

**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:

By your side



Modern Award Review 2023 – 2024

Making Awards Easier to Use

ASU Submission-In-Reply

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IN THE FAIR WORK COMMISSION

Matter No: AM2023/21

Modern Awards Review 2023-24

SUBMISSION IN REPLY OF THE AUSTRALIAN SERVICES UNION Making Awards Easier to Use

Introduction

1. This submission is made by the Australian Services Union ('ASU') in the Modern Award Review 2023 – 2024 ('Review') with respect to Item 4 'Ease of Use'. It is made pursuant to the Statement of the Fair Work Commission ('Commission') issued on 4 October 2023 and 17 December 2023.
2. The ASU is an interested party in the following awards:
 - a. *Social, Community, Home Care and Disability Services Industry Award 2010* ('SCHDS Award') and
 - b. *Clerks Private Sector Award 2020* ('Clerks Award').
3. The President's statements of 15 September 2023 outline the scope of Item 4, 'Ease of Use'. Specifically,
 - a. The Review "will not include any open-ended reconsideration of the terms of modern awards" and
 - b. Parties were able to submit "proposals to make modern awards easier to use while not reducing entitlements for award-covered employees".¹
4. The ASU has had the opportunity to review the submission of the Australian Council of Trade Unions (ACTU). The ASU adopts the ACTU's submission and shares the concerns raised that most of the proposals made in this stream advocate for a reduction of entitlements or otherwise do not go to making the awards easier to use.
5. We have carefully reviewed each claim and organised our response into two sections. Firstly, we address employer claims that do not meet the ease-of-use threshold or to which the ASU objects. Proposals in category one should be dismissed. Secondly, we cover proposals that the ASU can consider during the consultation period.
6. The Clerks Award has been redrafted via the *Plain Language Re-Drafting process*. We consider

¹ Justice Hatcher, Fair Work Commission, *President's Statement on Modern Awards Review 2023 -24* (15 September 2023).

that the plain language process redrafted clauses without altering the legal effect. Any further significant redrafting is unnecessary.

7. With respect to the Australian Workplace Compliance Council's submission, we have responded to claims that contain specific proposals.

Social, Community, Home Care and Disability Services Industry Award 2010

Diminishment of SCHDS Employee's Working Conditions

8. This section sets out the ASU's response to the employer proposals, specifically proposals that diminish our members' entitlements, and we propose not discussing the claims during the consultation period.

Business NSW and Australian Business Industrial

Variation of Part-Time

9. The proposed variation to cl. 10.3(e) weakens or eliminates protections provided by this clause. It imposes a rigid requirement for a formal agreement on specific hours prior to employment commencement. Currently, explicit agreement is needed to alter the initial agreement made before employment starts. The changes sought by ABI would allow this significant agreement to be modified through a continuous exchange of text messages for roster adjustments, particularly concerning SCHADS Award workers who are already vulnerable to employer pressure due to their precarious work arrangements.

Classification of Employees

10. The proposed variation to clause 13 significantly alters the classification system by eliminating elements that enable employees to progress to the next pay point and be rewarded for acquiring or improving skills or where the employer has implemented a staff development scheme. This proposal by BNSW and ABI diminishes employees' ability to advance pay points based on the employer's requirements.

Australian Chamber of Commerce and Industry

Superannuation clauses

11. The proposed variation to cl. 23 strips back superannuation clauses. The Commission has finalised a review of the superannuation clauses outlined in [2023] FWCFB 264. Ai Group is revisiting issues that the Commission recently decided. This matter underwent an extensive process and should not be reopened for reconsideration.

Time off in Lieu Clauses

12. The proposed variation to cl. 28.2 significantly reduces employee entitlement. It proposes the following changes:
 - a. Removes the requirements for separate agreements for each period of overtime.
 - b. Removes the requirement for the TOIL to be accessed within three months after the overtime is worked and is extended to 12 months.
 - c. Changes requirements payment for overtime from the next pay period to “as soon as practicable”.
 - d. Removes note that the employer must consider s.65 requests and only refuse the requests on reasonable business grounds.
 - e. Removes an employee's entitlement to a written agreement.

