlement. However, we note in this connection that employers already have to administer the existing unpaid pandemic leave entitlement and undertake the processes of accessing the government funding measures we have referred to.

...

---

<sup>5</sup> *Health sector awards – Pandemic Leave* [2020] FWCFB 3834 [2] – [4].

<sup>6</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3940.

**[59]** The “fine balance” upon which we decided not to award any paid pandemic leave in the 8 July Decision has now tipped the other way in relation to the residential aged care sector. Aged care workers are in the “frontline” of the community’s efforts care for and to protect from infection the aged, who are the group most vulnerable to fatality in the current pandemic. The establishment of a paid pandemic leave entitlement for such workers is necessary to support them in their critical work. Such an entitlement has the explicit support of the Victorian Government, which is at the centre of the current crisis, as a “further valuable resource in the broad package of economic and public health responses to help contain transmission of the virus”. The establishment of such an entitlement will also be supported by the financial assistance measures introduced by the Commonwealth Government which we have earlier described.<sup>7</sup>

27. The financial assistance described in the above passage was explained in greater detail earlier in the Commission’s decision: (emphasis added)

**[49]** There are two governmental measures which require consideration in the current context. First, there are the measures taken by the Victorian Government which are referred to in paragraphs [3] and [5] of the 22 July Statement. Based on the further information provided by the Victorian Government, we now have a better understanding of those measures.

**[50]** The \$1,500 payment referred to in the 22 July Statement is not confined to aged care workers, but is accessible by any adult worker residing in Victoria (including casual employees) who have been instructed by the Victorian Department of Health and Human Services to self-isolate because they have been diagnosed with COVID-19 or are identified as a close contact with a confirmed case or because their child under 16 has been diagnosed with COVID-19 or is identified as a close contact with a confirmed case. The worker must not be receiving any income, earnings or salary maintenance from their employment as a result of the period of self-isolation, must have exhausted paid personal leave entitlements, and must not be receiving a JobKeeper payment or any other form of Australian Government income support. The payment is described as a “one-off” payment, which we presume will mean that it is payable in respect of only a single instance of self-isolation. In addition, the Victorian Government has announced that it will pay \$300 to workers who have been tested for COVID-19, meet the same eligibility criteria and are awaiting results.

**[51]** The following observations may, on the basis of this information, be made about the Victorian Government’s measures:

- the measures are not specifically targeted at the residential aged care sector;
- they do not encompass the whole of the circumstances in which an employee may be required to self-isolate, including where the worker has displayed COVID-19-like symptoms but has not been diagnosed as having been infected or where the worker has been in contact with a suspected, as distinct from confirmed, COVID-19 case;

---

<sup>7</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3940 at [56] – [59].

- they do not maintain the normal pay of the worker but provide for a fixed payment which, in the case of a full 14-day isolation period, is likely to cause the worker to suffer a significant reduction in income;
- the amounts would not be payable to any person who had an entitlement to paid pandemic leave;
- the measures were not the result of any consensus in the residential aged care industry of a need to provide for payment to workers required to self-isolate; and
- the measures are not intended by the Victorian Government to constitute a substitute for a scheme of paid pandemic leave, and indeed the Victorian Government supports the establishment of such a scheme.

**[52]** The Commonwealth Government’s initiatives to provide financial assistance to the residential aged care sector are of significance, having regard to the weight we placed in paragraphs [126] and [129] of the 8 July Decision upon the financial burden which a paid pandemic leave entitlement would place on, inter alia, the residential aged care sector. As earlier set out, the Commonwealth Government’s submissions referred to direct financial support it is providing to residential and in-home aged care providers to support aged care workers who are unable to work due to symptoms, self-isolation or travel restrictions, regardless of whether they would usually receive paid leave. Thus, as explained by the Commonwealth Government, aged care providers located in “hotspots” or whose staff reside in “hotspots” may apply for funding to assist with wage costs via a grant. This funding is intended to be used by the provider for the benefit of employees required, relevantly, to self-isolate, and may extend to the wage costs of self-isolating casual employees who do not have access to paid leave and to full-time and part-time employees who do not have any leave entitlements.

**[53]** While the information provided to us does not wholly disclose the extent of financial assistance which may be available, it firmly indicates that employers in the residential aged care sector who are most exposed to the risk of their employees having to self-isolate are eligible to receive Commonwealth financial assistance for the cost of continuing to pay wages to employees, including casual employees, who are required to self-isolate.<sup>8</sup>

28. As for the rates of infection of COVID-19 affecting the aged care sector, the Commission said as follows: (emphasis added)

**[44]** In the 22 July Statement, we identified that there had been a significant deterioration in the position with respect to the COVID-19 pandemic since the 8 July decision. Publicly available information as at 26 July 2020 indicates that the position has continued to deteriorate:

- there were 475 new cases reported in the last 24 hours, of which 459 were in Victoria and 14 were in new South Wales;
- the total number of deaths has increased to 155, 32 more than when the 22 July statement was issued;

<sup>8</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3940 at [49] – [53].

