Australian Industry Group

Modern Awards Review 2023 – 24
Job Security

Submission
(AM2023/21)

5 February 2024

AM2023/21 MODERN AWARDS REVIEW 2023 – 24

JOB SECURITY

1. INTRODUCTION

1. This submission of the Australian Industry Group (**Ai Group**) is filed in respect of the Modern Awards Review 2023 – 24 (**Review**). Specifically, it is advanced in response to a discussion paper published by the Fair Work Commission (**Commission**) on 18 December 2023 in relation to the issue of *'job security'* (**Paper**) and in accordance with directions issued on 4 October 2023.[1]

2. In this submission, we deal firstly with the relevant legislative framework and the concepts of *'job security'* and *'secure work'*, which are central to the Paper and to the aspect of the Review to which this submission relates. We then set out some contemporary data concerning various forms of work or employment that are described by the Paper as being *'more susceptible'* to *'insecurity'*. In the following three sections of the submission, we detail various aspects of the safety net, as well as certain changes to be made and proposed to be made, to the *Fair Work Act 2009* (**Act**), which may have a bearing on job security and the availability of secure work. Finally, we respond to the questions posed in the Paper.

3. In essence, it is our position that the need to improve access to *'secure work'*, as required by the new s.134(1)(aa), is directed towards the need to improve or enhance access to (including the availability of) work that does not entail an inherent risk of being lost. It supports the removal of award-derived barriers that preclude employers from offering such work and tells against the imposition of new restrictions or requirements that will deter employers from engaging employees in secure work.

4. Ai Group intends to participate in the consultation process foreshadowed by the Commission. The Commission has invited parties to comment on the *'conduct of the consultation process, and the desirability of any additional consultation dates'*.[2] To some extent, we are limited in the extent to which we can usefully comment on these propositions at this stage, prior to having reviewed other

[1] *Modern Awards Review 2023-24* [2023] FWCFB 179.

[2] *Modern Awards Review 2023-24* [2023] FWC 3373 at [9].

interested parties' submissions, the issues raised therein and the proposals they advance. Nonetheless, at this stage, it would seem to us that:

(a) The four dates set aside for conferences may be sufficient; however, parties should be at liberty to request that additional conferences be scheduled as the matter unfolds.

(b) There would be merit in pre-determining and publishing an agenda for each of the conferences, by reference to subject areas and / or claims. For instance, questions 4 and 5 contained in the Paper relate to casual employment. Any issues raised or claims advanced in response to those questions (or more generally) should be scheduled to be dealt with together. It is likely that they will give rise to overlapping issues or matters that are inherently interconnected.

5. We may seek to be heard further in this regard during the directions hearing listed before the Commission on 6 February 2024, once we have had an opportunity to review the submissions of the other parties.

2. THE LEGISLATIVE FRAMEWORK

6. As explained in the Paper, this stream of the Review relates to two legislative amendments made to the *Fair Work Act 2009* (**Act**) by the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2002* (**SJBP Act**); those being:

   (a) The addition of the following new element to the object of the Act: (emphasis added)

   > The object of [the] Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by … providing workplace relations laws that … promote job security …[3]

   (b) The introduction of the following new matter that must be taken into account by the Commission when assessing whether an award achieves the *'modern awards objective'* (**MAO**): (emphasis added)

   > **(aa)** the need to improve access to secure work across the economy …[4]

7. At the very outset, before considering the meaning and implications of the above provisions of the Act, their relevance to the Review must be properly understood.

8. Section 134(1) imposes a statutory directive upon the Commission, to *'ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions'*, taking into account the matters listed at s.134(1)(a) – s.134(1)(h), as follows:

   (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 encourage collective bargaining; and

[3] Section 3(a) of the Act.

[4] Section 134(1)(aa) of the Act.

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

9. This is the MAO.

10. In addition, s.138 of the Act imposes a limitation on what can be included in modern awards, by reference to the MAO: (emphasis added)

> A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

11. For the purposes of s.138 of the Act, a distinction must be drawn between *'that which is necessary and that which is desirable. That which is necessary must be done. That which is desirable does not carry the same imperative for action.'*[5]

12. Further, the Commission's power to vary awards pursuant to s.157 of the Act is constrained by the MAO. It can do so only if it is *'satisfied that making the [variation] is necessary to achieve the modern awards objective'*[6].

[5] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [135] – [136].

[6] Section 157(1) of the Act.

13. Thus, the MAO is central to any consideration given to varying (or potentially varying) an award. As has been accepted on multiple occasions by the Commission in relation to that objective:

    (a) *'Fairness'* is to be assessed from the perspective of the employees and employers covered by the modern award in question.[7]

    (b) *'Relevant'*, as used in s.134(1), is intended to convey that a modern award should be suited to contemporary circumstances.[8]

    (c) The need for a *'stable'* modern awards system suggests that a party seeking to vary a modern award must advance a merit argument in support of the proposed variation. The extent of such argument will depend on the circumstances.[9]

    (d) No particular primacy is to be attached to any of the factors listed in s.134(1) of the Act, which amount to competing considerations that need to be balanced. Rather, each of the matters articulated therein must, insofar as they are relevant to a particular matter, be treated as matters of significance in the decision making process.[10]

    (e) The characteristics of the employees and employers covered by modern awards varies between awards. To some extent, the determination of a fair and relevant minimum safety net will be influenced by these contextual considerations. It follows that the application of the MAO may result in different outcomes between different modern awards.[11]

14. Thus, the new s.134(1)(aa) is but one of many considerations relevant to the Commission's assessment of whether an award achieves the MAO. A number of other countervailing factors must also be taken into account, including those

[7] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [37]. See also the Paper at [21].

[8] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [37].

[9] *4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

[10] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [115] and [163]. See also the Paper at [22].

[11] *4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788 at [60].

that relate to the circumstances of employers. Unless the Commission is satisfied that a particular change is *necessary* to ensure that the relevant award achieves the MAO, it does not have the discretion to make the variation.

15. The proposed review of awards in light of the new s.134(1)(aa) must be conducted with the above propositions in mind. Any consideration given to whether awards should be varied in light of the amended MAO must involve a wholistic assessment of the need for, and implications of, proposed changes; including the impact they would have on employers and the economy more generally.

16. The Paper states that it is intended to *'form the basis of a discussion with interested stakeholders about how the modern awards safety net might better support the objectives in the [Act] in relation to promoting job security and improving access to secure work'*[12].

17. Any such discussion should also encompass the many other facets of the MAO. A singular focus on the new s.134(1)(aa) would be of limited utility – and indeed, entirely inappropriate – given the operation of the statutory scheme. Further, the Act does not afford the Commission power to vary awards to *'better support'* a particular element of the MAO or the object of the Act.[13] Variations can only be made if they are *necessary*.

18. The amended object of the Act must also be seen in this context. It does not, of itself, grant the Commission power to vary awards or directly guide its discretion in this regard. The object of the Act is in fact an overarching one, of providing *'a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians'*. The added reference to job security is part of a number of textual considerations that may be relevant to the way in which the Act is interpreted and applied.

[12] The Paper at [5].

[13] The Paper at [5].

19. The Commission has never previously conducted a review of awards by reference to the object of the Act (much less, *one element* of the object). This is unsurprising, given the Commission's jurisdiction to vary awards does not arise from the object of the Act, and other elements of the legislation (particularly the MAO) expressly guide the Commission's discretion as to whether and how awards should be varied.

20. In a similar vein, this stream of the Review ought not focus unduly, or be conducted by reference to, the new mention of *'job security'* in s.3(a) of the Act. That too must be viewed in the context of the various other competing considerations identified in s.3 (such as flexibility for business[14], the promotion of productivity and economic growth[15] and the special circumstances of small and medium businesses[16]).

21. As stated in the Paper, *'[w]hen performing its functions or exercising its powers under a part of the [Act], the Commission must consider the objects of the [A]ct …'*.[17] That is, it must consider s.3 as a whole, including its various constituent parts. This is so, irrespective of how explanatory material accompanying the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (**SJBP Bill**) described its purpose.[18]

22. Moreover, it is ss.134(1), 138 and 157(1) that squarely deal with the Commission's statutory task in respect of the awards system (i.e. to ensure that they achieve the MAO) and the circumstances in which a variation to awards may be warranted.

23. We have approached the preparation of these submissions on the basis of the above contentions.

[14] Section 3(a) of the Act.

[15] Section 3(a) of the Act.

[16] Section 3(g) of the Act.

[17] The Paper at [11].

[18] For example, see the Paper at [16].

3. THE IMPORT OF SECTION 134(1)(AA) OF THE ACT

24. Section 134(1)(aa) requires the Commission to take into account *'the need to improve access to secure work across the economy'*.

25. To date, the only arbitral consideration given by the Commission to the meaning of s.134(1)(aa) was in the context of the Annual Wage Review 2022 – 2023. The Expert Panel made the following observations in that decision: (emphasis added)

> **[28]** Job security is not a matter that has, in terms, been taken into account in previous Review decisions. In the award context, job security is a concept which is usually regarded as relevant to award terms which promote regularity and predictability in hours of work and income and restrict the capacity of employers to terminate employment at will. The award provisions which are likely to be most pertinent in this respect are those which concern the type of employment (full-time, part-time, casual or other), rostering arrangements, minimum hours of work per day and per week, the payment of weekly or monthly rather than hourly wages, notice of termination of employment and redundancy pay (noting that a number of these matters are dealt with in the NES).
>
> **[29]** Beyond the immediate award context, job security has a broader dimension and may be understood as referable to the effect of general economic circumstances upon the capacity of employers to employ, or continue to employ, workers, especially on a permanent rather than casual basis. In exercising the Commission's modern award powers, consequential effects of this nature arise for consideration under ss 134(1)(f) and 284(1)(a), and have always been taken into account on this basis in past Review decisions.
>
> **[30]** As set out above, paragraph 334 of the REM explains that the reference to promoting job security in s 3(a) recognises the importance of employees and job seekers 'having the choice' to be able to enjoy as much as possible 'ongoing, stable and secure employment that provides regular and predictable access to beneficial wages and conditions of employment'. We see no reason to consider that the expression 'secure work' in s 134(1)(aa) bears any substantially different connotation to 'job security' in s 3(a). <u>However, we consider that it is significant that s 134(1)(aa) refers to 'the need to improve access' to secure work rather than the general promotion of job security. The language of s 134(1)(aa) suggests that it is more tightly focused on the capacity of employees to enter into work which may be characterised as secure. This appears to reflect the REM's reference to the importance of employees being able to have a 'choice' to enter into secure employment. As such, the consideration in s 134(1)(aa) would appear to direct attention primarily to those award terms which affect the capacity of employees to make that choice.</u> This is not a matter likely to be of substantial relevance to the consideration of minimum award wages in the conduct of the Review except perhaps in respect of the casual loading. The fact that s 134(1)(aa) finds no equivalent in s 284(1), such that the secure work consideration has no application to the NMW, supports our conclusion in this respect. However, the broader dimension of job security to which we have referred will, of course, continue to be highly relevant in our consideration under ss 134(1)(f) and 284(1)(a).[19]

[19] *Annual Wage Review 2022-23* [2023] FWCFB 3500 at [28] – [30].

26. As the Expert Panel observed, s.134(1)(aa) is narrower in its scope and more limited in its focus than the recently added element to s.3(a) of the Act. In particular, it expressed the view that *'it is significant that s 134(1)(aa) refers to 'the need to improve access' to secure work rather than the general promotion of job security'*.[20] We agree that the reference to the *'need to access'* secure work is significant and should be given meaning. In the circumstances, it would not be appropriate for broader notions of job security, or a desire to promote job security, to override or subsume the more narrowly described consideration at s.134(1)(aa). The statutory directive prescribed by s.134(1) requires the Commission to take into account the latter, not the former. That Parliament sought to make this distinction between the two parts of the Act, through the use of obviously distinguishable language, should not be overlooked or circumvented. We also note that nothing in the explanatory material concerning the SJBP Bill tells against this approach (including the Revised Explanatory Memorandum to the Bill (**REM**)). Indeed in respect of s.134(1)(aa), the REM does no more than to repeat the terms of the legislation.[21]

27. It is also relevant that whilst the revised s.3(a) refers to *'job security'*, s.134(1)(aa) refers to *'secure work'*. Respectfully, contrary to the comments of the Expert Panel, we consider that these terms connote different meanings. The concept of a *'job'* is a wholistic one, that encompasses matters such as the remuneration and other benefits that attach to it. *'Work'* on the other hand, is a narrower concept. It relates more specifically to the performance of certain tasks or activities. It is, again, telling that the two provisions of the Act, though related, utilise different verbiage.