Excess Annual Leave

13. The proposed variation to clauses 31.6-31.8 removes employee entitlements, including the following:
 - a. Remove an employee's rights to give notice of taking excessive leave.
 - b. Removes the employee protection of not being directed to take periods of leave of less than one week.
 - c. Removes the employee protection against the employer directing leave inconsistent with other planned leave.
 - d. Remove employee protection from the employer directing leave in more than 12-month time.

Consultation

14. The proposed variation to clauses 8 and 8A aims to combine significant changes in hours of work and regular roster obligations. It eliminates the requirement for consultation and replaces it with an invitation to discuss, thereby reducing the threshold for employees to influence decisions in the workplace. Additionally, the proposal allows employers to alter an employee's roster without first consulting the employee.

Individual Flexibility Arrangements

15. The proposed variation cl. 7 switches the Individual Flexibility Agreement (IFA) test from "better off overall" to "no disadvantage test" based on an employee's preference. Better off

overall entails more favourable terms than the modern award; removing this provision eliminates employee protection. ACCI submission emphasises that "the IFA can be more favourable terms and conditions by virtue of being preferred by the employee" and places importance on employee preference; this is fraught with risk even because the employee may not grasp the full extent of the change. The current mechanism ensures that the employee is better off and guards against exploitation.

Australian Industry Group

Minimum Engagement and Payment Periods

16. The proposed variation cl. 10.5 seeks to decrease minimum engagement and payment. It impacts employees' stability and predictability in their work schedules. Ensuring a guaranteed minimum number of hours provides security, allowing employees to budget effectively and support themselves and their families. Income security is another crucial aspect of minimum hours, as they establish a baseline level of income for employees to rely on. Without minimum hours, income fluctuations can pose challenges in budgeting and financial planning, potentially impacting employees' ability to meet their financial obligations and maintain stability in their lives.

Pay averaging

17. The proposed variation to cl. 24 introducing pay averaging will impact an employee's ability to predict earnings. It will erode our members' entitlement to fair compensation for overtime or extra hours worked beyond the regular schedule.

Pay Periods

18. The proposed variation to introduce monthly or four weekly pay periods severely impacts award-reliant employees' capacity to receive routine wages, making it more difficult to budget and meet day-to-day costs. Our members deserve a right to a regular income.

IFAs – Pay Periods

19. The proposed variation, which involves adding pay periods to Individual Flexibility Agreements (IFAs), jeopardises an employee's right to be paid at reasonable frequencies. While the current terms affected by an IFA notionally benefit both the employee and employer, introducing pay periods into IFAs offers no advantages to employees and only represents a reduction in their rights.

Annual Leave Loading

20. The proposed variation to cl. 31.3 allows employers to apply a 17.5% annual leave loading in situations where the number of hours eligible for weekend or shift penalty rates is unknown or identifiable. This proposal reduces an employee's entitlement to receive either the higher of the 17.5% loading or the relevant shift penalties if they were not on leave. It creates a potential employer incentive to inadequately roster employees and deny them their full entitlement. The current provision intentionally guarantees a minimum payment or more, reflecting the hours the employee would have worked. This proposal is out of scope.

Calculation of Minimum Hourly and Weekly Rates

21. The proposed variation allows employers to meet their obligations by compensating full-time employees for a 38-hour workweek by paying the weekly minimum rate or multiplying the hourly rate by 38. Ai Group has raised concerns about the minimum weekly rates in various awards. We propose addressing this matter through a process outside of the current Review. A separate process would allow all relevant parties to file submissions and express their views.

Definition of Home Care Sector & Social and Community Service Sector

22. No proposal has been advanced to respond to.

Annualised Wage Arrangements

23. The proposed variation seeks to include a new annualised wage arrangement. Introducing an annualised wage arrangement would diminish and change how entitlement entitlements are provided. This proposal goes beyond ease of use and is out of scope.