- 132 of the total deaths have been persons aged 70 or over, and 62 of the deaths have been person in Australian Government-subsidised residential aged care facilities;
- there are currently 241 active cases in Australia admitted to hospital, of which 46 are in intensive care; and
- in Victoria, there are 560 active cases linked to aged care settings, of which about half are residents and about half are staff, and of 22 “key outbreaks” identified by the Victorian Government, 10 are at residential aged care facilities.

...

[46] The seriousness of the position in the aged care sector in Victoria is demonstrated by the measures taken by the Commonwealth and Victorian Governments in respect of that sector to provide financial support to prevent aged workers working at more than one facility to prevent chains of transmission between facilities, to ensure that aged care providers can engage and train additional staff where existing staff are unable to work because of self-isolation, and to ensure aged care providers can provide alternative accommodation so that workers who live or work in “hotspots” can continue to work.

[47] The inference which we draw from this information is that there is a clearly manifested elevated risk of exposure to COVID-19 infection and of being required to self-isolate in the residential aged care sector in Victoria. This represents an alteration of the position which, in paragraph [129] of the 8 July Decision, constituted the “overriding factor” which caused us not to grant provisions for paid pandemic leave in any award at that time. This elevated level of risk is, broadly speaking, equivalent to that of health care workers in the Victorian public hospital and health system who have been afforded unlimited paid special leave by the Victorian Government when required to self-isolate (including casual employees who have been employed on a regular and systematic basis for at least 3 months). We note that this benefit has been extended by the Victorian Government to workers in aged care facilities operated by public hospitals and health services.

[48] We reject the submission advanced by ACCI and the AFEI that the available data is not demonstrative of a rate of self-isolation for staff in the aged care industry due to close contact or display of COVID-19 symptoms that is different from that of the general population or other industries. While there is no direct data concerning the rate of required self-isolation, an inference may clearly be drawn that the high level of infections in aged care residential facilities amongst both residents and staff and the disproportionate death rate in such facilities will have the necessary consequence that the number of employees required to self-isolate because of contact with other residents and staff will be correspondingly higher.<sup>9</sup>

---

<sup>9</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3940 at [44] – [48].

## **6. KEY CONSIDERATIONS FLOWING FROM THE COMMISSION'S EARLIER DECISIONS**

29. Various key considerations flowing from the Commission's earlier decisions, outlined above, tell against the grant of the Unions' claims. In particular, the AC Award was varied by the Commission to insert a new paid pandemic leave entitlement in circumstances that are clearly distinguishable from the circumstances of the relevant sectors covered by the Award. The findings made and conclusions reached by the Commission in its recent decisions about the AC Award cannot, in our submission, also be reached in relation to the Award.

### **No evidence of an 'elevated risk' being manifested in actual or suspected infections**

30. There is no evidence of an "elevated risk of infection of health and care workers ... currently being manifested in actual or suspected infections of any significant number of workers"<sup>10</sup> in the relevant sectors covered by the Award.

31. In its First Decision of 8 July 2020, the Commission found that the 'elevated risk' described above had not manifested in actual or suspected infections of any significant number of workers.<sup>11</sup> There is no evidence or other material before the Commission that could on this occasion ground a different finding.

32. The Unions have not advanced material in support of their claims that establishes that any significant number of employees working in the relevant sectors covered by the Award are facing an elevated risk of infection in the course of their employment or that any alleged risk is resulting in actual or suspected infections in any significant number of employees. The Unions have pointed only to one group home operated by Aruma, which has purportedly been the source of 10 instances of infection and made an oblique reference to other group homes that have purportedly been impacted. There is no evidence of transmission occurring within the group home settings between the clients and workers. To the extent that some employees have been infected as a result of community transmission,

---

<sup>10</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3561 at [122].

<sup>11</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3561 at [122].

such employees are in a position no different to employees in a significant number of other industries. Such transmission (or potential transmission) cannot justify the grant of the claims.

33. Accordingly, one of the key relevant considerations identified by the Commission in its First Decision tells against the grant of the Unions' claims.
34. Further, when considering whether the AC Award should be varied, there was information available to the Commission about the number of persons receiving care in residential aged care facilities who had been diagnosed with COVID-19 and the number of employees working in such facilities who had also been diagnosed with COVID-19. No comparable material has been put before the Commission in the context of the Unions' claim in relation to the Award. There is not so much as any anecdotal evidence that would suggest that the circumstances of the disability care sector are analogous to those of the residential aged care sector.
35. The Commission also drew an inference in its decision about the AC Award that there was a "clearly manifested elevated risk of exposure to COVID-19 infection and of being required to self-isolate in the residential aged care sector in Victoria" having regard to information about steps implemented by the Federal and Victorian governments to provide financial assistance to providers of residential aged care in relation to employees required to self-isolate and to minimise potential chains of transmission.<sup>12</sup> There is no material before the Commission about any such specific measures implemented by Governments in relation to the relevant sectors covered by the Award, which might enable a similar inference to be drawn. In so submitting, however, we do not concede that a similar or analogous inference would necessarily be available to the Commission even if such information was available.

