MODERN AWARDS REVIEW 2023-24 (AM2023/21)

SUBMISSION COVER SHEET

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Modern Award Review Stream:

Arts and Culture: ☐

Job Security: ■

Work and Care: ☐

Usability of awards: ☐

IN THE FAIR WORK COMMISSION
Matter No: AM2023/21
Modern Awards Review 2023-24

SUBMISSION OF THE AUSTRALIAN SERVICES UNION
JOB SECURITY

INTRODUCTION

1. This submission is made by the Australian Services Union ('**ASU**') in the Modern Award Review ('**Review'**) with respect to Item 2 'Job Security'. It is made pursuant to the following:

    a. The Statement issued by the Fair Work Commission ('**Commission'**) on 4 October 2023 and 18 December 2023, and

    b. The Discussion Paper – Job Security issued by the Commission on 18 December 2023 ('**Discussion Paper**').

2. Every Australian worker deserves a secure job with predictable hours of work. The ASU's submissions outline urgently needed reforms to the Modern Awards system to fix our broken safety net. As evidenced by the experiences of ASU members, a critical need exists to address systemic issues that undermine job security. We hope the Commission recognises the urgency of adopting new approaches that provide secure employment across all relevant awards. We ask the Commission to carefully consider our proposals to make job security a fundamental right for every employee, irrespective of industry or circumstance.

3. The ASU proposes thoroughly reworking modern award working time protections. Our proposals would allow the Fair Work Commission to review each award individually, a time-consuming and labour-intensive process for the Commission and industrial parties. The Commission should request additional legislative guidance from the Parliament through a legislated entitlement to roster stability and predictability. The new legislation should outline the minimum standards for rostering conditions and require the Fair Work Commission to review awards and enterprise agreements to meet those standards.

4. We have had the opportunity to view the Australian Council of Trade Unions' submission before lodgement. We adopt those submissions.

SUMMARY OF RECOMMENDATIONS

5. The Commission should review each modern award to ensure that they provide the following minimum protections:

    a. *Rostering Arrangements*: Improve access to secure work through a minimum

published roster period of 28 days, a minimum notice period of 14 days for roster changes, overtime compensation for work outside the notified roster, a limit of 5 consecutive workdays without a day's break, and a daily maximum working time limit of 12 hours.

b. *Part-Time Employment*: Ensure all modern awards provide a fair and relevant safety net for part-time workers with provisions that guarantee reasonably predictable hours of work, a written agreement outlining a regular work pattern, overtime compensation for work outside the notified roster/agreed hours of work, pro-rata pay and conditions equivalent to full-time employees, and a provision enabling employees to request an update to their contractual work hours after consistently exceeding their contracted hours for six months.

c. *Flexible working arrangements*: The Commission should develop a model term that establishes an effective framework for employees to request and negotiate flexible working arrangements.

d. *Casual Employment*: Casual employees should have a clear right to be absent from work when ill, caring for loved ones or experiencing bereavement without penalty. The Commission should consider further measures to improve job security for casuals, such as extending paid leave to casuals and/or increasing the casual loading. The Commission should recommend the strengthening of the adverse action jurisdiction to better safeguard casual employees accessing any new entitlements.

e. *Consultation and Redundancy Clauses*: All modern award consultation terms should specify the measures employers must take to prevent job losses once the decision to implement a major change has been made. This should include an obligation to address job security issues through consultation and redundancy processes.

f. *Consultation about Changes in Rosters*: Improve the consultation process concerning rosters and hours of work by mandating a 14-day notice period for roster changes and expressing that consultation is a precondition to roster change.

g. *Legislative Change*: The Commission should recommend that the Federal Government legislate a roster stability and predictability entitlement. The new legislation should outline the minimum standards for rostering conditions and require the Fair Work Commission to review awards and enterprise agreements to meet those standards.