Work performed before and after a sleepover

24. No proposal has been advanced to respond to. The matter is part of the Ai Group application AM2023/28.

Tea Breaks

25. The proposed variation to cl.27.2 aims to allow tea breaks to be taken simultaneously with other breaks. In the context of care work, many employees may not have the opportunity to take breaks. The Ai Group recognises that breaks may not always be feasible when working with clients with complex needs. Allowing breaks to be taken concurrently poses a significant risk that employees may not be able to take any breaks at all.

Australian Workforce Compliance Council

Clothing and Equipment

26. The proposed variation cl. 20.2(b) aims to change entitlements to clothing and equipment from per 'shift' to per 'day'. This adjustment would diminish the entitlement, as a shift represents a specific period of work, and an employee may work multiple shifts within a day, such as morning and evening.

Individual Flexibility Agreement

27. The proposed variation to cl. 7.4 removes the provision that an IFA can be entered after an employee commences employment. This proposal does not relate to ease of use.

Meal Allowance

28. The proposed variation to cl. 20.5 eliminates an employee's entitlement to a meal allowance paid on the same day overtime is worked.

Ordinary Hours of Work

29. The proposed variation to cl. 25.2 removes the employee protection of not exceeding eight hours in each work period and removes the employee's agreement when working a ten-hour shift. This diminishes inbuilt protections over the length of days and maximum hours of work.

Rostered Days Off

30. The proposed variation to cl. 25.3 attempts to regulate RDOs but does not result in an ease-of-use outcome. The proposal imposed a penalty on employers for not rostering RDOs.

Changes in Roster

31. It is unclear what the proposed variation to cl. 25.5(d) will achieve in ease of use. Including a provision allowing employees to refuse additional work without proper notice duplicates an existing clause (cl. 10.3(f) of the SCHDS Award) that prohibits employers from requiring part-time employees to work beyond their guaranteed hours. This redundancy risks introducing ambiguity rather than clarity.
32. The proposal also removes 'when practicable'; the proposal aims to eliminate the display of accrued days off (ADOs) for employers on the roster.

Sleepovers

33. As the subject matter is part of the Ai Group application AM2023/28, we propose to refer any discussion to that proceeding.

Rest Breaks between rostered work

34. The proposed variation cl. 25.4 does not achieve an ease-of-use outcome. Eliminating references to the "commencement" and "conclusion" of a shift removes the defined points in time for entitlement, leading to greater ambiguity.

Cashing out of annual leave

35. The proposed variation to cl.31.5 aims to offer a guidance note, but it duplicates a significant portion of the provision itself, causing an ambiguity over which section to apply.

Chamber of Commerce and Industry WA

Sleepover

36. As the subject matter is part of the Ai Group application AM2023/28, we propose referring any discussion to that proceeding.

Meal Breaks

37. The proposed change intends to widen the scenarios where employees only receive ordinary rates while with a client. Incorporating "being present and awake overnight with a client" diminishes employees' entitlements, reducing their benefits and rights.

Part-Time Work

38. The proposed variation seeks to strip employees of their protection against being forced to work additional hours beyond their guaranteed ones. This protection is vital for vulnerable employees at risk of exploitation, as it allows them to plan their lives and maintain stability in their schedules. Implementing this variation would directly undermine the Modern Award Objective of providing employees access to secure work, as outlined in s.134(1)(aa) of the FW Act.

Notice of Roster Changes

39. The proposed variation eliminates the option for employees to swap shifts with each other and imposes a 28-day notice requirement for any changes. However, the proposed amendment to clause 25.5(d)(ii) of the SCHDS Award, which mandates a 28-day notice for roster changes, contradicts the obligation in clause 25(d)(i) to provide only seven days' notice.