---

<sup>12</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3940 at [47].

## The Proposed Clauses would impose a significant additional employment cost on employers relying on NDIS funding

36. In its First Decision, the Commission found that the grant of the claim may cause “significant financial difficulty” for employers relying on NDIS funding:

**[126]** Fifth, as Ms Allanson’s evidence quoted above indicates, the establishment of a paid pandemic leave provision would potentially cause significant financial difficulty for some employers, particularly those in the subsidised aged care sector and the NDIS-funded disability sector, because such employers will have little or no capacity to recover the cost.<sup>13</sup>

37. The Commission went on to state that it had attributed “significant weight” to the non-recoverable costs that would be incurred by employers if the unions’ applications were granted in the context of the aged and disability sectors:

**[129]** ... In relation to paragraph (f), we have placed significant weight upon the potential non-recoverable costs to employers in the aged care and disability sectors of a new paid pandemic leave provision.<sup>14</sup>

38. There is no warrant for reaching a different conclusion regarding the mandatory consideration prescribed by s.134(1)(f) of the *Fair Work Act 2009 (Act)*. Unlike the residential aged care sector<sup>15</sup>, there has been no relevant change made to the NDIS funding arrangements. Employers continue to not have *any* capacity to recover the costs associated with the proposed leave entitlements and no government assistance or financial support for employers has been made available in this regard. This is a factor that clearly distinguishes the circumstances of the relevant sectors covered by the Award from the residential aged care sector covered by the AC Award, about which the Commission found that additional Commonwealth funding substantially if not wholly removed the cost of the claim.<sup>16</sup>

---

<sup>13</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3561 at [126].

<sup>14</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3561 at [129].

<sup>15</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3940 at [49] – [53].

<sup>16</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3940 at [57].

39. A significant proportion of employers providing disability services are not-for-profit organisations facing ongoing challenges as a result of inadequate NDIS funding, which have been compounded in the context of the pandemic due to various additional costs and pressures facing such organisations. The grant of the claims would be particularly unfair in such circumstances.

**There is no demonstrated threat to the resilience of the disability care system**

40. In its First Decision, the Commission concluded that it would only grant a “leave entitlement to casual employees if there was a demonstrated threat to the resilience of the health care system and the systems for the care of the aged and the disabled”<sup>17</sup>. In relation to the AC Award, it later formed the view based on the information before it that such a threat existed<sup>18</sup>.
41. There is however no material before the Commission that might suggest that such a threat exists in relation to the system of care for the disabled. The Unions have not called any evidence that might establish that the ‘resilience’ of the workforce has been compromised or undermined as a result of the impact of COVID-19 on the relevant sectors. There is no evidence of a shortage of labour as a result of COVID-19. Accordingly, there is no basis for granting a leave entitlement to casual employees covered by the Award.

**There is no evidence that employees will fail to be tested for COVID-19 or self-isolate in the absence of the Proposed Clauses**

42. In its First Decision, the Commission determined that “there is a very real risk that employees who have no paid leave entitlements to access ... in the event they are required to self-isolate, may not report any COVID-19 like symptoms or contact with someone suspected of having COVID-19 out of concern that they will suffer significant financial detriment”<sup>19</sup>.

---

<sup>17</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3561 at [131].

<sup>18</sup> *Health sector awards – Pandemic Leave* [2020] FWCFB 3834 at [4].

<sup>19</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3561 at [123].

43. Since that time, the Commonwealth Government has implemented a 'Pandemic Leave Disaster Payment' of \$1500 for persons residing in Victoria. It is available to those who have been directed by the Department of Health and Human Services to self-isolate or quarantine for one of the following reasons:
- (a) The person has COVID-19;
  - (b) The person has been in close contact with a person who has COVID-19;
  - (c) The person cares for a child 16 years or under who has COVID-19; or
  - (d) The person cares for a child 16 years or under who has been in close contact with a person who has COVID-19.<sup>20</sup>
44. The following eligibility criteria also currently applies:
- (a) The person must be at least 17 years old;
  - (b) The person must live in Victoria;
  - (c) The person must be unable to go to work;
  - (d) The person must have no sick leave entitlements, including pandemic sick leave; and
  - (e) The person's period of quarantine must be between 6pm on 2 August 2020 and 6pm on 2 September 2020.<sup>21</sup>
45. When the Commission made its decision about the AC Award, it was not clear whether a similar scheme then implemented by the Victorian Government would enable an employee to make multiple claims for the payment if the employee was required to self-isolate on more than one occasion. The Commission

---

<sup>20</sup> Services Australia, [Pandemic Leave Disaster Payment, Who Can Get It](#) (accessed on 8 August 2020).

