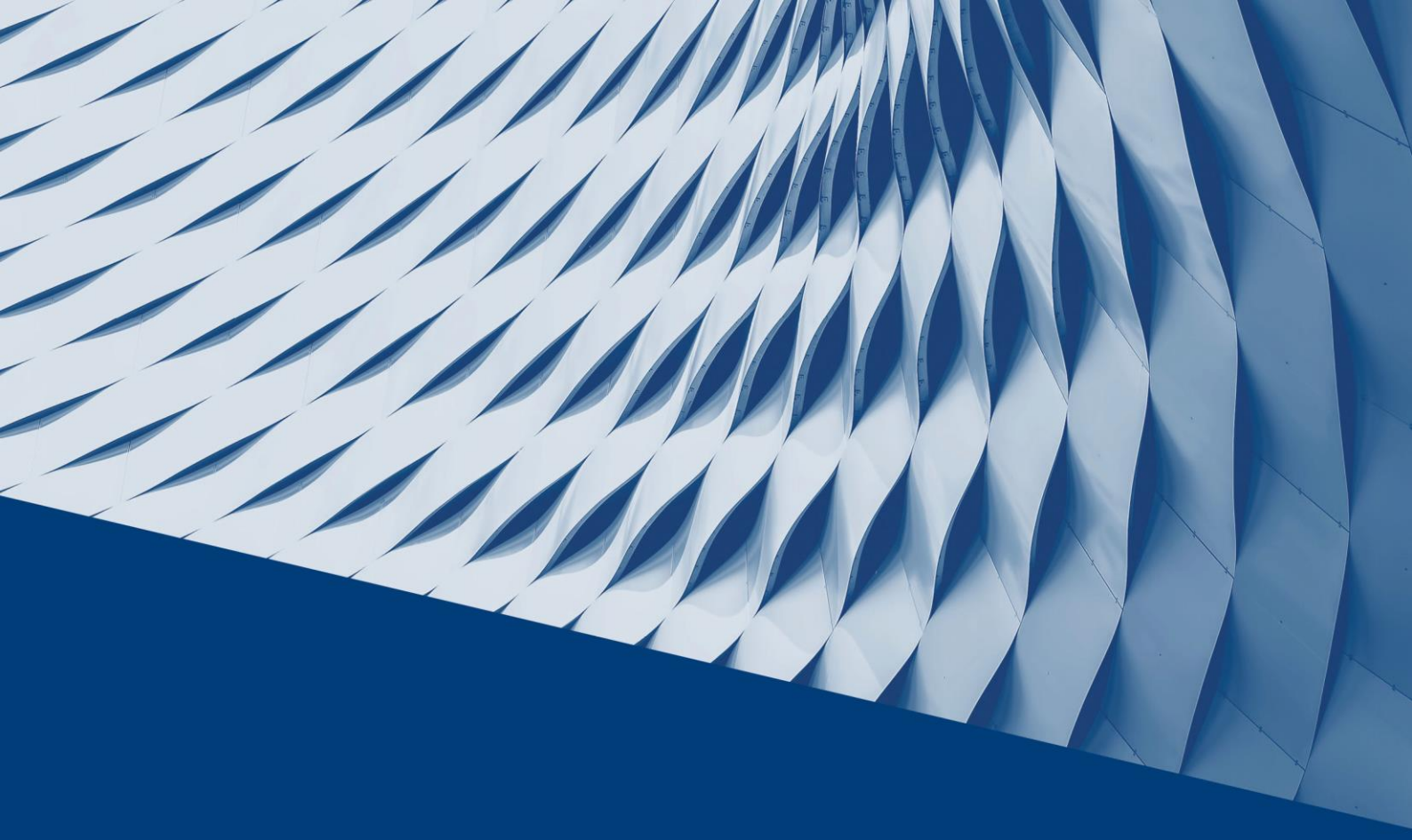

Modern Awards Review 2023-24

Submission by the Australian Council of Trade Unions in reply to *Work and Care* submissions

ACTU Submission, 26 March 2024
ACTU D. No 20/2024

ACTU
australian council of trade unions

Contents

Introduction

1. The ACTU is Australia's sole peak body of trade unions, consisting of affiliated unions and State and regional trades and labour councils. There are currently 36 ACTU affiliates who together have over 1.7 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

2. Since its formation in 1927, the ACTU has played the leading role in advocating for the improvement of working conditions in almost every Commonwealth legislative measure concerning employment conditions and trade union regulation. The ACTU has also appeared regularly before the Fair Work Commission and its statutory predecessors, in numerous high-profile test cases, as well as annual national minimum and award wage reviews.

3. The ACTU makes the following submissions in response to submissions made in the "Work and Care" stream, pursuant to the timetable set out in the Full Bench's statement of 4 October 2024.[1] Our submissions focus on broad proposals made by employer groups, and we refer to and support the submissions of our affiliates which respond to proposals made about specific awards in which they have an interest. Due to time constraints, we haven't had the opportunity to respond to all submissions in detail, so may need to make further submissions orally in the consultations.

Response to overarching themes

No reduction in worker entitlements

4. Many of the proposals put forward by employer groups in their submissions would strip away fundamental and hard-fought entitlements and protections, and would see workers go backwards. Many of the proposals are a cynical attempt to reduce conditions under the guise of addressing work and care, and are not consistent with the modern award objective, which includes new considerations relating to gender equality and job security, nor with the Minister's intent in requesting the Commission to undertake this review. They are not in the bests interests of working people, especially working women and workers with caring responsibilities. Rather

[1] [2023] FWCFB 179

than delivering fairness and roster justice they will instead make the balancing of work and care more difficult.

