Fair Work Commission

Modern Awards Review 2023-24 (AM2023/21)

Submission cover sheet

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Modern Award Review Stream:

Arts and Culture:	☐
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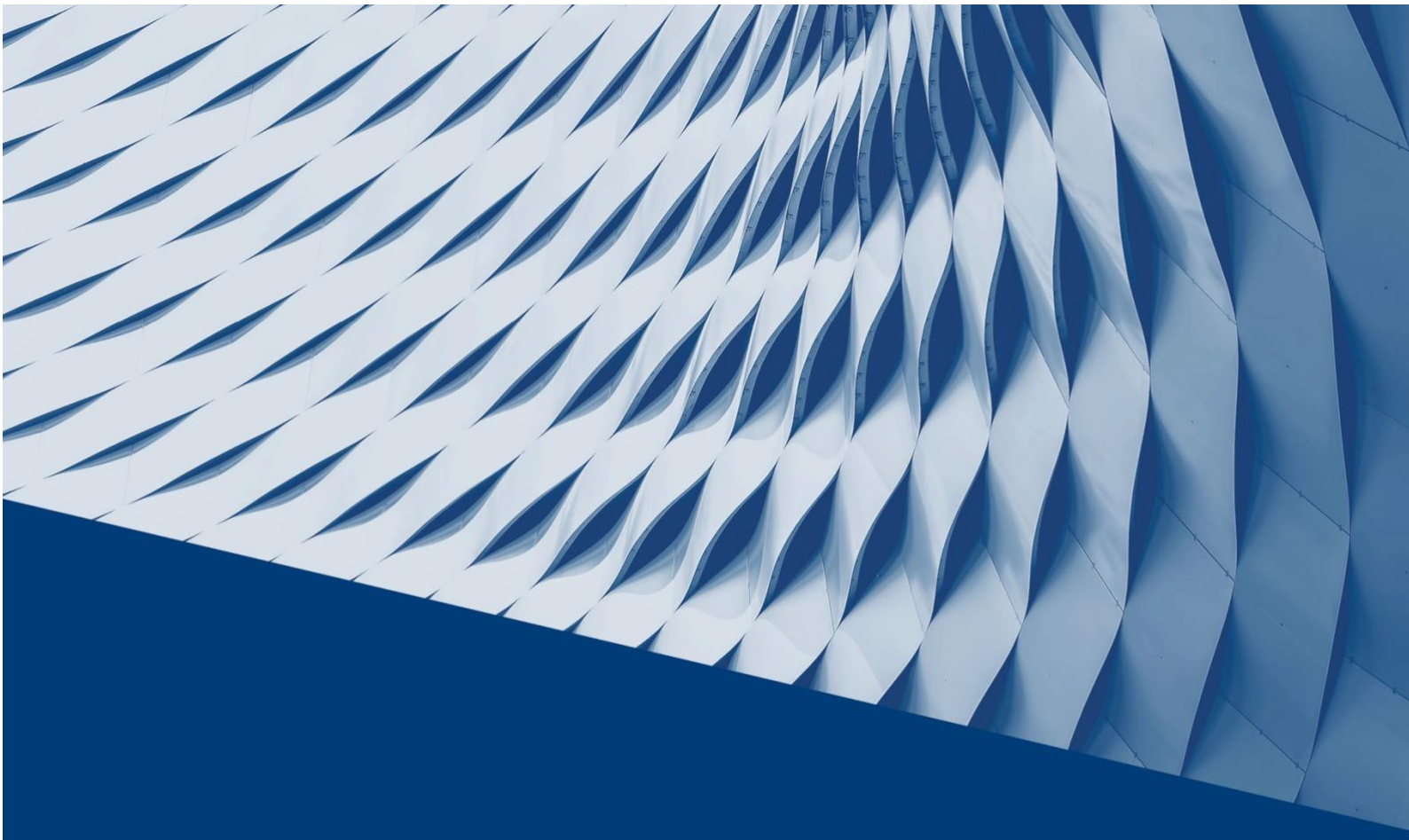

Modern Awards Review 2023-24

Submission by the Australian Council of Trade Unions in response to the ***Job Security*** Discussion paper.

ACTU Submission, 5 February 2024
ACTU D. No 6/2024

ACTU
australian council of trade unions

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Preface

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 43 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. Job security is a key concern of the ACTU and its affiliated unions. We have been enthusiastic supporters of recent reform efforts in this respect, informed by the experiences of our affiliates and the Panel we appointed to conduct the landmark *Lives on Hold* Inquiry of 2012. We welcome the opportunity to participate in the *Job Security* steam of this review.

4. Our submission is intended to identify issues which may inform the consultations and the final report. It reflects a consensus position of our affiliates on job security issues which relate to particular questions posed by the FWC discussion paper, with respect to modern awards generally. It is not a comprehensive statement of the entirety of the concerns and suggestions our affiliates wish to raise with the content or operation of modern awards collectively or individually.

Recommendations

Recommendation 1

That this review encompasses all awards.

Recommendation 2

That the following outcomes be pursued in this review:

• Providing security around patterns of hours that have become regular;

• Ensuring employees have written records of their engagement and classification or reclassification;

• Avoiding payment during paid leave falling below reasonable expectations of take home pay over the same period;

• Fairness and certainty on minimum engagements, including on a weekly basis for part time workers;

• Greater certainty and stability in rostering, particularly where the span of ordinary hours is wide;

• Ensuring part time workers are paid overtime for working outside agreed hours;

• Providing greater restrictions upon the imposition of monthly pay cycles, particularly for the low paid; and

• Avoiding short notice periods for roster changes.

Recommendation 3

The FWC should devote considerable time during these consultations assist to parties to improve the safety net entitlements of casual workers to better meet the amended modern awards objective and ensure that any remaining entitlement gaps are fairly compensated, having regard to industry conditions. This should include assistance in developing options to:

• Increase the casual loading;

• Provide for additional or improved forms of paid leave; and

• Adjust other conditions relevant to job security including restoring greater predictability and security to permanent work.

Recommendation 4

That the Commission note in its report the ACTU view that the legislative shortcomings of section 352 of the FW Act to protect a casual employee terminated due to a temporary absence from work due to illness or injury.

Recommendation 5

That the FWC consider varying awards to introduce a right for a casual to be absent due to injury or illness, and a prohibition on employers from altering shifts made available to those workers accessing the entitlement.

Recommendation 6

That the Commission develop a standard term to vary awards to provide for paid leave to casuals in respect of bereavement.

Recommendation 7

That the Commission notes in its report the ACTU view that individual flexibility arrangements have been inconsistent with the new modern award objective and should not be required or permitted in modern awards.

Recommendation 8

If Individual Flexibility Arrangements are to be retained in modern awards, the Commission should vary the standard term for individual flexibility arrangements by:

• Relocating the final subclause of the standard term as the first and supplementing it to alert readers to the NES right to request a flexible working arrangement;

• Ensuring that an employer's "proposal" for an IFA includes a draft of the IFA;

• Ensuring that an employer's "proposal" for an IFA includes a statement to the effect that the employee is free to choose agree or not agree to the proposal; discuss, seek advice or be represented in relation to the proposal; and put forward an alternative;

• Ensuring that an employer's "proposal" for an IFA, and any IFA made, states the employer's assessment as to whether the IFA will result in any improvement to the regularity and predictability of the employee's work and income;

• Referring to the capacity to bring disputes under the dispute resolution procedure and to the Commission's power to make conciliate, mediate, express an opinion or make a recommendation; and

• Providing a capacity for the Commission to review an IFA and express an opinion about whether it continues to meet the BOOT and whether any expectations concerning improvements to regularity and predictability of hours and income had been realised.

