



REPORT

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

(AM2023/21)

JUSTICE HATCHER, PRESIDENT
DEPUTY PRESIDENT GOSTENCNIK
DEPUTY PRESIDENT MILLHOUSE
DEPUTY PRESIDENT O’NEILL
COMMISSIONER TRAN

SYDNEY, 18 JULY 2024

Modern Awards Review 2023–24 – final report.

INTRODUCTION

[1] On 12 September 2023, the President of the Fair Work Commission received correspondence from the Minister for Employment and Workplace Relations which expressed the Commonwealth Government’s interest in:

... the Fair Work Commission initiating a targeted review of modern awards. The desirability of a review and possible areas for focus arise from outcomes of the Jobs and Skills Summit, changes to the objects, objectives and gender equality provisions of the *Fair Work Act 2009* made by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*, workplace recommendations of the National Cultural Policy, Revive, and the Final Report of the Senate Select Committee on Work and Care.

[2] The Minister noted that, consistent with the Commission’s usual approach, it would be important for the proposed review to be transparent, informed by consultation and give stakeholders a fair opportunity to express their views. The Minister identified four key priorities in the contemplated review:

- (1) ensuring that modern award wages are appropriately set having regard to the amended objects of the *Fair Work Act 2009* (Cth) (FW Act) regarding gender equality and other amendments aimed at eliminating the gender-based undervaluation of work;
- (2) considering whether the terms of modern awards appropriately reflect the new object of the FW Act and modern awards objective regarding job security and the need to improve access to secure work across the economy, including by:
 - (a) considering award provisions concerned with rostering, guaranteed shifts, and the interaction of permanent, part-time, and casual classifications; and

- (b) reviewing standard award clauses with general application across the award safety net, to assess their continuing suitability in light of the updated modern awards objective;
- (3) commencing a consultation and research process considering 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 Care¹ (Senate Committee Final Report);
- (4) investigating existing award coverage and minimum standards for the arts and culture sector, including potential coverage gaps, in line with the Government's National Cultural Policy.

[3] The Minister further stated that he considered it critically important that the modern award system be easy to understand, stable, and sustainable, and encouraged the use of the proposed review to identify what parties believe could be done to make awards easier to use. The Minister also noted the Government's view that the review should not result in any reduction in entitlements for award-covered employees.

[4] In a statement issued on 15 September 2023,² the President stated that he had determined to initiate an award review (Review) on the Commission's own motion to consider 'priority' matters (2), (3) and (4) in the Minister's correspondence as set out in paragraph [2] above and, in addition, the matter set out paragraph [3]. The President declined to have the Review deal with priority matter (1), which concerned gender equality issues, because this matter was already the subject of a process initiated by the *Annual Wage Review 2022–23* decision³ (as the Minister's correspondence acknowledged).⁴ It was indicated that the Review would involve the exercise of the Commission's functions under s 576(2)(aa) of the FW Act and, because the review might ultimately lead to the variation of one or more modern awards, s 157. The statement foreshadowed that the conduct of the Review in respect of matters (2), (3) and (4) in paragraph [2] above would involve the following steps:

- (1) The Commission would issue discussion/research papers addressing each of the issues.
- (2) Following the publication of the discussion/research papers, interested parties would be invited to lodge submissions. There would also be an opportunity to lodge submissions in reply.
- (3) The Commission would then convene conferences to discuss the issues raised in the discussion/research papers and submissions. In accordance with the

¹ Senate Select Committee on Work and Care, Parliament of Australia, [Final Report](#) (March 2023) ('Senate Committee Final Report').

² [President's statement—Modern Awards Review 2023–24](#).

³ [2023] FWCFB 3500.

⁴ Since the President's statement was issued, the Commission has published two research reports concerning gender equality issues affecting modern awards: Natasha Cortis et al, UNSW Social Policy Research Centre, [Gender-based Occupational Segregation: A National Data Profile](#) (Final Report, 6 November 2023), and Fair Work Commission, [Stage 2 report — Gender pay equity research — Annual Wage Review 2023–24](#) (Report, 4 April 2024). In the *Annual Wage Review 2023–24* decision, the Commission identified five priority awards for consideration of the elimination of gender undervaluation: [2024] FWCFB 3500 [112]–[123], [179]. The Commission has since initiated proceedings on its own initiative to address gender undervaluation issues in those five priority awards, constituted a five-member Expert Panel for this purpose, and programmed the matters for hearing in December 2024: [2024] FWCFB 280, [2024] FWCFB 291.

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.

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

[5] In respect of the additional matter set out in paragraph [3] above ('making awards easier to use'), the process contemplated was that parties would first be invited to advance proposals to make awards easier to use while not reducing entitlements for award-covered employees. Such proposals would be confined to the seven most commonly-used modern awards, namely:

- *General Retail Industry Award 2020*⁵ (Retail Award).
- *Social, Community, Home Care and Disability Services Industry Award 2010*⁶ (SCHADS Award).
- *Hospitality Industry (General) Award 2020*⁷ (Hospitality Award).
- *Fast Food Industry Award 2010*⁸ (Fast Food Award).
- *Restaurant Industry Award 2020*⁹ (Restaurant Award).
- *Children's Services Award 2010*¹⁰ (Children's Services Award).
- *Clerks—Private Sector Award 2020*¹¹ (Clerks Award).

[6] Following the receipt of any such proposals, interested parties would be given an opportunity to file submissions in response and the Commission would convene conferences of interested parties for the purpose of considering and discussing any such proposals and the submissions in response. The statement contemplated that:

[t]he final report of the review will assess the merits of any proposal advanced and may recommend possible next steps if parties seek variations to modern awards, or propose that the Commission takes steps on its own motion to vary awards.¹²

[7] On 20 September 2023, this Full Bench was constituted for the conduct of the Review. On 26 September 2023, the President published a further statement¹³ concerning a draft timetable for the Review. Based on the matters to be the subject of the Review identified in the earlier statement, the President indicated that the Review would be conducted in the following four streams, with a separate timetable proposed for each stream:

- (1) Arts and culture sector
- (2) Job security
- (3) Work and care

⁵ [MA000004](#).

⁶ [MA000100](#).

⁷ [MA000009](#).

⁸ [MA000003](#).

⁹ [MA000119](#).

¹⁰ [MA000120](#).

¹¹ [MA000002](#).

¹² [President's statement—Modern Awards Review 2023–24](#) [10(4)].

¹³ [2023] FWC 2481.

(4) Making awards easier to use

[8] On 4 October 2023, we issued a statement¹⁴ finalising the timetable. The statement indicated that specific members of the Full Bench would be responsible for the conduct of each stream of the Review. In a further statement issued on 24 November 2023¹⁵ we confirmed that members of the Full Bench had been allocated to the conduct of the streams as follows:

- Arts and culture sector — Deputy President Millhouse;
- Job security — Deputy President Gostencnik and Commissioner Tran;
- Work and care — Deputy President O’Neill;
- Making awards easier to use — Justice Hatcher, President.

[9] In respect of each stream, we outline below the process that was undertaken in the Review and the issues which have emerged which we consider merit priority attention.

ARTS AND CULTURE SECTOR

[10] The wider context of the inclusion of the arts and culture sector in the Review is provided by the Commonwealth Government’s release on 30 January 2023 of *Revive*, a five-year plan to renew and revive Australia’s arts, entertainment and cultural sector. As part of this process, *Revive* contemplated consideration by the Commission of existing modern award coverage and minimum standards for the arts and culture sector.¹⁶

[11] *Revive* is structured around five interconnected pillars, each outlining a strategic objective for the Government and its associated actions. Consideration of the arts and culture sector is an action identified in Pillar 3 of the policy. Pillar 3 is entitled *Centrality of the Artist*, and its strategic objective is to support artists as workers and celebrate them as creators. The chapter of *Revive* concerning Pillar 3 notes that artists and arts businesses have too often not been considered ‘real’ workers or businesses. It emphasises the need to recognise the value of Australia’s cultural and creative practitioners and the necessity of fair pay and conditions.

[12] Consistent with the timetable for the Review established by our 4 October 2023 statement, a discussion paper¹⁷ (Arts and Culture Sector Discussion Paper) concerning the arts and culture sector was published by the Commission on 6 November 2023. The purpose of the Arts and Culture Sector Discussion Paper was to facilitate consultation with interested parties about the industries and occupations that may fall within the arts and culture sector, whether existing modern awards cover those identified industries and occupations, and whether there are any potential gaps in award coverage.

[13] Written submissions were called for and received both prior to and throughout the consultation period from the following parties:

- ACT Government (Hon Tara Cheyne MLA, Minister for the Arts)
- Adelaide Contemporary Experimental

¹⁴ [2023] FWCFB 179.

¹⁵ [2023] FWCFB 218.

¹⁶ Commonwealth of Australia, [National Cultural Policy — Revive: a place for every story, a story for every place](#) (30 January 2023) 54 (*‘Revive’*).

¹⁷ Fair Work Commission, [Arts and Culture Sector](#) (Discussion Paper, 6 November 2023) (*‘Arts and Culture Sector Discussion Paper’*).