5. Proposals that would result in a reduction in worker entitlements should be rejected for the following reasons:

    a. This stream of the review has already revealed the deeply gendered impacts of the modern award system. Any reduction in entitlements would only exacerbate the systemic disadvantage experienced by award-reliant women and carers. For example, many award provisions regarding part time employment, rostering, span of hours, overtime, TOIL, minimum engagements, on call and recall to duty disproportionately impact on women workers in two main ways. Firstly, because they have significant negative impacts on the ability of workers to plan for and balance their unpaid caring responsibilities outside the workplace with their work commitments, plan financially and achieve economic security. Secondly, because there is a stark gendered difference in these entitlements between awards covering male dominated industries and those covering female dominated industries, with workers in female dominated industries being worse off in many ways – including have less secure employment, more unpredictable and precarious working arrangements, lower incomes, and less ability to manage their caring responsibilities. This is layered over the top of the reality that current award entitlements are inadequate to allow workers to manage their caring responsibilities.

    b. Award-reliant workers are definitionally more vulnerable than most other workers in Australia, being reliant on the modern award safety net. They are on average more likely to be female, younger, work fewer hours, earn lower wages, are far more often casually employed, and tend to work for smaller employers.[2] These intersectional indicators point to a heightened risk of exposure to low pay and insecure and part time work among the modern award reliant workforce compared to other employees.

[2] Yuen K & Tomlinson J (2023), A profile of employee characteristics across modern awards, Fair Work Commission Research Report 1/2023, March at p. 4

c. The Minister, when writing to the Commission regarding this review, clearly stated "Consistent with the Government's commitment to improving wages and conditions, it is the Government's view that outcomes should not result in any reduction in worker entitlements."[3] This was reflected in the President's Statement of 15 September 2024, which stated that "The Minister also notes the Government's view that the review should not result in any reduction in entitlements for award-covered employees."[4] These statements are clearly applicable to the whole Modern Awards Review, and are not limited to any particular stream.

6. It is a significant thing to reduce the rights and entitlements owing to an individual. This is particularly the case where each term of a modern award has been the subject of a detailed process of formation and extensive subsequent review. This review is not the forum to re-litigate proposed cuts to conditions from the past, or to explore new and innovative ways in which to strip entitlements.

7. There is also a myopic focus on so called flexibility (ie employer control of working time) in some of the employer submissions, with the repeated insistence that work arrangements must be flexible for employers as well as employees.[5] When employers use the term flexibility, they mean less security, predictability and control for working people. They seek 'flexibilities' that give employers ultimate scheduling control, while taking away important protections, rights and entitlements from employees, and which undermine job security and gender equality.[6] This impacts most profoundly on women workers and carers. Several points must be made about this:

[3] Letter from the Hon Tony Burke, Minister for Employment and Workplace Relations and Minister for the Arts to Hatcher J, President of the Fair Work Commission, 12 September 2023.
[4] President's Statement, Fair Work Commission, 15 September 2023 at [4].
[5] For example, see submission of ACCI at [7], [147], [154]; submission of Al Group at [89], [124], [126],[179].
[6] We refer to the distinction between 'good flex' and 'bad flex'. Good flex is described as where 'workers have a degree of control and choice over the types of flexibility they access coupled with the capacity to exercise voice, or "have a say", to signal needs and preferences. This form of flexibility allows workers to construct and progress within careers, underpinned by secure employment and a living wage.' Bad flex is described as 'precarious and poorly rewarded work where the flexibility overwhelmingly benefits employers and workers have low levels of control over these arrangements.' Such flexibility is seen as coming at the expense of job security and gender equality over the life course. See Literature Review at pages 10-11 and references, especially Rae Cooper, Frances Flanagan and Meraiah Foley, 'Flexible Work Policy: Building "Good Flex" across the Life Course' in Marian Baird, Elizabeth Hill and Sydney Colussi (eds), At a Turning Point: Work, Care and Family Policies in Australia (Sydney University Press, 2024) 103–124.

a. As important as flexible work is to allow workers to undertake their caring responsibilities, this stream of the review is far broader and looks at many issues other than flexible work.

b. This stream of the review is properly focused on assisting employees to manage work and care[7][8] – not on how to create new flexibilities for employers to require employees to work at all hours of the day or night without appropriate compensation.

c. Flexibility should not come at the cost of workers' rights, including secure working arrangements. This has been acknowledged both by the Senate Select Committee on Work and Care[9] and the Women's Economic Equality Taskforce,[10] as well as in many academic publications.[11] It is not only possible for work to be both flexible and secure[12], it is essential to ensure that women and workers with caring responsibilities are not disadvantaged, and that awards continue to meet the Modern Awards Objective.

d. Workers need greater control and predictability of working hours, and they need roster justice to enable them to work and meet their caring responsibilities.

8. Therefore, the proper focus of this stream of the review should be to ensure that modern awards provide an appropriate safety net that does not disadvantage women and carers. This includes proposals that genuinely assist workers to balance their work and caring responsibilities and do not reduce their entitlements.

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[7] This review is concerned with the impact of workplace relations settings on work and care" (Discussion paper at [2]; President's Statement, Fair Work Commission, 15 September 2023 at [3]; "award provisions that likely impact on an employee's ability to balance work and care" (Discussion paper at [38]); and "variations to modern awards that could enhance the ability for carers to balance work and caring responsibilities, provided the Commission is satisfied it is necessary to do so to achieve the modern awards objective" (Discussion paper at [36].

[9] Senate Select Committee on Work and Care, Final Report (March 2023) [6.59]–[6.60].

[10] Women's Economic Equality Taskforce (2023) 'A 10 year plan to unleash the full capacity and contribution of women to the Australian Economy 2023-2033.' Accessed online at Women's Economic Equality Final Report (pmc.gov.au)

[11] For example see Rae Cooper, Frances Flanagan and Meraiah Foley, 'Flexible Work Policy: Building "Good Flex" across the Life Course' in Marian Baird, Elizabeth Hill and Sydney Colussi (eds), At a Turning Point: Work, Care and Family Policies in Australia (Sydney University Press, 2024) 103–124. See also discussion in the Literature Review, at pages 10-11 and references.