28. Section 134(1)(aa) is, in effect, comprised of three composite parts:

    (a) Its subject matter is *'secure work'*;

    (b) More specifically, as observed above, it is about *'access'* to such work; and

[20] *Annual Wage Review 2022-23* [2023] FWCFB 3500 at [30].

[21] REM at [337].

(c) It articulates the objective of *'improving'* access.

29. We deal with each of these composite parts below. For the reasons that follow, s.134(1)(aa) is, in our view, directed towards the need to improve or enhance access to (including the availability of) employment that does not entail an inherent risk of being lost.

***'Improve'* Access to Secure Work**

30. To *'improve'* is to *'bring into a more desirable or excellent condition', 'increase in … excellence'* or *'become better'*.[22] It is to enhance.

31. Further, the concept of improving is a relative one. To improve is to make better; it does not require the achievement of an absolute or to attain a particular goal.

32. Thus, s.134(1)(aa) concerns *enhancing* access to secure work. It is not directed towards *guaranteeing* access to secure work. Further, trite though it may be, it bears noting that it does not concern the elimination of other forms of work or curtailing access to them.

***'Access'* to Secure Work**

33. In the context of s.134(1)(aa), the plain and ordinary meaning of *'access'* is *'way, means, or opportunity of approach or entry'* or the *'the act or privilege of coming; admittance; approach'*.[23]

34. Inherent to the notion of being able to *'access'* secure work is the extent to which such work is in fact available. Self-evidently, its accessibility will depend in part upon its availability.

[22] Macquarie Online Dictionary.

[23] Macquarie Online Dictionary.

35. The availability of such opportunities will in turn be contingent upon a raft of factors including:

    (a) The degree to which awards in fact render it practicable for employers to engage employees in such work. The mere existence of award provisions that contemplate secure work is not of itself enough. Rather, awards must genuinely enable employers to offer such work in a way that is also consistent with their operational needs and demands.

    (b) The existence of award-derived barriers to offering such work. Award terms that serve as unwarranted obstacles to offering secure work are contrary to the objective expressed by s.134(1)(aa). This includes provisions that are unduly restrictive, impose a significant regulatory burden and / or unsustainable costs.

    (c) General economic conditions and business confidence levels. Various macroeconomic factors influence the capacity and willingness of employers to engage direct employees, especially permanent employees. In times of economic uncertainty or volatility, employers are, unsurprisingly, less inclined to adopt the risks associated with engaging direct permanent workers, if their ongoing employment is potentially unsustainable.

'Secure Work'

36. After canvassing various pieces of academic literature and a publication prepared by the union movement,[24] the Paper concludes as follows as to the meaning of *'job security'*, which it appears to use interchangeably with the phrase, *'secure work'*:

> Ultimately, job security is a multi-faceted concept with no single definition. The international and domestic literature identifies a variety of indicators of job security and insecurity. As might be expected, in many instances *secure* work can be defined by the same indicators that *insecure* work lacks. In summary, some of the commonly understood indicators of insecure work include:

[24] The Paper at [49] – [55].

- low, unpredictable or irregular income;
- irregular, fragmented and/or unpredictable hours;
- limited access or lack of access to paid leave, redundancy and other entitlements;
- poor and/or limited security of tenure;
- uncertainty around hours or duration of employment;
- social and/or physical isolation; and
- low worker control.

The common thread across these different dimensions appears to be the lack of certainty and control experienced by workers in relation to the circumstances of their employment. In an even broader sense, job insecurity has been described as any form of uncertainty surrounding employment that reduces wellbeing.[25]

37. It is a well-established principle of statutory construction that the starting point is the ordinary meaning of the relevant words, having regard to their context and purpose.[26] Thus, it would be erroneous to seek to give meaning to the phrase *'secure work'* primarily by reference to the aforementioned material cited in the Paper, as proposed therein.

38. In s.134(1)(aa), *'secure'* is an adjective that describes *'work'*. Something is said to be *'secure'* if it is *'free from or not exposed to danger', 'safe', 'not liable to fall, yield, become displaced', 'sure', 'certain' or 'able to be counted on'*.[27]

39. Thus; secure work is, in our submission, work that does not entail an inherent risk of termination. It is secure because it is not exposed to an ongoing threat of being ended or lost.

40. Nothing in the plain meaning of s.134(1)(aa) states or suggests that it relates to factors such as employees' income, hours of work, access to leave and so on. Whilst the regularity of hours and / or earnings may, in some cases, be an incident of secure work, they do not appear to constitute its defining features for

[25] The Paper at [56] – [57].

[26] *4 yearly review of modern awards – Penalty Rates* [2017] FWCFB 1001 at [96].

[27] Macquarie Online Dictionary.

the purposes of the aforementioned legislative provision. Rather, it is directed simply towards employment that does not involve an inherent risk of termination.

41. The REM says very little of substance about s.134(1)(aa). Notably, it does not draw upon any of the literature cited in the Paper in an effort to give meaning to the phrase *'secure work'* or *'job security'*.

42. At paragraph [334], the REM says as follows in relation to the amendment to s.3(a) of the Act: (emphasis added)

> The reference to promoting job security recognises the importance of employees and job seekers having the choice to be able to enjoy, to the fullest extent possible, ongoing, stable and secure employment that provides regular and predictable access to beneficial wages and conditions of employment. …

43. To the extent that it is asserted that this is also relevant to the meaning of s.134(1)(aa); the REM must be approached with some caution. In particular, the REM cannot be relied upon to displace the meaning of the text found in ss.3(a) or 134(1)(aa), or to add or detract from the text of the provisions.[28] Further: (emphasis added)

> 71 Having regard to their provenance and to the circumstances of their creation, explanatory memoranda for Government Bills introduced into the Commonwealth Parliament can ordinarily be taken by courts to be reliable guides to the policy intentions underlying Government sponsored legislation. They can ordinarily be relied on by courts to explain the overall legislative design and the intended practical operation of provisions and combinations of provisions. Their use of examples of the contemplated operation of provisions can inform in both those respects. They can sometimes even yield insight into the precise grammatical sense in which words appear in the texts of provisions.
>
> 72 Lacking both the force of law and the precision of parliamentary drafting, however, an explanatory memorandum cannot be taken to be an infallible and exhaustive guide to the legal operation of a provision. Notoriously, explanatory memoranda sometimes get the law wrong. The potential for error in examples of the contemplated operation of provisions set out in explanatory memoranda is highlighted by the acknowledgement of the Parliament in s 15AD(b) of the Acts Interpretation Act that even an enacted example of the operation of a provision

[28] *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495) at [70] and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47].

might get the legal operation of the provision wrong: "if the example is inconsistent with the provision, the provision prevails".[29]

44. Thus, notions of employee *'choice'* and the regularity and predictability of *'beneficial wages and conditions'* should not be improperly imported into the text of s.134(1)(aa), in circumstances where the plain and ordinary meaning of the provision clearly and expressly suggests the designation of a different meaning to it.

45. In any event, even if regard were to be had to the REM, we would observe that:

    (a) Inherent to the notion of job seekers having the *'choice to be able to enjoy … ongoing, stable and secure employment'* is the availability of such opportunities. This, again, would require a consideration of the extent to which the regulatory environment facilitates the creation and maintenance of such work. Unworkable and unsustainable restrictions on the use of labour and / or employment costs would run counter to this notion.

    (b) *'Ongoing, stable and secure employment'* would constitute *'secure work'* as we have conceived of it.

    (c) Access to *'regular and predictable access to beneficial wages and conditions'* may in some contexts be a feature of *'secure work'* as per our proposed definition of it.

46. Viewed in this way, the definition we propose for *'secure work'* is not inconsistent with the REM in any event (to the extent that the Commission proposes to give it any significance).

47. The Commission has previously observed that the award provisions *'likely to be most pertinent in respect of promoting regularity and predictability in hours of work and income and restricting the capacity of employers to terminate employment at will are those concerned with'* types of employment, rostering

[29] *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* (2020) 271 CLR 495 at [71] – [72].

arrangements, minimum hours of work per day and per week, the payment of wages, notice of termination of employment and redundancy pay.[30]

48. Any review of the aforementioned provisions should be undertaken bearing in mind the impact that they, and any proposed variations to them, would have on the availability of secure work. As mentioned earlier, the imposition of barriers to engaging employees in secure employment would be antithetical to the objective expressed by s.134(1)(aa). This includes further limiting the availability of part-time or casual employment, introducing new or stricter rostering requirements, increasing minimum engagement or payment periods, imposing further regulatory requirements on employers and / or increasing employment costs associated with such work.

49. The Paper seeks to draw a connection between the notion of job security and *'non-standard employment or work'*. Specifically, it states that *'[n]on-standard work can be understood as any type of employment, or engagement in the labour market, other than permanent full-time employment'* (emphasis added).[31]

50. This is, respectfully, a retrograde and out-of-date perspective. In particular, other forms of employment, such as part-time and casual employment are longstanding and well-entrenched features of the safety net that have widespread utilisation, to the benefit of employees and employers. Combined, they constitute over 50% of all employed persons.[32]

51. Many employees wish to work less than full-time hours for a raft of reasons, including because they have caring responsibilities, they have study commitments, they are older and / or they have a personal preference for doing so. Part-time and casual employment provide important vehicles for employees to be engaged on this basis. As acknowledged in the Paper, they *'lower barriers to participation'*, particularly for women and young people.[33] More plainly, they

[30] See for example the Paper at [122].

[31] The Paper at [45].

[32] ABS, *'Working arrangements'* (August 2023).

[33] The Paper at [68].

create critical employment opportunities for persons who might otherwise not be able to gain paid employment.

52. The Paper describes the purported consequences of insecure work.[34] They are overwhelmingly negative in nature. The summary of the literature cited largely ignores the above propositions and to that end, we contend that it cannot be relied upon. Ultimately, if any party seeks a variation to an award on the basis of s.134(1)(aa), it would be incumbent upon them to demonstrate the impacts of the extant award terms and the proposed changes. It would be erroneous to assume that in all contexts, the Paper accurately describes the impacts of certain forms of engagement.

53. Further, the general discourse regarding notions of job security and secure work is oftentimes unfairly coloured by a misapprehension that such forms of work are utilised illegitimately, unfairly and / or in an exploitative manner. This is simply untrue. In numerous contexts, these arrangements are utilised by employers to satisfy their genuine operational needs and it is critical that they are able to continue to do so. For example:

    (a) Employers in industries associated with travel and tourism commonly experience marked fluctuations in demand due to a raft of reasons including seasonal variations, special events and general economic conditions. This includes employers covered by the *Airline Operations – Ground Staff Award 2020* (**Ground Staff Award**) and the *Airport Employees Award 2020*.

    (b) In addition, the performance of work covered by the Ground Staff Award is, to a large degree, contingent upon precisely when flights are scheduled to arrive and depart from a given airport, and when they *in fact* do so. Unsurprisingly, employers face countless challenges associated with rostering the hours to be worked by employees who, for instance, clean aircraft or are baggage handlers, in this context.

[34] The Paper at [91] - [107].

(c) Employers operating restaurants[35], hotels[36], fast food outlets[37] and retail stores[38] have an obvious need for flexible employment arrangements. They engage directly with customers and are therefore, highly susceptible to frequently changing operational needs.

(d) Employers in agricultural industries, such as those covered by the *Horticulture Award 2020*, are largely at the mercy of seasonal factors and climate conditions.

54. We provide other similar examples later in these submissions.

55. Finally, the suggestion that part-time employment in the context of award-covered employees is a form of *'non-standard work'* that is susceptible to insecurity is illogical and irrational.[39]

56. Generally, awards regulate part-time employment as follows:

(a) A part-time employee is defined as one who works a *'regular pattern'* of hours and / or one who has *'reasonably predictable hours'*.

(b) The employer and employee must agree on the arrangement of the employee's ordinary hours upon engagement; including the days they will work each week and their specific start and finish times. Some awards go so far as to also require agreement as to when the employee will take their meal breaks and for how long.[40]

(c) Employers have very limited, if any, scope to change that arrangement unilaterally. Typically, such changes can be made only by agreement.

[35] Under the *Restaurant Industry Award 2020*.

[36] Under the *Hospitality Industry (General) Award 2020*.

[37] Under the *Fast Food Industry Award 2020*.

[38] Under the *General Retail Industry Award 2020*.

[39] The Paper at [29] and [77] – [78].

[40] See for example clause 10.5(c) of the GRIA.

(d) Minimum engagement / payment periods apply; requiring an employer to engage or pay an employee for a minimum number of hours per shift. The minimum period varies between awards; but is generally 3 or 4 hours in length.

(e) Work performed in excess of the agreed hours constitutes overtime and is to be paid as such.