- Arts Law Centre of Australia
- Artspace
- Australian Business Industrial and NSW Business Chamber
- Australian Chamber of Commerce and Industry (ACCI)
- Australian Council of Trade Unions (ACTU)
- Australian Society of Authors
- Australian Writers' Guild
- Authorship Collecting Society
- Commercial Radio and Audio Ltd (CRA)
- Community and Public Sector Union, Victorian Branch
- Construction, Forestry and Maritime Employees Union, Construction and General Division (CFMEU C&G)
- Contemporary Arts Tasmania
- Creative Australia
- Diversity Arts Australia
- Kate Larsen
- Live Performance Australia (LPA)
- Madeline Thornton-Smith
- Matrix on Board Consulting and Training
- Media, Entertainment and Arts Alliance (MEAA)
- National Association for the Visual Arts (NAVA)
- National Exhibitions Touring Support Victoria
- The Association of Professional Engineers, Scientists and Managers, Australia (Professionals Australia)
- Rebus Theatre
- Research team leading the ARC Linkage Project Visual Arts Work
- Screen Producers Australia (SPA)
- Theatre Network Australia (TNA).

[14] Consultation in relation to the arts and culture sector was conducted by Deputy President Millhouse on 20–21 December 2023 and 22–25 January, 30–31 January and 1–2 February 2024, and involved a wide range of participants.

Modern award coverage: artists and arts workers

[15] *Revive* states that its aim is to improve circumstances for all arts workers, ‘whether they are employees, contractors or business owners’. It further notes that many creative practitioners may be engaged as contractors, and describes artists as the original gig workers:¹⁸

Patterns of work across the cultural and creative sector vary, with a large number of creative practitioners undertaking short-term contracts as employees or independent contractors, or performing ad hoc and seasonal work – artists are the original gig workers. Intermittent and insecure working arrangements mean that many may not have access to minimum employment standards. In turn, many creatives rely on holding multiple jobs in order to survive, which can prove to be a disincentive to pursuing a career in the sector.

[16] Submissions filed in response to the Arts and Culture Sector Discussion Paper identified a distinction between an ‘artist’ and an ‘arts worker.’¹⁹ The term ‘artist’ is said to

¹⁸ Ibid 32.

¹⁹ [NAVA submission no 2](#) (15 January 2024).

broadly encompass visual arts and crafts professionals. By comparison, ‘arts worker’ broadly captures employees engaged in roles such as arts administrator and manager, art gallery director, community arts manager, cultural centre manager, exhibition or collections employee, curator, art director, producer or programmer, access coordinator, advisor, registrar, exhibition/collections employee, conservator, educator and public programs officer, first nations art centre manager, front of house/visitor service, gallery assistant/attendant, gallery technician/installer, studio assistant or coordinator and related roles.

[17] While the consultation process did not give rise to comprehensive data on this point, it appears that a significant proportion of ‘artists’ would fall into the category of a non-employee. This proposition appears to find some support in the submissions filed by Creative Australia,²⁰ which refers to a 2016 study of professional artists that found that 81 per cent of practicing artists are non-employees. The material before the Commission appears to support the proposition that artists generally perform work as independent contractors, sole traders, freelancers, or small business owners who produce artistic works for sale (or are commissioned to do so) on a fee for service basis.²¹

[18] It is uncontroversial that modern award coverage is limited by the FW Act to national system employees.²² While acknowledging that issues were raised during consultation with respect to an alleged disparity in the fees or commission-based earnings negotiated by artists, these are not matters that are capable of redress by the modern award system as an outcome of this Review. We observe however that the Commission’s new ‘unfair contract terms of services contracts’ jurisdiction may provide relief for individual artists who are engaged in the future as independent contractors and who are concerned about unfair ‘contract terms’ (being terms that, in an employment relationship would relate to ‘workplace relations matters’).²³ Under this jurisdiction, a person may apply to the Commission for orders under new Part 3A-5 of the FW Act, which empowers the Commission to set aside, amend or vary services contracts, as defined, entered into on or after 26 August 2024.²⁴

[19] By contrast, it is not in dispute that ‘arts workers’ are typically engaged as employees. The submissions demonstrate that where arts workers are employed by arts and culture centres run by federal, state or territory governments or universities, it is broadly accepted that award coverage is sufficiently clear.²⁵ Minimum terms and conditions of employment for national system employees of these establishments are regulated, in summary, by state-based public sector awards such as the *Victorian State Government Agencies Award 2015*,²⁶ the *State Government Agencies Award 2020*,²⁷ or other awards and enterprise agreements.²⁸ Employees within the local government sector typically have their employment regulated by

²⁰ As a consequence of *Revive*, Creative Australia was established on 24 August 2023 following the commencement of the *Creative Australia Act 2023* (Cth). It is the Government’s principal arts investment and advisory body. Creative Australia’s functions include making decisions on grants funding on a wide range of arts activities.

²¹ See, eg, [ACTU, MEAA and Professionals Australia submission](#) (4 December 2023) [10].

²² *Fair Work Act 2009* (Cth) ss 42, 48.

²³ See *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth), which amends the *Fair Work Act 2009* (Cth) to insert a new Part 3A-5.

²⁴ *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) sch 1 cl 125.

²⁵ [NAVA supplementary submission](#) (22 January 2024). Cf [Creative Australia submission](#) (4 December 2023) [2.6.1], which contends that arts worker roles could be more ‘explicitly covered’ in these instruments.

²⁶ [MA000134](#).

²⁷ [MA000121](#).

²⁸ See, eg, the *Australian Centre for Contemporary Art and Media, Entertainment and Arts Alliance Enterprise Agreement 2023* [2023] FWCA 4259, [AE522739](#).

the *Local Government Industry Award 2020*.²⁹ It appears to follow that public sector arts workers are adequately covered by established minimum terms and conditions of employment.

[20] However, where arts workers are employed in the private sector by independent galleries, there is a ‘patchwork’ system of employment conditions which appears to be associated with widespread non-compliance with the modern award system. The issue is said to primarily stem from the absence of an independent stand-alone modern award with clear coverage for arts workers. In the absence of a clear award framework, arts workers are said to be employed pursuant to a variety of ‘adapted instruments’ or documents. This includes the recommended payment standards set out in a code of practice published by NAVA.³⁰

[21] In broad terms, where a modern award is used as a reference for employment conditions for arts workers, the majority of entitlements are said to be drawn from the *Amusement, Events and Recreation Award 2020*³¹ (Amusement Award).³²

Amusement Award

[22] The Amusement Award is an industry award that covers employers throughout Australia in the amusement, events and recreation industry and their employees in the classifications set out at Schedule A to that award. The amusement, events and recreation industry is defined to include ‘heritage, tourism and cultural centres’, as well as ‘museums and galleries’ amongst other things.³³

[23] It is contended that while the Amusement Award covers employers operating in cultural centres, museums and galleries, the classification structure at Schedule A fails to effectively address the work performed by employees engaged as arts workers. To the extent that an indicative role title in Schedule A might bear some similarity to the position title held by an arts worker, it is submitted that such classifications fail to recognise the skills utilised by arts workers in the performance of their duties. Further, it is submitted that the classification descriptors in the Amusement Award fail to recognise the multidisciplinary nature of creative work or the manner in which arts workers use their skills to liaise between the artist and the business in the implementation of the creative process.³⁴

[24] There are certain job titles said to fall into the category of ‘arts worker’ which may be award-free by reference to the senior nature of the role. However, it may be broadly accepted at this preliminary stage that positions such as those set out below, when performed in a museum, gallery or cultural centre, are capable of falling within the Amusement Award but may not be clearly identifiable as covered by the award’s classification definitions:³⁵

- (a) access coordinator;
- (b) advisor;
- (c) registrar;

²⁹ [MA000112](#).

³⁰ [NAVA submission](#) (4 December 2023).

³¹ [MA000080](#).

³² Other conditions are said to be drawn generally from the *Live Performance Award 2020* [[MA000081](#)], *Educational Services (Post-Secondary Education) Award 2020* [[MA000075](#)], *Clerks—Private Sector Award 2020* [[MA000002](#)] and *Broadcasting, Recorded Entertainment and Cinemas Award 2020* [[MA000091](#)].

³³ Amusement Award (n 31), cls 4.2(a)(iv), (v).

³⁴ [Creative Australia submission](#) (4 December 2023) [2.5]; [NAVA submission](#) (4 December 2023).

³⁵ [ACTU, MEAA and Professionals Australia submission](#) (4 December 2023) [5].

- (d) exhibition/collections employee;
- (e) conservator;
- (f) educator and public programs officer;
- (g) first nations art centre employee;
- (h) front of house/visitor service;
- (i) gallery assistant/attendant;
- (j) gallery technician/installer;
- (k) studio assistant or coordinator.

[25] It is contended that this uncertainty could be rectified by expanding the classification definitions in the Amusement Award to include the roles or duties typically performed by arts workers in these positions,³⁶ where such roles are not excluded on the basis of seniority. The submissions broadly contend that most arts workers possess qualifications or experience at a diploma level or above such that any variation may include the introduction of indicative roles or duties within grade 8 of the award. To address the confusion and systemic non-compliance with the terms of the Amusement Award, it is also suggested that the award title could be varied to explicitly recognise art as work.

[26] It may provisionally be accepted that the submissions advanced concerning arts workers demonstrates a need for improved clarity in the classification structure in Schedule A of the Amusement Award. There may also be a need to review the terms of this award, including its title and terminology, to aid understanding that it is intended to set minimum terms and conditions for ‘arts workers’ in the sense discussed above. The issues raised support the Commission commencing proceedings on its own motion to vary the Amusement Award pursuant to s 157 of the FW Act.

Video game development

[27] Professionals Australia, with the support of the ACTU and the MEAA,³⁷ submitted that certain roles performed by employees in video game development are not award-covered but should be.³⁸ This includes designers, artists, animators, writers, audio workers and producers.³⁹

[28] Professionals Australia accepts that the *Professional Employees Award 2020*⁴⁰ (Professionals Award), which is expressed to cover employers throughout Australia principally engaged in the information technology industry and their employees covered by the classifications in Schedule A, covers employers in video game development.⁴¹ However, it submits that employees engaged as designers, artists, animators, writers, audio workers and producers are unlikely to fall within the award’s classification structure.⁴² This is said to be due to the requirement that persons carrying out information technology duties under the award must hold a university degree with a science or information technology major or otherwise have ‘sufficient qualifications and experience to be a Certified Professional of the

³⁶ [Creative Australia submission](#) (4 December 2023) [2.6].