[12] Senate Select Committee on Work and Care, Final Report (March 2023) [6.61].

Modern Awards Objective

9. The variations sought by employer groups are largely inconsistent with the Modern Awards Objective, particularly the following considerations that the FWC must take into account in ensuring that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions:

> (a) relative living standards and the needs of the low paid; and
>
> (aa) the need to improve access to secure work across the economy; and
>
> (ab) the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation; and
>
> (b) the need to promote social inclusion through increased workforce participation.

10. Whilst no particular primacy is attached to the various social and economic factors set out in section 134 (1)(a)-(h) of the FW Act[13], we note that the above considerations are particularly relevant given the context of this review, which is to consider the impact of workplace relations settings on work and care, and the question of whether awards continue to meet the Modern Awards Objective in the context of providing protection to women and carers and a fair and minimum safety net of terms and conditions. We also note the amendments to the object of the FW Act so that it now includes the need to 'promote job security and gender equality'.

11. Many of the employer group proposals fly in the face of the amended object of the FW Act and the Modern Awards Objective. For example, many of their proposals would make work less secure, make it harder for women and carers to participate in the workforce, worsen the gender pay gap, and strip away rights and entitlements that protect women, carers and the low paid. Notably, many employer group submissions focus on other considerations in the Modern Awards Objective, and do not grapple with the impact of their proposals on the new considerations, despite their particular relevance to this review.

[13] [2020] FWCFB 3500 at [210]; 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788 at [32]; [2017] FWCFB 3500 at [129]

Senate Select Committee on Work and Care

12. A number of employer submissions seek to downplay or even discredit the findings of the Senate Select Committee on Work and Care.

13. We reject assertions that the findings of the Senate Select Committee should be given limited weight. The work of the Committee and the two resulting reports were the result of a long and very comprehensive process, with significant input from relevant stakeholders through submissions and the inquiry process. The work of the Committee has been crucial in helping to conceptualise and fully grapple with how our workplace settings impact on workers with caring responsibilities. Further, the Minister has asked the Commission to take into account the Committee's recommendations, and it is a key part of the terms of reference for this stream of the review. The Commission's review in respect of work and care clearly takes place within the context of the findings and recommendations of the Committee.[14]

14. It is self-evident that the legislative framework will require the Commission to take a different approach to that taken by the Senate Committee. However, the findings and recommendations of that Committee are a key input in this stream of the review, and it would be inappropriate to dismiss them or give them limited weight as suggested by some employer groups.

Legislative reform and the Modern Award Review

15. A number of employer submissions assert that it would be inappropriate to deal with some of the issues raised in this stream of the review in the award system, and that these issues should only be addressed through legislative reform to the National Employment Standards (NES).

16. We disagree. These issues have been specifically raised in the discussion paper and it is entirely appropriate for them to be considered in the context of this review and the modern award system. It is entirely open to the Commission to find that, for example, personal and carer's leave entitlements are inadequate and no longer meet the modern awards objective, and to vary awards accordingly. The Commission has done this before, for example in the family and domestic violence leave review[15], which found that it was necessary to vary awards to insert an

[14] Smith, M and Charlesworth, S (2024) Literature Review for the Modern Awards Review 2023-24 Relating to the Workplace Relations Settings Within Modern Awards That Impact People When Balancing Work and Care, Western Sydney University (**Literature Review**), at page 1.
[15] *Family and Domestic Violence Leave Review 2021*; [2018] FWCFB 1691 and [2022] FWCFB 2001.

entitlement to family and domestic violence leave (at first an unpaid entitlement of 5 days[16], and then in a later decision, a paid entitlement of 10 days[17]). Of course, legislative reform to enshrine this entitlement in the NES followed shortly after.[18]

17. The Commission may also acknowledge the limitations of its jurisdiction and propose legislative reforms. This is entirely appropriate. The Commission is the regulatory body charged with setting minimum standards for employment in the national system. It is not a body limited to arbitrating disputes. In a policy process such as the current review, our respectful submission is that it would be strange if the Commission did not make recommendations for legislative reform. Further, we note that the Literature Review contemplates legislative reform (such as changes to the NES) within its findings and the indicative proposals for change in Appendix 1.

18. We therefore see no issue with the Commission finding that it is necessary to vary modern awards to provide for particular entitlements where they go beyond what is contained in the NES. Of course, legislative reform that extends these entitlements to all workers is highly desirable, and if the Commission is of the view that all workers would benefit from these entitlements by having them included in the NES, we would encourage the Commission to make such a recommendation in its Final Report. There is nothing preventing the Commission from both varying modern awards to achieve the modern awards objective, and making recommendations for legislative change.

Response to employer group proposals

19. In this section we provide a brief response to the broad proposals put forward by employer groups to vary awards. We do not seek to repeat arguments we have made in our initial submission that are directly relevant to these proposals, but refer and rely on our initial submission by way of reply, as well as our submissions below.

Part time

20. Al Group have argued that access to part time employment in awards should be 'liberalised' and 'made far less restrictive' by varying awards to provide: "greater flexibility as to the fixation

[16] [2018] FWCFB 1691.
[17] [2022] FWCFB 2001.
[18] *Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022*.

of employees' ordinary hours of work; greater scope to vary their hours of work; and the option to agree that the employee will work additional hours at ordinary rates."[19]

21. These proposals seek to further erode and diminish the rights and entitlements of part time workers, who are overwhelmingly women and carers. These proposals will lead to less stability and predictability in hours, and worsen the gender pay gap, for example by not providing appropriate compensation for hours worked outside of agreed hours. They are antithetical to the new considerations in the modern awards objective of secure work and gender equality and should be rejected.

22. Instead, provisions in awards regarding part time employment need to be strengthened in several key ways to ensure that awards continue to meet the modern awards objective, and to give carers greater control and predictability in their working hours to enable them to work and meet their caring responsibilities. We refer to paragraphs 29-32 and Recommendation 2 of our initial submission.