10-Hour Break Requirements

40. The proposed variation to cl. 25. 4 aims to reduce the mandatory 10-hour break between shifts to 8 hours. This change diminishes rest time, impacting employees' safety and health.

Training

41. The proposed variation to cl.25.10 eliminates the minimum one-hour pay for staff meetings and remote training, instead opting for payment based on the duration of the activity. This represents a reduction in entitlements for employees. The minimum payment previously in place acknowledged the requirement for employees to engage in work-related activities. Removing this minimum payment could incentivise employers to schedule meetings and training without considering their impact on employees. In contrast, a financial payment of one hour encourages employers to allocate training and meetings more efficiently.

Time off in Lieu

42. The proposed variation to cl.28.2 aims to extend the period within which time off in lieu ('TOIL') must be taken from 3 to 12 months. This represents a reduction in employees' entitlements, the delay between the when work is performed and payment is made only benefits the employer. Looser TOIL arrangements could incentivise inadequate staffing. Ensuring employees' right to access TOIL guarantees its availability for their use.

Other Parties SCHDS Proposals for Consultation

43. This section identifies other parties' claims that ASU proposes to discuss during the consultation.

Business NSW and Australian Business Industrial & Australia Chamber of Commerce and Industry

- NIL.

Australian Industry Group

- Electronic Communications.
- Annual Leave Loading – the reference to weekend and shift rates (Cl. 31.3).
- Transitional Provisions (Cl. 10.5A and Schedule A). ASU has also proposed that the transitional provisions be deleted.

Australian Workforce Compliance Council

- Full-Time Employment Definition (Cl. 10.2).
- Part-Time Employment Definition (Cl. 10.3).
- Minimum pay for part-time and casual employees in disability services work (Cl. 10.5).

- First Aid Allowance (Cl. 20.6)
- Broken Shift Allowance (Cl. 20.12)

Chamber of Commerce and Industry WA

- Notice of Roster Change (Cl. 25.5)

Clerks Private Sector Award 2020

Diminishment of Clerks Employee's Working Conditions

44. This section sets out the ASU's response to the other parties' proposals, specifically proposals that diminish our members' entitlements, and we propose not discussing them during the consultation period.

Business NSW and Australian Business Industrial

Working Continuous Hours

45. The proposed variation cl. 13.6(a) permits split shifts via employee agreement instead of continuously working hours. This proposal removes an entitlement to overtime for a second period of work.

Variation to Part-Time Working Hours

46. The proposed variation to cl. 10.3 weakens or eliminates protections provided by this clause. It imposes a rigid requirement for a formal agreement on specific hours prior to employment commencement.

Exemption Rate for Clerical Employees

47. The proposed variation goes beyond ease of use. It aims to allow employees classified at Levels 3, 4, or 5, who are paid 55% above their existing weekly award base rate of pay, to cover up to a 50-hour work week consistently. This payment structure includes incorporating 4 hours of overtime at 150%, 8 hours of overtime at 200%, a payment for leave loading, individual allowance payments, and penalty rates.
48. Due to this proposal, employees would no longer be entitled to breaks – penalty minimum rates, allowances, overtime, rest period after working overtime, penalty rates, and annual leave loading.
49. This proposal will introduce ambiguity by adding an exemption provision despite an annualised salary provision (clause 18) in the Clerks Award that already achieves the intended outcome and builds better protection.

Australian Chamber of Commerce and Industry

Superannuation clauses

50. The proposal removes employee protections. The Commission has finalised a review of the superannuation clauses outlined in [2023] FWCFB 264. Ai Group is revisiting issues that the Commission recently decided. This matter underwent an extensive process and should not be reopened for reconsideration.