Recommendation 9

That the Commission invite parties to consider seeking variations to awards to require reporting on individual flexibility agreements, only in the event that the government indicates that it does not intend to legislate to abolish IFAs or require reporting in both awards and enterprise agreements.

Recommendation 10

The Commission should vary the consultation clause in modern awards to:

• identify a reduction in job security as a "significant effect" for the purposes of the clause;

• remove the requirement that there need to be a "major" change in order to trigger the obligation to consult;

• require an employer to specify options for suitable alternative employment with the employer in the event of an end to the employer's contract and, if no such options are available, to facilitate employee's names being given to the incoming contractor in order that they may be considered for work with the new contract. Such clauses could be considered in other industries where tendering/contracting as a service provider is common;

• Provide for the obligation to consult to be activated at a point prior to a "definite decision" being made, for instance when an employer was seriously considering making a change that would have significant effects; and

• Allow a forum for parties covered by an award to come together at an industry representative level to consult on job security issues.

Recommendation 11

That the Commission recommends varying the standard term concerning consultation about changes to regular rosters or ordinary hours of work to:

• ensure that the information provided by the employer about a proposed change includes information about whether the change is expected to be permanent or temporary (and, if the latter, its duration) and the expected effects of the change on employees' earnings; and

• ensure that the information provided by the employer about a proposed change is provided in writing and in a manner which facilitates employee understanding of the proposed changes, having regard to their English language skills.

Recommendation 12

That the Commission recommends variations to awards to include:

• a process whereby employees who work hours that are "irregular, sporadic or unpredictable" are given an opportunity to express their interest in working hours which are regular and predictable.

• an obligation on employers to inform those employees when such hours were available to them (even if only on a temporary basis), and what payment they would attract.

Recommendation 13

The Commission should acknowledge the important role of union delegates in representing employee's rights to job security by integrating their rights to represent employees and to receive training in dispute settlement, irrespective of business size.

Recommendation 14

The Commission should note in its report the ACTU view that the absence of arbitration as of right leaves workers with no viable options to pursue their interests in day-to-day workplace disputes.

Recommendation 15

That the standard dispute resolution term be varied to specify some of the powers that the Commission may choose to exercise in resolving a dispute, independent of the parties' consent - for example: expressing an opinion, making a recommendation, requiring persons to attend, requiring the production of documents and conducting inquiries.

Recommendation 16

The standard dispute resolution term be varied to remove the restriction on its application to disputes about matters arising under the award or the NES.

Recommendation 17

The standard termination clause should supplement the NES by requiring the employer to include, in any written notice of termination required under the NES, a statement as to the valid reason for the termination or that the dismissal was a genuine redundancy.

Recommendation 18

The standard termination clause should include a requirement to pay out the accrued personal leave of any employee terminated while they are absent on personal leave.

Recommendation 19

Modern awards should supplement the NES to ensure that the exemption from small business paying redundancy no longer applies. Furthermore the Commission should note in its report the ACTU view that the NES standard should be similarly revised to remove this exclusion.

Job security, the modern award system and this review

5. This review is properly concerned with how the modern award system should respond to the amended object of the FW Act set out in s. 3(a) ("..promote job security..") and the amended modern award objective set out in section 134(1)(aa) ("..the need to improve access to secure work across the economy..").

6. In giving consideration to this issue throughout this submission, we have adopted the views of the Annual Wage Review Expert Panel, as extracted in paragraph [25] of the discussion paper, as to the proper construction of those legislative provisions. Accordingly, we have focussed our consideration on the extent to which modern awards may, may not, or could better:
    - Promote regularity and predictability in hours of work and income;
    - Restrict the capacity of employers to terminate at will;
    - Provide a capacity for employees to choose to enter into work that provides regularity and predictability in hours of work and income;
    - Provide a capacity for employees to choose to enter in work in which there is a reduced capacity for the employer to terminate at will.

7. As part of the research published for last year's annual wage review, *A profile of employee characteristics across modern awards*[1] presents a range of employee characteristics using ABS microdata which, for the first time, enables analysis of employees across individual modern awards, focusing on employee, job and employer characteristics. Previous analysis of award-reliant employees was limited to examining the characteristics of those employees in aggregate or through approximation.[2] The report therefore provides more specific information on the employees reliant on modern awards than has previously been available.

8. One of the main findings of the report was that, compared to employees not reliant on modern awards, modern award-reliant employees 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.[3] These intersectional indicators point to a heightened risk of exposure to insecure work

[1] Yuen K & Tomlinson J (2023), A profile of employee characteristics across modern awards, Fair Work Commission Research Report 1/2023, March.
[2] Ibid, p. 38
[3] Ibid at p. 4

among the modern award reliant workforce compared to other employees. Specifically, the report found the following:

a. almost three in five employees across all modern awards were female (58.1 per cent), which is higher than for employees not on modern awards (48.5 per cent);[4]
b. of the 43 modern awards analysed, 25 have greater than 50% of female workers[5];
c. almost two-thirds of employees across all modern awards worked part-time hours (across all employees not on modern awards, the proportion is almost half that, at just over one-third of employees);[6]
d. around half of employees on modern awards are casual employees, which is significantly higher than for employees not on modern awards (1 in 7 employees);[7]
e. average hourly total earnings for adult employees on modern awards was $30.80 (unadjusted) and $27.70 (adjusted), compared to average hourly earnings for employees not on modern awards which were much higher, at $46.20 (unadjusted) and $46.10 (adjusted)[8]; and
f. over one-third of modern award-reliant employees could be considered as low paid - compared with less than 7 per cent across employees not on a modern award.[9]

9. The evidence therefore suggests that in any effort to promote job security, the modern award system is key. Whilst we accept that job security challenges may be naturally more prolific among the workforces covered by the more commonly used modern awards, we do not accept that the review must therefore necessarily be confined to those awards only. In that respect, we are at odds with the statement that there are "seven modern awards the subject of this review" on page 108 of the discussion paper. Having reviewed the President's Statements concerning this review, the contents directed to the scope of the job security stream disclose no desire to impose such a limitation, as distinct from the comments made concerning proposals to improve the "ease of use" of modern awards. Limiting this stream of the review to the seven identified awards risks failing to address the needs of the remaining 47% of award reliant workers[10] as well as limiting the potential "rising tide" effects which could be realised through bargaining. We accordingly urge the Commission not to limit the review in this way.

[4] Ibid at p. 18
[5] Ibid at pp.52-53 & Table B1 (Appendix B).
[6] Ibid at p. 21
[7] Ibid at p. 23
[8] Ibid at p. 25
[9] Ibid at p. 26
[10] Yuen & Tomlinson at Chart 3.3, Discussion Paper at [123].

Recommendation 1

That this review encompasses all awards.

10. Finally, any effective review of the modern award system requires a consideration of both the terms of modern awards and the statutory framework within which they operate. As this submission outlines, there are a range of restrictions within this framework that limit the achievement of the job security objective and which we recommend need legislative change. We acknowledge that the Commission's powers are not parliamentary, but do encourage it to produce a final report that at least flags up to Government the ACTU view on those statutory limitations. We have accordingly directed our recommendations to both components.