23. We note the observations made in the Literature Review that in some sectors, part time work has become marked by poorer working time security than in full time work. This is enabled by working time provisions that provide employers with the capacity to roster not only casual employees but also some part-time employees on an 'on-demand' basis – that is, work arrangements in which the worker agrees to be available for work and is called into work as and when they are needed by the employer. This includes part-time workers on minimum hours arrangements that can be flexed up and down from that minimum, under working time provisions in certain modern awards.[20]

24. The Literature Review goes on to observe that casual work and on demand forms of part time work have been found to create working time insecurity, which together with job insecurity impacts negatively on worker-carers.[21] For example, a study cited in the Literature Review found that parents who have more control over their work hours are likely to have fewer difficulties in managing child care compared to others.[22] The Literature Review, in its conclusion, observes:

[19] Submission of AI Group at [89].
[20] Literature Review, at pp 14-15.
[21] Literature Review at p21.
[22] Ibid; Jennifer Baxter, Kellie Hand and Reem Sweid, 'Flexible Child Care and Australian Parents' Work and Care Decision-making' (Research Report, Australian Institute of Family Studies, November 2016) at 25.

...there have been profound changes in the ways in which work is organised, which is reflected in the rise of non-standard work, including increasing employer use, particularly in some feminised service industries, of inadequate working time protections in modern awards. This has led to what might be termed 'just-in time' rostering of casual and many part-time worker-carers employed on low minimum hours contracts. While casual and part-time workers may require additional hours of work to support income security, many worker-carers have limited autonomy over when those hours may be scheduled. Further, hours worked in excess of their guaranteed minimum do not always attract the wage premia that accrue to full-time workers. Unsocial hours and fragmented hours worked across the day and the week has also been made possible by porous working time conditions in many modern awards. Such conditions make it difficult for those worker-carers who require predictability to manage both work and care. Working time insecurity is significant problem faced by worker-carers today, an issue that is increasingly raised in the literature and in submissions by carers', women's and other advocacy groups as well as unions.[23]

25. We note the large number of indicative proposals for change regarding part time employment in Appendix 1 of the Literature Review, and that many of them are aligned with the ACTU's recommendations in our initial submission.

Working from home

26. Several employer groups have made proposals regarding working from home. ACCI and BNSW/ABI propose that award provisions relating to span of hours and minimum engagement should not apply (or can otherwise be varied) by written agreement between employers and employees when an employee is working from home, and that these clauses "should not impede on working from home flexibilities".[24]

27. AI Group propose similarly that awards are varied to facilitate working from home (WFH) arrangements (which would also apply where an employee is working "from another location of

[23] Literature Review at pp58-59.
[24] Submission of ACCI at pp 22-25; Submission of BNSW/ABI at [23]-[63]

their choosing") so that an employer and employee may agree that when working from home/another location:

a. any award term that requires that ordinary hours must be worked continuously will not apply;

b. an employee can work ordinary hours outside the span of hours;

c. minimum engagement and payment provisions will not apply;

d. award provisions regulating when meal breaks and rest breaks are to be taken do not apply; and

e. allowances associated with matters arising from attendance at a designated workplace should not be payable.[25]

28. These proposals, with their apparent focus on the needs of employees with caring responsibilities, are disingenuous and cynical. They are an attack on the safety net and hand more unilateral decision-making power to employers. Rather than assisting workers to manage caring responsibilities, they will allow employers to allocate working time in ways that suits their business needs and which will disadvantage employees by providing less protection and security. They would result in a reduction in worker entitlements, including overtime, allowances and minimum engagement periods. This will only serve to further entrench disadvantage and insecurity, especially for women and working carers, including by reducing pay received by women and carers, and worsening the gender pay gap.

29. One of the key benefits of WFH arrangements for employees is a better work/life balance. This benefit quickly starts to be eroded where an employee might start work very early in the day and work in discontinuous periods until late at night. One of the risks associated with WFH arrangements is an intensification of work. It is telling that one employer group has stated in their submission that fatigue issues do not apply with the same force to an employee working from home.[26] All workers need to have the ability to rest, recover, and have the right to disconnect from work. The employer proposals risk creating working arrangements where

[25] Submission of AI Group at [130]-[156].
[26] Submission of AI Group at [153].

employees are expected to be available and working at all hours of the day and night without appropriate compensation, and where basic protections of reasonable working hours do not apply. A worker's life should not be reduced to work, care and sleep.

30. Many employers use the same management software to manage time at home as in the workplace, like call centre software. Our affiliates report that the work that takes place under these systems are continuous and utilisation rates are high. Our affiliates also report that there is often an intensification in workload, such as back-to-back zoom meetings instead of physical meetings scheduled with intervals between them. Finally, affiliates report that WFH arrangements are often associated with a higher degree of surveillance, time control and invasion of privacy.

31. Proposals to vary such basic entitlements are without strong evidence and would have a detriment impact on award reliant workers, and especially women and carers. One example of this is the proposal to not pay meal allowances when workers are performing work at home. Such allowances are designed to compensate employees for the additional cost of purchasing food associated with working overtime. This cost is still borne by employees working from home. The idea that an employee who works 4 hours of overtime after a full day's work won't need to purchase food relies on the gendered-assumption that they will have another person preparing meals for them. Therefore, overtime meal allowances should be paid when workers are performing overtime while WFH.

32. These proposals would allow employers to roster employees on at unsociable times to suit business needs (for example, to cover peak periods of work), without appropriate compensation for such work. In circumstances where this review has revealed the deeply gendered impacts of the modern award system, these proposals would strip away fundamental conditions and entitlements and only exacerbate the systemic disadvantage experienced by award-reliant women and carers.