³⁷ [ACTU, MEAA and Professionals Australia submission](#) (4 December 2023) [6].

³⁸ [Professionals Australia supplementary submission](#) (30 January 2024).

³⁹ *Ibid* [2].

⁴⁰ [MA000065](#).

⁴¹ See, eg, [ACCI reply submission](#) (19 January 2024) [32] and *ibid* cl 4.1(b).

⁴² [Transcript, 23 January 2024](#) PNs 681–685.

Australian Computer Society.’⁴³ It is contended that this may have the effect of excluding video game development roles from award coverage.⁴⁴

[29] If employees performing these roles are not covered by the Professionals Award, we record SPA’s preliminary view that video game development may be capable of falling within the coverage provisions of the *Broadcasting, Recorded Entertainment and Cinemas Award 2020*⁴⁵ (Broadcasting Award). The Broadcasting Award covers employers throughout Australia in the broadcasting, recorded entertainment and cinema industry (defined broadly to include the production of audio/visual content) and their employees in the award’s classifications.⁴⁶ SPA submits that where video game development is undertaken as an adjunct to, or by the same workforce as, a broader production and/or post-production slate, it would be covered under Part 13—Motion Picture Production of the Broadcasting Award. However, in respect of video game development more broadly, SPA recognises that the sector has emerged since the commencement of the award and that it does not appear to clearly fall within the award’s classification schedules in isolation from a broader production.⁴⁷

[30] Notwithstanding submissions which question whether video game employees are ‘truly’ engaged within the arts and culture sector,⁴⁸ *Revive* regards video game development as forming part of Australia’s arts and culture. *Revive* notes that increasing digital engagement has created an opportunity to grow the economic contribution of Australia’s creative industries, particularly in screen and digital games.⁴⁹ *Revive* also includes in its action items the introduction of a Digital Games Tax Offset to support growth in large-scale games development in Australia and increased investment to support digital game developers and small and medium independent games studios through Screen Australia.⁵⁰ Mindful of this, as well as the creative nature of the roles contemplated, it appears to be sufficiently clear that designers, artists, animators, writers, audio workers and producers who perform work in video game development are within the scope of the Review.

[31] Notwithstanding this, to the extent that the identified class of employees engaged to perform work in video game development are not covered by the Professionals Award or the Broadcasting Award, we are not presently persuaded that there is an appropriate basis for the commencement of a process on the Commission’s own motion pursuant to s 157 of the FW Act to extend award coverage to encompass them. On the confined information presently available, we consider that the identified class of employees may be subject to the award coverage prohibition in s 143(7)(b) of the FW Act on the basis that the work performed is not of ‘a similar nature’ to work that has traditionally been regulated by awards. This is a matter best dealt with upon application by an interested party with standing under s 158 of the FW Act.

⁴³ [Professionals Australia supplementary submission](#) (30 January 2024) [5], see also Professionals Award (n 40) cl 2—Definitions and sch A—Classification Structure and Definitions.

⁴⁴ [Professionals Australia supplementary submission](#) (30 January 2024) [2].

⁴⁵ [MA000091](#).

⁴⁶ [Transcript, 23 January 2024](#) PNs 873–877; [SPA reply submission](#) (1 February 2024) [9]–[10].

⁴⁷ [Transcript, 23 January 2024](#) PNs 873–877; [SPA reply submission](#) (1 February 2024) [8]–[10].

⁴⁸ [ACCI reply submission](#) (19 January 2024) [32].

⁴⁹ Commonwealth of Australia, *Revive* (n 16) 85.

⁵⁰ *Ibid* 86.

Audio book recording

[32] A submission was advanced by the MEAA, with the support of the ACTU and Professionals Australia,⁵¹ that the performance of production or technical-related work associated with the recording of audio books (outside of video game development) is work that falls within the scope of the Review. It is contended that such work may fall outside of the scope of the Broadcasting Award.⁵² Neither CRA nor SPA accept the contention that an award coverage gap is apparent in respect of audio book recording.⁵³

[33] The matter has not been pressed by the MEAA in the context of this aspect of the Review.

Live Performance Award

[34] The following proposals to vary the *Live Performance Award 2020*⁵⁴ (Live Performance Award) were the subject on a consensus amongst interested parties during the consultation process.

(a) Chaperone

[35] The MEAA, with the support of the ACTU and Professionals Australia,⁵⁵ submitted that there is a coverage gap in the Live Performance Award with respect to the role of ‘chaperone’.⁵⁶ A chaperone performs the function of supervising child performers with the authorisation of the child’s parents or guardians and otherwise in accordance with appropriate regulations, codes and guidelines concerning the employment of children in entertainment industries. The MEAA and LPA agree that the identified coverage gap should be resolved by the insertion of the role of ‘chaperone’ as an indicative position at Level 5 of the Live Performance Award.⁵⁷

(b) Administrator/Administrative Assistant and use of the term ‘keyboard’

[36] TNA submitted that the Live Performance Award uses outdated terminology which makes it difficult for the sector to discern applicable coverage for an ‘Arts Administrator’. It submitted that an Arts Administrator performs the duties contemplated by clauses A.1.1, A.2.1, A.3.1, A.4.1 and A.5.1 (Production and Support Staff Levels 1–5) of the award such as maintaining records, telephone duties, reception and other administrative duties. The coverage confusion is said to arise on account of the use of the term ‘clerk’ in the award.⁵⁸

[37] A consensus position was reached between TNA and LPA to replace the term ‘clerk’ where used throughout Schedule A to the Live Performance Award with the term ‘Administrator’.⁵⁹ In addition, the parties agreed that the term ‘Administrative Assistant’

⁵¹ [ACTU, MEAA and Professionals Australia submission](#) (4 December 2023) [6].

⁵² [MEAA supplementary submission](#) (22 January 2024) [1.1].

⁵³ [CRA supplementary submission](#) (2 February 2024); [SPA reply submission](#) (1 February 2024) [9].

⁵⁴ [MA000081](#).

⁵⁵ [ACTU, MEAA and Professionals Australia submission](#) (4 December 2023) [6].

⁵⁶ [MEAA supplementary submission](#) (22 January 2024) [2.3].

⁵⁷ Live Performance Award (n 54) cl A.5.1(d); [LPA submission](#) (29 January 2024) [1].

⁵⁸ [TNA submission](#) (9 January 2024).

⁵⁹ Live Performance Award (n 54) cls A.3.1(d)(i), A.3.1(d)(iii), A.3.1(d)(vi), A.4.1(d)(i), A.4.1(d)(iv).

should be included as an indicative position at Level 3 of the Live Performance Award,⁶⁰ to assist with identified coverage concerns.⁶¹ TNA and LPA also agreed that the term ‘keyboard’ in the classification definitions of the Live Performance Award should be replaced with ‘computer’ on the basis that this would assist in the identification of skills and thereby award coverage.⁶²

(c) *Arts Programmer*

[38] TNA submits that the role of Arts Programmer is not specifically covered by the Live Performance Award but should be. An Arts Programmer is said to plan, administer and review live performance activities and perform specific tasks such as managing artistic productions to meet quality, cost and timing specifications, hiring and managing staff, directing the formulation of production strategies, policies and planning and organising the preparation and presentation of productions.⁶³ A consensus position has been reached between TNA and LPA to insert the role of ‘Junior/Associate Arts Programmer’ as an indicative position at Level 6 of the Live Performance Award⁶⁴ to assist with identified coverage concerns.⁶⁵

(d) *Drafting errors*

[39] LPA, with the agreement of MEAA,⁶⁶ seeks the rectification of a number of purported drafting errors in the Live Performance Award.⁶⁷ Clause 41.2(f)(vi) of the award is said to incorrectly omit the words in bold and underlined below:

The provisions of clause 41.2(f) of this **Award** shall not apply to an archival and/or **reference** recording as defined.

[40] Further, the definition in Schedule A—Classification Definitions of the award is said to contain an erroneous cross reference at A.4.1 Production and Support Staff Level 4(b):

An employee at this level performs work above and beyond the skills of an employee at Level **3** and to the level of the employees’ training: ...

(e) *Conclusion on consent positions reached*

[41] The consensus reached on the matters identified above justify the Commission commencing a process on its own motion to vary the Live Performance Award pursuant to ss 157 and/or 160 of the FW Act to rectify the above matters.

JOB SECURITY

[42] The job security stream of the Review involved the release of a discussion paper⁶⁸ (Job Security Discussion Paper), the receipt of submissions in response and a consultation process. Submissions were received from the following parties:

⁶⁰ Ibid cl A.3.1(d).

⁶¹ [LPA submission](#) (29 January 2024) [2].

⁶² Live Performance Award (n 54) cls A.2.1(c)(vii), A.3.1(c)(x), A.4.1(c)(x), A.5.1(b)(iii), A.6.1(b)(vi); *ibid*.

⁶³ [TNA submission](#) (9 January 2024).

⁶⁴ Live Performance Award (n 54) cl A.6.1(d).

⁶⁵ [LPA submission](#) (29 January 2024) [3].

⁶⁶ [MEAA correspondence](#) (29 January 2024).

⁶⁷ [LPA submission](#) (25 January 2024).