SCOPE OF REVIEW

6. The Discussion Paper highlights seven commonly used awards. However, thousands of Australian workers rely on the safety net set by other awards. Neither the FW Act's object nor the modern awards objective is confined to the seven awards discussed. We respectfully submit that the Commission should not limit the scope of its considerations in this stream.

7. The ASU's submissions are relevant to all awards, but we specifically ask the Commission to consider:

    a. *Airline Operations—Ground Staff Award 2020* (**'Airline Operations Award'**)

    b. *Clerks - Private Sector Award 2020* ('**Clerks Award**'*)*

    c. *Contract Call Centres Award 2020* ('**Contract Call Centre Award'**)

    d. *Labour Market Assistance Industry Award 2020* (*'***Labour Market Award'**)

    e. *Legal Services Award 2020* ('**Legal Services Award'**)

    f. *Social, Community, Home Care and Disability Services Industry Award 2010* ('**SCHDS Award'**)

    g. *Supported Employment Services Award 2020* ('**SES Award'**)

8. We urge the Commission to thoroughly examine the Airline Operations Award, especially in relation to the highly female-feminised clerical and administrative classification stream. This stream covers airline staff at airports and in Airline offices. Typical roles include customer service officers (e.g. check-in desks, service desks and baggage desks), administration officers, and call centre staff. Many of our members are primary caregivers for their children or older parents.

9. There are structural limitations in the Airline Operations Award, which limit access to secure work and gender equality.

    a. *Rotating Rosters at Ordinary Rates*: The potential for employees to flex up to full-time hours on rotating rosters at ordinary rates can lead to income instability. This affects job security, especially for female employees who may face challenges managing caregiving responsibilities and planning their work-life balance.

    b. *Lack of Guaranteed Shifts and Predictability*: Limited provisions ensuring guaranteed shifts and predictable rostering may disproportionately impact women. Uncertain or unpredictable work schedules can hinder effective planning for caregiving responsibilities, exacerbating challenges faced by female workers.

c. *Predominance of Part-Time Work:* Many roles covered by the award involve part-time work. This prevalent part-time employment can disproportionately affect women, limiting their earning potential and financial independence.

d. *Limited Pathways to Full-Time Roles*: The award terms may not provide sufficient pathways for part-time employees, especially women, to transition into full-time. This limitation perpetuates job insecurity and may hinder career progression.

10. While many Airline workers are covered by enterprise agreements – their pay and conditions are closely tied to the Airline Operations Award. The Airline Operations Award does not provide employees with a fair or relevant safety net. It must be given the same attention as the Clerks Award or SCHDS Award.

ROSTERING ARRANGEMENTS

11. The Modern Award system does not provide employees with a fair and relevant safety net. Rostering rules in most awards are not consistent with the modern awards objective and must be varied to ensure they meet the objective.

12. All employees deserve consistent and reliable rosters regardless of their employer. All employees should be able to rely on published rosters to plan for the future. Employers should be obliged to genuinely consider employees' perspectives regarding the potential effects of proposed roster changes and genuinely try to accommodate the employees' individual needs. The Award system must be reformed to give employees control over their working hours.

13. All Modern Awards should include the following standard terms:

a. A minimum published roster period of 28 days,

b. A requirement for a minimum notice period of 14 days for any roster changes would promote stability and predictability for employees.

c. Overtime compensation is mandated for all work outside the notified roster, ensuring fair remuneration.

d. A limit of five consecutive workdays without a day's break,

e. The daily maximum working time limit is 12 hours.

f. Stronger consultation rights, emphasising that consultation on changes to rosters and hours of work is to occur before an employer makes said changes. This approach reinstates the original intent of consultation, fostering better work-life balance and ensuring more stable rosters.

14. For example, the Airline Operations Award is fraught with imbalances that tip the scales disproportionately in favour of employers' unilateral control over working time. Clause 17.2(b)

of the Airline Operations Award merely mandates that employers must provide a seven days' notice for a shift worker's shift and allow employers to change an employee's roster with 48 hours' notice without penalty. The only deterrent to making roster changes within the 48-hour window is a 200% penalty rate found in clause 17.2(c).