33. We reiterate the proposals in our initial submission that awards be varied to give workers the right to request work from home arrangements (Recommendation 10), and that flexible working arrangements in awards are strengthened (Recommendations 6, 7 and 8). This will give workers access to the flexibility they need, whilst ensuring that basic entitlements are not stripped away based on incorrect assumptions about the kind of flexibility workers want. The Commission should consider variations which support employee-controlled flexibility, rather than flexibility dictated by the employer and which suits their operational needs.

Individual Flexibility Agreements (IFAs)

34. There are two proposals concerning IFAs in the reply submissions of employer groups. Al Group proposes that awards are varied to enable IFAs to be entered into by an employer and a prospective employee prior to the commencement of their employment.[27] ACCI's proposal (also put forward in the 'Making Awards Easier to Use' stream of this review) is that IFA clauses be varied so that an employee would be better of overall if the IFA does not disadvantage them overall, and is preferred by the employee because it better meets their genuine needs.[28]

35. These proposals are yet another way in which employer groups argue that carers should have to give up their minimum conditions in order to get the flexibility they need to manage work and care. As outlined above, this review should not result in recommendations that would see worker entitlements go backwards.

36. Al Group's proposal would be a license to exploit workers. Whilst more senior and well paid employees may have bargaining power in negotiations around offers of employment, award reliant employees are far less likely to have any bargaining power in these situations at all. They are more likely to be female, younger, work fewer hours, earn lower wages and be casually employed.[29] The idea that workers with these characteristics have equal (or indeed, any) bargaining power with employers who seek to impose IFAs as a condition of employment is deeply out of touch with the reality for most award reliant employees.

37. Further, this would become a way for employers to roll out identical and template IFAs when offering employment to prospective employees, in a way that would be far more difficult for workers to genuinely understand and refuse than once they had commenced employment. The case of *Fair Work Ombudsman v Commonwealth Bank of Australia* [2024] FCA 81 (discussed in more detail below) illustrates the dangers of this approach, where individual agreements under enterprise agreements were unlawfully offered to prospective employees. Rather than being individual agreements that were genuinely negotiated and tailored to the individual circumstances of employees, these were template agreements identical in nature and offered

[27] Submission of Al Group at [96].
[28] Submission of ACCI at [61].
[29] Yuen K & Tomlinson J (2023), A profile of employee characteristics across modern awards, Fair Work Commission Research Report 1/2023, March at p. 4

to a large number of prospective employees, resulting in those employees being paid less than what they were entitled to under the enterprise agreement.

38. ACCI's proposal would result in a reduction of worker entitlements, contrary to the intention expressed by the Minister that this review should not result in such outcomes. Their proposed "no disadvantage overall" test is uncertain and untested. It is clearly a lower threshold than the current BOOT. It is conceivable that an employee could be disadvantaged in a particular way, but still be found not to be disadvantaged 'overall.' The 'no disadvantage' test also requires the employer to prove a negative, which is undesirable and complex. By contrast, the BOOT is conclusive and simpler – if an employee is better off, the test is satisfied.

39. The test of being preferred by the employee in comparison with the award because it better meets their genuine needs introduces a number of uncertain, untested and ambiguous thresholds. Ascertaining whether it is indeed the preference and needs of the employee rather than that of the employer is a difficult exercise, especially in the context of award reliant employees who are less likely to have any kind of bargaining power in the employment relationship. This test would open up the likelihood of employees being pressured to agree to IFAs out of fear of reprisals or adverse action. Where such a power imbalance exists, this test would be very difficult to properly enforce. When combined with AI Group's proposal above, it would mean that IFAs would become a defacto condition of employment, as most award-reliant employees have no meaningful bargaining power at the point of engagement.

40. The case of *Fair Work Ombudsman v Commonwealth Bank of Australia* [2024] FCA 81 should sound a strong cautionary note against these proposals. In this case, the Fair Work Ombudsman (FWO) secured a record $10.34 million in penalties against the Commonwealth Bank of Australia (CBA) and its subsidiary CommSec for their conduct in underpaying 7,402 employees more than $16 million from 2015 to 2021. CBA and CommSec admitted multiple breaches of the FW Act, including some serious contraventions committed knowingly and systematically. This conduct resulted in employee's basic lawful minimum entitlements being undercut and employees being left worse off for several years.

41. The Federal Court found that CBA and CommSec committed serious contraventions, including the following:

    a. Failing to ensure that employees were better off overall in the payment of entitlements under:
        i. Individual agreements (IAs) as compared to the applicable enterprise agreements; and

ii. The applicable EAs as compared to the industrial award that otherwise applied.

b. Contravening the BOOT, in particular senior staff being aware of the underpayments, forming a systematic pattern of conduct over approximately ten years.

c. Failing to pay certain employees' full entitlements under the applicable EA.

d. Misrepresenting to employees that they would be better off overall under an IA than under the applicable enterprise agreement and that remuneration paid would satisfy their EA entitlements, when neither was true.

42. CBA and CommSec also offered purported IAs to multiple employees before they commenced their employment as part of their offer of employment, which were accepted by the prospective employees. These 'pre-employment IAs' resulted in underpayments to those employees totalling over $5 million.

43. We reiterate Recommendations 3, 4 and 5 of our initial submission regarding IFAs. Our view remains that individual flexibility arrangements have been inconsistent with the new modern award objective and should not be required or permitted in modern awards.

TOIL, overtime and make up time

44. ACCI and Al Group have made various proposals regarding TOIL, overtime and make up time.

45. ACCI argues (as they did in the 'Making Awards Easier to Use' stream of this review) that TOIL arrangements are likely to give workers with caring responsibilities "greater and more useful flexibility to undertake caring responsibilities as they arise" and that "time off may be of greater value than monetary compensation for overtime work."[30]

46. It is unclear what ACCI's actual proposal is and whether or not they are proposing that TOIL should be taken at ordinary time rates rather than overtime rates. If it is the former, they are proposing that carers don't need to be compensated properly for work they perform outside of

[30] Submission of ACCI at [174]-[175].

ordinary hours, and that if carers want to have flexibility to undertake their caring responsibilities, they need to give up basic entitlements.