<sup>21</sup> Services Australia, [Pandemic Leave Disaster Payment, Who Can Get It](#) (accessed on 8 August 2020).

presumed, based on the information available at the time, that it would be payable “in respect of only a single instance of self-isolation”<sup>22</sup>.

46. The aforementioned Commonwealth Government scheme replaces the previous Victorian Government scheme. The Commonwealth Government has made clear that a claim for payment can be made by an employee in relation to *each* 14 day period of self-isolation / quarantine<sup>23</sup>.
47. An employee will not be eligible to receive the payment if they are receiving income, earnings or salary from paid work, income support payments or Jobkeeper payments.<sup>24</sup>
48. In addition, employees are eligible for a payment of \$300 from the Victorian Government (referred to as the ‘Coronavirus (COVID-19) Test Isolation Payment’) if the employee:
  - (a) Is 17 years and over;
  - (b) Has been tested for COVID-19 or is the guardian or carer of someone who has been tested for COVID-19;
  - (c) Lives in Victoria;
  - (d) Is likely to have worked during the self-isolation period;
  - (e) Is unable to work due to a requirement to self-isolate after a COVID-19 test or a requirement to stay in isolation to care for someone who is required to self-isolate;
  - (f) Is not receiving any income or salary during self-isolation;
  - (g) Has exhausted personal / carer’s leave entitlements, including any special pandemic leave, or have no entitlement to such leave;

---

<sup>22</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3940 at [50].

<sup>23</sup> Services Australia, [Pandemic Leave Disaster Payment](#) (accessed on 8 August 2020).

<sup>24</sup> Services Australia, [Pandemic Leave Disaster Payment, Who Can’t Get It](#) (accessed on 8 August 2020).

- (h) Is receiving Australian Government income support such as Jobseeker payments or Jobkeeper payments.<sup>25</sup>
49. Both of the aforementioned forms of financial support were introduced by Federal and State Governments in direct response to concerns that employees may not self-isolate or get tested for COVID-19 for reasons associated with a loss of income during that period. Indeed, it is a condition of receiving the ‘Coronavirus (COVID-19) Test Isolation Payment’ that the employee will remain in self-isolation while awaiting their test results. The Victorian Government has advised that employees will be required to repay the amount if they are found to have failed to comply with that requirement.<sup>26</sup>
50. There is no evidence that employees covered by the Award (or indeed employees more generally) are failing to be tested or self-isolate due to a lack of leave entitlements. Further, there is no evidence of employees failing to do so after the aforementioned measures were introduced. The Unions have not called any evidence that might establish that the financial support offered by the Commonwealth and Victorian Governments has been unsuccessful in ensuring that employees come forward for testing and self-isolate in the relevant circumstances.
51. The Commonwealth Government has expressed a preparedness to extend the Pandemic Leave Disaster Payment to other states and territories if this is requested by their governments.<sup>27</sup> To date no such arrangement has been announced. It may be inferred that other states and territories have not deemed this necessary given the relatively low infection rates experienced amongst their workforces and the absence of any evidence revealing that employees are failing to be tested or self-isolate in the absence of additional financial support.

---

<sup>25</sup> Department of Health and Human Services, [\\$300 Coronavirus \(COVID-19\) Test Isolation Payment](#) (accessed 8 August 2020).

<sup>26</sup> Department of Health and Human Services, [\\$300 Coronavirus \(COVID-19\) Test Isolation Payment](#) (accessed 8 August 2020).

<sup>27</sup> Sydney Morning Herald, [More than 350 people have applied for the disaster payment this morning](#), 5 August 2020 (accessed 8 August 2020) and Prime Minister of Australia, [Transcript of Press Conference on 7 August 2020](#) (accessed on 9 August 2020).

52. In our respectful submission, though the Commission may previously have been concerned about employees failing to self-isolate for reasons associated with an absence of a paid leave entitlement, there has since been a material change in circumstances directed at that very concern and there is no evidence that that change has not had the desired effect or that it will not have the desired effect.
53. The Commission should, in our submission, find that these measures, coupled with ongoing education and increased awareness amongst the public about the importance of testing and self-isolation, sufficiently address any concern about employees knowingly not self-isolating due to an absence of paid leave entitlements.

**Any perceived deficiencies in the financial support made available by the Commonwealth and Victorian Governments must be weighed against the impact of the Proposed Clauses on employers**

54. We acknowledge that the financial support available to employees from the Commonwealth and Victorian Governments do not “encompass the whole of the circumstances in which an employee may be required to self-isolate”<sup>28</sup>, however this must be weighed against the various countervailing considerations that tell against the grant of the claim, including the significant additional employment costs that it would impose on employers, as outlined earlier.
55. In its decision about the AC Award, the Commission expressed the view that the Victorian Government schemes that then applied would not “maintain the normal pay of the worker but provide for a fixed payment which, in the case of a full 14-day isolation period is likely to cause the worker to suffer a significant reduction in income”<sup>29</sup>. The financial support now available to employees from the Commonwealth Government is also in the form of a fixed payment of \$1500, which may in some cases be less than what the employee would have earned during the relevant period.