15. This system results in unpredictable rosters and allows employees little control over their working time. Airline employees often receive less than seven days' notice of their roster and have their rostered shifts changed with little notice. This forces our members to continuously monitor their phones or rostering applications in case their shifts are changed. Further, the absence of enforceable rostering rules exposes employees to variable working hours, fluctuating between minimum and 37 hours per week at ordinary rates. This so-called 'flexibility' places the entire operational burden and risk squarely on the shoulders of employees.

16. Other Awards do not offer any protections for rostering at all. For example, the Clerks Award does not require an employer to give a day worker any notice when setting or changing their roster.[1] Similarly, an employer has no obligation to give a shift worker any notice of their roster and is only required to give an employee seven days' notice when there are changes to starting and finishing times.

PART-TIME EMPLOYMENT

17. The Modern Award system does not provide part-time employees with a fair and relevant safety net. Existing part-time employment provisions are not consistent with the modern award objectives and must be varied if they meet the objectives.

18. All part-time employees have a right to stable and predictable rosters, which include consistent working hours, equitable compensation for all work beyond the notified rostered hours, and the opportunity to transition into secure full-time employment.

19. The key terms that should include the following:

    a. Reasonably predictable hours of work.

    b. A written agreement outlining a regular work pattern, which should include:

        i. Each day's working hours

        ii. Designated days of expected work,

        iii. Clearly defined starting and finishing times each day,

        iv. Acknowledging that agreed hours do not need to be the same each week.

        v. with variation in writing being permissible.

[1] Clause 14.

c. Overtime is paid for all work outside the notified roster.

d. The employee will receive, on a pro-rata basis, pay and conditions equivalent to those of full-time employees who do the same kind of work.

e. Each Award should include a provision enabling employees to request an update to their contractual work hours after consistently exceeding their contracted hours for six months. This provision should encompass the possibility of transitioning to full-time employment if an employee consistently works full-time hours.[2]

20. The Discussion Paper identifies that Full Bench observed in 2017 that "award provisions have not been constructed simply to allow any person to be employed on any number of hours below full-time hours."[3] Rather, "part-time work retains distinctive features that reflect its original purpose of providing flexibility for certain workers, notably those with care or study commitments".[4] However, our members' experience does not reflect the stated objectives of part-time employment.

21. However, this is no longer the case. Our members report that part-time employment is now used as a strategy to strengthen managerial prerogative to control working hours, particularly when employers can increase employees' work hours at ordinary rates. Combined with the weak rostering rules in many awards, part-time employees often have little control over how many hours they work each week or when they work those hours. In many cases, these gaps in our safety net allow employers to engage employees as part-time workers but roster them to work full-time hours.

22. For example, a part-time shift worker is only entitled to overtime if they work more than their rostered hours under the Airline Operations Award.[5] This affects different groups of workers differently. In some cases, members experience significant variation in their weekly hours of work, going up and down as the employer needs. In other cases, employees consistently work full-time hours despite being engaged as part-time employees.

Case Study 1

Jack's story

I'm Jack, a ground staff worker at an airline. Initially, I was verbally promised a permanent full-time position when I started working. However, when I received the written contract, it only offered part-time hours. Feeling pressured, I accepted the part-

[2] See, cl 10.3(g) of SCHDS Award.
[3] *Four yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [97].
[4] Fair Work Commission, *Modern Awards Review 2023 – 24 Discussion Paper - Job Security* (Discussion Paper, December 2023).
[5] Clause 10.3(c), Airline Operations Award.

time hours fearing that refusing might lead to the withdrawal of the offer. Although management assured me that a full-time contract would be provided soon, I continued working full-time hours while being kept on a part-time contract. With help from my union, I was able to negotiate with my employer. After six months, the airline finally agreed to update my employment contract.