Response to Discussion Paper

Questions 1-3

11. Questions 1-3 of the discussion paper require a close examination of the terms of individual awards for consistency with the need to improve secure work across the economy. This is an exercise which has been undertaken by our affiliates and has identified may opportunities for improvement. Whilst the submissions of our affiliates speak for themselves and address numerous award specific concerns, there are recurring themes reflecting a need to address the following matters in several modern awards:
    a. Providing security around patterns of hours that have become regular;
    b. Ensuring employees have written records of their engagement and classification or reclassification;
    c. Avoiding payment during paid leave falling below reasonable expectations of take home pay over the same period;
    d. Fairness and certainty on minimum engagements, including on a weekly basis for part time workers;
    e. Greater certainty and stability in rostering, particularly where the span of ordinary hours is wide;
    f. Ensuring part time workers are paid overtime for working outside agreed hours;
    g. Providing greater restrictions upon the imposition of monthly pay cycles, particularly for the low paid; and
    h. Avoiding short notice periods for roster changes.

Recommendation 2

That the following outcomes be pursued in this review:

• Providing security around patterns of hours that have become regular;

• Ensuring employees have written records of their engagement and classification or reclassification;

• Avoiding payment during paid leave falling below reasonable expectations of take home pay over the same period;

• Fairness and certainty on minimum engagements, including on a weekly basis for part time workers;

• Greater certainty and stability in rostering, particularly where the span of ordinary hours is wide;

• Ensuring part time workers are paid overtime for working outside agreed hours;

• Providing greater restrictions upon the imposition of monthly pay cycles, particularly for the low paid; and

• Avoiding short notice periods for roster changes.

Questions 4 and 5

12. Questions 4 and 5 of the discussion paper raise the important issue of the exclusion of casual employees from accessing certain NES entitlements and whether any awards should be varied to supplement these NES entitlement gaps. The proper consideration of these questions involves examination of the adequacy of casual loading, which in part seeks to compensate casual employees for such exclusions, among other reasons.

13. In circumstances where the very "objective" of modern awards calls for weight to be given to the need to improve access to secure work, resolution of any unfairness in accessing entitlements which are the usual to the incidents of a secure job is fundamental. However, such resolution should not proceed on a one size fits all basis. The preferences of casual employees are not homogenous: according to the ABS *Labour Multi-Purpose Survey,* around 70% of casual employees have been with an employer for at least 12 months. Of that figure, 29% would prefer to be permanent with 61.6% of that number citing job security as the key reason and 22.2% citing access to paid leave entitlements. Of those long term casuals in the survey who preferred to remain employed casually, 39.4% cited flexibility and 20.4% cited higher hourly pay as the reason. The

hourly rate of pay differences perceived at the workplace level may not however reflect broader labour market opportunities, as a pay gap *preferencing* permanent workers in the order of 11% still exists between permanent and casual workers at the same skills levels or within the same occupation (on 2022 figures)[11].

14. As noted in the discussion paper, the decision by the Award Modernisation Full Bench to fix the level of the casual loading at 25% was based in part upon it being "..sufficiently common to qualify as a minimum standard"[12]. At the same time, the Full Bench was cognisant that there was a broad mix of casual loadings and casual entitlements across the Federal and State Awards that were to be replaced with Modern Awards and that, at least in the Federal system, decision on casual loadings "…were based on the circumstances of the industries concerned".[13] This was certainly true of the *Metals Industry Casual Decision,* as the Award Modernisation Full Bench acknowledged. In a similar vein, the decision with respect to the Pastoral Award by a Full Bench of the AIRC relevantly observed as follows:

> "..The *Metal Industry Casuals Case* is not a *"test case"* in the sense in which that term is used in this jurisdiction. It provides no authority for the proposition that a casual loading of 25 per cent is now some sort of *"community standard"* which ought flow on to other awards. Indeed, in that case the Full Bench explicitly noted that applications to vary casual loadings would need to be considered on a sector by sector or industry by industry basis. The Full Bench was at pains to demonstrate that the increase from 20 per cent to 25 per cent sought in the application before it was justified upon an analysis of the value of the award benefits enjoyed by permanent employees that were not enjoyed by casual employees in the metal industry…"[14]

15. Whilst the AIRC Full Bench in the *Pastoral Award Case* was not satisfied that a 25% loading was a test case standard, it was evidently persuaded of the merits of the principled approach to *determining* an appropriate casual loading that was adopted in the *Metals Industry Casuals Case*:

> "In our opinion, the relevance of the *Metal Industry Casuals Case* to the present matter is as authority for the proposition that if, upon analysis of the true value of award and other benefits enjoyed by permanent employees that are not enjoyed by casual employees and the disadvantages suffered by casual employees that are not suffered by permanent employees, it appears that the current casual loading is inadequate, then this can provide a proper basis for awarding an increase in a casual loading as part an award safety net of fair minimum wages and conditions. The various components that

[11] ABS, *Characteristics of Employment*, August 2022.
[12] [2008] AIRCFB 1000 at [49].
[13] *Ibid.*
[14] *Australian Workers Union Re Pastoral Industry Award*, AIRCFB PR930781, 10/4/2003 at [63]

> contribute to an assessment of a casual loading may vary from award to award. Some components are relevant to all awards. In relation to those components, the approach adopted in the *Metal Industry Casuals Case* in respect of those components ought be applied unless there is some clear distinguishing circumstance."[15] (emphasis added)

16. The Award Modernisation Full Bench reached its view concerning standardising the casual loading in the early stages of the Award Modernisation process which concerned "priority industries and occupations". Dealing with that issue at that stage effectively prevented any industry level analysis of the "true value of award and other benefits" and "disadvantages suffered by casual employees" as subsequent modern awards were made. Indeed, in the 2017 decision on *Casual Employment* in the Four Yearly Review, a Full Bench accepted that:

> **"**The award modernisation process conducted in 2008–09 by the AIRC pursuant to Part 10A of the WR Act involved a wholesale consolidation of the terms of pre-existing federal and State awards (as contained in NAPSAs) into 122 modern awards. However this process did not involve any re-analysis of the conceptual underpinnings of casual employment."[16]

17. It may be accepted that modern awards, as underpinned by the NES, have *more* in common than their predecessors. However, that greater commonality in our view does not necessarily justify a unified treatment in casual loading or casual conditions. This is particularly the case given that some of the disadvantages of casual employment have not been analysed in terms of how they present differently in different industries. These disadvantages go beyond the accounting for hours lost or variations from NES standard termination notice periods, redundancy pay or leave equivalents for casuals working roster patterns that would constitute "shiftwork" if they were permanent. Rather, the assessment must extend to the industry level lived experience of the attendant disadvantages of that form of work (including the disadvantages of insecure work discussed at pages 34- 64 of the discussion paper).

18. Comprehensively analysing these disadvantages on an award-by-award basis may reveal a mix of preferences for providing additional or improved forms of paid leave, raising the casual loading or adjusting other conditions (including restoring greater predictability and security to permanent work, particularly part time work which in some industries has become closer to casual work in form and almost indistinguishable in practice). What is deemed as fair, relevant and necessary in each context may also vary and the Commission should be hesitant to develop provisions that are

[15] *Australian Workers Union Re Pastoral Industry Award*, AIRCFB PR930781, 10/4/2003 at [67]
[16] [2017] FWCFB 3541 at [71]

unlikely to be utilised in a particular industry owing to its practices or the characteristics of its workforce. We understand that some of our affiliates will be advancing considered proposals in this regard for particular awards which they have an interest in.