---

<sup>28</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3940 at [51].

<sup>29</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3940 at [51].

56. In our respectful submission, however, there may be a large number of scenarios in which the Governments' financial support in fact *exceeds* the amount that would be paid to employees covered by the Award pursuant to the Proposed Clauses. For instance, \$1500 equates to approximately 60 hours of work over the course of a fortnight at the base rate prescribed by the Award for an employee classified as a level 2 'social and community services employee' at pay point 3.<sup>30</sup>
57. Many part-time and casual employees performing less than full-time hours may in fact be *better off* or, at the very least, not materially disadvantaged, under the Governments' schemes than they would be if the Proposed Clauses applied.
58. Furthermore, to the extent that some employees receive a lesser amount, this too must be weighed against countervailing considerations including the employment costs associated with the grant of the claim. As has been observed by the Commission many times, the modern awards objective prescribed by s.134(1) of the Act requires an evaluative judgement, often involving competing considerations.
59. We also note that both forms of support introduced by the Federal and Victorian Governments are not available to an employee entitled to paid pandemic leave. The introduction of the entitlement sought by the Unions would shift the financial burden of making payments to employees in the event of a need to self-isolate from the relevant Governments to employers who are themselves reliant on Government funding. The unfairness of this is, in our submission, self-evident.
60. Further, one of the benefits of the relevant Governments deciding to make the aforementioned payments is that employers, who are also facing various challenges and adverse consequences as a result of the pandemic, are not faced with the cost of paying their employees in the relevant circumstances. That benefit would be entirely lost if the Proposed Clauses were granted.

---

<sup>30</sup> As we understand it this is a classification level commonly ascribed to employees performing disability support work. The NDIS' [cost model](#) assumes this classification level for various base level supports.

61. In its First Decision, the Commission had observed that much of the evidence before it established that employers were often paying employees for periods of self-isolation. It may be assumed in this regard that an employer eligible for Jobkeeper payments will continue to pay eligible employees required to self-isolate the relevant fortnightly subsidy, even if they are not entitled to paid leave.
62. In addition, consistent with the evidence, employers who are in a position to pay their employees in the relevant circumstances, may continue to do so, notwithstanding the many challenges facing them. For instance, Life Without Barriers, one of the largest disability service providers in Australia, is providing full-time, part-time and casual “frontline staff who work directly with clients” without access to or with insufficient personal / carer’s leave with an additional paid leave entitlement if they are unable to attend work because they have contracted COVID-19 or are required to self-isolate.<sup>31</sup> It is appropriate that such arrangements are determined at the enterprise level, taking into account the employer’s capacity to be able to make such payments.
63. We also submit that generally, where an employee is required to self-isolate at the direction of their employer, the employee will be entitled to be paid.
64. The cumulative effect of the above can be summarised as follows:
- (a) Some employees will not be materially disadvantaged if required to self-isolate because their employer will afford them paid leave even if they are not *entitled* to such leave;
  - (b) Some employees will not be materially disadvantaged if required to self-isolate by their employer because they will be entitled to be paid for that period;
  - (c) Some employees will not be materially disadvantaged if required to self-isolate because they will be in receipt of financial support from the Commonwealth and / or Victorian Government;

---

<sup>31</sup> Life Without Barriers, [Life Without Barriers commits to Additional Support Leave for frontline staff during Covid-19 pandemic](#) (accessed 8 August 2020).

- (d) Some employees will not be materially disadvantaged if required to self-isolate because they will receive Jobkeeper payments;
- (e) The Proposed Clauses would unfairly and unjustifiably shift the financial burden of supporting employees during a period of self-isolation from the relevant Governments to employers who do not have any capacity to recover any of the resulting additional employment costs because they rely on NDIS funding; and
- (f) To the extent that some employees are worse off in absence of the Proposed Clauses, this must be weighed against the adverse consequences that the grant of the claims would have on employers, which tells strongly against making the variations sought by the Unions.

**The Proposed Clauses would apply even if an employee contracted COVID-19 through community transmission or was required to self-isolate / quarantine due to circumstances that have transpired outside the scope of their employment**

65. In its First Decision, the Commission determined that a paid leave entitlement for employees who contract COVID-19 as a result of community transmission was not justifiable: (emphasis added)

**[127]** ... We likewise do not consider that paid pandemic leave is justified for health and care workers who test positive for COVID-19 as a result of community transmission (that is, it is not contracted at or in connection with work) since, in that case, the position is no different from that of a worker in any other sector of employment.