47. Given what this review has revealed about the gendered impacts of TOIL and overtime provisions in modern awards, this is the opposite of what is needed. Workers who elect to take TOIL instead of overtime should receive the equivalent payment, rather than employers receiving a windfall. It may well be the case that some carers have a preference for additional time over additional payment, but that is no reason to reduce worker entitlements and exacerbate the ways in which modern awards already disproportionately disadvantage women and carers. If workers elect to take TOIL, they should receive an amount that reflects the nature of the work that was undertaken.

48. In addition, ACCI's proposal would significantly disadvantage workers in industries where TOIL is very difficult to schedule and to take, such as in the care economy. It also doesn't get paid out when employees resign. ACCI's proposal would result in a clear economic benefit to employers whilst also significantly disadvantaging employees.

49. Ai Group's proposal is that awards should be varied to include: provisions allowing for make up time in awards that don't currently have them; varying TOIL clauses to provide for a standing agreement to be reached between employers and employees for multiple instances of overtime; and varying the TOIL clause to permit employers and employees to extend the period over which accrued TOIL must be taken, by agreement.[31]

50. The ACTU and our affiliates have significant concerns with these proposals, both individually but especially in combination, and what they would mean in practice, and we oppose them. These proposals would require employers to have a bank of hours system, and our affiliates report that in practice, these systems are very difficult to manage and can give rise to multiple issues in their implementation and operation– for example, employees who fluctuate in hours that they owe or are owed, the need to continually monitor start and finish times and keep comprehensive records, inconsistency in application due to employer discretion, requests being regularly refused due to excessive workloads/short staffing/not having enough staff to cover leave, and confusion regarding entitlements to overtime. Further, these proposals will result in employees taking their accrued time off when it suits the business and the peaks and troughs

[31] Submission of AI Group at [192].

of work or customer demands. There is no guarantee that this will be when an employee needs to take time off to manage their caring responsibilities.

51. The experience of our affiliates is that these systems are largely beneficial for employers and disadvantageous for employees. Rather than employees being table to take banked TOIL at a time they need it (such as during schoold holidays or for an appointment), it can only be taken by agreement, and this rarely lines up with when an employee needs leave. Instead, our affiliates report that workers regularly worked overtime during peak periods, that this was banked rather than paid as overtime, and then the employer would only agree to them taking those banked hours in quieter periods, rather than when it suited the employee. Employees often end up with hours owed to them, and are then directed to take those hours at a time they do not want or need to take them.

52. One of the central problems with a bank of hours system is that once an employee elects TOIL instead of overtime, something that was solely their entitlement is taken out of their control. Rather, mutual agreement from the employer about when the TOIL can be taken is required. In the experience of our affiliates, this often leads to employers applying TOIL in ways to suit their own interests, such as we have detailed above. Another example is where employers direct employees to take accrued TOIL instead of other entitlements such as compassionate leave or annual leave where there is a discretion to grant leave, making those entitlements inaccessible to employees.

53. Further, these proposals are likely to introduce an undesirable administrative burden on employers. Our affiliates report that such systems are actually being removed from enterprise agreements due to the complexities, issues and difficulties that arise in administering them. We refer to the submissions of the SDA which refers to recent negotiations that resulted in the removal of a bank of hours, with a survey of SDA members finding that more than 75% wanted the bank of hours removed, because if worked in the favour of the company, which always directed employees when they were to take their banked hours.

Facilitative provisions and span of hours

54. AI Group has proposed a variation to facilitative provisions in modern awards that would allow the span of hours to be expanded, on both ends, by agreement between an employer and

employee, which they argue would "create opportunities for employees to work at times that best suit them, where such arrangements are currently not permissible."[32]

55. They have also proposed a variation to awards to include an ability to perform ordinary hours throughout weekends (and note that it may be necessary for appropriate penalty rates to apply in relation to the performance of such work).[33]

56. These proposals would result in a reduction of entitlements to employees and would give employers the ability to pay workers less across a broader span of hours. It also seeks to relitigate issues that have already been explored and settled in the 4 yearly review of modern award. These proposals completely miss the point about how span of hours provisions in modern awards already significantly disadvantage women and carers, with female dominated industries having much more expansive spans than male dominated industries. Awards with expansive spans (or indeed no spans) mean that an employee can be rostered for ordinary hours across that span, and that they cannot refuse particular times of work. They affect both an employee's rate of pay, and the degree of control they have over their hours. The much larger span of hours for female dominated awards raises real concerns regarding how workers manage work and care, and undermine the achievement of gender equality. Rather than making these issues worse, span of hours provisions need to be fixed in awards covering female dominated awards. We refer to paragraphs 86-92 and Recommendation 12 of our initial submission.

57. Given AI Group's proposal to extend the span of ordinary hours in the Clerks Award to 7am-7pm, 7 days a week in the "Making Awards Easier to Use" stream of this review[34], the motive and intention behind its proposals regarding facilitative provisions and span of hours in this stream of the review are transparent, and clearly aimed at extending the span of hours to avoid employers needing to compensate employees appropriately for work done at unsociable times outside of ordinary hours, and reducing the ability of employees to have any control over their hours of work.

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[32] Submission of AI Group at [111]-[112].
[33] Submission of AI Group at [175].
[34] We note that AIG's claim in the Clerks Award appears to be based on a deliberate misreading of the terms of the Award, finding ambiguity where there is none. As the ASU will address in supplementary submissions, the apparent ambiguity about when ordinary hours may be worked is resolved when clause 13.5 is taken into account. Day workers may work ordinary hours on Saturdays and Sundays when hours are set by the award that applies to the industry they are working in.

58. This proposal would only exacerbate the disproportionate impact that span of hours provisions already have on women and carers, and should be rejected.