Recommendation 3

The FWC should devote considerable time during these consultations assist to parties to improve the safety net entitlements of casual workers to better meet the amended modern awards objective and ensure that any remaining entitlement gaps are fairly compensated, having regard to industry conditions. This should include assistance in developing options to:

- Increase the casual loading;
- Provide for additional or improved forms of paid leave; and
- Adjust other conditions relevant to job security including restoring greater predictability and security to permanent work.

Illness, absence and security

19. Our hesitancy to embrace a one size fits all paid leave entitlement does not carry with it a view that casual employees should be penalised when they are unfit to work. As was highlighted in the *Casual Employment* decision in the 2014 review, there are two dimensions to casual employees presenting to work when sick: firstly there is the concern about loss of pay for the work not performed, secondly there is a concern about being offered less work in future. There is an opportunity through this review to address the second of these concerns.

20. In its decision to create an entitlement to unpaid pandemic leave, a Full Bench of the Commission was alert to the significance of there being no "workplace right" for workers, including casual workers, to be absent when required to self-isolate by Public Health Orders issued under State and Territory Laws.[17] Similarly, there appears to be no "workplace right" for a casual employee to be absent when they are not fit to work owing to illness or injury. This is in contrast to their right to be absent for 2 days on each occasion when *a member of their immediate family or household* requires care or support due to illness or injury.[18]

[17] [2020] FWCFB 1837 at [68]-[70]
[18] FW Act, s. 102

21. Casuals (as with other employees) have limited protection in section 352 of the FW Act against *dismissal* for temporary absence due to prescribed illness or injury. However, even leaving aside the limits of what is prescribed, the point at which a termination takes place when no further shifts are offered to a casual employee is "obscure"[19]. Even if a termination is identified, the current position concerning enforcement of the General Protections in Part 3-1 of the FW Act, where section 352 resides, appears to be highly unsatisfactory. The logical extension of the majority judgment in *Endeavour Coal*[20] to section 352 claims would appear to be that a dismissal for temporary absence *simpliciter*, being a dismissal that disclosed no motivating reason linked to the reason for such absence, involves no contravention. If an employee has no positive *right* to be absent when ill, they may well not even disclose the illness to the employer as a reason for absence. In our view, the protection against dismissal where absent due to illness or injury is insufficient and the protection against a reduction or alteration in hours is entirely lacking.

22. A legislative solution that deals with some of the limitations of the general protections framework is sorely desired, however an award-based response is available in the form of a right for casual workers to be absent due to injury or illness and a corresponding provision which prohibits an employer from altering the shifts made available to those workers accessing the entitlement. The entitlement to be absent could, as a "standard term", take the form of a leave provision (as was the case with unpaid pandemic leave[21] and unpaid family and domestic violence leave[22]), but be amenable to tailoring to the circumstances of particular awards including those where our affiliates are urging a more comprehensive reconsideration of casual employment conditions. We are strongly of the view that the protection against the alteration of shifts should also be embedded in the award, both to promote awareness and to overcome the shortcomings of the General Protections provisions.

Recommendation 4:

That the Commission note in its report the ACTU view that the legislative shortcomings of section 352 of the FW Act to protect a casual employee terminated due to a temporary absence from work due to illness or injury.

[19] *Fathalla & Lemana v. Gallawah* [2023] FWC 2542 at [108], *Khayam, v. Navitas* [2017] FWCFB 5162 at [127].
[20] *CFMEU v. Endeavour Coal* [2015] FCAFC 76
[21] [2020] FWCFB 1837
[22] [2018] FWCFB 3936

Recommendation 5

That the FWC consider varying awards to introduce a right for a casual to be absent due to injury or illness, and a prohibition on employers from altering shifts made available to those workers accessing the entitlement.

Revisiting community standards concerning bereavement

23. We also support a standard term for paid compassionate leave for casuals, again subject to any more considered proposals in respect of particular awards. At present, casual employees are entitled to be absent on unpaid carer's leave or unpaid compassionate leave. The occasions on which a casual an employee will be required to take unpaid compassionate leave from scheduled work would, we predict, likely remain in single digits in total for around two decades or more of service (and likely longer the fewer days that they work). We base this on the indication given by the measure provided for days of "Miscellaneous leave" per full time equivalent employee in the Australian Public Service, which was 0.5.in 2022-2023[23].

24. The lead time between the occurrence of a circumstance entitling the taking of compassionate leave and the actual taking of the leave is typically small, meaning that the capacity to plan for the unavailability of income is reduced but may also be associated with unplanned expenditure, particularly if the entitling circumstance is bereavement. In our view, there is a serious question as to whether community standards are adequately reflected in safety net provisions that provide no right for casuals to absent from rostered shifts without loss of pay in these circumstances.

Recommendation 6

That the Commission develop a standard term to vary awards to provide for paid leave to casuals in respect of bereavement.

[23] Australian Public Service Commission, "State of the Service Report, 2022-23", November 2023, at Appendix 1. 'Miscellaneous leave' is said to comprise "bereavement, compassionate and emergency leave". The APS sample is over 170,000 employees.

Question 6

25. Question 6 seeks evidence that use of individual flexibility arrangements undermines job security. As each of the General Managers' Reports into Individual Flexibility Arrangements have pointed out, there is a lack of data concerning these arrangements.[24] This is hardly surprising given the design features of the legislative scheme, which provide for poor oversight of IFAs. That these instruments are made and operate in the shadows, even where made in contravention of the provisions that authorise them, is one of the major failings of the Fair Work system and is out of step with its general architecture.

26. The General Manager's reports are, to date, the best source of data one is likely to find on the extent to which IFA's undermine job security, however the methodology has not been stable throughout the report series. Nonetheless, some concerning findings emerge notwithstanding these limitations. These include:

    a. In the 2009-2012 report:

        i. Sample IFA's provided showed efforts to develop all in rates, suspend overtime without a change in the rate of pay, and suggestions that employees would not be allocated shifts unless they agreed to the IFA.[25]

        ii. Employers perceiving the leading benefits of IFAs as increased flexibility with rostering, and staff working more or less hours as needed by the employer and reduced costs.[26]

        iii. Between 17 -27% of employers surveyed who made an IFA did not conduct a BOOT assessment.[27]

    b. In the 2012-2015 report:

        i. A quarter of surveyed employers who made more than one IFA in respect of modern awards required employees to accept those IFAs as a condition of commencing employment[28];

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[24] General Manager's report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements (2009-2019) at p 2; General Manager's report into individual flexibility arrangements under s. 653 of the Fair Work Act (2015-2018) at pp8-9; General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act (2012-2015) at p 10 & 1; General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act (2015-2018) at p iv, 8; ; General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act (2018-2021) at p vi & 8.

[25] At p75-76

[26] At Table 5.10

[27] At Tables 5.5 & 5.7.

[28] At Table 5.7

ii. Around half of the surveyed employers that made more than one IFA reported that all of their IFA's varied the same conditions[29], suggesting template arrangements rather than genuine efforts to meet employee needs;

iii. Only 12.4% of surveyed employers who entered into IFA's considered that those IFAs improved their employees' job security[30]

iv. 42% of employers surveyed that made an IFA did not document how an employee was better off under the arrangement;

v. Around 14% of employees surveyed who entered into an IFA indicated that they had sacrificed pay or conditions through their IFA, including 28.7% of those employees working part time hours and 46.5% of the employees engaged as casuals[31]

c. In the 2018-2021 report:

i. The most common reason revealed by survey participants for entering into an IFA was to "change an employee's hours of work and to address issues with overtime and penalties that result from the change"[32]

ii. Examples were provided where IFAs were offered to avoid paying penalty rates in response to shift patterns first requested via request for flexible working arrangements under section 65.[33]

27. The 2015-2018 report did not include any detailed examination or inquiry into the content of the IFA's made by the participants or report on the reasons employers initiated IFAs.