**[128]** However, the position is distinguishable with respect to the situation where a health or care worker has to spend time off work because they are self-isolating as a result of potential contact with a suspected COVID-19 carrier in the course of employment or the display of potential COVID-19 symptoms. In neither case would workers' compensation entitlements apply if the worker ultimately tested negative for the virus. As was pointed out in the April decision, employees in that position might not be able to access personal carer's leave (even if they have an entitlement to it) without the agreement of their employer because they are not unfit to work because of personal illness. This is the "regulatory gap" referred to in the April decision. On the basis of the our earlier findings, we consider that this regulatory gap has greater significance for employees covered by the Health awards ... because of the greater risk and likelihood that that they will be required to self-isolate and because of the critical importance of ensuring that employees self-isolate where necessary rather than not disclosing their position and continuing to work out of financial need. In that respect, we note that some categories of workers who are paid in accordance with the *Aged Care Award 2010* and

the *Social, Community, Home Care and Disability Services Industry Award 2010* meet the definition of being low paid.<sup>32</sup>

66. Despite this, the Proposed Clauses would apply if an employee contracted COVID-19 as a product of community transmission. Similarly, an employee would be entitled to paid leave if the employee was required to self-isolate for reasons associated with community transmission or potential community transmission. For example, an employee would be entitled to paid leave under the Proposed Clauses if:
- (a) The employee is required by government or medical authorities to self-isolate or quarantine because they travelled interstate for personal reasons;
  - (b) The employee is required by government or medical authorities to self-isolate or quarantine because the employee attended a restaurant, pub, café, bar, retail outlet or gym (for reasons not associated with their employment) that was attended by another person who was at the time infectious or potentially infectious;
  - (c) The employee is required by government or medical authorities to self-isolate or quarantine because the employee has had close contact with a family member or friend who has or is suspected of having COVID-19;
  - (d) The employee is required on the advice of a medical practitioner to self-isolate or quarantine in any of the aforementioned scenarios; and
  - (e) The employee is in self-insolation or quarantine waiting for the results of a COVID-19 test which was undertaken because the employee was potentially exposed to the virus in circumstances not related to their employment (such as the examples above).
67. There is simply no justification for requiring an employer to pay an employee for a period of leave in circumstances like those described above, which have no relationship with an employee's employment. It is plainly unfair to visit the significant additional employment costs that would result from the Proposed

---

<sup>32</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3561 at [127] – [128].

Clauses upon employers, particularly in circumstances where they are unable to recover any of the costs associated with the leave entitlements sought.

68. Examples of circumstances such as those described above are unfortunately not uncommon. Taking New South Wales as an example, where the daily number of new infections remains relatively low, there are nonetheless numerous venues that are frequently being identified by health authorities that were attended by potentially infectious persons and others who attended at the same time are being directed to self-isolate for 14 days. In such circumstances, as the Commission said in its First Decision, the position of employees covered by the Award is no different to those in other sectors or industries.
69. If, despite our submissions, the Commission decides to grant the Unions' claims, any variation made to the Award should not entitle employees to leave if they contract COVID-19 or are required to self-isolate / quarantine as a result of circumstances that have transpired outside the course of their employment.

## 7. A RESPONSE TO THE UNIONS' KEY CONTENTIONS

70. Most of the key contentions advanced by the Unions in support of the claims have been addressed in the preceding section of this submission. We deal with the balance below.
71. *First*, the ASU contends that an entitlement to paid leave would “help prevent an outbreak in the SACS sector like that in Aged Care”. There is no evidence to support this proposition.
72. As we outlined in section 6 of this submission, there is no evidence of widespread transmission occurring in the disability services sector, nor is there any evidence that it is occurring because employees are failing to be tested or self-isolate.
73. To the extent that any transmission in the workplace is occurring between an employee and client while the employee is asymptomatic (but nonetheless infectious), a paid leave entitlement will clearly not limit the extent to which this may occur.
74. Accordingly, the material before the Commission does not establish that there will be any broader public health benefits accruing from the grant of the claims.
75. *Second*, the HSU refers to feedback provided to it by its members and a survey conducted by the University of Melbourne. It is trite to observe that neither source carries sufficient probative value (if any) to move the Commission to grant the variations sought. None of it is in evidence. None of it can be tested by respondent parties or the Commission. It is all in the nature of second-hand hearsay (or potentially even more removed).
76. Importantly, it also appears irrelevant to the claims here before the Commission, as it relates primarily to the use of personal protective equipment and infection control measures. To the extent that the Unions allege that employees do not have sufficient access to PPE or they are concerned about the adequacy of various infection control measures, that is a matter that may be raised by the Unions (or employees) pursuant to relevant workplace health and safety regulation. It does not present a basis for granting an entitlement to paid leave.