- Australian Business Industrial and Business NSW (ABI/BNSW)
- ACCI
- ACTU
- Australian Hotels Association (AHA)
- Australian Higher Education Industrial Association (AHEIA)
- The Australian Industry Group (Ai Group)
- Australian Manufacturing Workers' Union (AMWU)
- Australian Meat Industry Council (AMIC)
- Australian Nursing and Midwifery Federation (ANMF)
- Australian Municipal, Administrative, Clerical and Services Union (ASU)
- CFMEU C&G
- Construction, Forestry and Maritime Employees Union — Manufacturing Division (CFMEU – MD)
- Flight Attendants' Association of Australia (FAAA)
- Housing Industry Association
- National Tertiary Education Industry Union (NTEU)
- Queensland Council of Unions
- Retail and Fast Food Workers Union Incorporated (RFFWU Inc)
- Shop, Distributive and Allied Employees Association (SDA)
- United Workers' Union (UWU).

[43] The major issues raised by parties in their submissions and during the consultation process were:

- the proper construction of ss 3(a) and 134(1)(aa) of the FW Act;
- part-time employment;
- individual flexibility arrangements; and
- casual employment and the National Employment Standards (NES).

[44] Some parties also advanced proposals to vary specific awards, many of which overlapped with proposals advanced in other streams of the Review. We propose to discuss as part of the job security stream the issue raised by the NTEU in relation to how fixed-term contract provisions in the FW Act interact with higher education awards.

Construction of FW Act amendments concerning job security

[45] A number of employer organisations raised issues about the proper construction of ss 3(a) and 134(1)(aa) of the FW Act. Some themes⁶⁹ in employer organisations' submissions were:

- 'job security' in the object of the Act and 'access to secure work' in the modern awards objective are distinct and should not be conflated; and
- job security is best achieved by stimulating economic growth and contributing to business sustainability.⁷⁰

⁶⁸ Fair Work Commission, *Job Security* (Discussion Paper, 18 December 2023) ('Job Security Discussion Paper').

⁶⁹ See, eg, [ABI/BNSW submission](#) (5 February 2024); [ACCI submission](#) (5 February 2024) [10]–[19]; [ACCI reply submission](#) (22 February 2024) 5–6; [AHA submission](#) (February 2024); [Ai Group submission](#) (5 February 2024); [AMIC submission](#) (15 January 2024).

⁷⁰ See especially [ABI/BNSW submission](#) (5 February 2024) [90]–[92]; [ACCI reply submission](#) (22 February 2024) [15]–[18]; [Ai Group submission](#) (5 February 2024) [48]–[55].

[46] In response, union parties generally submitted that the proper construction of ss 3(a) and 134(1)(aa) of the FW Act was beyond the scope of this review, which was not intended to be determinative,⁷¹ and that the Commission had dealt, in past decisions, with the meaning of ‘job security’ and ‘access to secure work’ and there was no utility in revisiting this in the Review.⁷² Unions also submitted that to be effective, the Review required consideration of the legislative framework in which awards operate, and that the modern awards system is key in any effort to promote job security. They emphasised that the concept of job security included the need to provide predictable and stable work arrangements.

[47] In the Job Security Discussion Paper, reference was made to the Expert Panel’s commentary about job security in the *Annual Wage Review 2022–23* decision⁷³ at [28]–[29]:

... 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).

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 ...

[48] The Expert Panel also observed at [30]:

... 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). 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 ...⁷⁴

[49] In the *Annual Wage Review 2023–24* decision⁷⁵ at [133] the Expert Panel said:

In the context of this Review, the relevance of the consideration concerning the need to improve access to secure work across the economy (s 134(1)(aa)) is primarily whether the

⁷¹ Instead, the ACTU cited authorities in [2023] FWCFB 93 and [2023] FWCFB 3500 in its [reply submission](#) (21 February 2024) [2]–[3], see also [transcript, 27 February 2024](#) PNs 37–40.

⁷² See, eg, [ACTU submission](#) (5 February 2024); [FAAA submission](#) (5 February 2024); [NTEU submission](#) (5 February 2024); [UWU reply submission](#) (21 February 2024).

⁷³ [2023] FWCFB 3500.

⁷⁴ *Ibid.*

⁷⁵ [2024] FWCFB 3500.

review outcome might affect the capacity of employers in the future to continue to offer, or maintain permanent employment.

[50] We see no reason to deviate from these views about the meaning of job security and the need to improve access to secure work in the object of the FW Act in s 3 and in the modern awards objective in s 134(1)(aa) respectively.

Part-time employment

[51] Several parties made extensive submissions concerning part-time employment, focused on the extent of flexibility provided by the part-time provisions in modern awards and the influence such provisions have on job security and access to secure work, both in theory and in practice. Submissions included proposals to change rostering restrictions, notice periods regarding rostering, changes to how regular patterns of hours and guaranteed hours can be established, arranged and varied, as well as proposals for both lesser and greater minimum engagement periods.

[52] There was no consensus regarding proposals about part-time employment, but rather a significant divergence of views. In general terms, employer organisations sought greater flexibility and the ability to unilaterally alter hours of work, while unions focused on greater predictability for employees, and employee control over part-time hours of work.⁷⁶

[53] Employer organisations submitted⁷⁷ that current part-time employment provisions across awards were inflexible and inhibited access to secure work, resulting in engagement of casual employees, labour hire and independent contractors. Further, it was said that award requirement for the payment of overtime rates of pay meant that some were not able to offer additional hours to part-time employees. As a paradigm of this approach, ABI/BNSW proposed a new category of employment, namely ‘flexible ongoing employment’, with a pay loading of 10 per cent.

[54] In the work and care stream and the ‘making awards easier to use’ stream of this review, issues concerning part-time employment similar to those raised in the job security stream were canvassed and which are discussed further below. It is sufficient to say at this point that we accept that the appropriate award regulation of the incidents of part-time employment is a matter of significance for employees’ job security.

Individual Flexibility Arrangements

[55] In the Job Security Discussion Paper, we asked parties to consider whether the use of Individual Flexibility Arrangements (IFAs) undermines job security and whether the provisions of the IFA standard clause are consistent with the new modern awards objective. Parties agreed that IFAs were underused, but differed about how to address this, if at all.

[56] The ACTU submitted that IFAs should be removed from awards by legislation,⁷⁸ and unions generally argued that flexible working requirements under the FW Act for people with

⁷⁶ See, eg, [ACTU submission](#) (5 February 2024) [11]; [AMWU submission](#) (5 February 2024) [13]; [ASU submission](#) (5 February 2024) [17]–[28].

⁷⁷ See, eg, [Ai Group submission](#) (5 February 2024) [130].

⁷⁸ [ACTU submission](#) (5 February 2024) [29].

family responsibilities sufficiently addressed employee need for IFAs.⁷⁹ We observe that while the FW Act includes rights and obligations about flexible working arrangements, those rights are limited to the circumstances in s 65. On the other hand, IFAs are not restricted to enumerated circumstances, and may be requested for any reason.

[57] Where IFAs are to be retained in awards, the ACTU sought variations and additional protections, including a regular Commission review after IFAs are entered into about whether an employee continues to be better off overall.⁸⁰ Excepting a minor proposal to rearrange sub-clauses in the IFA standard clauses, the employer organisations opposed the ACTU's proposals on the grounds of increased regulatory burden or that they are unnecessary.⁸¹

[58] We discuss the issue of IFAs further in respect of the work and care stream below (noting that the same issue was also raised in the 'making awards easier to use' stream).

Casual employment and the National Employment Standards

[59] In the Job Security Discussion Paper, we asked parties to consider whether the exclusion of casual employees from accessing certain NES entitlements (such as paid personal leave) should continue.

[60] In their submissions, employer organisations emphasised the importance of flexibility that casual employment provides to employers to meet demands and market changes.⁸² Employer organisations further said that changes to casual employment in awards should not be made until the effect of recent casual conversion and casual definition reforms are better understood.⁸³

[61] Employee organisations submitted that casual employment lacks sufficient job security and is inconsistent with the amended modern awards objective.⁸⁴ They sought that the casual loading be reassessed to ensure it compensates for lack of entitlements or increased to incentivise employers to engage employees in more secure forms of work.⁸⁵ Employer organisations disagreed that the purpose of the casual loading is to disincentivise employers from engaging casual employees.⁸⁶

[62] Employee organisations also sought a review of minimum engagement periods for casual employees;⁸⁷ rights for casual workers to be absent due to illness or injury;⁸⁸ and

⁷⁹ See, eg, [transcript, 4 March 2024](#) PN31 (Mr Maxwell – CFMEU C&G); [ACTU submission](#) (5 February 2024) [25]–[29]; According to a survey taken by Clubs Australia, 46.43 per cent of employees who requested IFAs did so due to parental responsibilities: [Clubs Australia submission](#) (7 February 2024) [53].

⁸⁰ [ACTU submission](#) (5 February 2024) [32]–[37].

⁸¹ [Ai Group reply submission](#) (21 February 2024) [130]–[147].

⁸² See, eg, [ABI/BNSW submission](#) (5 February 2024) [217]–[227]; [Clubs Australia submission](#) (7 February 2024) [15]–[39].

⁸³ See, eg, [Ai Group reply submission](#) (21 February 2024) [104]–[105].

⁸⁴ See, eg, [CFMEU C&G reply submission](#) (21 February 2024) [10]; [Queensland Council of Unions submission](#) (5 February 2024) [16].

⁸⁵ See, eg, [ACTU submission](#) (5 February 2024) [12]–[24], [63]–[65]; [ANMF submission](#) (5 February 2024) [108]–[113]; [ASU submission](#) (5 February 2024) [35]; [RFFWU Inc reply submission](#) (20 February 2024) [9b].