28. The general impression of misuse of IFA's to employees' disadvantage is reflected in the interactions between our affiliates and their members, including IFAs being presented as a fait accompli and loss of work opportunities where IFA's are questioned or refused.

29. Given the evidence of misuse of IFAs, often to undermine job security, we call for legislative reform to remove individual flexibility provisions from modern awards.

[29] At page 32
[30] At Table 6.5
[31] At Page 37-38
[32] At Page 13
[33] *Ibid.*

Recommendation 7:

That the Commission note in its report the ACTU view that individual flexibility arrangements have been inconsistent with the new modern award objective and should not be required or permitted in modern awards.

Questions 7 and 8

30. Questions 7 and 8 of the discussion paper invite consideration of whether the standard clauses engage, positively or negatively, with the amended object of the FW Act set out in s. 3(a). and the amended modern award objective set out in section 134(1)(aa).

31. Our response includes some proposals for change. These do provide specific drafts of terms or variations, but rather seek to identify the issues we wish to raise. We anticipate that the consultative process will provide opportunity to explore detailed drafting in due course and that, as is the case with all standard terms, award specific considerations may justify reflecting some of these issues differently (or not at all) in particular awards. We are cognisant that the other streams of the award review may also raise additional issues for consideration with respect to the standard clauses.

Individual Flexibility

32. The matters which are within the scope of the current Individual Flexibility term include those which most directly engage with the regularity and predictability in hours of work and income. Notably, the most recent report of the General Manager into individual flexibility arrangements[34] suggests that Individual Flexibility Arrangements ('IFAs') dealing with changes to start times, finish times, shifts and days worked were the most common among the sample of employers and employee and employer representatives participating.[35] The disjuncture between the incidence of IFAs dealing with those matters and those dealing with overtime and penalties is consistent with one of the "most common reasons for initiating an IFA" being identified in that report as "allowing

[34] General Manager's report into individual flexibility arrangements under s.653 of the Fair Work Act 2009, Fair Work Commission, 2021.
[35] Table 5.4.

part time employees to take extra shifts at their own request, without the employer having to pay them overtime"[36]. Having regard to the observations made by the Commission concerning the interaction of "preferred hours arrangements" with the Better Off Overall Test[37], this is a cause for concern.

33. In our view, there is scope for enhancing employees' capacity to choose to enter into work that provides regularity and predictability in hours of work and income through adjustments to the Individual Flexibility Term.

34. The first such adjustment would be one of form rather than substance. Currently, the standard term informs readers that the right to make an individual flexibility agreement is additional to other award based rights, but does so only in the last subclause. In our view, the intent of this provision might be more readily achieved if it were relocated as the first subclause and supplemented so that it also alerted readers to the NES right to request a flexible working arrangement.

35. The second adjustment we recommend involves requiring, for employer initiated proposals for an IFA, that some consideration or indication be given regarding whether regularity and predictability in hours of work or income would be enhanced or not by entering to a proposed IFA. An opportune way of giving effect to this would involve providing greater clarity around what a "proposal", as referred to in subclause 4(a) of the standard clause, would involve. Ideally, the proposal should include:

    - a draft of the proposed IFA; and
    - a statement to the effect that the employee is free to:
        - choose to agree or not agree to the proposal;
        - discuss, seek advice or be represented in relation to the proposal; and
        - put forward an alternative.

    Moreover, it should (and the final form of the IFA also should) set out whether the employer expects that the IFA will result in any improvement to the regularity and predictability of the employees work and income. For the avoidance of doubt, we make these suggestions as additions to rather that substitutions for setting out the matters referred to in subclause 6 of the standard term.

[36] At page 13.
[37] [2013] FWCFB 2170 at [121]-[136]

36. The use of the existing standard clause may result in disagreements between employees and employers about whether a proposal would, if agreed to, actually result in the employee being better off overall. If our suggestions are adopted, there may also be disagreements as to the accuracy of the assessment that an IFA would or would not enhance regularity and predictability of income. Such disagreements would in our view be properly characterised as disputes "about a matter arising under this award" for the purposes of the standard dispute resolution term. It would be helpful if the capacity to utilise the dispute resolution provision for these purposes was highlighted either in the standard IFA term or in a note beneath it. Such amendments, which would ideally refer to the Commission's capacity to conduct conciliation, mediation, express an opinion or make a recommendation, would additionally assist to resolve some outstanding issues from the last substantive consideration of the flexibility clause, without running the risk of imposing a requirement that Commission actually approve or consent to the terms of an IFA.[38]

37. A final issue worthy of consideration in our view relates to the options for exiting from an IFA if it no longer ensures that the employee is better off overall, or if the employer's expressed expectations concerning improvements to regularity and predictability of hours and income have been not fulfilled. We accept that the IFA scheme was not initially designed to provide any future guarantee as to the suitability of an IFA that was compliant when made, however the same is true of enterprise agreements. Opportunities now exist to review enterprise agreements where circumstances have changed, via section 227A of the FW Act. We would be keen to explore whether a simplified mechanism could be adapted from the model provided by section 227A , which would permit the FWC to express an opinion about whether the BOOT continued to be met or any expectations concerning improvements to regularity and predictability of hours and income have been realised. Such a process would not of its own set aside an IFA which was not meeting an employee's needs or was non-compliant, but may prompt or reassure either or both of the parties to it to exercise their rights to exit from the in circumstances when they otherwise may be reluctant to do. This would at least limit the damage brought about by deficient IFA's, rather than relying on the wholly unsatisfactory enforcement provisions which deem non-complaint IFA's to be a breach of the flexibility term in the award yet allow them to continue to operate to an employee's disadvantage.

38. We note that Recommendation 24 of the Senate Select Committee on Work and Care, concerning reporting on flexible working arrangements, could in part be given effect to by variations to the

[38] [2013] FWCFB 2170 at [189]-[202]

standard term. We are concerned however that this would be a sub-optimal solution as it would not provide a uniform system of reporting between individual flexibility arrangements made under awards and those made under enterprise agreements. A legislative change would be a more effective method of implementation.

Recommendation 8

If Individual Flexibility Arrangements are to be retained in modern awards, the Commission should vary the standard term for individual flexibility arrangements by:

• Relocating the final subclause of the standard term as the first and supplementing it to alert readers to the NES right to request a flexible working arrangement;

• Ensuring that an employer's "proposal" for an IFA includes a draft of the IFA;

• Ensuring that an employer's "proposal" for an IFA includes a statement to the effect that the employee is free to choose agree or not agree to the proposal; discuss, seek advice or be represented in relation to the proposal; and put forward an alternative;

• Ensuring that an employer's "proposal" for an IFA, and any IFA made, states the employer's assessment as to whether the IFA will result in any improvement to the regularity and predictability of the employee's work and income;

• Referring to the capacity to bring disputes under the dispute resolution procedure and to the Commission's power to make conciliate, mediate, express an opinion or make a recommendation; and

• Providing a capacity for the Commission to review an IFA and express an opinion about whether it continues to meet the BOOT and whether any expectations concerning improvements to regularity and predictability of hours and income had been realised.

