Modern Awards Review 2023-24 (AM2023/21)

Submission cover sheet

Name

(Please provide the name of the person lodging the submission)

Stuart Maxwell, Senior National Industrial Officer

Organisation

(If this submission is completed on behalf of an organisation or group of individuals, please provide details)

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Modern Award Review Stream:

Arts and Culture:	☐
Job Security:	☐
Work and Care:	☒
Usability of awards:	☐

CFMEU
CONSTRUCTION

IN THE FAIR WORK COMMISSION

Fair Work Act 2009

s.157—FWC may vary etc. modern awards if necessary to achieve modern awards objective

s.576(2)(aa)—Promoting cooperative and productive workplace relations and preventing disputes

Modern Awards Review 2023-24 – Work and Care

(AM2023/21)

REPLY SUBMISSION OF THE CONSTRUCTION, FORESTRY AND MARITIME EMPLOYEES UNION (CONSTRUCTION & GENERAL DIVISION)

26th March 2024

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Introduction

1. On 12th September 2023, the Minister for Employment and Workplace Relations wrote to Justice Hatcher, the President of the Fair Work Commission (the **Commission**), regarding the Government's interest in the Commission initiating a targeted review of modern awards.[1]

2. After considering the contents of the Minister's letter, the President determined to initiate an award review (the **Review**) on the Commission's own motion to consider the following matters:

    - whether the terms of modern awards appropriately reflect the new object of the Fair Work Act (FW Act) and modern awards objective regarding job security and the need to improve access to secure work across the economy (the *Job Security* issue);
    - the impact of workplace relations settings on work and care, including early childhood education and care, having regard to relevant findings and recommendations of the Final Report of the Senate Select Committee on Work and Care (the *Work and Care* issue);
    - existing award coverage and minimum standards for the arts and culture sector, including potential coverage gaps (the *Arts and Culture* issue); and
    - what parties believe could be done to make awards easier to use (the *Making Awards Easier to Use* issue).[2]

3. The President's Statement confirmed that the review would be conducted by a five-member Full Bench of the Commission and that the conduct of the review would involve the following steps:

    - The Commission issuing discussion/research papers addressing each of the issues.
    - Following the publication of the discussion/research papers, interested parties would be invited to lodge submissions. There will also be an opportunity to lodge submissions in reply.
    - The Commission would then convene conferences to discuss the issues raised in the discussion/research papers and submissions. In accordance with the Commission's normal practice for award-related matters, the conferences would be open to any interested parties and the conference transcripts would be published on the Commission's website.

[1] President's Statement, 15th September 2023, at paragraph [1]
[2] Ibid., at paragraph [3]

- Following the conferences, a final report would be issued to conclude the review process. The report might provide recommendations about possible next steps if parties seek variations to modern awards or propose that the Commission take steps on its own motion to vary awards.[3]

4. On the 29th January 2024, Deputy President O'Neill issued a Statement on the next steps for the consideration of the work and care issues[4], and the Commission published a discussion paper concerning work and care[5].

5. In the January 2024 Statement the Commission invited interested parties to file submissions in response to the discussion paper by Tuesday 11th March 2024 and foreshadowed a mention to finalise arrangements for the consultation process on 21st February 2024.

6. On 21st February 2024 the Commission issued a further Statement ([2024] FWC 476), which amended the timetable for consultation, and which invited parties to file any submissions in reply by 12pm (AEDT) on Tuesday 26th March 2024.

7. The CFMEU (Construction & General Division) (the **CFMEU C&G**) did not file an initial submission in response to the discussion paper as we were generally supportive of the submission made by the ACTU. We do however make this brief reply submission in response to the submissions filed by the employer parties that concern awards in which we have an interest.

The NSW Business Chamber (BNSW) and Australian Business Industrial (ABI) Submission

8. The BNSW/ABI submission only contains one substantive proposal for the work and care stream which is to allow award provisions dealing with span of hours and minimum engagement clauses to be varied or not applied where an employee works from home.[6]

9. Apart from generally opposing the proposal as we believe there is sufficient flexibility already available under modern awards, the CFMEU C&G does not make any further submissions on this proposal as the major awards in which we have an interest (i.e. the *Building and Construction General On-site Award 2020*, *Joinery and Building Trades Award 2020*, and *Mobile Crane Hiring Award 2020*) all cover work that is either performed on-site or in a factory type environment where working from home is not an option. This would equally apply to the

[3] Ibid., paragraph 8.
[4] [2024] FWC 213
[5] https://www.fwc.gov.au/documents/sites/award-review-2023-24/discussion-paper-work-and-care-290123.pdf
[6] https://www.fwc.gov.au/documents/sites/award-review-2023-24/am202321-sub-bnsw-abi-120324.pdf, at paragraphs 6 and 7.

other awards in which we have an interest, particularly the *Concrete Products Award 2020* and the *Manufacturing and Associated Industries and Occupations Award 2020*.