⁸⁶ See, eg, [Ai Group reply submission](#) (21 February 2024) [117].

⁸⁷ See, eg, [CFMEU–MD submission](#) (5 February 2024) [43].

⁸⁸ See, eg, [ACTU submission](#) (5 February 2024) [19]–[22]; [AMWU submission](#) (5 February 2024) [18]; [transcript, 4 March 2024](#) PN 93; [ASU submission](#) (5 February 2024) [32]–[36]; [RFFWU Inc reply submission](#) (20 February 2024) [17].

access to compassionate (bereavement) leave.⁸⁹ Employee organisations further sought that general protections provisions should be strengthened to ensure that effective legislative protections for casual employees,⁹⁰ which we note would be outside the scope of this Review.

[63] We are not persuaded by parties' submissions to take any steps to review or vary casual provisions in awards on our own motion. Separately, the Commission will undertake a review of casual employment provisions of modern awards having regard to the impending altered definition of casual employee in s 15A of the FW Act and amendments to Division 4A (Casual Employment) of Chapter 2 Part 2-2 brought about by the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024*.

Fixed-term contracts and Higher Education awards

[64] The NTEU made proposals to vary the two main awards that cover employees in the higher education sector, the *Higher Education Industry—Academic Staff—Award 2020*⁹¹ and *Higher Education Industry—General Staff—Award 2020*⁹² (the HE Awards).

[65] Its submissions referred to the amendments to the FW Act made by the SJPB Act that introduced regulation of the use, extension and renewal of fixed-term contracts. A new Division 5 ('Fixed term contracts') was inserted into Part 2-9 of the FW Act ('Other terms and conditions of employment') and effective from 6 December 2023, the FW Act now limits the use of fixed-term contracts for non-casual employees in the same job role to two consecutive contracts or a maximum duration of two years.⁹³

[66] Subject to the exceptions in s 333F of the FW Act, s 333E(1) prescribes circumstances in which a person may not enter into a contract with a non-casual employee that provides for termination at the end of an identifiable period.⁹⁴

[67] However, the NTEU submits that because of the exception in s 333F(1)(h), where a modern award applies to an employee and permits a fixed-term contract greater than 2 years in duration, none of the restrictions on fixed-term employment introduced by the SJPB Act contained in Division 5 of Part 2-9 will apply.⁹⁵ The NTEU submits that as result, none of the restrictions against fixed-term contracts contained in s 333E apply to any employee covered by the HE Awards.

[68] The NTEU submits that the higher education sector now allows for far more permissive use of fixed-term contracts than in the rest of the economy, and that the awards as a result do not meet the modern awards objective to improve access to secure work.

⁸⁹ See, eg, [ACTU submission](#) (5 February 2024) [23]; [transcript, 3 March 2024](#) PN 91; [RFFWU Inc reply submission](#) (20 February 2024) [17].

⁹⁰ See, eg, [ACTU submission](#) (5 February 2024) [12]–[24]; [transcript, 4 March 2024](#) PNs 80–81; [ASU submission](#) (5 February 2024) [35]–[36].

⁹¹ [MA000006](#).

⁹² [MA000007](#).

⁹³ *Fair Work Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) sch 1 cl 441.

⁹⁴ *Ibid.*

⁹⁵ [NTEU submission](#) (5 February 2024) [23]–[31].

[69] The fixed-term contract provisions of the HE Awards were developed against the backdrop of a different legislative scheme — one that did not regulate the use, extension and renewal of fixed-term contracts. For that reason, we are persuaded by the NTEU’s submission that the fixed-term contract provisions of the HE Awards require a review considering the modified legislative scheme in which they will operate.

WORK AND CARE

[70] The work and care stream of the Review involved a research and consultation process considering how modern awards impact employees in balancing work and caregiving duties. The stream also had regard to the relevant findings and recommendations of the Senate Committee Final Report.

[71] The work and care stream was initiated by the publication of a discussion paper⁹⁶ on 29 January 2024 (Work and Care Discussion Paper). This was followed by two research papers. The first was a literature review⁹⁷ undertaken by the University of Western Sydney which was published on 8 March 2024 relating to workplace relations settings within modern awards that impact people when balancing work and care (Literature Review). The second was a data profile on workplace flexibilities⁹⁸ (Data Profile), which was published on 28 March 2024. Parties were initially provided with an opportunity to make submissions in response to the Work and Care Discussion Paper. Submissions were received from the following parties:

- ABI/BNSW
- ACCI
- ACTU
- AHEIA
- AHA
- Australian Human Resources Institute
- Ai Group
- AMWU
- ASU
- ANMF
- Australian Retailers Association (ARA)
- The Australian Workers’ Union
- Carers NSW
- Carers Tasmania
- Centre for Future Work at the Australia Institute
- Circle Green Community Legal
- City of Newcastle
- Clubs Australia
- Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU)
- Community and Public Sector Union — Public Services Union Group
- Community and Public Sector Union — State Public Service Federation Group
- CFMEU C&G

⁹⁶ Fair Work Commission, [Work and Care](#) (Discussion Paper, 29 January 2024) (‘Work and Care Discussion Paper’).

⁹⁷ Meg Smith and Sara Charlesworth, [Literature Review for the Modern Awards Review 2023-24 Relating to the Workplace Relations Settings within Modern Awards that Impact People When Balancing Work and Care](#) (Report, March 2024) 14 (‘Literature Review’).

⁹⁸ Fair Work Commission, [Work and Care](#) (Data Profile, 28 March 2024) (‘Data Profile’).

- CFMEU – MD
- FAAA
- Health Services Union (HSU)
- Infinite Potential
- Law Council of Australia
- Mining and Energy Union
- Motor Trades Organisations
- National Electrical and Communications Association (NECA)
- NTEU
- Per Capita
- SDA
- South-East Monash Legal Service, Westjustice Community Legal Centre and Jobwatch
- Transport Workers’ Union of Australia
- UWU
- Work and Family Policy Roundtable.

[72] The submissions included many specific proposals to vary one or more modern awards. Consultations with interested parties were initially arranged for 3, 4, 9 and 10 April 2024 to discuss the proposals advanced and the issues raised in parties’ submissions in accordance with the following program:

Day 1:

- Part-time employment, definition, availability and guaranteed hours, overtime for part-time employees, right to say no to additional hours, other issues
- Individual flexibility arrangements, facilitative provisions, other workplace flexibilities

Day 2:

- Working from home and hours of work: working from home; span of hours and minimum payment periods when working from home;
- Minimum engagement/payment periods for part-time employees;
- Span of hours
- Rosters: notice of rosters; variation to rosters; other issues

Day 3:

- Hours of work: overtime, time off in lieu of overtime (TOIL), make-up time, on-call, recall to duty, travel time
- Leave arrangements: annual leave, ceremonial leave, other proposed leave

Day 4:

- Personal/carer’s leave: definition of immediate family, unpaid carer’s leave, separate entitlements to personal and carer’s leave
- Other variations to modern awards: paid nursing/lactation breaks; parental leave; reduce/compress standard working week; variations to the *Aircraft Cabin Crew Award 2020*.

[73] During the consultation process, an additional consultation session was arranged and occurred on 11 April 2024. Following the consultations, parties were given the opportunity to make submissions in response to the Literature Review, and submissions were received from the ANMF, the ARA and the Ai Group. In addition, during the consultation process, interested parties were consulted on the design of a survey of employers on workplace

flexibilities (Employer Survey). The Employer Survey was conducted by the Social Research Centre, and the final report of the Employer Survey⁹⁹ was published on the Commission’s website on 31 May 2024.

[74] Following the conclusion of the consultation process, Commission staff prepared an analysis entitled the ‘[Gender Prism](#)’ to identify key differences in entitlements relevant to balancing work and care responsibilities between female-dominated and male-dominated awards. The Gender Prism draws on:

- The 25 modern awards and relevant provisions analysed in the Work and Care Discussion Paper.
- A detailed breakdown of modern award coverage by gender, as outlined in the Commission report: [A Profile of Employee Characteristics Across Modern Awards](#).
- Identification of occupational gender segregation using the 60 per cent threshold, as outlined in the [Gender-based Occupational Segregation: A National Data Profile](#) report by the UNSW Social Policy Research Centre (2023).

[75] Several key issues emerged from the research material, the submissions before the Commission, the specific proposals to vary one or more modern awards which were discussed during the consultation process, and the Gender Prism. These included:

- The regulation of part-time work, including the absence of a standard definition and low guaranteed hours.
- Flexible working arrangements in modern awards, including working from home, IFAs and the adequacy of leave arrangements.
- Certainty and predictability of working hours and income.

[76] We discuss these issues further below.

Part-time employment

[77] The submissions and research in the work and care stream highlighted several issues with respect to part-time employment. The issues identified include the varied definitions of part-time employment in modern awards, issues related to rostering or job security, guaranteed hours, minimum payment periods and payment for working additional hours. There was broad acknowledgment by both employee and employer interests about the important role that part-time provisions play in balancing work and care. At the same time, some parties observed that changes to existing modern award terms should not be considered immediately given the introduction on 26 August 2024 of a new statutory definition of casual employment, which may impact the incidence of part-time employment.¹⁰⁰

[78] It is not controversial to say that part-time employment has a gendered history in that it was initially intended to a substantial degree to accommodate the perceived needs of

⁹⁹ Social Research Centre, [Modern Awards Review 2023–4 Work and Care Survey](#) (Final Report, 30 May 2024) 10 (‘Employer Survey Final Report’).