Recommendation 9

That the Commission invite parties to consider seeking variations to awards to require reporting on individual flexibility agreements, only in the event that the government indicates that it does not intend to legislate to abolish IFAs or require reporting in both awards and enterprise agreements.

Consultation about major workplace change

39. The current standard consultation clause is based on the TCR standard and has not been modified, other than for plain language reasons, since it was introduced by the Award Modernisation Process in "almost identical terms" to the standard consultation clause appearing in pre-modern federal awards.[39]

40. An adjustment to the standard consultation clause which would be responsive to the job security objects would be to identify a reduction in job security as a "significant effect" for the purposes of the clause. This could be achieved either by referring to effects on "job security" or instead referring directly to the underlying concepts relating to the choice to enter into or remain in work that provides regularity and predictability in type of employment, hours of work and income. Furthermore, the currently ambiguous requirement that the change be "major" ought to be removed. In a context when job security is to be strived for, measures to avert any termination, reduction in hours or other negative job security impacts ought to be the subject of consultation irrespective of whether the change which threatens to bring about those effects is itself judged to be "major".

41. We note that the Security Services Industry Award and the Cleaning Services Award provide additional consultation obligations (at clause 29 in each) concerned with a change of contract. These clauses relevantly oblige an employer to specify options for suitable alternative employment with the employer in the event of an end to the employer's contract and, if no such options are available, to facilitate employee's names being given to the incoming contractor in order that they may be considered for work with the new contractor. Such obligations have a clear potential to facilitate employees' choice to enter into or remain in work and to mitigate the employer's capacity to terminate at will, thus serving the objects of job security with which this review is concerned. Such clauses could be considered in other industries where tendering/contracting as a service provider is common. Such clauses would also be suitable where the employer concerned is a labour hire company.

42. We see two opportunities to more substantially modify award consultation obligations for the benefit of job security. Firstly, a key concern with the current consultation clause is that it is engaged only after a "definite decision" has been taken. Consultation involves making an informed

[39] [2017] FWCFB 4419

decision where the views of the stakeholders can be given mature reflection, and clearly necessitates a "bona fide opportunity to influence the decision maker"[40]. However, it is difficult to promote or improve job security where that obligation is concentrated on the effects a decision which the employer is unlikely to change. That is not to say that a genuine consultation process cannot involve revisiting or adjusting the "definite decision" as one means of mitigating it effects - it is merely to observe that this would be exception rather than the rule. A consultation procedure which activated at a point prior to a "definite decision" being made, for instance when an employer was seriously considering making a relevant change, is more likely to provide a real opportunity to influence decision making. The change in practice which we seek to bring about is starkly illustrated by the oft quoted passage of Logan J in *CEPU v. QR:*

> "To elaborate further on the ordinary meaning and import of a requirement to 'consult' may be to create an impression that it admits of difficulties of interpretation and understanding. It does not. Everything that it carries with it might be summed up in this way. There is a difference between saying to someone who may be affected by a proposed decision or course of action, even, perhaps, with detailed elaboration, 'this is what is going to be done' and saying to that person 'I'm thinking of doing this; what have you got to say about that ?'. Only in the latter case is there 'consultation....'"[41]

43. Secondly, enhancing employees' choice to engage in secure work and mitigating the impacts of employer's capacity to terminate at will may be enhanced by allowing consultation to occur beyond the firm level. Allowing a forum for parties covered by an award to come together at an industry representative level to consult on job security issues would assist in identifying challenges to job security and addressing skills shortages and moreover would serve the interests of cooperative workplace relations more generally. Consultative forums would be permitted as terms about "procedures for consultation, representation and dispute settlement"[42] and the involvement of representative organisations would provide for a more manageable consultation forum. During the award modernisation process, the AIRC expressed the view that there was no benefit in naming organisations as covered by modern awards.[43] If our proposal is accepted, it would have a more certain application if the organisations that were participants in the industry level forums were identified in some way.

[40] [2001] AIRC 1291
[41] [2010] FCA 791 at [45]
[42] S. 139(1)(j)
[43] [2008] AIRCFB 1000 at [15]-[22]

Recommendation 10

The Commission should vary the consultation clause in modern awards to:

• identify a reduction in job security as a "significant effect" for the purposes of the clause;

• remove the requirement that there needs to be a "major" change in order to trigger the obligation to consult;

• require an employer to specify options for suitable alternative employment with the employer in the event of an end to the employer's contract and, if no such options are available, to facilitate employee's names being given to the incoming contractor in order that they may be considered for work with the new contract. Such clauses could be considered in other industries where tendering/contracting as a service provider is common;

• Provide for the obligation to consult to be activated at a point prior to a "definite decision" being made, for instance when an employer was seriously considering making a change which would have significant effects; and

• Allow a forum for parties covered by an award to come together at an industry representative level to consult on job security issues.

Consultation about changes to regular rosters or hours of work

44. The standard term concerning consultation about changes to regular rosters or hours of work was prepared by the Fair Work Commission following the introduction of the *Fair Work Amendment Act 2013*.

45. In drafting the term, the Commission had regard to the modern awards objective (as it stood), section 138 of the FW Act and the terms of what is now s. 145A of the FW Act. It relevantly found as follows:

> "Section 145A is intended to impose a new, additional obligation to consult employees in circumstances where their employer proposes to change their regular roster or ordinary hours of work. There is no conflict between the imposition of such an obligation and existing modern award provisions permitting the variation of a regular roster or ordinary hours of work on the giving of a specified period of notice or pursuant to a facilitative provision. There is no impediment to the employer complying with both provisions. The employer may still implement the proposed change on the giving of the requisite notice, but will now be required to consult the employees affected before implementing such a change. As we have mentioned such consultation *must provide the affected employees with a genuine opportunity to attempt to persuade the employer to adopt a different course*

of action. For these reasons the relevant term will make it clear that it is to be read in conjunction with other award provisions concerning the scheduling of work and notice provisions."[44] (emphasis added)

46. The Commission also considered the extrinsic material which was consistent, among other things, with an intent that employers consider the impact of proposed changes on family responsibilities. It does not however appear that employee's interests in job security, in particular the ability to exercise some choice about entering into work that is regular and predictable, directly arose for consideration.

47. We note that the Senate Select Committee on Work and Care recommended amendments to the FW Act to:

    - Ensure employers implement rostering practices that are predictable, stable and focussed on fixed shift scheduling (for example, fixed times and days); and
    - Amending section 145A of the Act to require employers genuinely consider employee views about the impact of proposed roster changes and take the views of employee, including working carers, into consideration when changing rosters and other work arrangements.

    These recommendations clearly engage with the job security issues with the scope of the review.

48. It is clear from both the interim and final report that considerations that led the Committee to these recommendations were not limited to those experienced by workers already working a regular roster. However, the obligation in the standard clause (and the subject matter to which s. 145A relates) is presently confined to *regular* rosters or ordinary hours of work.

49. In our view, there is a capacity to respond to the broader issues with which these recommendations engage through the modern award system, irrespective of whether the Government also chooses to act on the recommendations legislatively.