(**Standard Part-time Model**)

57. This approach to regulating part-time employment guarantees employees fixed agreed hours of work, that can be varied only with their consent; and overtime rates for additional hours of work. Indeed, in some respects, part-time employees have far greater control over their hours of work than full-time employees. Generally, the hours of work of full-time employees are arranged at the employer's prerogative, within certain parameters set by the relevant award. The employee's consent as to when those hours are to be worked is not required.

58. Further, under the National Employment Standards (**NES**), part-time employees are entitled to all other entitlements afforded to full-time employees (albeit on a pro-rata basis in some contexts). This includes notice on termination of employment, redundancy pay and paid leave entitlements.

4. THE STATISTICS

59. Part 3.4 of the Paper characterises particular types of employment or engagement, including part-time, casual, fixed-term, labour hire arrangements and digital platform work, as *'more susceptible'* to being *'insecure'*.[41] The Paper sets out data, largely from the Commission's Statistical Report prepared for the Annual Wage Review 2022 – 2023 (**Statistical Report**), in relation to these types of employment.[42]

60. In this chapter of our submission, we set out the latest Australian Bureau of Statistics (**ABS**) data that considers these types of employment and, where relevant, address data from the Paper.

61. As observed in the preceding chapter of this submission, we do not accept the proposition that part-time employment is susceptible to insecurity, given the way it is regulated through the award system. As to the remaining types of engagement the Paper identifies as being susceptible to insecurity; the ABS data below demonstrates that the proportion of persons employed as casual, fixed-term and labour hire employees has fallen in recent years and these figures are currently at or near their lowest in a decade.[43] Recently published ABS data reveals that the proportion of digital platform workers is also very small.

62. Any proposed award variations directed towards secure work must be seen in this context. The union movement's rhetoric, that *'insecure work'* is growing in prevalence, is not supported by the facts.

Casual Employment

63. The table below demonstrates that casual employees represented 22.42% of the total employed population in 2023. This is down from 24.13% in 2014 and from its peak in the last decade at 25.09% in 2016. This is broadly consistent with the

[41] The Paper at [70] - [90].

[42] The Paper at [70] - [71].

[43] The data reflects *'main job employees'*, that is, employees who reported working in the various category of employment as their main job.

Paper, which also indicated that the rate of casual employment has decreased over time.[44]

Casual employees^[45]		
Time period (August quarters)	**'000s of employees**	**% of total employed**
2014	2308	24.13%
2015	2367	24.47%
2016	2471	25.09%
2017	2530	25.06%
2018	2581	24.65%
2019	2570	24.09%
2020	2308	22.13%
2021	2427	22.58%
2022	2711	23.69%
2023	2661	22.42%
^ Casual employees are defined as those without paid leave entitlements		

Fixed-term Employment

64. In 2023, fixed-term employment was at its lowest level in a decade: 2.92% of the employed population. This is down from 3.74% in 2014 and a peak of 4.09% in 2016. The figures for 2014 – 2022 are broadly consistent with the range of 3.5% - 4% identified by the Commission in the Paper sourced from the Statistical Report, but the current rate of 2.92% is clearly lower.[46]

Fixed-term employees[47]		
Time period (August months)	**'000s of employees**	**% of total employed**
2014	355.6	3.74%
2015	383.5	3.95%
2016	405.4	4.09%
2017	399.9	3.94%
2018	406.6	3.88%
2019	389.3	3.64%
2020	411.5	3.94%
2021	401.0	3.74%
2022	389.7	3.40%
2023	345.4	2.92%

[44] The Paper at [74].

[45] ABS, *'Labour Force, Australia, Detailed'* (December 2023).

[46] The Paper at [79].

[47] ABS, *'Working arrangements'* (August 2023), Table 6.

65. It is relevant to note that, as identified in the Paper,[48] fixed-term contracts are now regulated under amendments to the Act effected by the SJBP Act which will over time likely further reduce the proportion of fixed-term employees in the employed population. We consider the import of these and other legislative reforms in more detail in the next chapter of this submission.

Labour Hire Arrangements

66. The proportion of labour hire employees in the employed population was 1.89% in 2023. This is down from a peak of 2.35% in 2018 and 2019, and near the 2014 figure of 1.84%. The current figure is lower than the range of 2% - 2.5% contained in the Paper, which is sourced from the Statistical Report.[49]

Labour hire employees[50]		
Time period (June months)	**'000s of employees**	**% of total employed**
2014	217.1	1.84%
2015	231.0	1.93%
2016	231.3	1.89%
2017	251.1	2.01%
2018	302.7	2.36%
2019	309.2	2.36%
2020	267.0	2.13%
2021	276.3	2.07%
2022	267.1	1.92%
2023	270.5	1.89%

Digital Platform Work

67. On 13 November 2023, the ABS published its first data concerning digital platform workers in Australia in an analytical article titled '*Digital platform workers in Australia*' (**Analytical Article**).[51] The Analytical Article states that the proportion of the employed population who reported undertaking digital platform work in the last four weeks was merely 0.96% in 2022-23. This figure from the Analytical Article is also referenced in the Paper.[52]

[48] The Paper at [81].

[49] The Paper at [84].

[50] ABS, *Labour hire workers* (June 2023), Table 1.

[51] ABS, *Digital platform workers in Australia* (13 November 2023).

[52] The Paper at [87].

68. Because this ABS data is so new, it is difficult to assess with confidence any trends in the rate over time. However, it is worth noting that the rate of 0.96% is similar to rates of digital platform work seen in other Organisation for Economic Cooperation and Development (**OECD**) countries, as well as the 2022 *Household, Income and Labour Dynamics in Australia Survey* report (**HILDA Report**).[53] The HILDA Report, considering data gathered in 2020, estimated the proportion of employed persons engaged in digital platform work in the last four weeks at 0.8%.[54]

[53] ABS, *Digital platform workers in Australia* (13 November 2023).

[54] The Melbourne Institute: Applied Economic and Social Research, *The Household, Income and Labour Dynamics in Australia Survey: Selected Findings from Waves 1 to 20* (2022) at page 89.

5. THE SAFETY NET

69. It must be observed, at the outset, that there are various features of the extant safety net and broader legislative scheme (comprised of awards and the Act, including the NES) that in a range of ways already facilitate or improve access to secure work and promote job security more generally. Such features include the following:

(a) A statutory right to request flexible working arrangements, with a limited right of refusal.[55]

(b) A robust casual conversion scheme, that requires employers to offer conversion to employees and gives employees a residual right to request conversion, with a limited right of refusal. Disputes about this aspect of the Act can also be dealt with by the Commission.[56]

(c) Various forms of leave including parental leave[57], annual leave[58], personal leave[59], carer's leave[60], compassionate leave[61], family and domestic violence leave[62], community services leave[63] and long service leave[64].

(d) The general protections scheme.[65]

(e) Protection from unfair dismissal and the provision of remedies where an employer is found to have unfairly dismissed an employee.[66]

[55] Division 4, Part 2-2 of the Act.
[56] Division 4A, Part 2-2 of the Act.
[57] Division 5, Part 2-2 of the Act.
[58] Division 6, Part 2-2 of the Act.
[59] Subdivision A, Division 7, Part 2-2 of the Act.
[60] Subdivision B, Division 7, Part 2-2 of the Act.
[61] Subdivision C, Division 7, Part 2-2 of the Act.
[62] Subdivision CA, Division 7, Part 2-2 of the Act.
[63] Division 8, Part 2-2 of the Act.
[64] Division 9, Part 2-2 of the Act and various pieces of state and territory legislation.
[65] Part 3-1 of the Act.
[66] Part 3-2 of the Act.

(f) The ability to stand down employees in certain circumstances, which may avoid the need to terminate their employment.[67]

(g) The ability to make individual flexibility arrangements (**IFAs**) pursuant to the model term found in awards.

(h) The availability of various forms of employment under awards, including in particular part-time employment.

(i) The inclusion of facilitative provisions in awards, particularly in relation to hours of work clauses, that enable the implementation of mutually agreeable arrangements.

(j) The inclusion of provision for time off in lieu of overtime and make-up time in various awards.

(k) The right to be consulted in respect of certain major changes and / or changes to regular rosters or ordinary hours of work, derived from model award terms.

(l) A dispute resolution procedure in awards, that enables employees to pursue disputes, with representation, in an informal and efficient way.

70. In addition, certain amendments have been made (or will soon be made) to the Act by virtue of the SJBP Act, which are also relevant. These are set out in the following chapter of this submission.

[67] Part 3-5 of the Act.

6. RECENT LEGISLATIVE REFORMS

72. In this chapter, we outline various legislative amendments to the Act that have recently commenced or that are due to commence shortly. Each of these amendments will serve (or are already serving) to improve access to secure work and promote job security. Indeed some (such as new limitations on fixed term employment) were designed for the very purpose of furthering those objectives.[68]

73. Given that the changes are now a part of (or soon to be a part of) the minimum safety net, they are plainly a relevant contextual consideration in the Commission's assessment of whether it is *necessary* to vary modern awards in this Review.

The SJBP Act

74. On 6 December 2022, the SJBP Act received royal assent. Relevantly, the following amendments to the Act were introduced by it:

(a) The inclusion of the words '*promote job security*' in the objects of the Act (s.3(a));

(b) The insertion of a new mandatory consideration in the modern awards objective; that being '*the need to improve access to secure work across the economy*' (s.134(1)(aa));

(c) The model term previously found in modern awards regarding requests for flexible working arrangements was, in essence, incorporated into the NES, the Commission was given new powers to deal with disputes related to flexible work requests and the circumstances in which an employee may request flexible work arrangements were also expanded.

(d) The introduction of limitations on the use of fixed term contracts.

[68] REM, Outline.

75. We dealt with the changes described at paragraphs (a) and (b) above in chapters 2 and 3 of this submission. In the submissions that follow, we detail the relevant changes described at paragraphs (c) and (d) above.

Flexible Working Arrangements

76. The SJBP Act introduced three key changes to Division 4 of the NES, in respect of flexible working arrangements.

77. The *first* relates to the introduction of a new NES provision dealing with the procedure which an employer must follow in responding to a flexible work request. The new provision[69] is based upon the model term that was found in modern awards. Following the introduction of s.65A, modern awards were subsequently amended to refer to the new NES provision.[70] This change results in all NES covered employees having the same protections as those previously provided only to award-covered employees in respect of seeking flexible working arrangements, including the requirements for employers to:

    (a) Provide a written response to a flexible work request within 21 days.

    (b) Discuss the request with the employee and genuinely try to reach agreement with the employee about making changes to their working arrangements prior to refusing a request.

    (c) Only refuse the request on reasonable business grounds and after consideration has been given to the consequences of the refusal.

    (d) Inform the employee of any alternative working arrangements the employer would be willing to make to accommodate the employee's circumstances (if any), when refusing a request.

[69] Section 65A of the Act.

[70] *Variation on the Commission's own motion – flexible work amendments and unpaid parental leave* [2023] FWCFB 107.

78. The *second* relates to the introduction of a new NES provision[71] which deals with disputes concerning requests for flexible working arrangements. Following the introduction of s.65B, modern awards were subsequently amended to refer to it.[72] In particular, where a dispute cannot be resolved at the workplace level, the new s.65B empowers the Commission to deal with such disputes by way of mediation and/or conciliation in first instance, or by arbitration. If the dispute is arbitrated, the Commission may order that:

    (a) The employer is taken to have refused the request in the absence of a written response to the employee;

    (b) The employer's refusal of the request is taken to be on reasonable business grounds or not on reasonable business grounds;

    (c) The employer comply with various procedural obligations to ensure compliance with s.65A; or

    (d) If, there is no reasonable prospect of the dispute being resolved, an order that the employer grant the request, or make other specified changes to the employee's working arrangements that accommodates the employee's circumstances.[73]

79. The changes above provide employees seeking access to flexible working arrangements with significantly greater protections, including new powers for the Commission to make orders relating to the process through which a flexible work request has been considered, the grounds upon which it has been refused (and whether such grounds constitute reasonable business grounds), and orders which compel an employer to grant a request or to otherwise accommodate an employee's individual circumstances.

[71] Section 65B of the Act.

[72] *Variation on the Commission's own motion – flexible work amendments and unpaid parental leave* [2023] FWCFB 107.

[73] Section 65C of the Act.

80. The *third* relates to providing employees that are pregnant[74] and employees that are experiencing family and domestic violence (or have a member of their immediate family or household experiencing such violence)[75], with a right to request flexible work arrangements.

81. The changes relating to flexible working arrangements commenced operation on 6 June 2023.

Fixed Term Contracts

82. The SJBP Act introduced new limitations which prohibit an employer from engaging an employee on a fixed term contract with a period of two or more years (including extensions) or on a fixed term contract that permits more than one extension. Employers are also required to provide new employees engaged under a fixed term contract with a '*Fixed Term Contract Information Sheet*'.[76]

83. Civil remedy provisions were also introduced, and the Commission was empowered to resolve disputes about fixed term contract arrangements by way of conciliation, mediation or consent arbitration[77]. In addition, employees were provided with the ability to access the small claims jurisdiction in various courts to enforce these new limitations.