¹⁰⁰ See [Ai Group submission](#) (12 March 2024) [36]–[37]; [ACCI submission](#) (12 March 2024) [156]–[163].

women workers — in particular, their caring responsibilities.¹⁰¹ The makeup of employees working part-time hours remains predominantly women with the Data Profile finding that, as of August 2023, 31.1 per cent of all employees are part-time, with 43.3 per cent of all women employees and 18.8 per cent of all male employees working part-time.

[79] This is further supported by the analysis of the 25 modern awards in the Work and Care Discussion Paper. **Table 1** below consolidates Tables 2 and 3 of the Work and Care Discussion Paper and demonstrates the higher proportions of employees working part-time hours under female-dominated awards:

Table 1: Percentage of part-time employment under male- and female-dominated modern awards

	Gender balance	Part-time employment
Male-dominated awards		
Plumbing Award	100% male	<27.8%
Building On-site Award	93.5% male	22.2%
Manufacturing Award	93.3% male	17.3%
Road Transport Award	87.5% male	<30.3%
Electrical Award	>85.9% male	<14.1%
Female-dominated awards		
Nurses Award	>85.3% female	92.8%
Schools Award	70.2% female	>89.8%
Aged Care Award	79.5% female	86.9%
Fast Food Award	60.8% female	86.0%
Fitness Award	66.0% female	85.3%

[80] Caring for children is cited as the third most common reason for working part-time among all part-time employees, at 17.8 per cent. It is the second most common reason for working part-time amongst women part-time employees at 24.3 per cent, compared to 3.0 per cent of men part-time employees.¹⁰²

[81] The Employer Survey found that part-time work is categorised as a ‘planned flexibility’, that is, a prearranged adjustment in work schedules.¹⁰³ It concludes that, following flexible starting and finishing times and working from home, part-time work is one of the most requested workplace flexibility arrangements for employees with childcare and caring responsibilities (such as for a sick family member, elderly parent or person with disability).¹⁰⁴

[82] The Literature Review sets out findings that while there has been an increase in the rates of part-time work over the last 20 years for both men and women, there is some debate about the extent to which this trend reflects a shift in employer and employee preferences.¹⁰⁵ What is generally agreed in some sectors, however, is that part-time work has poorer rostering security compared to that in full-time work. The Literature Review suggests that this is due to the ability of employers to roster casual and part-time employees on an ‘on-demand’ basis.¹⁰⁶ This position is reflected in many of the union parties’ submissions.

¹⁰¹ See Fair Work Commission, [Job Security Discussion Paper](#) (n 68) 66; Fair Work Commission, [Work and Care Discussion Paper](#) (n 96) 46.

¹⁰² Fair Work Commission, [Data Profile](#) (n 98) 11.

¹⁰³ Social Research Centre, [Employer Survey Final Report](#) (n 99) 10.

¹⁰⁴ Ibid 24.

¹⁰⁵ Smith and Charlesworth, [Literature Review](#) (n 97) 14.

¹⁰⁶ Ibid 15.

[83] The Literature Review cites that part-time employment, along with casual employment, reflects a gendered distribution of paid work and unpaid care. Employees with caring responsibilities, who usually work reduced hours to manage work and care, may contend with job insecurity to do so. As women remain primarily responsible for unpaid care in Australia, the Literature Review suggests that the gender division of unpaid care significantly shapes their labour force participation. For example, women are much more likely than men to be out of the labour market if they have a preschool-aged child. Alternatively, if they are in paid work, women are much more likely than men to work part-time, potentially impacting career progression, lifelong earnings and superannuation contributions.¹⁰⁷

[84] The primary work and care issues concerning part-time employment arising for consideration are discussed in greater detail below.

(a) *Definition of part-time employment*

[85] There is no standard definition of part-time employment in modern awards. The Work and Care Discussion Paper observes a range of different definitions across the sample of 25 modern awards analysed. While all 25 modern awards indicate that ordinary hours of work for a part-time employee are fewer than 38 hours per week, other conditions vary from award to award. The most common conditions defining part-time arrangements in the sample include ordinary hours of work, guaranteed hours, employee availability and start and finish times. Less common arrangements include setting meal times and minimum weekly hours.¹⁰⁸

[86] The Ai Group submitted that the existing part-time model is ‘rigid and inflexible’, outlining that a revised definition of part-time employment could provide greater flexibility to fix ordinary hours of work, more scope to vary those hours, and include an option for employees to agree to additional hours at ordinary (rather than overtime) rates.¹⁰⁹

[87] The Ai Group’s proposal is opposed almost unanimously by union parties, including the ACTU, ANMF, ASU, CEPU, CFMEU C&G, UWU and SDA.¹¹⁰ In general, the unions presented proposals aimed at strengthening access to predictable and secure forms of employment. In particular, the ACTU suggested that the Ai Group proposal will see ‘workers have to give up their basic rights and give employers even more control over their working hours and conditions’.¹¹¹

(b) *Rostering and issues related to job predictability*

[88] Under the FW Act, modern awards are permitted to include terms regarding the arrangement of work hours, including rostering, notice periods and variations to working hours. The Commission’s review of 25 modern awards in the Work and Care Discussion Paper reveals diverse provisions concerning hours of work, roster changes, notification periods and exceptions to these notice periods.

¹⁰⁷ Ibid 2.

¹⁰⁸ Fair Work Commission, [Work and Care Discussion Paper](#) (n 96) 49.

¹⁰⁹ [Ai Group submission](#) (12 March 2024) [86]–[89].

¹¹⁰ See [ACTU reply submission](#) (26 March 2024) [20]–[22]; [ANMF reply submission](#) (26 March 2024) [5]–[6]; [ASU reply submission](#) (26 March 2024) [11]; [CEPU reply submission](#) (26 March 2024) [17]–[18]; [CFMEU C&G reply submission](#) (26 March 2024) [21]–[22]; [UWU reply submission](#) (26 March 2024) [2]; [SDA reply submission](#) (26 March 2024) [85]–[100].

¹¹¹ [Transcript, 3 April 2024](#) PN 122.

[89] Material before the Commission suggests that roster instability and unpredictable hours adversely affect worker-carers, who require predictable schedules to manage caregiving responsibilities.¹¹² On-demand flexibility, where employees are expected to be available at short notice, was noted to exacerbate job insecurity. For part-time employees, particularly those with caregiving responsibilities, this can lead to income insecurity and increased work-family conflict.¹¹³

[90] **Table 2** below is extracted from the Gender Prism and shows the requirements prescribed by the relevant modern award in changing part-time hours and providing notice of rosters, indicating a disparity between male- and female-dominated awards.

Table 2: Changes to part-time hours and notice of rosters in male- and female-dominated modern awards

	Gender balance	Changes to part-time hours	Notice of rosters
Male-dominated awards			
Plumbing Award	100% male	By consent	48 hours
Building On-site Award	93.5 % male	By consent	48 hours
Manufacturing Award	93.3% male	By consent	48 hours
Road Transport Award	87.5% male	By consent	48 hours
Female-dominated awards			
Pharmacy Award	>88.1% female	7 days' notice or 48 hours in an emergency	Nil
Children's Services Award	96.1% female	7 days' notice or less in an emergency	Nil
Hair and Beauty Award	92.8% female	By consent	14 days
Health Professionals Award	91.2% female	7 days' notice or less to cover a staff absence	14 days

(c) *Guaranteed hours*

[91] The majority of modern awards include a provision for agreed guaranteed hours for full-time employees. By comparison, two of the 25 awards analysed in the Work and Care Discussion Paper require minimum guaranteed hours per week for part-time employees.¹¹⁴

(d) *Employee availability*

[92] The Work and Care Discussion Paper found that of the 25 modern awards analysed, only the Hospitality Award and the Restaurant Award specifically prohibit employers from rostering an employee to work outside their nominated available hours. Additionally, the SCHADS Award and the *Electrical, Electronic and Communications Contracting Award 2020*¹¹⁵ impose restrictions on employers requiring part-time employees to perform work in excess of their guaranteed hours or outside their agreed ordinary hours.¹¹⁶

¹¹² Smith and Charlesworth, [Literature Review](#) (n 97) 42.
¹¹³ See [ACTU submission](#) (12 March 2024) [29]–[34].
¹¹⁴ Fair Work Commission, [Work and Care Discussion Paper](#) (n 96) 51.
¹¹⁵ [MA000025](#).
¹¹⁶ Fair Work Commission, [Work and Care Discussion Paper](#) (n 96) 110.

(e) *Minimum payment periods*

[93] A minority of modern awards (nine of 25) examined in the Work and Care Discussion Paper did not provide for minimum payment periods for part-time employees.¹¹⁷ Of the remaining 16 modern awards that did prescribe minimum payment periods for part-time employees, the periods ranged from one to up four hours.¹¹⁸

[94] There appears to be a gendered distinction in minimum payment periods between the male-dominated and female-dominated modern awards examined. **Table 3** below is extracted from the Gender Prism, indicating that there appears to be more generous minimum payment periods in the male-dominated awards examined as compared to the female-dominated awards of the sample:

Table 3: Minimum payment period for ordinary hours in male- and female-dominated modern awards

	Gender balance	Minimum payment period for ordinary hours
Male-dominated awards		
Plumbing Award	100% male	4 hours
Building On-site Award	93.5% male	4 hours
Manufacturing Award	93.3% male	4 hours
Road Transport Award	87.5% male	4 hours
Electrical Award	>85.9% male	2 hours
Storage Award	84.9% male	3 hours
Female-dominated awards		
Clerks Award	80.8% female	3 hours
Nurses Award	>85.3% female	2 hours
Pharmacy Award	>88.1% female	3 hours
Health Professionals Award	91.2% female	2 hours
Hair and Beauty Award	92.8% female	3 hours
Children’s Services Award	96.1% female	3 hours

(f) *Overtime for part-time employees*

[95] Overtime is a prevalent feature in Australian workplaces, with seven out of 10 employees reporting to have performed work outside of scheduled working hours.¹¹⁹ Of those that completed overtime, men are more likely to perform overtime than women (78% compared to 64%). The Literature Review observes that this finding is likely linked to women’s disproportionate share of unpaid family and caring work.¹²⁰

[96] The material before the Commission, including the Senate Committee Final Report, suggest that many part-time employees are engaged on low hour contracts but regularly perform close to full-time hours.¹²¹

[97] The Work and Care Discussion Paper showed that additional compensation for working these additional hours, can depend on the interactions between ordinary or

¹¹⁷ Ibid 76.