23. Similarly, a part-time employee is not entitled to overtime until they have worked 10 hours a day or 38 hours a week (which may be averaged) under the SCHDS Award.[6] The SCHDS Award permits employers to engage staff of contracts with as few as ten guaranteed weekly hours and vary the employee's working time at will without any additional costs. There is a right in the award to refuse additional hours, but this right is largely theoretical. The economic power of the employer means part-timers are often too scared to refuse additional hours. Further, many community and disability sector workers have statutory obligations to continue working. For example, a child protection worker could not finish work until their replacement had arrived on the premises. Consequently, short-hours contracts are common in the industry, and workers regularly hold multiple jobs. Better working time protections for part-time employees and portable leave entitlements could improve job security in the sector.

24. The Airlines Operation Award grants employers significant control over determining working hours, lacking provisions that empower employees to influence or control their rosters. To meet the modern awards objective, the Commission must consider variations prioritising providing workers with more stable and predictable rosters. While employers may argue that additional restrictions could impede workplace operations, it is crucial to recognise that the capacity for employers to determine part-time working hours should not be unlimited.

25. The Full Bench of the Fair Work Commission views are evident in Re Apple Pty Ltd [2023] FWCFB 185. The context involved a comparison between the Apple Agreement and the Award, demonstrating that the Apple Agreement, while granting the employer the right to roster within a "contract range" of weekly hours, offered part-time employees greater autonomy and stability over their working hours. The Commission emphasised the significance of employee control of working additional hours, particularly for part-time employees, as a relevant consideration in approving the agreement.

26. Within the framework of the Apple Agreement, part-time employees had the unilateral ability to inform the employer of their availability to work, with specific operational constraints being the only limitations. Importantly, the employer was barred from rostering work when the employee was unavailable. In addition, the enterprise agreement mandated a four-week

[6] Clause 28.1(b), SCHDS Award.

rolling roster visibility and stipulated that rosters could only be altered with the explicit agreement of the employee.

27. The essence of the Apple Agreement demonstrates a situation where an employer can adjust employees' working hours, but this ability is not boundless. Instead, it is contingent upon the availability provided by the employee, offering an improved opportunity for stable and predictable rosters.

28. In alignment with the Full Bench's observation from 2017, we support that part-time employment should retain distinctive features consistent with its original purpose of providing flexibility, particularly for individuals with caregiving or study commitments. The existing Award provisions need to align with the new Modern Awards Objective and incorporate the insights of the Full Bench in 2017. The Apple Agreement is an example of if employers are afforded the ability to manipulate working hours that ability must be balanced with the right of employees to have stable and predictable working hours, particularly in the context of part-time employment.

FLEXIBLE WORKING ARRANGEMENTS

29. The current system of flexible working arrangements is a significant barrier to workers accessing secure work. Our members report that employers impose unnecessarily complex bureaucratic barriers to accessing flexible working arrangements. Further, many employers require workers to reapply every 12 months, despite the relevant factors outlined in section 65 of the FW Act, such as pregnancy, parental, and/or caregiving responsibilities, remaining consistent over many years. Members also felt an invasion of privacy due to the unnecessarily detailed information employers require to approve FWAs.

Case Study 2

<u>Amy's story</u>

My FWA I am currently on is not flexible. [Employer] has forced me, a married mum to two small kids under the age of eight to work four hour shifts over five days. I cannot work 4days or even three. I have been unofficially told that because I'm married & because my kids are healthy, I don't qualify for more flexible options. I am currently pregnant and had to take a sick day each week so I can work four days as per my doctor's medical certificate. Subsequently, I've used all my sick leave before going on maternity leave. The only benefit I have is that I don't work weekends.