59. Finally, we note the observations made in the Literature Review that for worker-carers, provisions that discourage employment in non-standard or 'unsocial' hours during the week and on weekends are particularly important. A number of studies suggest that reconciliation of work and care is especially difficult to achieve for parents working nonstandard hours, including that weekend work increased work-life conflict more for mothers than for fathers.[35] Studies have also have highlighted social and emotional benefits of parents spending time with their children on the weekend and the conflicts that arise for worker-carers through their work being scheduled at 'unsocial' times (including the lack of affordable child care on weekends).[36] These observations should strongly caution against AI Group's proposal regarding weekend work.

Minimum payment periods

60. AI Group's proposal on minimum payment periods contains two elements: firstly, that the relevant period should be able to be reduced by agreement between the employer and employee; and secondly, that minimum engagement periods for ordinary hours can be satisfied by either providing a minimum period of work or a minimum payment of the equivalent amount.[37]

61. Regarding the first part of the proposal, this would be a reduction in entitlements, and would only exacerbate the gendered impacts of minimum payment provisions that disproportionately impact on women and carers. The inclusion of a requirement for agreement between the employer and the employee does not provide sufficient protection against employees being required to incur the expense and inconvenience associated with a brief attendance at work where they do not wish to do so. Those costs can be particularly high for carers, given the need to organise alternative care arrangements as well as travel and related expenses. AI Group's proposal again ignores the reality of the power imbalance in the employment relationship, which is magnified for many award reliant employees, especially where they are part time or casual and may feel compelled to agree in order to remain employed or to continue receiving hours. The minimum payment period protects employees from these outcomes, and should not be

[35] Literature Review at p20.
[36] Ibid at p41.
[37] Submission of AI Group at [162].

eroded. Short minimum payment periods may also discourage carers from entering the workforce, a significant issue given workforce shortages in sectors such as aged care, disability support and ECEC.

62. Regarding the second part of the proposal, we do not disagree that there should be the ability to provide a minimum payment of the equivalent amount (which in our submission should be at least 4 hours) instead of a minimum period of work. It is in no-one's interests for an employee to be required to stay at work with no work to perform. However, we oppose the requirement that an employee needs to be "ready, willing and able to work." It is unclear what this means, and could lead to significant disputation. For example, if an employer tells an employee there is no more work to perform and suggests they can go home, and the employee takes them up on that suggestion, could that worker be found to not be ready willing and able to work?

63. We note the comments in the Literature Review that low minimum engagement periods contribute to inferior working time standards and an absence of hours and income continuity, and that there are gendered distinctions between awards.[38] Appendix One of the Literature Review highlights that minimum engagement periods are too low for casuals and part time workers in some modern awards in feminised sectors and notes proposals for change that minimum engagements are increased in line with those in male dominated awards such as the Manufacturing Award[39] (which has a 4 hour minimum). This is consistent with the ACTU's recommendation in its initial submission.

64. As recommended in the Literature Review (and in the ACTU's initial submission at Recommendation 11), minimum engagement periods in awards should be increased in line with those that are the norm in male dominated awards – that is, a period of 4 hours as a baseline entitlement for all employees (excluding awards where there is a more generous entitlement that exists, and except where indicated otherwise by our affiliates for specific awards).

[38] Literature Review at p 39.
[39] Literature Review at p 67.

Rostering

65. Al Group propose that awards containing pre-existing rostering provisions should be varied to permit an employer and employee to agree to a roster variation at any time, and to provide a unilateral right for an employer to vary the roster with a short period of notice in the event of unforeseen circumstances.[40]

66. Once again, this proposal seeks to take employees backwards in terms of their rights and entitlements when what is needed is to give workers greater security and rights surrounding their rosters and hours of work. We refer to paragraphs 93-99 and Recommendation 13 of our initial submission, and the well documented issues regarding unfair rostering practices which need to be rectified – such as variable hours, unexpected schedule changes, disruptive rostering, lack of genuine consultation with workers, no capacity to reject changes to working hours - all of which negatively affect employees' caring responsibilities and place stress on workers and their families.[41] Al Group's proposal is a continuation of these unfair practices and should be rejected.

67. Allowing employers to vary rosters unilaterally at short notice undermines the regularity and predictability of work, which working carers need in order to plan and make alternative care arrangements. The proposed test of "Unforeseen circumstances" is also very broad and could be satisfied by any number of things.

68. Hours of work and rates of pay are two of the most fundamental employment entitlements. Employer groups are interpreting 'flexibility' in a very one-sided way – they seem to want the ability to require workers to turn up at any time they want, without having to compensate them properly. The purpose of overtime is to compensate employees for being called in at short notice, or outside their ordinary hours, and the disruption that this causes to their lives. Overtime remains the appropriate way in which to strike a balance between the needs of the employer and the needs of the employee in these situations.

69. Appendix 1 of the Literature Review identifies poor working time security in relation to changes to rosters with little notice or consultation as a key area for change. It notes proposals for change to address this, including:

[40] Submission of Al Group at [181].
[41] Discussion paper at [150]-[151]; Senate Select Committee on Work and Care, Final Report (2023) at pp112–117.

a. Changes to NES and awards to improve rostering protections for permanent and casual workers, to ensure they have levels of certainty and predictability of working hours and income needed to organise their care responsibilities and other aspects of their lives.

b. Improved rostering rights in modern awards to provide for greater predictability in rosters, advanced notice of roster changes and genuine consultation regarding changes to rosters.

c. Improved regulation of working hours and rosters to support the creation of better quality jobs in the care economy.[42]

70. These recommendations are similar to some of those put forward by the ACTU and our affiliates in our initial submissions, and are in stark contrast to the proposals of AI Group. There is a clear need for roster justice that provides better rights for all workers to secure, certain, stable and meaningful rosters that provide job security and accommodate caring responsibilities.