84. The new limitations on the use of fixed term contracts commenced on 6 December 2023, with transitional arrangements in place for fixed term contracts entered into prior to that date.

[74] Section 65(1A)(aa) of the Act.

[75] Section 65A(1)(f) of the Act.

[76] Division 5, Part 2-9 of the Act.

[77] Section 333L of the Act.

The *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* (Cth)

85. *The Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* (Cth) greatly enhanced the ability of employees to access unpaid parental leave. Such changes complement the recent expansion of entitlements for employees to government-funded paid parental leave.

86. These developments can be expected to both assist working parents to remain in the workforce and to maintain what may be viewed as more secure forms of employment, such as full-time or part-time employment, given they will provide employees with a greater capacity to balance work and family obligations without shifting from permanent employment to other, more flexible, working arrangements.

The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth)

87. On 4 September 2023, the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) was tabled into Parliament and on 7 December 2023, the Bill was split by the Senate into two parts. The first part, now known as the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (**Closing Loopholes Act**), passed both houses and was given Royal Assent on 14 December 2023.

88. Relevantly, the Closing Loopholes Act introduced new provisions relating to the regulation of labour hire arrangements. These provisions empower the Commission, on application, to make '*regulated labour hire arrangement orders'* (**RLHA Orders**) in relation to labour hire employees supplied to a '*regulated host*' employer, where the regulated host has a '*host employment instrument*' that would apply to the employees if they were employed by the regulated host. When a RLHA Order is in force, the employees being supplied to the regulated host (i.e. '*regulated employees'*) must generally be paid no less than the '*protected rate of pay*'. In addition to the making of RLHA Orders, the Commission has also been given:

(a) Significant dispute resolution powers to deal with disputes about the operation of this new regulatory scheme;

(b) Powers to make, on application, an *'alternative protected rate of pay order'* that requires the employer to pay its regulated employees a minimum rate based on an alternative employment instrument;

(c) Powers to extend the coverage of a RLHA Order to include additional employers and their regulated employees;

(d) Powers to vary a RLHA Order to cover a new labour hire provider that supplies employees to a regulated host to perform work of the same kind; and

(e) Powers to make guidelines about the operation of this new regulatory scheme.

89. These changes commenced operation on 15 December 2023, however, a RLHA Order cannot come into operation before 1 November 2024.

7. PROPOSED LEGISLATIVE REFORMS

90. The second part of the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth), now known as the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023* (**Closing Loopholes No. 2 Bill**) is currently being considered by the Senate.

91. There is of course significant uncertainty as to what will occur in relation to the potential passage of the Closing Loopholes No. 2 Bill, including which (if any) of the proposed changes will be legislated, precisely when they might be legislated, when they would take effect and the final form of any such changes. Nonetheless, it is relevant to note that various aspects of the Bill are potentially relevant to this stream of the Review, because they deal with issues associated with notions of job security (as contemplated by the Paper and / or as conceived of in this submission).

92. Relevantly, the Closing Loopholes No. 2 Bill proposes to introduce several significant changes, including the following:

    (a) Amending the existing statutory definition of a casual employee from a point-in-time test (i.e. at the outset of the engagement) to a consideration of the conduct or nature of the relationship on an ongoing basis.

    (b) Fundamentally altering the nature of casual employment, as contemplated by the extant statutory scheme[78], by providing that it must be characterised by the absence of a *'firm advance commitment to continuing and indefinite work'* as distinct from the current approach of necessitating a firm advanced commitment to continuing and indefinite work according to an *'agreed pattern of work'*. The result would be to narrow access to casual employment.

[78] In particular, s.15A of the Act.

(c) Creating a new *'employee choice'* process for casual conversion, which would exist alongside the current casual conversion pathway. This new process would enable a casual employee to notify their employer after 6 months of service (or 12 months for a small business employer) if they believe that they are no longer a casual employee under the definition in the Act.

(d) Introducing statutory definitions for the terms *'employer'* and *'employee'* in the Act. The new definitions would permit a Court to consider, not only the terms of the contract governing the relationship, but also the totality of the relationship, including how the contract is performed in practice.

(e) Amending the defence to a sham contracting claim, such that an employer has to prove that it reasonably believed that the contract was a contract for services rather than a contract of service.

(f) Introducing a new framework for dealing with unfair contract terms in the Act, including by giving the Commission a new jurisdiction.

(g) Establishing new regulatory schemes for the setting of minimum standards and guidelines, the making of collective agreements, and the power for the Commission to deal with matters relating to unfair deactivations and terminations, for employee-like workers and road transport contractors.

93. If, and when, the Closing Loopholes No. 2 Bill is passed by Parliament, we may seek a further opportunity to be heard in respect of the extent to which such changes may impact this aspect of the Review, which of course, will depend on the final form of the Closing Loopholes No. 2 Bill. If it were passed in the current terms, it would warrant significant consideration in the current proceedings. Indeed, we expect that it would necessitate a fundamental reconsideration of part-time employment provisions in awards.

94. For present purposes, we seek to rely on the relevant aspects of the Bill as presently drafted and summarised below.

Casual Employment

95. The Closing Loopholes No. 2 Bill seeks to introduce two significant changes to casual employment.

96. The *first* relates to the proposed amendment to the existing casual employment definition in s.15A of the Act, which would, in effect, change the test from a point-in-time test that is assessed by reference to the terms of employment as agreed at the point of engagement, to the totality of the relationship. It would also change the nature of commitment to ongoing work that can be provided to a casual employee (without having ramifications for whether or not they meet the statutory definition) as discussed above. In particular, the newly proposed statutory definition would provide that an individual is a casual employee if both of the following conditions are satisfied:

    (a) The employment relationship is characterised by an '*absence of a firm advance commitment to continuing and indefinite work*'. In making this assessment, a Court must have regard to a range of factors, including; the real substance, practical reality and true nature of the employment relationship, as well as the mutual understandings or expectations of the parties (which, under the new definition, can be inferred from the parties' conduct and how the contract has been performed).

    (b) The employee is entitled to a casual loading or a specific rate of pay.

97. The REM states that the newly proposed statutory definition would improve job security, as the definition would be a '*fair and objective*'[79] test that draws on '*core elements of casual employment, as it was understood prior to the decision of the High Court in Rossato… [t]hese considerations would capture all aspects of the employment relationship and require an objective assessment of the totality of the employment relationship*.'[80] The REM further states that this proposed change would *'expand access to secure work for an employee engaged in a*

[79] REM, page 1.

[80] REM, page 58 at [312].

manner substantially consistent with full-time or part-time employment, and reflective of the patterns of work of these employees.'[81]

98. The *second* relates to the creation of a new *'employee choice'* process for casual conversion, which will provide casual employees with an additional casual conversion pathway. The new *'employee choice'* pathway will provide employees with 6 months service (or 12 months if employed by a small business) with a right to notify their employer if they believe they are not a casual employee under the definition in the Act and are instead a part-time or full-time employee. An employer must consult with the employee about the notification and respond in writing within 21 days.

99. An employer can refuse the notification if it believes the notifying employee is still a casual employee in accordance with the statutory definition. It may also refuse the notification if it would be impractical to convert the employee to permanent employment because the change would require substantial changes to the employee's terms and conditions to comply with a fair work instrument. The Commission would be empowered to deal with disputes about employee choice notifications or casual conversion, including by arbitration in exceptional circumstances.

100. This proposed new pathway departs significantly in nature from the casual conversion mechanism previously and only relatively recently developed by a Full Bench of the Commission during the 4 yearly review of modern awards.

101. It is also proposed that there would be new anti-avoidance provisions to prohibit an employer from reducing / varying an employee's hours of work, pattern of work or terminating employment.

[81] REM, page 58 at [311].

Employees versus Independent Contractors

102. The Closing Loopholes No. 2 Bill proposes to implement new statutory definitions for an *'employee'* and *'employer'*, and for such definitions to be determined by reference to the '*real substance, practical reality and true nature of the relationship*' between the parties. In other words, the Bill seeks to introduce a statutory test which would override the existing common law test that is used to determine whether a worker is an employee or an independent contractor.

103. Currently, employment relationships are defined by common law. In deciding whether a relationship is one of employment or of independent contracting, the terms of any contract between the parties are determinative (unless the contract is a sham). Except where the parties have made changes to their contract, the nature and terms of the contract are assessed at a point-in-time when the relationship begins. This was confirmed in two relatively recent High Court decisions in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting*[82] and *ZG Operations Australia Pty Ltd v Jamsek*[83].

104. The newly proposed definitions of an *'employee'* and *'employer'* would require consideration of more than the agreed contractual terms. It would require consideration of the conduct of the parties at the beginning and throughout the relationship. Specifically, the statutory definition requires the Courts to consider:

    (a) The totality of the relationship between the individual and the person;

    (b) The terms of the contract governing the relationship; and

    (c) Other factors relating to the totality of the relationship, including but not limited to how the contract is performed in practice.

[82] [2022] HCA 1.

[83] [2022] HCA 2.

Sham Contracting

105. Part-3-1 of the Act currently prohibits sham contracting, where an employment arrangement is disguised as an independent contractor relationship.

106. The Closing Loopholes No. 2 Bill proposes to amend the defence to a sham contracting claim such that an employer would have to prove that it '*reasonably believed*' that the contract was a contract for services rather than a contract of service. This increases the threshold requirement for the defence, which currently requires an employer to prove that they did not know and was not reckless.

Unfair Contract Terms

107. The Closing Loopholes No. 2 Bill proposes to empower the Commission to review terms in a contract for services relating to *'workplace relations matters'* including remuneration, allowances, other payable amounts and hours of work.

108. A similar jurisdiction exists under the *Independent Contractors Act 2006* (Cth). Substantial parts of the proposed jurisdiction have been taken from the existing unfair contracts regime, including the factors which the Commission must take into account in determining whether a term in a services contract is unfair, for example:

    (a) The relative bargaining power of the parties;

    (b) Whether the services contract displays a significant imbalance between the rights and obligations of the parties;

    (c) Whether the contract term is reasonably necessary to protect the legitimate interests of a party to the contract; and

    (d) Whether the contract term imposes a harsh, unjust or unreasonable requirement on a party to the contract.

109. If the Commission finds that a term is unfair, it is able to set aside all or part of a services contract or vary a part of it.

Employee-like Work and the Road Transport Industry

110. The Closing Loopholes No. 2 Bill proposes to establish two new schemes for the regulation of employee-like work and the road transport industry.

111. The new schemes would empower the Commission to:

    (a) Set binding minimum standards orders, as well as guidelines, for employee-like workers and road transport contractors, which would seek to establish a set of minimum terms and conditions for such workers, including with respect to payment terms;

    (b) Approve, vary and terminate collective agreements between digital platform operators, road transport businesses and unions; and

    (c) Deal with unfair deactivation claims filed by employee-like workers and unfair termination claims filed by road transport contractors, including the power to order reactivation and reinstatement, respectively.

112. The Closing Loopholes No. 2 Bill also proposes to provide the Minister for Employment and Workplace Relations with powers to make regulations for supply chain participants associated with the road transport industry. This includes regulations which would empower the Commission to make '*road transport industry contractual chain orders*' that confer rights and impose obligations on '*road transport industry contractual chain participants*'.

8. QUESTION 1

113. Question 1 is as follows:

> Are there specific provisions in the seven modern awards the subject of this review that parties consider are necessary to improve access to secure work across the economy? Parties are specifically asked to consider:
>
> a. Types or modes of employment;
>
> b. Rostering arrangements, including rostering restrictions;
>
> c. Payment of wages, in particular pay cycles;
>
> d. Agreed regular patterns of work or guaranteed hours for part-time employees; and
>
> e. Minimum engagement/payment periods.

114. In broad terms; the awards system is unduly complex, prescriptive and restrictive. In countless ways, awards restrict the capacity of employers to engage employees in a way that is efficient and promotes productivity. Ai Group's members routinely express concerns and frustrations about the disconnect between the regulatory environment created by awards and their genuine operational needs. In numerous respects, awards do not reflect contemporary work practices. Further, they impose various unworkable requirements and unwarranted costs upon employers, that prevent them from operating competitively. As a result, they often serve to undermine business' confidence to invest in their operations through the expansion of their workforces, particularly by engaging direct permanent employees.

115. Whilst it may be said that some award terms, *prima facie*, improve access to secure work; they are also, in our assessment, ripe for significant improvement in various ways that would far better facilitate access to secure work, including by creating more employment opportunities.