50. Firstly, the standard clause should be varied to specify that the information about the change which the employer is to provide must include information about whether the change is expected to be permanent or temporary, and if the latter - its duration. Secondly, such information should include information about the effect of the change on the employees' earnings. Both of these are critical to enable the employees to participate in the consultation in an informed way and to thereby exercise some influence or choice over matters affecting their job security. We note that the *Textile,*

[44] [2013] FWCFB 10165 at [50]

Clothing, Footwear and Associated Industries Award requires information concerning changes to regular rosters or ordinary hours of work to be provided "…in a manner which facilitates employee understanding of the proposed changes, having regard to their English language skills". Whilst it may be accepted that the particular industry in which that award operates has a high density of workers from a non-English speaking background, it seems to us that genuine participation in consultation and the genuine facilitation of choice requires some effort to ensure that a proposition being put to an employee is comprehensible, irrespective of the industry they work in.

51. The third variation would involve addressing the needs of employees currently excluded from the standard clause, being those employees who *do* work hours which are "irregular, sporadic or unpredictable". The FWC previously took the view that a term that "requires the employer to consult employees about a change to *their* regular roster *or ordinary hours of work*" (emphasis added) necessarily required such an exclusion. Whilst this is contestable in our view, we note that given that modern awards can validly contain terms about "consultation"[45] and "arrangements for when work is performed"[46]. There is therefore little doubt that terms providing for employees who *do* work irregular hours to have some additional input to decisions about those g hours would be permissible, subject to the modern awards objective. In our view, modern awards could enhance job security by providing a process whereby employees in that category were given an opportunity to express their interest in working hours which are regular and predictable and obliging employers to inform those employees when such hours were available to them (even if only on a temporary basis), and what payment they would attract. This may be accommodated as an additional sub-clause to the existing standard term, or alternatively rights of this nature could be reflected in clauses dealing with types of employment or hours of work.

52. A final matter we wish to raise in consultation concerns the form in which the "information" referred to in subclause 3 of standard clause is provided. When the terms of the clause were settled, the Full Bench took the view that a requirement provide such information in writing would be unduly burdensome, particularly for small and medium businesses.[47] We suspect that, over a decade on, attitudes and practices concerning the impost of written communication may have changed and we would be keen to explore this.

[45] s. 139(1)(j)
[46] s.139(1)(c)
[47] [2013] FWCFB 10165 at [83]

Recommendation 11

That the Commission recommends varying the standard term concerning consultation about changes to regular rosters or ordinary hours of work to:

• ensure that the information provided by the employer about a proposed change includes information about whether the change is expected to be permanent or temporary (and, if the latter, its duration) and the expected effects of the change on employees' earnings; and

• ensure that the information provided by the employer about a proposed change is provided in writing and in a manner which facilitates employee understanding of the proposed changes, having regard to their English language skills.

Recommendation 12

That the Commission recommends variations to awards to include:

• a process whereby employees who work hours that are "irregular, sporadic or unpredictable" are given an opportunity to express their interest in working hours which are regular and predictable; and

• an obligation on employers to inform those employees when such hours were available to them (even if only on a temporary basis), and what payment they would attract.

Dispute resolution

53. We note that where there are departures from the standard dispute resolution term in modern awards, they are confined to additional provisions which provide for dispute resolution training leave.

54. Workplaces can benefit from representatives receiving training in using and representing employees in disputes, and this may include negotiations to resolve disputes in a way that improves employees' job security. All modern awards should contain terms that provide for dispute resolution training leave for union delegates, however it is preferrable to give effect to this through proceedings conducted under Item 95 in Part 15 of Schedule 1 of the FW Act, which require the Commission to vary modern awards to include "delegates' rights terms". Such terms must, among other things, provide for the exercise by union delegates of their right to represent and training related to representation rights.

55. Union delegates have a central role in dispute resolution, and this role should be recognised in the standard dispute resolution term. A small addition to subclause 7 of the standard term, to specify that a party to a dispute who is an employee may appoint a workplace delegate to represent them, is desirable. Once again, this may be more appropriately dealt with via the concurrent proceedings initiated under Item 95 in Part 15 of Schedule 1 of the FW Act.

56. The key deficiency of the dispute resolution process lies in its inability to direct an outcome unless the employer either agrees to a resolution or submits to consent arbitration. The absence of arbitration as of right leaves workers with no viable options to pursue their interests in day-to-day workplace disputes. If the dispute raises non-compliance with an award provision, workers must take enforcement proceedings in a court – which due to delay (and cost) is unsuitable in most instances. If the dispute raises the unjust or unreasonable exercise of managerial prerogative[48] in relation to a matter arising under the modern award or the NES (or indeed beyond it), there is no effective remedy at all. In the absence of legislative change, there is little that can be done to address this.

57. One small step that could be taken would be to specify some of the powers that the Commission may choose to exercise in resolving a dispute, independent of the parties' consent - for example: expressing an opinion, making a recommendation, requiring persons to attend, requiring the production of documents and conducting inquiries. These could be specified either in a note to the clause or in the body of the clause. The benefits of such an approach are twofold. Firstly, an employer's position in dispute resolution may be more flexible if it assessed the prospect of external scrutiny of its conduct as real rather than remote. Secondly, it may enable the Commission to take a more active role in dispute resolution than is presently the case.

58. The most recent Commission annual report indicates that only 1,257 of the 31,523 applications to it in the 2022-2023 reporting period related to disputes brought under s. 739 – a category that covers disputes arising under dispute resolution provisions in modern awards, enterprise agreements, contracts of employment and public service determinations. Against this, there were 11,012 applications brought in respect of unfair dismissal and 4,964 brought in respect of general protections matters involving dismissal.[49] It seems inherently unlikely that an employee is 12 times more likely to be dismissed in circumstances they dispute than they are to have a less serious

[48] See [2011] FWA 8288 at [10]-[12]
[49] Fair Work Commission Annual Report 2022-23, Appendix C.

unresolved dispute that engages in some way with the NES or their employment instrument. It may be employees are more inclined to seek the involvement of the Commission only when they feel they have nothing to lose.

59. If employees felt more assured that their employer's conduct would be scrutinised, even without the formal compulsion of arbitration, there may be a greater willingness for them to utilise the Commission's dispute resolution function – provided the Commission itself became less cautious about expressing opinions or making recommendations that it felt the employer in question would not accept. There are broad benefits associated with Commission building over time a catalogue of best practice workplace relations through published recommendations and opinions.

60. A further issue for consideration is whether job security may be enhanced through the capacity to resolve disputes that extend beyond matters arising under the modern award or the NES. We note that the requirement in s. 146 for modern awards to include a term with that scope is a requirement that is expressed as "without limiting paragraph 139(1)(j)". It follows that there would be no point in including the reference to "dispute settlement" in paragraph 139(1)(j) unless it was contemplated that dispute resolution provisions in modern awards could deal with disputes of a wider ambit between parties covered by the award.

Recommendation 13

The Commission should acknowledge the important role of union delegates in representing employee's rights to job security by integrating their rights to represent employees and to receive training in dispute settlement, irrespective of business size.

Recommendation 14

The Commission should note in its report the ACTU view that the absence of arbitration as of right leaves workers with no viable options to pursue their interests in day-to-day workplace disputes.

Recommendation 15

That the standard dispute resolution term be varied to specify some of the powers that the Commission may choose to exercise in resolving a dispute, independent of the parties' consent - for example: expressing an opinion, making a recommendation, requiring persons to attend, requiring the production of documents and conducting inquiries.

Recommendation 16

The standard dispute resolution term be varied to remove the restriction on its application to disputes about matters arising under the award or the NES.

Termination of employment.

61. The current standard term concerning termination of employment is predominantly concerned with notice periods and job search entitlements.