10. The only other issue that we would comment on is the response from BNSW/ABI to question 13 of the discussion paper on the matter of annual leave. BNSW/ABI seek to make the issue of annual leave at half-pay overly complicated when it clearly is not. As noted in the discussion paper awards were varied to include a Schedule that provided for annual leave at half-pay as one of the issues to address the Covid-19 pandemic.[7] The only question that needs to be addressed is whether the parties see any merit in re-inserting such a provision in awards to apply more generally.

ACCI Submission

11. The ACCI submission[8] appears centred on the proposition that "*flexible modern work practices*" are the answer to all issues, including balancing work and caring responsibilities of workers.[9] The ACCI however seek to put a limitation on any flexible work practices to be introduced requiring that they should come at no cost to the employers.[10]

12. The CFMEU C&G rejects this blatant attempt to recast the purpose of this stream as being only about award flexibility when it is not the case. The scope of the stream as noted in paragraph 2 above is to consider,

    - the impact of workplace relations settings on work and care, including early childhood education and care, having regard to relevant findings and recommendations of the Final Report of the Senate Select Committee on Work and Care (the *Work and Care* issue);

13. The purpose of the Senate Select Committee on Work and Care was to inquire into the "*impact that combining work and care responsibilities has on the wellbeing of workers, carers, and those they care for*" and its terms of reference included "*Consideration of the impact on work and care of different hours and conditions of work, job security, work flexibility and related workplace arrangements*".[11] There should therefore be no argument that the matters to be considered in this stream cover more than flexibility in the workplace.

14. The other general criticism we would make is that the ACCI is disingenuous in claiming that "*ACCI does not seek in these proceedings to reduce workers entitlement*"[12] when that is precisely what they are seeking to do.

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[7] See for example PR721490
[8] https://www.fwc.gov.au/documents/sites/award-review-2023-24/am202321-sub-acci-120324.pdf
[9] Ibid, at paragraph 23
[10] Ibid, at paragraphs 25-27
[11] Discussion Paper – Work and Care, paragraph [12]
[12] ACCI at paragraph 27

15. On the issue of individual flexibility agreements (IFAs) the ACCI restates its position and the proposed variation that it raised in the 'Making Awards Easier to Use' Stream. The proposed variation, set out in paragraph 61, seeks to include a new subclause that redefines "better off overall" as being about no-disadvantage to the employee overall.

16. The CFMEU C&G opposes the variation. This is clearly a reduction in award conditions and seeks to roll back to the no-disadvantage regime of the *Workplace Relations Act 1996*.

17. Contrary to the submissions of ACCI on the "better off overall test" (the BOOT),[13] The High Court in *ALDI Foods Pty Limited v Shop, Distributive & Allied Employees Association [2017] HCA 53* made it abundantly clear that the BOOT is different to the no disadvantage test,

> "93. ……The BOOT expressly requires that the employees be "better off" under the Agreement compared to the award; it may be contrasted with the "no disadvantage" test which was the legislative predecessor of the BOOT……..
>
> 94. The paragraphs excerpted above from the reasons of the Full Bench in relation to the BOOT issue are all that was said upon this issue by the Full Bench. There is nothing in the reasons of the Full Bench to suggest that, irrespective of the comparison clause, the employees were found to be better off under the Agreement, such that it could possibly be said that **the Agreement as a whole secures employees payments "equal to or higher than those contained in the award**". (Emphasis added)

18. The rest of the ACCI submission is similar to the BNSW/ABI submission, and mainly deals with working from home. For the reasons expressed in paragraph 9 above we make no comment on these matters.

AIG Submission

19. The AIG submission[14] runs to a similar vein as the other employer submissions referred to above. It is nothing more than a cynical attempt to reduce conditions under the guise of trying to address work and care. Suffice it to say, save for the issue of annual leave at half pay, the CFMEU C&G strongly oppose everything they propose.

20. The CFMEU C&G notes that there is a clear inconsistency in the AIG submission as in paragraph 180 they say, in regard to when rosters are to be published and / or varied, that a one-size fits all proposition would be ill suited to the awards safety net, but yet that is precisely what they are proposing on many of the other matters they raise.

[13] Ibid, at paragraphs 66 to 78
[14] https://www.fwc.gov.au/documents/sites/award-review-2023-24/am202321-sub-aig-120324.pdf

21. To very briefly respond to some of the outrageous proposals we start with part-time work. The AIG repeat their submission from the Job Security stream on what they call "the Standard Part-time Model". The AIG's assertion in paragraph 87 that the Standard Part-time Model is "*overwhelmingly rigid and inflexible; so much so that it is commonly prohibitive and results in employers instead employing casual employees or adopting other forms of engagement (such as labour hire workers or independent contractors)*" doesn't stand up to scrutiny. Employers use of these "flexible forms of engagement" has nothing to do with modern award part-time provisions. Employers use them so that they can hire and fire at will without any ongoing commitment to the employment of workers and little chance of a dismissal being challenged.