116. An obvious example of this arises from the part-time employment provisions found in many awards. On one view, they improve access to secure work by facilitating the engagement of employees on a permanent part-time basis (noting that in their absence, an employee would not be able to be engaged to work less than full-time hours on a permanent basis). However, in our submission, the part-

time employment provisions found in many awards are overwhelmingly rigid and inflexible; so much so that they are commonly prohibitive and result in employers instead employing casual employees or preferring other forms of engagement (such as labour hire workers or independent contractors). Reforming the manner in which part-time employees are to be engaged and the terms and conditions that apply to them under awards (particularly in relation to their hours of work) would create new permanent employment opportunities, to the benefit of employers and employees.

117. Nonetheless, in the table below, we have endeavoured to identify examples of terms that go some way to promoting access to secure work in some of the awards identified by the Commission (**Relevant Awards**). They provide a form of flexibility that reduces the regulatory burden on employers, moderates employment costs, improves efficiency, promotes productivity and / or better enables employers to respond to their operational needs. Such provisions, in turn, encourage the engagement of employees, especially on a permanent basis. This list of award terms must, however, be understood in the context of our submissions above. They are, by no means, a panacea.

Clause Number	Clause Subject	Clause Summary
***Clerks Private Sector Award 2020* (Clerks Award)**		
5	IFAs	Allows for the making of IFAs
9.1(b)	Full-time employment	Full-time employees may be engaged to work fewer than 38 ordinary hours in some circumstances
10	Part-time employment	Provides for the engagement of employees on a part-time basis
11	Casual employment	Provides for the engagement of employees on a casual basis
13.2	Ordinary hours of work	Ability to average ordinary hours
13.4	Ordinary hours of work	Ability to shift span of hours by agreement
13.5	Ordinary hours of work	Ability to require employees to work ordinary hours per another award
13.6	Ordinary hours of work	Ordinary hours to be worked at the discretion of the employer (within the other parameters set by the award)
13.8	Make-up time	Employee can take time off and work make up time later

18	Annualised Wage Arrangements	Ability to remunerate full-time employees by way of an annualised wage
23 & 29	Time off in lieu of overtime	Ability to take time off in lieu of overtime payments by agreement
25	Shiftwork	Provides for engagement on shifts
32.5	Annual leave during shut down	Permits employer direction to take annual leave during a shut down
32.7	Excessive annual leave	Permits employer direction to take annual leave where there is an excessive accrual
32.9	Cashing out annual leave	Permits cashing out of annual leave by agreement
***Fast Food Industry Award 2020* (FF Award)**		
5	IFA	Allows for the making of IFAs
9 & 13.1	Full-time employment	Ability to average ordinary hours
10	Part-time employment	Provides for the engagement of employees on a part-time basis
11	Casual employment	Provides for the engagement of employees on a casual basis
20.7	Time off in lieu of overtime	Ability to take time off in lieu of overtime payments by agreement
22.4	Cashing out annual leave	Permits cashing out of annual leave by agreement
22.6	Excessive annual leave	Permits employer direction to take annual leave where there is an excessive accrual
***General Retail Industry Award 2020* (GRIA)**		
5	IFA	Allows for the making of IFAs
10	Part-time employment	Provides for the engagement of employees on a part-time basis
11	Casual employment	Provides for the engagement of employees on a casual basis
21.3	Time off in lieu of overtime	Ability to take time off in lieu of overtime payments by agreement
24	Shiftwork	Provides for engagement on shifts
28.4	Annual leave during shut down	Permits employer direction to take annual leave during a shut down
28.6	Excessive annual leave	Permits employer direction to take annual leave where there is an excessive accrual
28.9	Cashing out annual leave	Permits cashing out of annual leave by agreement
***Social, Community, Home Care and Disability Services Industry Award 2010* (SCHCDS Award)**		
7	IFA	Allows for the making of IFAs
10.2	Full-time employment	Ability to average ordinary hours
10.3	Part-time employment	Provides for the engagement of employees on a part-time basis
10.3(f)	Part-time employment	Ability to work additional hours with agreement
10.4	Casual employment	Provides for the engagement of employees on a casual basis

25.5(f)	Client cancellation	Scheme for dealing with client cancellations, including by requiring affected employees to perform other work
25.6	Broken shifts	Provides for the performance of broken shifts
25.7	Sleepovers	Provides for the performance of sleepovers overnight
28.1(b)	Overtime for part-time and casual employees	Employees can work up to 38 hours in a week / 76 in a fortnight, before overtime entitlement triggered (subject to clauses 28.1(b)(ii) and (iv).
28.2	Time off in lieu of overtime	Ability to take time off in lieu of overtime payments by agreement
29	Shiftwork	Provides for engagement on shifts
31.5	Cashing out annual leave	Permits cashing out of annual leave by agreement
31.7	Excessive annual leave	Permits employer direction to take annual leave where there is an excessive accrual
***Children's Services Award 2010* (CS Award)**		
7	IFA	Allows for the making of IFAs
10.3 & 21.1	Full-time employment	Ability to average ordinary hours
10.4	Part-time employment	Provides for the engagement of employees on a part-time basis
10.5	Casual employment	Provides for the engagement of employees on a casual basis
21.3	Ordinary hours of work	Ability to work broken shifts
21.8	Make-up time	Employee can take time off and work make up time later
23.3	Time off in lieu of overtime	Ability to take time off in lieu of overtime payments by agreement
23.4	Shiftwork	Provides for engagement on shifts
24.4	Annual leave during shut down	Permits employer direction to take annual leave during a shut down
24.6	Excessive annual leave	Permits employer direction to take annual leave where there is an excessive accrual
24.9	Cashing out annual leave	Permits cashing out of annual leave by agreement

9. QUESTIONS 2 AND 3

118. Question 2 is as follows:

> Are there any additional specific award provisions that are consistent with the new modern awards objective? If so, parties are asked to consider and address whether it is relevant and necessary to vary any awards to include that or those specific award provision(s).

119. Question 3 is as follows:

> Are there specific award provisions that are not consistent with the new modern awards objective? If so, parties are asked to address whether it is relevant and necessary to vary any awards to amend or remove that specific award provision.

120. We propose to respond to questions 2 and 3 jointly.

121. To a large extent, any consideration of whether variations to an award are necessary in light of the new s.134(1)(aa) and the form of any such variation(s) will turn on matters that pertain specifically to the industry and / or occupation(s) covered by that award. What might be necessary it the disability services sector covered by the SCHCDS Award might not be necessary in the fast food industry covered by the FF Award, and vice-versa. As stated in the Paper:

> Terms included in modern awards must be 'necessary to achieve the modern awards objective'. Assessing that which is 'necessary' to achieve the modern awards objective in a particular case involves an evaluative judgement, taking into account the section 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern awards, the terms of any proposed variation and the submission and evidence.[84]

122. Nonetheless, it may generally be observed that several awards cover sectors in which there is a direct interface between employers and the users or consumers of their goods and / or services. This includes, for example, the fast food sector[85], the retail industry[86], the childcare sector[87] and the disability services sector[88].

[84] The Paper at [24].

[85] As covered by the FF Award.

[86] As covered by the GRIA.

[87] As covered by the CS Award.

[88] As covered by the SCHCDS Award.

Many employees covered by the Clerks Award are also required to engage directly with customers (e.g. those that work in call centres).

123. It is critical for employers engaged in these sectors to be agile and respond to changes in customer needs or demands in a way that is efficient and maximises productivity.

124. It is not always practicable to predict fluctuations in customer demand. Whilst some may be foreseeable (e.g. a likely uptick in customer demand in the retail sector ahead of Christmas), not all are. Moreover, in any event, it may not be feasible to accurately forecast the *extent* of any such changes.

125. Examples of circumstances affecting customer demand in the sectors covered by the Relevant Awards include:

    (a) School holidays affecting the demand for goods or services under the FF Award, GRIA and CS Award;

    (b) Festive periods (such as Easter and Christmas) affecting the demand for products and services under the GRIA;

    (c) Promotional periods affecting the demand for products and services under the GRIA and Clerks Award (e.g. mid-season sales, end of financial year sales and Black Friday sales).

    (d) The examples described in paragraphs (b) and (c) above can also affect employers in the fast food industry operating in retail areas (e.g. in a shopping centre food court).

    (e) Major events, such as sporting matches, affecting the demand for fast food from certain outlets.

126. Further, the provision of certain services under the SCHCDS Award, including to those with a disability, is centred on the notion of choice and control of the person receiving the relevant services. This affects not only *which* services they seek to access; but also *when* they receive them and for what period of time.

127. Other sectors experience fluctuating demands for labour for various reasons that include seasonal variations, supply chain influences, international pressures and other macroeconomic factors.

128. In broad terms, the hours of work provisions contained in many awards do not afford employers with sufficient flexibility to respond to changes of the nature described above. Rather, many awards:

    (a) Impose onerous and unrealistic rostering requirements, accompanied by various limitations as to whether the roster and can be amended and if so, how and when.[89]

    (b) Deter employers from offering additional hours of work to employees (many of whom wish to work those hours), by requiring the payment of penalty rates.

    (c) Are overly prescriptive as to how ordinary hours of work may be arranged, with limited scope to reach agreement with employees to implement alternate arrangements.[90]

    (d) Place various unworkable restrictions on when meal breaks and rest breaks are to be taken.[91]

129. Further, as discussed earlier in this submission, the part-time employment provisions contained in many awards significantly inhibit access to secure work. Thus, the regulation of part-time employment in a raft of awards is, in our submission, fertile ground for reform.

130. The Standard Part-time Model (described earlier) is, in many cases, plainly prohibitive. It prevents employers from being able to engage employees on a part-time basis. The rigidity of the relevant provisions renders it unworkable in many contexts. It is axiomatic that, as a result, employers prefer other more

[89] See for example clause 25.5 of the SCHCDS Award and clause 15.7 of the GRIA.

[90] See for example clause 15 of the GRIA.

[91] See for example clause 14.5 of the FF Award and 16.5 of the GRIA.

flexible forms of engagement, such as casual employment, labour hire workers and independent contractors.

131. As we understand it, this stream of the Review is not limited to the Relevant Awards. Rather, it pertains to modern awards generally. Bearing in mind the need to take into account the specific circumstances of employers and employees covered by each award; we propose that through this process, consideration is given to the following potential changes to awards, where necessary:

    (a) The introduction of greater flexibility as to how ordinary hours of work may be arranged. This would include provisions concerning minimum engagement and payment periods.

    (b) Revising extant rostering provisions to remove unnecessary requirements and limitations.

    (c) Removing various barriers to the engagement of employees on a part-time basis, including:

        (i) Greater flexibility as to the fixation of their ordinary hours of work;

        (ii) Greater scope to vary their hours of work; and

        (iii) The option to agree that the employee will work additional hours at ordinary rates.

132. In the context of discussions before the Commission in relation to this matter, assuming interested parties are genuinely willing to constructively explore these concepts further, we anticipate that there will be scope to develop specific proposed variations to awards that would facilitate better access to secure work by addressing the matters we have raised, with the benefit of an understanding of the perspective of other stakeholders.

133. We also foreshadow that any such proposals, and indeed the need for a broader reassessment of the suitability of award terms relating to part-time employment, may be affected by the passage of the Closing Loopholes No. 2 Bill, given its potential to radically alter the nature and availability of casual employment.

134. As summarised in chapter 7, the Closing Loopholes No. 2 Bill proposes a number of changes to the existing casual employment framework, with a view to limiting its use. This includes the proposed inclusion of a new definition of *'casual employee'* in the Act and an additional pathway for casual conversion to permanent employment. Such a pathway departs significantly in nature from the casual conversion mechanism previously and only relatively recently developed by a Full Bench of the Commission during the 4 yearly review of modern awards.

135. There is still uncertainty as to what will occur in relation to the potential passage of the Closing Loopholes No. 2 Bill and what impact this will have on the definition and accessibility of casual employment in the context of awards. If the notion of casual employment in the workplace relations system is fundamentally altered, or access to it is restricted, there would foreseeably be a pressing need to reassess the suitability of current award provisions related to part-time employment that have developed in a different context. Indeed, to some degree, such a need potentially already exists, having regard to the definition of casual employee at s.15A of the Act.

136. Put simply, provisions governing access to part-time employment may need to be made far less restrictive in order to ensure that awards meet the needs of both employers and employees. At the very least, there may be a need to ensure that employment arrangements that are not consistent with either any new definition of casual employment under the Act or requirements of awards relating to the definition or engagement of part-time employees are catered for. We may seek to be heard further on this issue in due course, once the Closing Loopholes No. 2 Bill has been passed by Parliament.