62. In relation to the latter, the multi-party consultation forum we proposed in our discussion of the standard consultation term may be of use in assisting employees who are searching for work following notice being given. As to the former, there are a number of adjustments to both employee and employer notice periods throughout modern awards which were considered during the 2014 Award Review, presumably based on industry specific considerations. We do not seek to create a new standard to overturn those existing arrangements.

63. Many modern awards which involve travel or work at remote locations provide an obligation upon an employer to return an employee to their usual or "home" location upon a termination and/or for the notice period to not commence until the employee has returned.[50] This may facilitate employees' choice to engage in secure work by ameliorating the loss in opportunity for job seeking that might otherwise occur during the notice period. Whilst we would not seek that the standard clause be modified to incorporate this across the board, there may be other occupations or industries which similarly involve remote work or travel where such a provision is appropriate.

[50] See *Ports, harbours and enclosed water vessels; Marine towage, Dredging Industry, Aircraft Cabin Crew, Air Pilots, Timber Industry, Road Transport Long Distance.*

64. The larger issue is the extent to which the termination of employment clause should impinge on decisions of the employer to terminate at will. The unfair dismissal jurisdiction does play this role, but only after an employee has "been dismissed". Whilst enterprise agreements have content restrictions concerning unlawful terms which prohibit certain terms which may interact with the unfair dismissal jurisdiction[51], the same does not appear to be true of modern awards[52]. Indeed, modern awards may supplement the NES[53] and the termination of employment clauses in many do supplement an NES entitlement which is expressed as "An employer must not terminate an employee's employment *unless…."*. This suggests that modern award terms could introduce other conditions precedent to a termination being effected and that in doing so they would be supplementing the NES.

65. The most logical condition to embrace in such a clause would be a condition designed to prevent the employer from dismissing an employee without a valid reason, except in cases of genuine redundancy (within the meaning of s.389) or summary dismissal. This would ideally take the form of a requirement that the employer include, in any written notice of termination given in compliance with the NES, a statement of a valid reason for the termination or that the dismissal was a genuine redundancy. The intention would be that disputes about veracity of those statements could be dealt with via the dispute resolution provisions in the award (as proposed to be enhanced above). The potential for Commission intervention at this early stage, through conciliation, mediation, a recommendation or opinion, may preserve some jobs that would otherwise be lost and obviate the need to make unfair dismissal applications.

66. In addition, we believe that the job security of employees who are temporarily ill or injured would be enhanced by creating incentives to keep them employed and reducing the capacity of employers to terminate them at will. We believe that clause 33.4(b)(ii) of the *Black Coal Mining Industry* award deals with this issue particularly well. It neither creates or limits the right to terminate an employee whilst the employee is on personal leave (though that right may be limited by statutory provisions in a variety of circumstances), however it does effectively oblige the employer to pay out the remaining accrued personal leave of an employee if it does terminate their employment while they are absent on personal leave.

[51] See s.194(c), 194(d), 186(4) of the FW Act.
[52] See Subdivision D of Division 3 of Pat 2-3.
[53] S. 55(4)(b)

Recommendation 17

The standard termination clause should supplement the NES by requiring the employer to include, in any written notice of termination required under the NES, a statement as to the valid reason for the termination or that the dismissal was a genuine redundancy.

Recommendation 18

The standard termination clause should include a requirement to pay out the accrued personal leave of any employee terminated while they are absent on personal leave.

Redundancy

67. The standard redundancy term has many deviations in specific awards, including in relation to changed notice periods and exemptions from the job search entitlement where employment is remote. We understand that the industry or occupation-based considerations leading to these deviations do not fall within the remit of this review.

68. The issue that we do wish to be further examined in this review is the entitlements of small business employees to redundancy payments. This will address discrimination between employees of small and larger business and impose some guardrails to restrict small business employer's capacity to terminate at will.

69. We note that the award modernisation Full Bench did initially propose small business redundancy "uniformly" in exposure drafts, before adopting an approach which was designed to confine those entitlements to particular industries and occupations.[54] The mechanism for confining it was to restrict the entitlement to circumstances where existed *prior* to the 2004 test case which extended redundancy entitlements to small business employers more generally (although at a lower level)[55]. In extending the entitlement to small business employers in 2004, the Full Bench noted that "…the nature and extent of losses suffered by small business employees upon being made redundant is broadly the same as those employed by medium and larger businesses" and that "..the exemption is to some extent arbitrary and can give rise to inequities in circumstances where a business reduces

[54] [2008] AIRFB 1000 at [56]-[60]

[55] Prior to the 2004 test case, awards generally reflected the standard set in the second TCR case, being that redundancy payments to small business employees were available on application only rather than by default: "Subject to an order of the Commission, in a particular redundancy case, this clause shall not apply to employers who employ less than 15 employees". See Print F7262, 19/12/84.

employment levels over time"[56]. The 2004 test case standard was short-lived, owing to the limitations on "allowable award matters" introduced by the *Work Choices* reforms.[57]

70. The rationale for the award modernisation Full Bench implementing this mechanism was twofold, based on the terms of the Award Modernisation Request and related legislative provisions under which it was made. One the one hand, it evidently saw that excluding the small business exemption would "exclude the NES or any provision of the NES", contrary to the terms of the Award Modernisation Request. Secondly, it considered that it was not "necessary" to supplement the NES in modern awards to create a small business exemption where that exemption was not an existing entitlement of employees, having regard to the following statement in the Award Modernisation Request:[58]

> " 32. ….. a modern award may supplement the NES where the Commission considers it necessary to do so to ensure *the maintenance of a fair minimum safety net for employees covered by the modern award*, having regard to the terms of this request and *the existing award provisions (including under NAPSAs) for those employees*, such as small business redundancy entitlement. The Commission may only supplement the NES where the effect of these provisions is not detrimental to an employee in any respect when compared to the NES." (emphasis added)

71. The award modernisation Full Bench evidently equated the supplementation threshold of necessity to ensure the *maintenance* of the safety net as particular to identified groups of employees and particular award terms already in effect. In doing so, it took the expression "*maintenance* of a fair minimum safety net for employees covered by the modern award" as being limiting it to the preservation of extant benefits for defined groups.

72. Whatever the merits of making the decision that it did at the time, there is no warrant under the terms of section 134 or 138 for reaching the same conclusion. In circumstances where "the need to improve access to secure work" is now a mandatory consideration in Commission carrying out its function to "..*ensure* that modern awards, together with the National Employment Standards, *provide* a fair and relevant safety net…" there is a strong basis for devising a standard term providing for small business redundancy, and we strongly encourage the Commission to do so in this review.

[56] *National Union of Workers & Ors*, AIRCFB PR032004 (26/3/2004) at [272]
[57] See section 116(1)(i) and 116(4) of the *Workplace Relations Act 1996* c. 2006.
[58] [2008] AIRFB 1000 at [56]-[60]

73. For completeness, we note that section 55(7) of the FW Act resolves the tension between NES supplementation and NES exclusion that that award modernisation Full Bench appears to have encountered with the award modernisation request. Noting the changed objective in paragraph (a) of section 3 of the Act, the continued exclusion of redundancy pay to small business employees under the NES should be removed.

Recommendation 19

Modern awards should supplement the NES to ensure that the exemption from small business paying redundancy no longer applies. Furthermore, the Commission should note the ACTU view that the NES standard should be similarly revised to remove this exclusion. from Awards.

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