30. The application process and prolonged waiting times have contributed to significant stress among many respondents.

Case Study 3

Rebecca's story

The benefits include knowing in advance what my days off are in advance to book appointments, provide care and not needing to pay for childcare. The challenges involve the application process that requires providing evidence children's and spouses medical reports. Management requires letters from spouses employment, stat dec stating whether friends or family can help, medical records of children and husbands etc Issues include providing family personal issues to compete with fellow colleagues for a desirable 4 day FWA and sometimes left unhappy when information is given in good faith and used against them when given unsuitable hours.

31. The Commission should develop a model flexible working arrangement consultation term to provide clear guidance to employers about best practice models for negotiating flexible working arrangements with employees.

CASUAL EMPLOYMENT

32. The current safety net for casual employees is a problem. Employers have too much power to hire, fire and roster casual employees at will. The theoretical right of a casual employee to refuse is often meaningless. ASU members who are casual employees tell us they refrain from exercising their existing workplace rights because they fear they will not be given any further work.

33. While punishing an employee for exercising a workplace right is an adverse action, the FW Act jurisdiction is too weak to be effective because it relies too heavily on the subjective state of mind of the decision-maker. The Commission should recommend that the Government legislates a strengthened adverse action jurisdiction to safeguard casual employees accessing the new entitlements.

34. As a bare minimum, casual employees should be given the right to be absent from work for a protected purpose. For example, when a casual employee is ill, injured, caring for a loved one or supporting the community as an emergency services volunteer, they must rely on their common law right to refuse work. This would complement welfare programs, such as the Victorian Sick Pay Guarantee.

35. The Commission has raised the possibility of extending some paid NES leave entitlements to casual employees. We do not believe new leave entitlements for casual employees would affect job security. New leave entitlements are more likely to address social welfare concerns by ensuring that employees maintain their income during absences from work. As noted above, the power of employers to hire and fire at will may make these entitlements difficult

to access in practice.

36. However, the Commission should also consider ways to strengthen existing forms of secure employment with paid leave: full-time and part-time employment. An effective approach would create a financial disincentive for employers to engage employees in casual employment, influencing their decision-making without necessitating prescriptive regulations. The simplest way would be to rebalance the relationship between permanent and casual employment by increasing the casual loading.

CONSULTATION AND REDUNDANCY REQUIRE CHANGES TO MEET THE MODERN AWARD OBJECTIVES.

37. All employees are entitled to practical steps to maximise job security when faced with redundancy and economic insecurity.

38. The ASU highlights three specific provisions out of those listed that are crucial to achieving modern awards objectives: Consultation, Redundancy and Consultation on changes to rosters and hours of work.

39. Given that women and other groups facing economic and social barriers often experience higher levels of insecure work, such a provision would contribute to promoting gender equality as well.

Job Security Terms

40. The Commission should produce a new 'commitment to job security' model term, imposing an obligation on employers to promote job security when exercising their rights under the award.[7]

41. With the introduction of a commitment to job security for employers, employers should thoroughly explore various measures to mitigate compulsory redundancies, including options like voluntary redundancies, shared job arrangements, and leave without pay.

Standard Consultation and Redundancy Clause

42. The standard consultation clause, found in all ASU awards, does not achieve the modern awards objectives and must be changed to improve access to secure work. It is too easy for an employer to start consultation at the last possible moment when it is impossible to have any influence over the decision.

43. Firstly, the standard consultation term is only activated after a "definite decision" has been made by the employer. Promoting secure work becomes challenging once an employer has made a "definite decision" regarding a major change. Consultation should commence at the

[7] See *National Tertiary Education Union v La Trobe University* [2015] FCAFC 142.

earliest opportunity to allow employees the opportunity to consider the employer's proposals and contribute meaningfully to consultation.

44. Secondly, the standard consultation term only requires employers to "discuss with affected employees…. measures to avoid or reduce the adverse effects of the change on employees". The employer must have some obligation to take practical steps to mitigate the impact of change on employees. In the case of redundancy, this must involve exhausting all other options before forcibly terminating employees.