Travel Time

71. We note AI Group's comments regarding work related travel time and the SCHADS Award, and that any proposal to introduce new entitlements in respect of payment for travel will be strongly opposed.[43]

72. Work travel should be during paid time, as it is a fundamental part of the employer's business and the employee's role. Employees employed under the SCHADS Award for example are not able to perform work in a person's private home without the employee travelling between locations.

73. We note the observations made in the Literature review about particular types of work tasks not being accounted for or recognised as work. Examples given are administration time and travel time between home care visits in some sectors, with no remuneration or recognition of administrative tasks or the time taken in travelling between clients as paid working time.

[42] Literature Review at page 68.
[43] Submission of AI Group at [204]-[209].

74. We refer to paragraphs 120-126 and Recommendation 20 of our initial submission and reiterate that many awards covering female dominated industries do not contain provisions specifying that work related travel is paid at ordinary hours.[44] This means caregivers (and including those who work in the care economy) may be giving up personal time without additional pay for work related travel (as well as for time spent being on call, training, and administrative responsibilities).[45] This entrenches disadvantage for women and working carers in our modern award system (including worsening the gender pay gap), and needs to be rectified.

Annual leave

75. AI Group has proposed that modern awards be varied to permit an employer and employee to agree to the employee taking up to twice as much annual leave at a proportionately reduced rate of pay.[46]

76. We do not disagree with this proposal, and believe it has merit. We note that a similar proposal to vary the Nurses Award was put forward by the ANMF in their initial submission, which we support. However, certain safeguards would need to be in place to ensure that such a provision was not used to the disadvantage of employees. These would include that any such arrangement is initiated by the employee and is granted only at their request (not by employer directive); that it is not unreasonably refused by the employer; that the employer must keep appropriate records of the arrangement; that there be prorating of annual leave loading to cover the period of proportionate leave; and that payment for the period of proportionate annual leave should be the relevant proportion of what the employee would have been paid had the arrangement not applied ("applicable base rate of pay" is not appropriate for an employee paid a common hourly rate).

77. Further, the following matters should be subject to consultation as part of this stream of the review:

[44] Discussion paper at [209].
[45] Discussion paper at [207],[209]; Senate Select Committee on Work and Care, Final Report (March 2023) at 92–94.
[46] Submission of AI Group at [214].

a. The limits on the proportionate leave that would be available eg twice the leave at half the pay; three times the leave at one-third the pay, four times the leave at 25% of the pay.

b. Any consequential variation to accrued leave during a period of proportionate leave.

c. Any consequential variation to superannuation contributions during a period of proportionate leave.

78. We propose a clause similar to the model clause used in variations to modern awards in relation to pandemic leave[47] as follows:

X. Proportionate Annual Leave

a. An employee and their employer may agree to the employee taking annual leave on a proportionate basis, e.g. twice the amount of leave at half the rate the employee would have been paid had the arrangement not applied.

b. Any agreement must be at the initiative of the employee and at their request. Any such request must not be unreasonably refused by the employer.

c. Any agreement to take proportionate annual leave must be recorded in writing and retained as an employee record.

d. The agreement in (b) must also specify the following consequential variations:
   i) The limits on the proportionate leave that will be available, i.e. twice the leave at half the pay; three times the leave at one-third the pay; four times the leave at 25% of pay.
   ii) Any consequential variation to accrued leave during the period of proportionate leave (e.g. personal leave, annual leave, LSL).
   iii) Any consequential variation to superannuation contribution during the period of proportionate leave.
   iv) Pro-rating of annual leave loading to cover the period of proportionate leave.

[47] [2020] FWCFB 1873 at [100].

Other matters

79. We turn now to some final matters we wish to address in our reply.

Ceremonial leave – proposed clause

80. In our initial submission we referred to the fact that all awards should be varied to include new ceremonial leave provisions, and indicated that wording for a clause was being developed in consultation with the ACTU's Aboriginal and Torres Strait Islander Committee.

81. That consultation is now complete and we propose that all awards be varied to insert the following clause:

> X. *Ceremonial leave*
>
> a. *An Aboriginal or Torres Strait Islander employee will be granted up to 5 working days paid leave and up to 10 working days unpaid leave per year for ceremonial purposes:*
>
> i. *connected with the death of a member of the immediate family or extended family; or*
>
> ii. *for other ceremonial obligations; or*
>
> iii. *to participate in significant activities associated with their culture.*
>
> b. *For the purposes of cl X(a)(i), in recognition that extended families exist within Aboriginal and/or Torres Strait Islander society and obligations of Aboriginal and/or Torres Strait Islander employees may exist regardless of the existence of a bloodline relationship or not, "**extended family**" means any close association between the employee and deceased.*
>
> c. *Paid ceremonial leave will not accrue from year to year and is not paid out on termination of employment.*
>
> d. *Ceremonial leave can be taken in part days and is in addition to compassionate and bereavement leave.*

82. This clause would add 5 days of paid leave on top of the 10 days of unpaid leave, and addresses the deficiencies of the provisions in the Nurses Award and SCHADS Award identified in our initial submission.

83. We note the Literature Review's comments that most modern awards do not provide for ceremonial leave, and that this exclusion is in addition to the difficulties faced by First Nations Australians in accessing care and support services.[48]

Literature review

84. We note that the Literature review was published on 8 March 2024, and acknowledge the significant contribution it makes to this stream of the review. Whilst we have made some references to it throughout this submission, due to time constraints we haven't had the opportunity to respond to it in detail, so we may need to make further submissions orally in the consultations.

85. As a general comment, we note that the findings of the Literature Review broadly support the submissions of the ACTU and our affiliates, including many of the key areas of concern and the indicative proposals for change identified. It also supports many of the variations to modern awards recommended by the ACTU and our affiliates. The ACTU is supportive of many of the findings of the Literature Review, and many of the indicative proposals for change contained in Appendix 1.

[48] Literature Review at p49.

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