137. Finally and for completeness; we seek to highlight that we have advanced numerous claims in the Review in relation to making the Relevant Awards *'easier to use'*, which would also improve access to secure work:

(a) The ability to reach agreement between an employer and employee to reduce minimum engagement and payment periods.[92]

(b) Modifying the minimum engagement obligation for part-time employees in the Clerks Award, such that it can also be satisfied by a minimum payment.[93]

(c) Removing various parameters that apply to the setting of hours of work when an employee is working remotely under the Clerks Award and the GRIA.[94]

(d) Introducing the ability to perform ordinary hours of work throughout the weekend under the Clerks Award.[95]

(e) Enabling an employer and employee to agree that they will forfeit the meal break in certain circumstances under the Clerks Award.[96]

(f) Removing the requirement to reach agreement about the timing and duration of part-time employees' meal breaks from the FF Award and GRIA.[97]

(g) Enabling an employer and part-time employee covered by the FF Award or GRIA to reach agreement that the employee may work additional hours at ordinary rates.[98]

[92] Ai Group submission dated 22 December 2023, pages 14 – 17.
[93] Ai Group submission dated 22 December 2023, page 71.
[94] Ai Group submission dated 22 December 2023, pages 72 – 74 and 129 – 131.
[95] Ai Group submission dated 22 December 2023, pages 74 – 76.
[96] Ai Group submission dated 22 December 2023, pages 76 – 78.
[97] Ai Group submission dated 22 December 2023, pages 97 – 98 and 122 – 123.
[98] Ai Group submission dated 22 December 2023, pages 98 – 101 and 123 – 125.

(h) Permitting more than one separate period of work to be performed in a calendar day under the FF Award.[99]

(i) Allowing an employer and employee to agree to schedule a meal break and / or rest break in ways that are currently prohibited by the FF Award and GRIA.[100]

(j) Reviewing the ordinary hours of work provisions contained in the GRIA.[101]

(k) Remedying an anomaly in the span of hours provision in the GRIA.[102]

(l) Greater flexibility as to the taking of tea breaks under the SCHCDS Award.[103]

(m) Greater flexibility as to the provision of notice to part-time employees regarding roster changes covered by the CS Award.[104]

(n) Greater flexibility to respond to roster changes due to client cancellations under the CS Award.[105]

[99] Ai Group submission dated 22 December 2023, pages 106.

[100] Ai Group submission dated 22 December 2023, pages 106 – 110 and 131 – 135.

[101] Ai Group submission dated 22 December 2023, page 125.

[102] Ai Group submission dated 22 December 2023, pages 125 – 129.

[103] Ai Group submission dated 22 December 2023, pages 157 – 158.

[104] Ai Group submission dated 22 December 2023, pages 160 – 162.

[105] Ai Group submission dated 22 December 2023, page 162.

10. QUESTIONS 4 AND 5

138. Question 4 is as follows:

> Having regard to the new modern awards objective, should the exclusion of casual employees from accessing certain NES entitlements (such as paid personal leave) continue?

139. Question 5 is as follows:

> Should any of the awards be varied to supplement these NES entitlement gaps for casual employees?

140. We propose to respond to questions 4 and 5 jointly.

141. Briefly stated and for the reasons more fulsomely described below; the exclusion of casual employees from NES entitlements continues to be appropriate, notwithstanding the revised MAO. Awards should not be varied in this regard.

NES Entitlements from which Casual Employees are Excluded

142. At the outset, it is important to observe that of the twelve NES, only three exclude casual employees, whilst a further two entitlements are limited to *'regular and systematic'* casual employees. Patently, casual employment does not operate as a blanket exclusion from the NES. Despite their employment status, casuals already enjoy access to the majority of the NES.

143. The NES in its present iteration provides for twelve minimum standards of employment contained in Part 2-2 of the Act, namely:

    (a) Maximum weekly hours (Division 3);

    (b) Requests for flexible working arrangements (Division 4);

    (c) Offers and requests for casual conversion (Division 4A);

    (d) Parental leave and related entitlements (Division 5);

    (e) Annual leave (Division 6);

(f) Personal/carer's leave, compassionate leave and paid family and domestic violence leave (Division 7);

(g) Community service leave (Division 8);

(h) Long service leave (Division 9);

(i) Public holidays (Division 10);

(j) Superannuation contributions (Division 10A);

(k) Notice of termination and redundancy pay (Division 11); and

(l) Fair Work Information Statement (Division 12).

144. Of these 12 minimum standards:

(a) Eight prescribe entitlements, all or some of which do not contain any exclusion for casual employees or additional threshold requirements for casuals to access the entitlement. These include:

(i) Division 3 (which contains entitlements regarding maximum weekly hours);

(ii) The portions of Division 5 (which contains parental leave and related entitlements) which concern unpaid pre-adoption leave and unpaid no safe job leave;[106]

(iii) Division 7 (which contains entitlements to personal/carer's leave, compassionate leave and paid family and domestic violence leave) other than the entitlement to paid personal/carer's leave and paid compassionate leave;[107]

[106] Sections 67(1), 67(2), 82A and 85 of the Act.

[107] Sub-division A of Division 7 of Part 2-2 and s.106 of the Act

(iv) Division 8 (which contains community service leave entitlements), other than the entitlement to be paid for up to the first 10 days' absence whilst on jury service;[108]

(v) Division 9 (which concerns long service leave);

(vi) Division 10 (relating to public holidays);[109]

(vii) Division 10A (which concerns superannuation contributions); and

(viii) Division 12 (regarding the obligation to issue employees with a Fair Work Information Statement and, for casual employees, also a Casual Employment Information Statement).

(b) Two - being requests for flexible working arrangements (Division 4) and parental leave and related entitlements (Division 5) - are available to casual employees, however have different threshold requirements to those that apply to permanent employees for accessing the entitlement. In some instances, certain types of casual employees may be excluded from accessing the entitlement. By way of illustration:

(i) In order to be entitled to make a request for flexible working arrangements under Division 4, an employee who is not a casual must have completed at least 12 months of continuous service with their employer immediately before making the request.[110] In contrast, a casual employee must be a *'regular casual employee of the employer'* who has been employed on that basis for a sequence of periods of employment during a period of at least 12 months, and have a

[108] Section 111(1)(b) of the Act.

[109] Casual employees are not excluded from Division 10 of Part 2-2 of the FW Act. However, s.116 of the Act will not impose a requirement for payment to a casual employee on a public holiday if the employee was not rostered to work ordinary hours on the public holiday. This operates similarly for part-time employees whose ordinary work hours do not include the day of the week on which the public holiday falls. See Note immediately below s.116.

[110] Section 65(2)(a) of the Act.

reasonable expectation of continuing employment by the employer on a regular and systematic basis.[111]

(ii) To access unpaid parental leave and other entitlements under Division 5 (except for unpaid pre-adoption leave and unpaid no safe job leave, which are discussed above), an employee who is not a casual must complete 12 months of continuous service with their employer immediately before the date prescribed in s.67(3).[112] A casual employee must by that prescribed date, be *a 'regular casual employee of the employer'* who has been employed on that basis for a sequence of periods of employment during a period of at least 12 months, and must (but for the actual or expected birth or placement of the child) have a reasonable expectation of continuing employment by the employer on a regular and systematic basis.[113]

(c) Two are available only to casual employees, being:

(i) Offers and requests for casual conversion (Division 4A), and

(ii) The requirement to be provided with a Casual Employment Information Statement (s.125B).[114]

(d) Three operate either wholly or partially to the exclusion of casual employees, being:

(i) Annual leave (Division 6),

(ii) The portions of Division 7 that deal with the entitlement to paid personal/carer's leave (Subdivision A) and the entitlement to be paid for compassionate leave (s.106), and

[111] Section 65(2)(b) of the Act.

[112] Section 67(1) of the Act.

[113] Section 67(2) of the Act.

[114] Section 66A(1) and 125B of the Act.

(iii) Notice of termination and redundancy pay (Division 11).[115]

The Revised MAO

145. Chapters 2 and 3 of this submission address the relevance of the new requirement for the Commission to consider '*the need to improve access to secure work across the economy*' as part of the MAO.

146. Bearing those submissions in mind and as a matter of merit, the focus of any variations made in this stream of the Review should be on the accessibility of more secure forms of work (such as permanent full-time and part-time employment) rather than any redesigning of casual employment (including the entitlements attached to casual employment) in an attempt to make it a more *'secure'* form of employment.

147. This would also be consistent with the approach taken by a Full Bench of the Commission in the 4 yearly review Casual and Part-time Common Issues proceedings. The Full Bench, after giving detailed consideration to the extent to which receipt of a loading by casuals can justify their exclusion from particular NES entitlements, ultimately resolved the issue by deciding to introduce casual conversion provisions in modern awards that did not already contain such a scheme.

148. To this end, two key issues potentially arise from the revised MAO.

149. The *first* is the extent to which casual employees who wish to access a more secure form of work are able to do so, through measures which permit or require the employment to be converted to (or recognised as) permanent. Such measures already exist, including casual conversion mechanisms and the definition of casual employment.

[115] Section 86 (exclusion of casual employees from annual leave), s.95 (exclusion of casual employees from paid personal/carer's leave), s.123(1)(c) (exclusion of casual employees from notice of termination and redundancy pay) of the Act.

150. The *second* is a consideration of the features of permanent employment which operate as barriers to securer forms of employment and a loosening of regulatory requirements so as to neutralise these barriers. This would better enable employers to offer such work, and employees who desire flexibility to accept such work. Examples of award provisions that may operate as a barrier to accessing secure work are provided as part of our response to questions 2 and 3.

Applying the MAO

151. The new s.134(1)(aa) is but one of many considerations relevant to the Commission's assessment of whether an award achieves the MAO. A number of other countervailing factors must also be taken into account. Relevantly, this includes the matters in the MAO concerning:

    (a) The need to promote social inclusion through increased workforce participation;[116] and

    (b) The need to promote flexible modern work practices and the efficient and productive performance of work.[117]

152. Casual employment is an important and legitimate form of employment. Whilst its prevalence is not increasing, its utilisation remains broadly steady and this is a hallmark of its ongoing relevance not only to employers but also to employees who seek the flexibility afforded by casual employment (including opportunities to access employment in circumstances where the rigidities of permanent employment may otherwise prevent participation in the workforce). Casual employment enables employers to satisfy genuine operational needs, including circumstances in which employers need to respond to sudden and unexpected fluctuations in labour demands.

[116] Section 134(1)(c) of the Act.

[117] Section 134(1)(d) of the Act.

153. Any attempted redesign of the concept of casual employment with a view to instilling concepts associated with permanent employment carries the real risk of jeopardising the ongoing utility and availability of this mode of employment.

154. Also relevant in the current context, are the matters in the MAO concerning:

(a) The likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden;[118] and

(b) The likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.[119]

155. The cost of conferring NES entitlements such as paid annual leave and sick leave on casual employees will inevitably lead to an enormous cost burden on business. By way of recent example, in March 2023 - 12 months after the introduction by the Victorian Government of its *'Sick Pay Guarantee Scheme'* - the scheme had cost $22 million.[120] This cost would be magnified many times over should a national entitlement to paid sick leave be established for casuals; and further still if paid annual leave entitlements (which are typically at least double the quantum of paid personal leave entitlements) were also made available to casuals.

156. To this end, it is imperative that any proposal to extend NES entitlements (from which they are currently excluded) to casual employees is considered not in isolation but in the context of the loading to which casuals are invariably already entitled to under modern awards, which is paid in compensation of such entitlements.

[118] Section 134(1)(f) of the Act.

[119] Section 134(1)(h) of the Act.

[120] H Hayes, *'Victorian State Government Details Impact of Sick Pay Guarantee Laws'*, News.Com.au (13 March 2023) (accessed on 24 January 2024).

157. Further, as the Paper notes, the assumption that a casual employee under an award is paid the casual loading in lieu of annual leave, personal/carer's leave, compassionate leave, payment for absence on a public holiday, payment in lieu of notice of termination and redundancy pay is reflected in the statutory offset mechanism inserted into the FW Act in 2021 under the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (Cth)*.[121]

158. Lastly, it is relevant to consider the regulatory burden on employers and the need to ensure a *'simple, easy to understand'* modern award system[122] in the context of the inherent payroll and administration difficulties that would be faced by employers if incidents of permanent employment such as paid annual and personal leave – which accrue based on ordinary hours of work – are retrofitted to casual employment which by definition involves *'no firm advance commitment to continuing and indefinite work according to an agreed pattern of work'*[123]. In the case of annual leave for example, it is difficult to conceive of how a casual employee could determine which days they would need to apply to take leave and for how many hours on each day, in circumstances where there exists no entitlement to be rostered on particular days or hours (or indeed, to be rostered for work at all).