Time off in Lieu Clauses

51. The proposed variation significantly reduces an employee entitlement; it proposes the following changes:
- a. Removes the requirements for separate agreements for each period of overtime.
 - b. Removes the requirement for the TOIL to be accessed within three months after the overtime is worked and is extended to 12 months.
 - c. Removes an employee's right to request payment for overtime from the next pay period to "as soon as practicable".
 - d. Removes note that the employer is obligated to consider s.65 requests and only refuse the requests on reasonable business grounds.
 - e. Removes an employee's entitlement to a written agreement.
52. For shift workers, the proposed variation cl. 29 significantly reduces employee entitlement; it proposes the following changes:
- a. Removes an employee's entitlement to a written agreement.
 - b. Removes the requirement for the TOIL to be accessed within six months after the overtime is worked and extends it to 12 months.
 - c. Removes an employee's right to request payment for overtime from the next pay period to "as soon as practicable".
 - d. Removes note that the employer is obligated to consider s.65 requests and only refuse the requests on reasonable business grounds.

Annualised Wage Arrangements

53. The proposed variation removes employee entitlements, including:
- a. The right to know the method of calculations.

- b. The right to the outer limit of compensated hours.
- c. The right to overtime if the employee works beyond the outer limit.
- d. The right to receive an annual salary to be at least equal to what would have been paid over the year otherwise.
- e. The obligation of an employer to maintain records.
- f. The right to receive pay compensation within 14 days after reconciliation.

Excess Annual Leave

54. The proposed variation removes employee entitlements, including the following:
- a. Remove an employee's rights to give notice of taking excessive leave.
 - b. Removes the employee protection of not being directed to take periods of leave of less than one week.
 - c. Removes the employee protection against the employer directing leave inconsistent with other planned leave.
 - d. Remove employee protection from the employer directing leave in more than 12 months' time.

Consultation

55. The proposed variation combines significant changes in work hours and regular roster obligations, impacting employees directly. By eliminating the requirement for consultation and replacing it with a mere invitation to discuss, employees' ability to influence workplace decisions is diminished. Additionally, the proposal allows employers to alter employees' rosters without prior consultation, potentially disrupting their work-life balance and creating uncertainty in their schedules.

Individual Flexibility Arrangements

56. The proposed variation switches the Individual Flexibility Agreement (IFA) test from "better off overall" to "no disadvantage test" based on an employee's preference. Better off overall entails more favourable terms compared to the modern award; removing this provision eliminates protection for employees. ACCI submission emphasises that "the IFA can be more favourable terms and conditions by virtue of being preferred by the employee" and places importance on employee preference; this is fraught with risk even because the employee may not grasp the full extent of the change. The current mechanism ensures that the employee is

better off and guards against exploitation.

Australian Industry Group

Minimum Engagement and Payment Periods

57. This proposed variation to clauses 10.5 and 11.4 will impact employees' stability and predictability in their work schedules. Ensuring a guaranteed minimum number of hours provides a sense of security, allowing employees to budget effectively and support themselves and their families. Income security is another crucial aspect of minimum hours, as they establish a baseline level of income for employees to rely on. Without minimum hours, income fluctuations can pose challenges in budgeting and financial planning, potentially impacting employees' ability to meet their financial obligations and maintain stability in their lives.

Pay averaging

58. This proposed variation will impact an employee's ability for predictable earnings. Pay averaging, wherein an employee's earnings are distributed evenly over a defined period irrespective of actual hours worked, poses fairness concerns as it may result in inadequate compensation for overtime or extra hours worked beyond the regular schedule.

Pay Periods

59. This proposed variation to cl. 17.2 introduce monthly or four weekly pay periods severely impacts award-reliant employees' capacity to receive routine wages, making it more difficult to budget and meet day-to-day costs.

IFAs – Pay Periods

60. The proposed variation introduces pay periods into Individual Flexibility Agreements (IFAs), which could undermine an employee's right to receive a regular income. While current IFA terms may benefit employees and employers, this change offers no clear advantages to employees and could ultimately diminish their rights.

Annual Leave Loading

61. The proposed variation to 32.3(c) allows employers to apply a 17.5% annual leave loading when the number of hours eligible for weekend or shift penalty rates is uncertain. This change reduces an employee's entitlement to receive either the higher of the 17.5% loading or the relevant shift penalties if they were not on leave. It could lead to employers inadequately rostering employees, denying them their full entitlement.