¹¹⁸ Ibid 75.

¹¹⁹ Eliza Littleton and Lily Raynes, *Call Me Maybe (Not): Working Overtime and A Right To Disconnect in Australia* (Survey, November 2022). Overtime in this survey was defined as all time worked in addition to scheduled working hours and refers to both paid and unpaid overtime.

¹²⁰ Smith and Charlesworth, *Literature Review* (n 97) 44.

¹²¹ [Senate Committee Final Report](#) (n 1) 113, 121–122.

guaranteed hours, the span of hours, the days worked, the type of employment and other modern award provisions.¹²²

[98] Across the modern awards, the conditions that trigger payment of overtime rates for part-time employees range from work performed outside ordinary hours to all time worked in excess of 38 hours a week. **Table 4** below is extracted from the Gender Prism and sets out the payment of overtime rates on all additional hours, beyond ordinary hours. It highlights that there is a potential gendered element to low base contract hours that can be ‘flexed up’ without incurring overtime rates for additional hours of work:

Table 4: Payment for overtime in male- and female-dominated modern awards

	Gender balance	Overtime payable on all additional hours?
Male-dominated awards		
Plumbing Award	100% male	Yes
Building On-site Award	93.5% male	Yes
Manufacturing Award	93.3% male	Yes
Road Transport Award	87.5% male	Yes
Electrical Award	>85.9% male	Yes
Storage Award	84.9% male	Yes
Female-dominated awards		
Clerks Award	80.8% female	Yes
Nurses Award	>85.3% female	No
Pharmacy Award	>88.1% female	No
Health Professionals Award	91.2% female	No
Hair and Beauty Award	92.8% female	Yes
Children’s Services Award	96.1% female	No

Working from home

[99] As observed throughout the work and care research and consultation process, the shift towards remote work in many industries and occupations has transformed the way work is performed. The Data Profile shows that the number of employees regularly working from home increased from 24.6 per cent in 2019 to 31.5 per cent in 2023.¹²³ As of August 2023, 34.2 per cent of female employees and 28.9 per cent of male employees regularly worked from home in their main job.¹²⁴

[100] Historically, working from home arrangements were believed to help women balance work and care.¹²⁵ However, the pandemic has revealed that there are complex relationships between working from home arrangements and the work-life conflict. While reduced commuting and increased schedule control lowered the conflict, unsocial working hours increased it. The Literature Review found that mothers, who are more likely to be primary caregivers, benefit more from working from home arrangements compared to fathers, although the overall positive impact was modest.¹²⁶

¹²² Fair Work Commission, [Work and Care Discussion Paper](#) (n 96) 112.

¹²³ Fair Work Commission, [Data Profile](#) (n 98) Table 1, 6.

¹²⁴ *Ibid* 5.

¹²⁵ Smith and Charlesworth, [Literature Review](#) (n 97) 20.

¹²⁶ *Ibid* 21; Inga Laß and Mark Wooden, ‘[Working from Home and Work-Family Conflict](#)’ (2023) 37(1) *Work, Employment and Society* 176, 178, 190.

[101] For many, the increase in opportunities to work remotely has expanded employment opportunities and provided more flexibility to balance work and caring responsibilities.¹²⁷ Material before the Commission suggests that working from home arrangements are synonymous with flexible working arrangements,¹²⁸ and that the main reasons for such arrangements are to accommodate employees with caring responsibilities.¹²⁹

[102] There was a general consensus amongst parties that modern awards should be varied to deal with working from home arrangements and an acknowledgement of the importance of working from home arrangements to support workers with caring responsibilities.¹³⁰ It was also acknowledged that working from home is not relevant to all industries or modern awards.¹³¹ Material before the Commission notes that working from home arrangements are most commonly implemented in desk-based industries and in more senior roles,¹³² while the Literature Review observes that around a third of all jobs could be performed remotely, with significant disparities between industries.¹³³

[103] Broadly speaking, proposals advanced by employer interests sought to modify the operation of existing terms in modern awards dealing with the span of ordinary hours, minimum payment periods, requirements that work be performed in a continuous period, and provisions relating to meal breaks including allowances. Proposals advanced by unions broadly involved the inclusion of a right for employees to work from home, with such a right being able to be refused by employers only on reasonable grounds.

[104] The Clerks Award is of particular relevance to working from home provisions. It is generally recognised that working from home arrangements are more accessible to and adopted by employees who perform clerical work. The Data Profile shows that 41.4 per cent of clerical and administrative workers regularly work from home, as compared to 31.5 per cent of all employees across all occupations.¹³⁴ The insertion of Schedule I into the Clerks Award during the COVID-19 pandemic, which had the support of unions and employer organisations, further underscores the significance of working from home provisions to the Clerks Award. We also note that the Clerks Award has been used as an example by the ACCI, ABI/BNSW and the Ai Group in their submissions relating to working from home arrangements. The ACCI anticipates ‘that the working from home arrangements suitable for this proposal would likely be largely limited to clerical roles, primarily arising under the [Clerks Award].’¹³⁵

[105] By way of background, on 28 March 2020, during the first phase of the COVID-19 pandemic, the Commission inserted Schedule I—Award Flexibility into the Clerks Award on a temporary basis.¹³⁶ This followed an application to vary the award filed by employer organisations with the support of union parties. Schedule I facilitated flexibility for employees

¹²⁷ Productivity Commission, ‘[Working from home](#)’ (Research Paper, September 2021) 4–5.

¹²⁸ Fair Work Commission, [Data Profile](#) (n 98) 5; Social Research Centre, [Employer Survey Final Report](#) (n 99) 11.

¹²⁹ Social Research Centre, [Employer Survey Final Report](#) (n 99) 24.

¹³⁰ [Ai Group submission](#) (12 March 2024) [131]; [ACCI submission](#) (12 March 2024) [103]; [ABI/BNSW submission](#) (12 March 2024) [30]; [ACTU submission](#) (12 March 2024) [76]; [ASU submission](#) (12 March 2024) [41].

¹³¹ Acknowledgement from ACTU only; other groups acknowledge WFH not suitable to all but seem to hold in principle position that all Awards be varied: [transcript, 4 April 2024](#) PNs 509–514.

¹³² Social Research Centre, [Employer Survey Final Report](#) (n 99).

¹³³ Smith and Charlesworth, [Literature Review](#) (n 97).

¹³⁴ Fair Work Commission, [Data Profile](#) (n 98) 6.

¹³⁵ [ACCI submission](#) (12 March 2024) 22.

¹³⁶ [2020] FWCFB 1690.

who were working from home. In a decision on 6 October 2020 contemplating the extension of Schedule I, a Full Bench of the Commission observed that:¹³⁷

It also seems likely that there will be a continuing need for flexible work arrangements to assist employers and employees in adapting to the changed conditions and to support the recovery. The facilitation of agreed working from home arrangements looms large in this context... These circumstances suggest that there is a need to consider whether it is necessary to vary the Clerks Award to provide more enduring means of facilitating agreed working from home arrangements. The extension of Schedule I provides the parties with an opportunity to consider whether a more enduring solution is necessary and if so, the form of that solution.

[106] Following four decisions of the Commission to vary and extend Schedule I, it ceased operation on 30 June 2021.¹³⁸ In its final iteration,¹³⁹ the Schedule included:

- a definition of remote work.
- an extended span of hours for employees working remotely.
- a provision allowing employees to elect to work their hours in a non-continuous manner while undertaking remote work.
- a provision allowing part-time employees to select their own starting and finishing times when undertaking remote work, with agreement from their employer.
- flexibility in relation to the taking of meal or rest breaks by employees undertaking remote work, subject to agreement with the employer.

[107] Ultimately, notwithstanding the general consensus that modern awards should address the issue of working from home, there was no common position reached as to the form which working from home provisions should take in modern awards.

Individual flexibility arrangements in modern awards

[108] Material before the Commission in the work and care stream indicated that the existing IFA provisions in modern awards are not commonly used. However, there was no consensus as to how the IFA framework in modern awards could be improved.

[109] The explanatory memorandum to the *Fair Work Bill 2008* states the requirement for modern awards to include flexibility terms would ‘ensure the needs of employers and employees are met’ and ‘assist employees in balancing their work and family responsibilities and improve retention and participation of employees in the workforce’.¹⁴⁰ The FW Act requires all modern awards, enterprise agreements and registered agreements to include a flexibility term enabling an employer and employee to agree to an IFA which ensures employees are better off overall.¹⁴¹

[110] The General Manager of the Commission reports on the use of IFAs every three years. However, as there are no sources of administrative data relating to IFAs, there are challenges in accurately assessing their extent and terms.¹⁴²

¹³⁷ [2020] FWCFB 5199 [89], [94].

¹³⁸ [2021] FWCFB 3653 [12].

¹³⁹ PR725755 (summarised in [2021] FWCFB 3653).