The Meaning of *'Casual Employee'*

159. The extent to which casual employees are excluded from accessing certain NES entitlements (such as paid leave) may be affected by the potential passage of the Closing Loopholes No. 2 Bill introduced by the Government on 4 September 2023, given its potential to radically alter the nature and availability of casual employment. A more fulsome overview of the proposed changes to casual employment arising from the Closing Loopholes No. 2 Bill is set out earlier in this submission.

[121] The Paper at 152] – [154].

[122] Sections 134(1)(f) and (g) of the Act.

[123] Section 15A(1)(a) of the Act.

160. Section 15A was inserted in the Act by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth). In defining who is a casual employee, s.15A defines the types of employees who are prevented from accessing NES entitlements from which casuals are excluded. As currently worded, s.15A operates to prevent employees from having access to certain NES terms where the employee:

    (a) Has had an offer of employment made to them by the employer on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person;

    (b) The person has accepted the offer on that basis, and

    (c) The person is an employee as a result of that acceptance.

161. The Closing Loopholes No. 2 Bill proposes to include a new definition of *'casual employee'*, with a view to limiting employees who will be captured by the definition. If these amendments are made, they would have the effect of reducing the number of employees who are excluded from the relevant NES entitlements.

162. Further, the Bill proposes an additional pathway for casual conversion to permanent employment. The Department of Employment and Workplace Relations has reported that 85,000 *'regular casual'* workers are expected to seek conversion to permanency in each of the first five years after the passing of the Closing Loopholes No. 2 Bill, and half that number beyond that point.[124]

163. Taken together, the measures contained in the Closing Loopholes No. 2 Bill will have the practical effect of substantially increasing the ability of casual employees to access more secure forms of employment and as a corollary, diminish arguments in support of awards being used to address so-called *'entitlement gaps'*.

[124] Workplace Express, *'85,000 a year set to use casual conversion laws: DEWR'* (23 January 2024).

164. It follows that, for the reasons outlined above, Ai Group does not consider that awards should be varied to supplement so-called *'NES entitlement gaps'* for casual employees.

11. QUESTION 6

165. Question 6 is as follows:

> Is there evidence that use of individual flexibility arrangements undermines job security?

166. In our submission, the answer to question 6 is *'no'*.

167. Rather, the availability of IFAs in fact improves job security, by providing a vehicle for the implementation of mutually agreed arrangements that would otherwise not be permitted by the applicable award and which result in the employee being better off overall.

168. In particular, IFAs can facilitate the employment of an employee, including on a permanent basis, in circumstances where this might not otherwise be feasible. For example, the strictures of award terms concerning hours of work may preclude an employee from being able to continue their employment, having regard to their availability and personal circumstances. The model flexibility term may allow the implementation of an IFA that enables the continuation of their employment, by varying the effect of award terms concerning arrangements for when work is performed, provided its various requirements are met. In our experience, IFAs are commonly used in this context.

169. In addition, whilst evidence regarding the use and content of IFAs is limited,[125] there is nothing within the results of the research that is available to indicate that either the utilisation of IFAs, or their content, is undermining job security.

[125] See discussion of this in Fair Work Commission, *General Manager's report into individual flexibility arrangements under section 653 of the Fair Work Act 2009* (November 2021), at page vi; Evidence regarding the use of IFAs is scarce, due to the absence of any sources of administrative data in relation to IFAs and the small scale on which they are utilised within Australia's industrial relations landscape.

The Content of IFAs

170. IFAs provide a mechanism to enhance workplace flexibility for employees and employers. By way of illustration:

(a) The Explanatory Memorandum to the *Fair Work Bill 2008* explained that an IFA '*might provide for varied working hours to allow parents or guardians to drop off or pick up children from school where this suited the business needs of the employer*'.[126]

(b) Some awards do not permit the performance of ordinary hours of work during the weekend.[127] An IFA could be implemented to allow for this in relation to an employee who is primarily available on the weekend, due to study commitments or caring responsibilities that preclude them from being able to work on weekdays.

(c) Some employees wish to work outside the span of hours prescribed for a given day (e.g. they wish to start work early in the morning such that they can finish in the afternoon, before their children are released from school) and some employers require work to be performed at those times. An IFA could facilitate an arrangement that enables this.

171. Research in relation to IFAs has been conducted by the General Manager of the Commission pursuant to s.653(1) of the Act on four occasions (**FWC Reports**).[128] Notably, in the section of the 2012-15 Report dealing with *'Outcomes reported by employees with IFAs',* the most common outcome overall (at 42 percent of employees) was flexibility to better manage non-work related commitments. Further, most IFAs were reportedly initiated by employees.[129]

[126] Explanatory Memorandum to *the Fair Work Bill 2008* at [570].

[127] See for example clause 13.4 of the Clerks Award, which only permits ordinary hours to be worked on Saturday morning.

[128] Referred to in this submission as the 2009–12 Report, 2012–15 Report, 2015–18 Report and 2018 - 21 Report.

[129] 2018-21 Report at page 11.

172. Research undertaken by the Commission for the purpose of the 2009-12 Report is also telling; with 60 percent of employers who had made IFAs with multiple employees (**Multiple IFA Employers**) reporting having made IFAs with permanent staff. In contrast, around 19 percent of such employers had agreed to IFAs with casual staff.[130] In the 2012-15 Report, permanent employees accounted for 89.3 percent of IFAs made.[131]

173. Variations to award terms dealing with arrangements for when work is performed has consistently been reported as the most common variation type for which an IFA is used:

    (a) The 2009-12 Report found that arrangements for when work is performed was the most frequently reported form of variation amongst employers who had made an IFA with only a single employee (accounting for 45 percent of variations), and also accounted for 36 percent of variations made by Multiple IFA Employers; and that within this category, the most frequently reported variations related to changes in the span of ordinary hours, days of the week when work is to be performed and the maximum number of ordinary hours worked in a shift.[132]

    (b) The 2012-15 Report found that three-quarters of employers, regardless of whether they had made IFAs with a single or multiple employees, indicated that the most common variations in IFAs were to *'arrangements for when work is performed'* (including changes to the span of ordinary hours or to the days of the week when work is performed, or modifications to breaks or entitlements to rest periods).[133]

[130] Fair Work Commission, *General Manager's report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements 2009 – 2012* (November 2012), page 45.

[131] 2012-15 report, page 28.

[132] 2009-12 Report, page 60.

[133] 2012-15 Report, pages vii and 30.

(c) The 2015-18 Report found that the most common elements included (or sought to be included) in IFAs were a reduction in hours (from full-time to part-time), changes to the start and finish times, changes to the days of work, changes to the time work is performed, and working from home during selected days of the week.[134]

(d) The 2018-21 Report found that employee-requested variations were more likely to involve changes to start/finish times, change in days worked and a reduction in the number of days worked.[135]

Safeguards in the Model Term and the Act

174. Awards generally contain a model term that permits the making of an IFA. It is set out at paragraph [212] of the Paper. That model term has various in-built features which ensure that IFAs cannot be used as a mechanism to undermine job security. These include the following:

(a) Employees are required to be *'better off overall'* under the terms of the IFA than the reference award;[136]

(b) Employers are required to ensure that any IFA is in writing and signed by the employee and employer, as well as by a parent or guardian of the employee if they are under 18, and a copy of the IFA is then given to the employee;[137]

(c) IFAs cannot be made so as to change minimum employment conditions contained in the NES - insofar as entitlements such as paid leave and notice of termination and redundancy entitlements may be considered relevant to security of work;[138] and

[134] 2015-18 Report, page 18.

[135] 2018-21 Report, pages 12-13.

[136] Clause A.5.

[137] Clauses A.7 – A.9.

[138] Fair Work Commission, *General Manager's report into the extent to which individual flexibility arrangements are agreed to and the content of those arrangements 2009 – 2012* (November 2012), page 11. Also see clause A.1.

(d) IFAs are required to be genuinely agreed to by the employee and employer, and able to be terminated by either party in accordance with the model flexibility term under which the IFA is made.[139]

175. Further, s.344 of the Act prohibits an employer from exerting undue influence or undue pressure on an employee in relation to any decision by them to agree to, or terminate, an IFA.[140]

176. Each of these elements of the model flexibility term and the Act provide safeguards that protect employees from arrangements that might otherwise undermine job security.

The Limited Prevalence of IFAs

177. The FWC Reports have consistently identified that the utilisation of IFAs is very low, ranging over the years as an estimate of between 9 percent[141] and 14 percent[142] of employers. Although the most recent 2018-21 Report did not estimate the incidence of IFAs made during the reporting period, it included a finding that '*the prevalence of IFAs was low'*.[143]

178. Accordingly, the potential capacity of IFAs to undermine job security (and specifically, to undermine award terms and conditions relevant to job security) is necessarily tempered by their limited prevalence within Australia's industrial relations system.

179. Further, we have also not identified anything in the FWC Reports to provide a basis to conclude that IFAs are being used more extensively in relation to particular categories of employees who are identified as potentially more vulnerable to experiencing job insecurity.

[139] Clause A.2 and A.11.

[140] Section 344(c) of the Act.

[141] 2015-18 Report, pages vi and 13.

[142] 2012-15 Report, page 14.

[143] 2018-21 Report, page 10.

180. In this regard, there is some overlap between the categories of person specifically required to be considered by the General Manager as to the effect of IFAs on their employment as part of the 3-yearly reporting requirement,[144] and the employees described in the Paper as occupying a higher share of insecure employment.[145] The overlapping categories are women, young people and persons from a non-English speaking background / new migrants.

181. The FWC Reports do not disclose any consistent correlation regarding the incidence of IFAs amongst these categories of employees; that is, there is nothing in the FWC Reports to suggest that IFAs are consistently and more prevalently used in relation to the categories of employees purportedly more vulnerable to job insecurity than those who are not, so as to suggest any correlation between the use of IFAs and job insecurity.

182. By way of illustration, in relation to women, the:

    (a) 2009-12 Report concluded that 69.1 percent of IFAs reported were made by female employees,[146]

    (b) 2012-2015 Report concluded that 61.7 percent of employees with an IFA were female,[147] and

    (c) 2018-21 Report found that respondents to its online survey were more likely to indicate that IFAs were mostly signed by females, although a similar proportion also indicated no discernible difference between females and males.[148]

[144] Section 653(2) of the FW Act requires the General Manager give consideration to the effect of IFAs on the employment of the following persons: women, part-time employees, persons from a non-English speaking background, mature age persons, and young persons.

[145] The Paper describes women, young people, Aboriginal and Torres Strait Islander peoples, some members of the LGBTQI+ community, new migrants and people who disability as routinely reporting a higher share of insecure employment: see [109] and more detailed discussion at [110] – [121] inclusive.

[146] 2009-12 Report, page 58.

[147] 2012-15 Report, pages 27-28.

[148] 2018-21 Report, page 15.

183. In relation to young people, the:

(a) 2009-12 Report concluded that persons under 25 years accounted for 4.1 percent of all employees who had possibly made an IFA,[149]

(b) 2012-15 Report concluded that persons under 25 years accounted for 10.2 percent of all employees with an IFA,[150] and

(c) 2018-21 Report stated that respondents to its online survey identified young people (i.e. aged under 18 years) as accounting for 12 percent of employees who had signed IFAs.[151]

184. In relation to persons from non-English speaking backgrounds, the:

(a) 2009-12 Report concluded that 8.1 percent of IFAs were made with employees from a non-English speaking background,[152]

(b) 2012-15 Report concluded that 12.9 percent of IFAs were made with employees who speak a language other than English at home,[153] and

(c) 2018-21 Report stated that respondents to its online survey identified persons from a non-English speaking background as accounting for 28 percent of employees who had signed IFAs.[154]

Conclusion

185. There is no evidence to suggest that IFAs undermine job security. Whilst the FWC Reports suggest that IFAs are utilised in a very limited way, they nonetheless remain an important mechanism available to employers and employees to implement mutually agreeable arrangements that leave the employee better off overall. In many cases, they in fact improve or facilitate job

[149] 2009-12 Report, page 54.
[150] 2012-15 Report, page 28.
[151] 2018-21 Report, page 15.
[152] 2009-12 Report, page 54.
[153] 2012-15 Report, page 28.
[154] 2018-21 Report, page 15.

security, by permitting working arrangements that would otherwise be prohibited by the relevant award; especially in relation to when work is performed.

186. Any review of the model flexibility term in these proceedings should focus on how it could be varied to improve the utilisation of IFAs, including by improving the workability of the model term and easing the regulatory burden associated with implementing IFAs.

12. QUESTION 7

187. Question 7 is as follows:

> Having regard to the following modern award standard clauses:
>
> - Individual flexibility arrangements;
> - Consultation about major workplace change;
> - Consultation about changes to rosters or hours of work;
> - Dispute resolution;
> - Termination of employment; and
> - Redundancy.
>
> a. Are provisions of the standard clauses consistent with the new modern awards objective?
>
> b. Do any of the standard clauses negatively impact job security? If so, how?
>
> c. Do any or any part of the standard clauses:
>
> i. prevent or limit access to secure work?
>
> ii. enhance access to secure work?