Minimum Engagement Period for Part-Time Employees

62. The proposed variation to cl. 10.5 permits employers to pay employees for less than three hours of work based on the employee's readiness, willingness, and ability to work. This weakens the protection of ensuring a minimum of three hours of work and payment. If an employer communicates to an employee that there isn't sufficient work for three hours and the employee agrees to stop working, they would no longer be entitled to the minimum three-hour payment.

Remote Work

63. The proposed variation goes beyond ease of use and introduces split shifts by agreement. Employers and employees already have access to IFA, which permits agreements to be made about "arrangements for when work is performed". Implementing the proposed variation would undermine the purpose and protection established in IFAs.

Ordinary Hours on a Weekend

64. The proposed variation aims to decrease weekend penalty rates by extending ordinary work hours. Weekend penalty rates serve to compensate employees for the inconvenience of weekend work. This proposal exceeds the scope of improving ease of use and should be considered outside the intended focus.

Taking a Meal Break

65. The proposed variation eliminates employees' entitlement to a break for working more than 5 hours. It proposes that this could be agreed upon for up to six hours. This undermines the protection of rest for employees. Additionally, it incentivises employers to avoid proper staffing, and employees may feel obligated to agree to waive their breaks. The proposal goes beyond the ease of use and should be out of scope.

Annualised Wage Arrangements

66. The proposed variation to cl. 18 introduces annualised salaries for part-time employees, a change that goes beyond improving ease of use. Part-time employees already contend with fluctuating hours, making it challenging to determine their annual salary accurately. This change also poses a risk for employees who may opt to work additional hours, potentially leading to underpayment during the annual reconciliation process.

Exemption Rate

67. The proposed variation goes beyond ease of use and restricts exempt employees from receiving significant benefits if paid 15% above the award rate. Ai Group's proposal introduces a new clause that fails to enhance ease of use and directly reduces employees' entitlements.

Returning to Duty Remotely

68. The proposed variation to cl. 21.5 limits an employee's entitlement to a minimum of three hours of pay upon returning to duty after completing work for the day, as long as the work isn't done at the designated workplace. This change could lead to employees losing their right to the three-hour payment. It might encourage employers to recall employees to duty after returning home without compensating them for the inconvenience of completing additional work.

Australian Workforce Compliance Council

Individual Flexibility Agreements

69. The proposed variation cl. 5 eliminates protection for employees regarding translation services in cases where the employer knows or reasonably should know that an employee has limited English proficiency, requiring the employer to provide translations in an appropriate language. This protection is crucial in Individual Flexibility Agreements (IFAs) to safeguard some of the most vulnerable workers from exploitation and ensure their meaningful engagement in the workplace.

Facilitative Provisions

70. The proposed variation cl. 7 simply alters the sentence structure. The example scenarios would be more appropriately situated in a usage guide rather than being incorporated directly into the award.

Breaks (Employees other than shift workers)

71. The proposed variation to cl. 15 limits the circumstances in which an employee has two paid rest breaks as one rest break. It does not result in an ease-of-use outcome but adds examples.

Cashing out of annual leave

72. The proposed variation to cl. 32.9 attempts to provide a guidance note; however, it replicates a substantial part of the provision itself, which would lead to confusion over which section to apply.

Other Parties Clerks Proposals for Consultation

73. This section identifies other parties' claims that ASU proposes to discuss during the consultation.

Business NSW and Australian Business Industrial

- NIL.

Australia Chamber of Commerce and Industry

- Rest Periods Clause

Australian Industry Group

- Electronic Communications
- Annual Leave Loading –
 - Weekend and shift rate (Cl. 32.3), and
 - Requirement to make an additional payment (Cl. 32.3).

Australian Workforce Compliance Council

- NIL.

AUSTRALIAN SERVICES UNION

19 February 2024