## 8. THE TERMS OF THE PROPOSED CLAUSES

### The Proposed Clauses Vis-à-vis the Clause Inserted in the AC Award

77. The Proposed Clauses are broadly similar to the paid pandemic leave provision recently inserted by the Commission in the AC Award subject to the following.
78. *First*, clause Y.2.1(c) of the HSU Proposed Clause and clause Y.3.1(c) of the ASU Proposed Clause would entitle employees to paid leave in a broader range of circumstances than the AC Award. Specifically, they would entitle an employee to paid leave if the employee is required on the advice of a medical practitioner to self-isolate or quarantine because they are *suspected of* having come into contact with a person suspected of having contracted COVID-19.
79. The AC Award, however, creates such an entitlement only if the employee is required on the advice of a medical practitioner to self-isolate or quarantine because they *have* come into contact with a person suspected of having contracted COVID-19.
80. The relevant provisions are set out in the table below:

HSU Proposed Clause	ASU Proposed Clause	AC Award
<p><b>Y.2.1</b> Subject to clauses Y.2.2 to Y.2.9, an employee engaged in the social and community services sector or home care sector is entitled to take up to 2 weeks' paid pandemic leave on each occasion the employee is prevented from working (including working from home):</p> <p>...</p> <p><b>(c)</b> because the employee is required on the advice of a medical practitioner to self-isolate or quarantine because they are displaying symptoms of COVID-19 <u>or are suspected to have come into contact with a person</u></p>	<p><b>Y.3.1</b> Subject to clauses Y.4 to Y.4.9, an employee engaged in the social and community services sector or home care sector is entitled to take up to 2 weeks' paid pandemic leave on each occasion the employee is prevented from working (including working from home):</p> <p>...</p> <p><b>(c)</b> because the employee is required on the advice of a medical practitioner to self-isolate or quarantine because they are displaying symptoms of COVID-19 <u>or are suspected to have come into contact with a person</u></p>	<p><b>Y.2.1</b> Subject to clauses Y.2.2 to Y.2.9, an employee is entitled to take up to 2 weeks' paid pandemic leave on each occasion the employee is prevented from working (including working from home):</p> <p>...</p> <p><b>(c)</b> because the employee is required on the advice of a medical practitioner to self-isolate or quarantine because they are displaying symptoms of COVID-19 <u>or have come into contact with a person</u> suspected of having contracted COVID-19;</p>

suspected of having contracted COVID-19; ...	suspected of having contracted COVID-19; ...	...
---	---	-----

81. The Commission made clear in the First Decision that any entitlement for paid leave would apply to employees who *have* come into contact with a person suspected of having contracted COVID-19; not to employees who are *suspected* of having come into contact with a person suspected of having contracted COVID-19.<sup>33</sup> The variation made to the AC Award is consistent with this. The Unions have not proffered any justification for granting a more expansive entitlement in the Award. If, despite our opposition, a variation of the nature sought is made to the Award, the proposed clauses above should be confined to mirror the scope of clause Y.2.1(c) of the AC Award.

82. *Second*, clause Y.3.8 of the ASU Proposed Clause is in broader terms than clause Y.2.8 of the AC Award:

ASU Proposed Clause	AC Award
<p><b>Y.3.8</b> An employee will not be entitled to paid pandemic leave unless they agree to undertake a COVID-19 test at the earliest opportunity.</p>	<p><b>Y.2.8</b> An employee will not be entitled to paid pandemic leave unless the employee:</p> <p><b>(a)</b> has undertaken a COVID-19 test in connection with the applicable circumstance in clause Y.2.1; or</p> <p><b>(b)</b> undertakes a COVID-19 test at the earliest opportunity.</p>

83. We note that the above clause was the subject of specific consideration by the Commission in relation to the AC Award. In its decision of 27 July, the Commission agreed with a submission made by employer representatives as follows:

- (3) *Any clause which is introduced should seek to incentivise immediate testing. We agree. It will be a condition of receipt of the leave entitlement that the relevant employee has agreed to undertake a COVID-19 test at the earliest opportunity.*<sup>34</sup>

<sup>33</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3561 at [131].

<sup>34</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3940 at [64].

84. The Commission's decision was accompanied by a draft determination that contained a clause in the same terms as clause Y.3.8 of the ASU Proposed Clause. Submissions expressing concern about the form of the proposed clause were made by employer organisations and it would appear that in light of those submissions, the Commission modified this element of the entitlement, such that the exclusion of employees from the entitlement was not contingent upon employees *agreeing* to undertake a COVID-19 test but rather, on employees in fact having undertaken such a test or undertaking such a test at the earliest opportunity. There is no basis for departing from this.

### **Other Concerns Arising from the Terms of the Proposed Clauses**

85. Various other concerns arise from the Proposed Clauses, some of which were previously raised by Ai Group in its submission of 18 June 2020 (**June 2020 Submission**) but were not determined by the Commission in its First Decision.