22. In regard to the proposal set out in paragraph 89 (that consideration be given to liberalising access to part-time employment in awards that presently adopt the Standard Part-time Model), the proposed changes are unnecessary and are clearly an attempt to reduce conditions. Awards such as the *Building and Construction General On-site Award 2020* already contain provisions that allow an agreement to work part-time to be varied, as long as it is in writing, by consent and a copy of the variation is given to the employee by the employer.[15] In the modern digital age this is hardly a difficult or onerous task.

23. The proposal in paragraph 96, that awards be varied to enable an IFA to be entered into by an employer and a prospective employee prior to the commencement of their employment, must be rejected. In the Modern Awards Review 2012 the Full Bench decision on Award Flexibility[16] clearly spelt out why the provision was inserted in the first place:

> **"[73]** We also note that there is some evidence that IFAs are being used in a manner which is inconsistent with the model flexibility term and the requirements of the FW Act.
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> **[74]** In the employer survey conducted as part of the 2012 IFA Report employers were asked whether the employee was required to sign IFA documentation in order to continue or commence employment. A majority of single IFA employers (69 per cent) with modern award IFAs required the employee to sign the IFA documentation to either commence or continue their employment. Just over half of multiple IFA employees (54 per cent) required all employees to sign IFA documentation to either commence or continue their employment. On its face such conduct is inconsistent with the requirement in clause 7.2 of the model flexibility term that the employer and individual employee must have 'genuinely agreed' to make the IFA, without coercion or duress. The making of an IFA prior to the commencement of employment is inconsistent with the June 2008

[15] See clause 11
[16] [2013] FWCFB 2170

AIRC Full Bench decision in which it was decided that an IFA was to be made available only after the commencement of employment:

> "*We next consider whether the model clause ought permit an agreement to be made prior to the commencement of employment. The terms of cl.10 suggest that an agreement ought be available only after employment has commenced. Had it been intended that an agreement be permitted between an employer and a prospective employee that could have been made clear. By way of contrast to the language of cl.10, s.326(5) specifically provides that an interim transitional employment agreement may be made prior to the commencement of employment. The absence of such direct language in cl.10 is telling. We recognise that this interpretation may limit the flexibility available under the clause in some circumstances. On the other hand it is consistent with the statutory concept of awards as a safety net that the parties should initially be bound by the award provisions, which then form the base from which a flexibility agreement might be made*."

[75] The intention of the AIRC Full Bench is reflected in the reference to 'employee' in the model flexibility clause, rather than 'prospective employee'.

[76] Section 341(3) of the FW Act is also relevant in this context, it states:

> *"(3) A prospective employee is taken to have the workplace rights he or she would have if he or she were employed in the prospective employment by the prospective employer.*
> *Note: Among other things, the effect of this subsection would be to prevent a prospective employer making an offer of employment conditional on entering an individual flexibility arrangement*."

[77] The Review Report also gave consideration to this issue and concluded as follows:

> "*The Panel is not persuaded that it is appropriate or desirable for the employer and employee to enter an IFA at the time of the engagement of the employee. This is important. An essential underpinning of our recommendations is that the arrangement is genuinely agreed to by the employee. At the point of engagement, it is extremely unlikely that the employee will genuinely agree by engaging in an assessment of the potential worth of benefits foregone with the*

benefits gained. At this point, a potential employee may feel he or she has no real choice other than to accept employment on the terms offered. These circumstances would not involve genuine agreement of the type we consider must be associated with IFAs. For the sake of clarity, the Panel considers that ss.144 and 203 should be amended to include the prohibition currently under s.341(3) preventing a prospective employer making an offer of employment conditional on entering into an IFA.'"" (footnotes omitted)

24. At paragraph 112 the AIG propose that <u>all</u> awards be varied to allow for the span of hours to be expanded on both ends by agreement between an employer and employee. This is nothing more than an attempt to overturn the Full Bench decision ([2019] FWCFB 5409) in the 4-yearly Review of Modern Awards, which rejected the AIG's claims that the alteration clauses in awards allowed for the variation of the span of hours at both ends.[17] In that decision the Full Bench observed that,

> "[220] Fourth, contrary to the submissions advanced by ABI and Ai Group, it seems to us that a facilitative provision which permits the variation of the spread of hours in an award necessarily imposes some financial detriment on employees. Such variations necessarily reduce employee entitlements as they permit the certain hours to be paid at ordinary time rates which would have been, absent the variation, paid at overtime rates."

25. The proposal by the AIG to vary all awards is not only impracticable in many industries (e.g. construction where local government regulations prohibit work at certain times and/or other employees would be required on-site to allow work to be performed) but more importantly would reduce employee entitlements to penalty rates (either overtime rates of shift loadings) depending on the relevant award provision.

26. In regard to the proposed award changes relating to working from home we make no comment for the reasons outlined in paragraph 9 above.

27. As for the other AIG proposed changes dealing with reducing minimum engagement/payment periods, facilitative provisions, working ordinary hours on the weekend, varying rosters without notice, time off in lieu of overtime and make-up time, we again submit that all of these proposed changes are strongly opposed by the CFMEU C&G as they are nothing more than an attempt to reduce existing entitlements.

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[17] See paragraphs [154] to [235]