45. For example, ASU-negotiated *Australian Services Union (Qantas Airways Limited) Agreement 12*[8] includes particularly effective job security provisions. This agreement aims to manage staff reductions by exploring solutions in consultation with the union and affected employees, such as redeployment, extended leave, unpaid leave, part-time or job share arrangements, and other voluntary measures before using forced redundancies. This proactive approach aligns with the goal of promoting job security and finding secure work options within the company.

> ***PART 8 – COMPULSORY REDUNDANCY***
>
> ***54. CONSULTATION***
>
> *54.1.1. The Company and where the redundancy impacts a member of the ASU, the ASU agree to seek to manage all necessary staff reductions in a manner aimed at minimising the need for redundancies. Only after these means have been exhausted will a redundancy program be embarked upon.*
>
> *54.1.2. Notwithstanding any obligations for notification that accrue as a result of the Act, where the Company decides to terminate the employment of employees on account of redundancy, then as soon as practicable after so deciding, and before the terminations take place, employees and where the redundancy impacts a member of the ASU, the ASU will be advised of the decision, together with:*
>
> *(a) The terminations and the reasons for them;*
>
> *(b) The number and categories of employees likely to be affected, and;*
>
> *(c) The time when, or the period over which, the Company intends to carry out the terminations.*
>
> *54.1.3. Further, prior to termination of employment and prior to the final determination, the Company will meet as a minimum its Statutory Obligations to consult employees and where the redundancy impacts a member of the ASU, the ASU on measures to avert or minimise the terminations, and implement measures (such as finding alternative employment) to mitigate the adverse effects of the terminations.*
>
> *54.2. Before implementing compulsory redundancy Qantas will investigate, provide information to and consult with the ASU on the following options:*

[8] [2023] FWCA 1320.

(a) Redeployment to another position and opportunity for "job swaps" where there is a reasonable skill and location match;

(b) Employees taking extended leave and exhausting accumulated leave;

(c) Employees taking periods of unpaid leave;

(d) Full-time employees converting to part-time;

(e) Full-time employees converting to job share; and

(f) A process of expressions of interest in which a suitable number of volunteers may be found.

These options may be investigated concurrently.

54.2.1 (intentionally omitted as it related to an obsolete company)

54.3. The redundancy program shall have regard to:

(a) Retaining an age, skill and experience balance within areas of employment in each employment category;

(b) No discrimination against employees; and

(c) Special efforts to minimise retrenchment of apprentices or trainees.

The Company will consult with the ASU where the redundancy impacts a member of the ASU, on the process to be adopted on a case-by-case basis.

Standard Consultation about changes in rosters or hours of work clause

46. The Fair Work Commission must adopt an approach that significantly improves the consultation process concerning *rosters* and *hours of work*.

47. The Revised Explanatory Memorandum to the Fair Work Amendment Bill 2013 states the purpose of the relevant amendments *' will ensure that employers cannot unilaterally make changes that adversely impact upon their employees without consulting on the change and considering the impact of those changes on those employees' family and caring responsibilities'*.[9]

48. However, the Standard Consultation clause is ineffective. Employers rarely genuinely consult with their employees about roster changes. Significantly, the Standard Consultation clause mandates that the clause be read in conjunction with any other provisions of this award concerning the scheduling of work or the giving of notice. Arguably, it permits employers to make significant changes to rosters or hours of work without consulting employees.

49. For example, the Airline Operations Award allows employers to provide only seven days' notice for an employee's shift and permits roster changes with less than 48 hours' notice, with a penalty rate within that 48-hour window. This allows employers to implement substantive

[9] Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 (Cth) at [45].

roster changes at short notice.

50. To ensure employees have sufficient time to meaningfully express their concerns about proposed rosters and for employers to consider employees. The standard consultation term should require the following:

    a. A 14-day notice period for roster changes, and
    b. A provision expressly indicating that consultation over changes to rostering or hours of work is a precondition to change being made.

AUSTRALIAN SERVICES UNION

5 FEBRUARY 2024