86. Specifically:

#### **(a) No consequence of failing to provide a medical certificate**

While the Proposed Clauses require an employee to provide a medical certificate, if required by their employer in certain circumstances, they do not provide for any consequence if an employee fails to do so. For instance, if an employee fails to provide a medical certificate, it is not clear that the employee would not be entitled to the leave afforded by the Proposed Clauses. An employee would appear to be entitled to paid leave irrespective of their failure to substantiate the reason for the leave and the employer's only available redress would be through the Award's dispute settlement procedure or to commence enforcement proceedings – neither of these are practical options in the context of the Proposed Clauses. We refer to paragraphs 52 – 53 of our June 2020 Submission in this regard.

**(b) No requirement concerning the provision of evidence in a range of circumstances**

The Proposed Clause does not require an employee to provide a medical certificate except where an employee is self-isolating on the advice of a medical practitioner. It does not contain any requirement to provide evidence if an employee is required to self-isolate or quarantine on the direction of a government or medical authority, including where the employee is awaiting test results. This is a glaring and unjustifiable deficiency in the Proposed Clauses.

**(c) Casual employees entitled to leave even if they would not have been required to work**

Notwithstanding that the Proposed Clauses would apply only to casual employees “engaged on a regular and systematic basis”, they would apply to employees who do not have a guarantee, commitment or expectation of ongoing work. This raises the obviously unfair prospect that an employee may be able to access paid ‘leave’ in circumstances where they would not otherwise have been engaged by the employer to work during the period of ‘leave’. In such circumstances, the Proposed Clauses would essentially require a form of employer provided income support to casual employees rather than paid ‘leave’. It cannot be said that such a term is a *fair* or *necessary* part of the minimum safety net.

If, despite our opposition to the grant of the claims and / or our earlier submissions about the specific absence of any justification for granting a leave entitlement to casual employees, a variation to the Award is made in respect of casual employees, it should make clear that it would apply only in circumstances where the employee would otherwise have been required to work during the period of ‘leave’.

**(d) The rate payable to casual employees during a period of leave**

Unlike the entitlement afforded to full-time employees, the amount payable to a casual employee for a period of leave taken pursuant to the Proposed Clauses would not be limited to the base rate of pay. It would appear to include the casual loading and other loadings, penalties and allowances. There is no apparent justification for requiring the payment of such additional amounts to casual employees. This aspect of the Proposed Clauses would further compound its unfairness to employers.

**(e) The Proposed Clauses would require the payment of above-Award amounts**

The amounts payable pursuant to the Proposed Clauses in respect of full-time and casual employees are not limited to rates prescribed by the Award. They would include above-Award payments. It is not appropriate for an award to require the payment of over-award amounts, nor can such a term be said to form a *necessary* part of the minimum safety net.

**(f) The rate payable to part-time employees during a period of leave**

The amount payable to a part-time employee for a period of leave taken pursuant to the Proposed Clauses is not specified. It is not clear whether it is limited to the base rate of pay prescribed by the Award or whether it includes other amounts.

If a variation to the Award is made, the entitlement of part-time employees should be limited to the base rate of pay prescribed by the Award.

**(g) No minimum period of employment required**

The absence of any requirement that an employee has worked for an employer for a minimum period before they are entitled to the leave under the Proposed Clauses further renders it unfair to employers. We refer to paragraphs 60 – 61 of our June 2020 Submission in this regard.

## 9. THE MODERN AWARDS OBJECTIVE

87. Neither the variations proposed nor the Proposed Clauses are *necessary* to ensure that the Award achieves the modern awards objective.<sup>35</sup> We continue to rely on our June 2020 Submissions in this regard; and highlight in particular the following:

(a) **Section 134(1)(a):**

(i) The Commission has found that *some* employees covered by the Award are low paid.<sup>36</sup> This is but one of many factors that must be taken into account by the Commission. It is not determinative of the matter.

(ii) Further, the financial impact of an absence from work in Victoria due to a need to self-isolate will in many cases be alleviated if not wholly removed. We refer to paragraph 64 of this submission in this regard.

(b) **Section 134(1)(f):** The grant of the claim will have a significant adverse impact on employers in the disability sector, who rely on Government funding through the NDIS and are prohibited from charging their clients higher prices in an effort to recover additional costs. No further funding has been afforded to employers by the NDIS in respect of the Proposed Clauses or the cost of paying employees for such an absence.

(c) **Section 134(1):** The Commission is tasked with ensuring that the Award provides a *fair* safety net for both employers and employees. The grant of the claims would clearly be *unfair* to employers in the aforementioned circumstances.

(d) **Section 134(1)(g):** The Proposed Clauses are not simple or easy to understand in various respects. These are outlined in section 8 of this submission.

---

<sup>35</sup> Sections 157 and 138 of the Act.

<sup>36</sup> *Health Sector Awards – Pandemic Leave* [2020] FWCFB 3561 at [128].