188. We first jointly respond to questions 7(a) and 7(c)(ii), before turning to jointly consider questions 7(b) and 7(c)(i).

Questions 7(a) and 7(c)(ii)

189. The aforementioned standard clauses are consistent with the need to improve access to secure work in various ways. For example:

(a) As previously explained, the model flexibility term facilitates the implementation of mutually beneficial IFAs, that can facilitate access to secure work in various contexts.

(b) The model consultation term relating to major workplace change ensures that employers are required to consult with employees in a range of circumstances that could otherwise affect their job security, including the continuation of their employment. This includes, for example, where an

employer is proposing to restructure its operations in a way that might result in termination by reason of redundancy.

(c) The model consultation clause about changes to regular rosters or hours of work requires employer to consult employees prior to implementing changes of the prescribed kind. The clause requires that employees' views are taken into account.[155] This would ensure that an employee has an opportunity to be heard in respect of proposed changes that could impact the ongoing viability of their employment (e.g. because the employer is proposing to roster the employee at times when they are not available to work).

(d) The dispute resolution procedure provides employees with a pathway to have any disputes arising from the award or NES that impact their access to secure work to be dealt with efficiently and potentially without the need to resort to proceedings before the Courts (e.g. for alleged non-compliance with consultation provisions).

(e) The model termination and redundancy provisions provide obvious benefits and protections to permanent employees.[156]

190. With the exception of the model consultation term concerning changes to rosters and hours of work, the remaining standard terms were formulated by the Australian Industrial Relations Commission (**AIRC**) during the Part 10A Award Modernisation Process. When performing its functions under Part 10A of the *Workplace Relations Act 1996* (**WR Act**), the AIRC was required to have regard to various factors contained in s.576B(2). Relevantly, there is some overlap between many of those factors and the new requirement to take into account the need to improve access to secure work when the Commission exercises its modern award powers.[157]

[155] See for example clause 39.4 of the Clerks Award.

[156] See for example clauses 41.2 and 42 of the Clerks Award.

[157] Section 134(2) of the Act.

191. For example, when carrying out the Part 10A Award Modernisation Process (including making each of the relevant standard clauses), the AIRC was required to have regard to (amongst other things):

    (a) Promoting the creation of jobs;[158]

    (b) High levels of employment and labour force participation;[159] and

    (c) The need to assist employees to balance their work and family responsibilities effectively, and to improve retention and participation of employees in the workforce.[160]

192. These factors are patently aligned to the concept of employees being able to access secure work and improving access to such work opportunities. The requirement to have regard to the need to '*improve retention … of employees in the workforce*', on one view, went squarely to the notion of security and permanency/longevity of employment.

193. The AIRC was also required to have regard to:

    (a) Protecting the position in the labour market of young people, employees with a disability and employees to whom training arrangements apply,[161] and

    (b) The need to help prevent and eliminate discrimination on various grounds, which relevantly included race, colour, sex, sexual preference, age, physical or mental disability.

194. Insofar as part 3.6 of the Paper identifies women, young people, Aboriginal and Torres Strait Islander people, some members of the LGBTQI+ community, new migrants and people with a disability as reporting a higher share of insecure employment, it is apparent that there is considerable alignment between these

[158] Section 576B(2)(a) of the WR Act.

[159] Section 576B(2)(a) of the WR Act.

[160] Section 576B(f) of the WR Act.

[161] Section 576B(2)(b) of the WR Act.

categories of workplace participants and those whose interests the AIRC was specifically required to have regard to when making the relevant standard clauses.

195. Finally, and with a narrower focus on only the standard consultation clause regarding major change; at the time of making the standard clause, a Full Bench of the AIRC (citing from the judgment of Deane J in *Federated Clerks' Union of Australia v Victorian Employers' Federation*[162]) recognised terms and conditions of employment that require consultation as being beneficial to any employee '*who is concerned with the security, significance and content of his or her employment and whose existing employment is or may be thought vulnerable to the effects of such changes*'.[163]

Questions 7(b) and 7(c)(i)

196. To the extent that the standard clauses improve access to secure work, or they are proposed to be varied in light of the new s.134(1)(aa), it is critical that the they adopt a fair and balanced approach, that does not hamper an employer's ability to operate in a responsive and agile manner. Any proposals advanced in this Review that seek to further limit the prerogative of employers to implement necessary operational changes or curtail their discretion to determine employees' hours of work, should not be entertained.

197. Earlier in this submission (in response to questions 2 and 3) we identified the criticality for employers – particularly those involved in sectors where there is a direct interface between employers and the users or consumers of their goods and/or services – to respond to changes in customer needs or demands in a way that is efficient and maximises productivity. Many other sectors are influenced by various factors such as seasonal variations, supply chain influences and international pressures. All of these factors can lead to the need to introduce workplace change that may impact on employees. The ability for an employer to respond swiftly to market and economic changes is critical to business success

[162] (1984) 154 CLR 472 at 502-503.

[163] *Award Modernisation* [2008] AIRCFB 1000 at [41].

and longevity. This in turn may have a direct bearing on employment security, work opportunities and job longevity for employees.

198. This is, by way of example, relevant to the standard consultation terms. In our experience, the operation of the extant clauses often slows business reaction times and consumes unwarranted resources in order to pursue critical and time-sensitive changes. In some contexts, this is coupled with the presence of workplace disputation, which interrupts business operations or halts the implementation of change whilst the dispute is being resolved.

199. This Review should not result in any changes to the standard clauses that further impede the ability of employers to be agile and responsive to market forces, competitive demands, supply chain challenges and the like. Such variations would potentially have a negative bearing on the extent to which employees have access to secure work. Examples of particularly problematic potential changes include, in relation to the standard clauses dealing with consultation about major workplace change and consultation about changes to rosters or hours of work:

    (a) Employers being required to reach agreement with employees and / or their representatives in order to implement changes.

    (b) Any increase to the scope of matters about which employers are required to consult employees.

200. By way of further example, in relation to the standard dispute resolution clause, it is critical that wording such as that contained in sub-clause 8 of the standard dispute resolution clause – which requires work to continue whilst the dispute resolution procedure is being followed, and states that an employee must not unreasonably fail to comply with any direction given by the employer about performing work, whether at the same or another workplace, that is safe and appropriate for them to perform - is retained in favour of alternatives such as a requirement for the *'status quo'* to remain in place pending the resolution of a dispute.

13. QUESTION 8

201. Question 8 is as follows:

> Are there variations to the standard clauses that could improve access to, or remove barriers to accessing, the standard clauses by employees who are vulnerable to job insecurity?

202. Any extension of the scope of the standard clause's application to employees currently excluded from them would be unwarranted and unjustified. It would unfairly impose further costs and regulatory requirements on employers.

203. Further, various existing features of the standard clauses have the effect of providing safeguards and protections to employees who seek to access them, including employees who may be more vulnerable to job insecurity. These include:

(a) Rights of representation for the employee;[164]

(b) Requirements for information or proposals to be provided in writing;[165] and

(c) In the IFA standard clause; a requirement that an employer who wishes to initiate the making of an IFA and who is aware that the employee has (or should reasonably be aware that the employee may have) limited understanding of written English, must take reasonable steps including providing a translation in an appropriate language to ensure the employee understands the proposal.

[164] Employee rights of representation are contained in the standard clauses dealing with consultation about major workplace change, changes to rosters or hours of work and dispute resolution.

[165] The IFA standard clause requires an employer who wishes to initiate the making of an agreement to provide an employee with a written proposal. Any concluded IFA must be in writing. An IFA may only be terminated in writing. The standard clause on consultation about major workplace change requires an employer to give affected employees (and their representative, if any) all relevant information about the changes in writing.

204. In addition, Part 3-1 of the Act contains protections for employees who access, or seek to access, the standard clauses. This includes protection for employees from:

(a) Adverse action by their employer because they have a workplace right (for example, they are entitled to the benefit of an award standard clause) or may exercise a right (for example, the right to raise a dispute under the standard dispute clause), including protection from adverse action directed to preventing the exercise of the workplace right;[166]

(b) Being coerced by their employer not to exercise a workplace right that may arise under a standard clause, or to exercise it in a particular way;[167]

(c) Undue influence or pressure to agree to, or terminate, an IFA;[168]

(d) An employer knowingly or recklessly making false or misleading representations about their workplace rights (including the exercise or effect or exercising those rights);[169] and

(e) Adverse action by their employer because the employee seeks to be represented by a union in the context of availing themselves of the right of representation in the standard clauses.[170]

205. In this context, Ai Group submits that the existing framework of standard clauses, and the broader framework of the Act in which they operate, is carefully balanced. Any proposed expansion to the scope of the relevant provisions is likely unwarranted.

[166] Section 340(1) of the Act.

[167] Section 343 of the Act.

[168] Section 344 of the Act.

[169] Section 345 of the Act.

[170] Section 346 of the Act.

Absence of Express Limitations

206. Three of the six standard clauses contain no limitation on the types or categories of employee able to access or benefit from the rights contained therein, being the:

(a) Model flexibility clause that facilitates the making of IFAs between an employer and *'an individual employee'*;

(b) Standard clause on consultation about major workplace change, which creates a right to be consulted for *'employees who may be affected'* by relevant changes; and

(c) Standard dispute resolution clause, which can be accessed by *'parties to the dispute'*.

207. Further, part 3.6 of the Paper identifies the following categories of employees as reporting a higher share of insecure employment:

(a) Women;

(b) Young people;

(c) Aboriginal and Torres Strait Islander people;

(d) Some members of the LGBTQI+ community;

(e) New migrants; and

(f) People with disability.

208. There is nothing within the standard clauses that operates to expressly exclude these categories of employees from accessing these clauses.

Sensible Limitations on Some Standard Clauses

209. Some of the standard clauses contain sensible limitations upon who may access them, which should not be disturbed. We point to the following by way of example.

210. *First,* the standard clause about changes to rosters or hours of work does not create a right to be consulted where an employee's working hours are '*irregular, sporadic or unpredictable*'[171]. As a result, this clause may not apply to some casual employees.

211. It would be nonsensical for an employer to be required to consult with an employee who has irregular, sporadic or unpredictable hours. Plainly, the consultation clause is intended to ensure that an employer takes into account the impact on an employee of a proposed *change* to their regular hours of work, before deciding whether it will be implemented. In circumstances where an employee's hours of work are not fixed, regular or predictable, the justification for engaging in the required consultation process does not apply.

212. *Second,* the standard notice of termination clause does not apply to employees identified in ss.123(1) and 123(3) of the Act.[172] Relevantly, this has the effect of excluding the following types of employees:

    (a) Employees employed for a specified period of time, for a specified task, or for the duration of a specified season;[173]

    (b) Casual employees;[174]

    (c) Employees (other than apprentices) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement;[175]

    (d) Certain daily hire employees in the building and construction and meat industries;[176] and

[171] Sub-clause 1 of the standard clause for consultation about changes to rosters or hours of work.

[172] Sub-clause 1(a) of the standard termination of employment clause.

[173] Section 123(1)(a) of the Act.

[174] Section 123(1)(c) of the Act.

[175] Section 123(1)(d) of the Act.

[176] Sections 123(3)(b) and (c) of the Act.

(e) Weekly hire employees working in connection with the meat industry and whose termination of employment is determined solely by seasonal factors.[177]

213. Further, the standard redundancy clause creates rights and entitlements for employees whose position is made redundant, which operates in the context of the notice of termination of employment the employee is entitled to under s.117 of the Act.[178] Section 123 of the Act describes situations in which s.117 does not apply, which are as set out above.

214. The exclusion from sub-clause 1 of the standard clause relating to termination of employment in fact operates to alleviate the above categories of employees from an obligation to give notice to their employer upon resignation and accordingly, operates favourably to them. It does so in the context of an absence of any requirement under the NES for an employer to provide them with notice of termination of employment.

215. Finally, since the excluded employees do not have a right to notice of termination under the NES, it would be nonsensical for sub-clauses 2 and 3 of the standard termination of employment clause to create rights able to be exercised by those employees during the notice period. The same may be said of the exclusions to the standard redundancy clause.

216. These three standard clauses are the product of extensive consideration of the Commission, involving consultation and input of representatives of both employers and employees. They reflect sensible limits and exclusions as to how they should operate, in the context of the subject matter of the clause. It is not appropriate to modify or remove these exclusions.

[177] Section 123(3)(d) of the Act.

[178] Standard redundancy clause, subclauses X.1(b)(i), X.2(a) and X.3(a).