¹⁴⁰ Fair Work Commission, [Job Security Discussion Paper](#) (n 68) 92–93.

¹⁴¹ *Fair Work Act 2009* (Cth) s 144(1).

¹⁴² Bernadette O’Neill, [General Manager’s report into individual flexibility arrangements under s.653 of the Fair Work Act 2009 \(Cth\) 2015–16](#) (Report, Fair Work Commission, November 2018).

[111] Material before the Commission suggested that IFAs could play a meaningful role in facilitating balancing work and care within the modern awards system, but that they are underutilised, including because of complexity in applying the better off overall requirement.¹⁴³ Broadly speaking, employer interests sought amendments which they contend would increase the utilisation of IFAs, whereas union interests sought to remove such provisions in modern awards.

[112] Proposals were advanced to amend the better off overall requirement to include a consideration of an employee's 'genuine needs'. This may mean an employee not being strictly 'better off overall' in monetary or quantifiable terms, but better off because they prefer the arrangement.¹⁴⁴ During consultations, clarification was also sought around how the better off overall test should be applied in the context of an IFA.¹⁴⁵ However, it would be impermissible for an award term to purport to define the meaning of the expression 'better off overall' as used in s 144(4)(c) of the FW Act. Other proposals to amend IFAs included permitting IFAs be entered into by an employer and a prospective employee, prior to the commencement of their employment.¹⁴⁶ However, this would require legislative change.¹⁴⁷

[113] Other proposals related to IFAs also involved legislative change to remove IFAs from modern awards.¹⁴⁸ Union parties contended that there is a general impression that IFAs are misused by employers to disadvantage employees who question or refuse to enter them, including by deprivation of work opportunities. They submit that the legislative scheme is poorly designed and provides for little oversight of IFAs, making it prone to contravention.¹⁴⁹

[114] The material before the Commission reveals consensus that IFAs are not readily utilised. Many submissions suggest that the problem lies in the FW Act itself and, accordingly, many of the proposed 'fixes' to the IFA regime concern legislative change, which is outside the purview of the Commission. Importantly, any variation to modern award terms would not displace the statutory requirement that employees are better off overall under an IFA, and there would therefore appear to be no utility in modifying the standard modern award term in relation to the better off overall test.

[115] Consequently, the Commission does not propose to take steps of its own motion to vary individual flexibility provisions in modern awards. Should interested parties consider an application to vary IFA provisions in modern awards appropriate, they may make such an application at any time outside of this Review under s 158 of the FW Act.

Annual leave at half pay

[116] In the modern awards framework, leave entitlements generally reflect the provisions in the NES and are a key enabler of employees balancing work and care.¹⁵⁰ Material before the

¹⁴³ [ACCI submission](#) (12 March 2024) 13–14.

¹⁴⁴ *Ibid* 14–18.

¹⁴⁵ [Transcript, 10 April 2024](#) PN 397; [ABI/BNSW reply submission](#) (26 March 2024) 3.

¹⁴⁶ [Ai Group submission](#) (12 March 2024) 39–40.

¹⁴⁷ See *Fair Work Act 2009* (Cth) s 144.

¹⁴⁸ [ACTU submission](#) (12 March 2024) 20–22; [SDA submission](#) (12 March 2024) 27–28.

¹⁴⁹ [ACTU submission](#) (12 March 2024) 20–22.

¹⁵⁰ Smith and Charlesworth, [Literature Review](#) (n 97) 51, referencing Iain Campbell, '[On-call and Related Forms of Casual Work in New Zealand and Australia](#)' (Working Paper No 102, International Labour Organization, Conditions of Work and Employment, 2018) 28; see also Sara Charlesworth and Jenny Malone, '[Re-Imagining Decent Work for Home Care Workers in Australia](#)' (2017) 27(4) *A Journal of the Social and Economic Relations of Work* 284.

Commission generally supported the insertion in modern awards of provisions facilitating the taking of annual leave at half pay into all modern awards.¹⁵¹

[117] Annual leave at half pay was previously inserted into modern awards as a result of the COVID-19 pandemic. In March 2020, an urgent application to vary the Hospitality Award resulted in the introduction of Schedule L, allowing employees to take twice as much annual leave at half the ordinary rate of pay, with agreement.¹⁵² This measure was later extended to 99 modern awards through *Schedule X—Additional measures during the COVID-19 pandemic*¹⁵³ which provided similar flexibility and included unpaid pandemic leave provisions. Schedule X was operational until 30 June 2022.¹⁵⁴ Submissions filed in response to the Work and Care Discussion Paper identified this temporary schedule as a precedent for ongoing annual leave flexibility.

[118] Various proposals were advanced, including by the Ai Group, which submitted that any new entitlement should facilitate as much flexibility as possible, enabling ‘up to’ twice as much leave at a prorated or proportional rate.¹⁵⁵

[119] The ACTU contended that the Ai Group proposal has merit but does not accept that employers require grounds to either refuse or request that employees take annual leave at half pay. In contrast, any entitlement would require employee-level ‘safeguards’, including:¹⁵⁶

- Arrangements be initiated by and granted only at employees’ requests.
- Ensuring requests are not unreasonably refused by employers.
- Requiring employers to keep appropriate records of arrangements.
- Prorated entitlements to annual leave loading, superannuation, and other entitlements that the employee would have been paid, had the arrangement not applied.¹⁵⁷

[120] Supporting the ACTU proposal, the ANMF submitted that COVID-era Schedule X variations were an ‘effective means to managing work and life and the wellbeing of others, and self, be that in private life or the workplace.’¹⁵⁸

[121] The ACCI and ABI/BNSW both expressed ‘in-principle’ support for annual leave at half pay, noting this would effectively double existing NES entitlements. The ACCI advanced the position that any mechanism should be ‘mutually practical’¹⁵⁹ and based on ‘genuine’ agreement.¹⁶⁰ Further, the ACCI and ABI/BNSW say that doubling the duration of leave is a significant change and employers should be able to refuse leave at half pay without a

¹⁵¹ [ABI/BNSW submission](#) (12 March 2024) [88]–[93]; [ACCI submission](#) (12 March 2024) [182]–[187]; [ACTU submission](#) (12 March 2024) [127]–[131]; [Ai Group submission](#) (12 March 2024) [210]–[219]; [ANMF submission](#) (12 March 2024) [103]–[105]; [Centre for Future Work submission](#) (12 March 2024) [24]–[25]; [Motor Trades Organisations submission](#) (12 March 2024) [24]–[25]; [Work and Family Policy Roundtable submission](#) (12 March 2024) [28]–[33].

¹⁵² *Application to vary an award – Hospitality Industry (General) Award 2010– Award flexibility during the COVID-19 Pandemic* [2020] FWCFB 1574; Hospitality Award cl L.2.3.

¹⁵³ *Variation of awards on the initiative of the Commission* [2020] FWCFB 1837; *Variation of awards on the initiative of the Commission* [2020] FWCFB 3281.

¹⁵⁴ *COVID-19 Award Flexibility – Schedule X and award-specific schedules* [2022] FWC 1531.

¹⁵⁵ [Ai Group submission](#) (12 March 2024) [218].

¹⁵⁶ [ACTU submission](#) (26 March 2024) [75]–[76].

¹⁵⁷ [Transcript, 9 April 2024](#) PNs 1208–1212.

¹⁵⁸ *Ibid* PN 1243.

¹⁵⁹ [ACCI reply submission](#) (26 March 2024) [56].

¹⁶⁰ [Transcript, 9 April 2024](#) PN 1228.

‘reasonableness standard’.¹⁶¹ An additional position was advanced by the ACCI that grounds of refusal may include those already set out at s 65A(5) of the FW Act.¹⁶²

[122] Whilst there is broad consensus in principle on the inclusion in modern awards of a term enabling annual leave to be taken at half-pay, there is no consensus on the detail of any such term. In those circumstances, the Commission does not intend to initiate proceedings on its own motion. Interested parties may make such an application at any time outside of this Review under s 158 of the FW Act.

Observations on gender differences

[123] The work and care research and consultation process revealed differences generally between modern award entitlements relevant to balancing work and care responsibilities in female-dominated and male-dominated awards. No conclusions can be drawn simply from the existence of differences in the terms of modern awards. However, the Gender Prism analysis does indicate that some conditions that are more generous to employees are more likely found in male-dominated awards than in female-dominated awards, and vice versa. This is particularly the case with provisions concerning the span of ordinary hours, which were identified in the work and care stream of the Review as important to employees’ ability to manage their work and care arrangements. The material before the Commission highlights the need for working time predictability to manage ongoing care responsibilities, such as caring for children, older Australians or people with disability.

[124] The Work and Care Discussion Paper highlighted that spans of hours across the 25 modern awards vary widely, with significant differences between male- and female-dominated awards. This is highlighted in Table 5, reproduced from the Gender Prism analysis, below.

¹⁶¹ [ACCI submission](#) (12 March 2024) [185].

¹⁶² [ACCI reply submission](#) (26 March 2024) [58]–[61].

Table 5: Top 6 male and female occupational gender-segregated awards — maximum daily hours and total spans of hours

	Gender balance	Maximum daily hours	Total span of ordinary hours
Male-dominated awards			
Plumbing Award	100% male	8 hours	11 hours
Building On-site Award	93.5% male	8 hours	12 hours
Manufacturing Award	93.3% male	8–12 hours	11 hours
Road Transport Award	87.5% male	8 hours	13 hours
Electrical Award	>85.9% male	12 hours	12 hours
Storage Award	84.9% male	8 hours	10.5 hours
Female-dominated awards			
Clerks Award	80.8% female	10 hours	12 hours
Nurses Award	>85.3% female	10 hours	12 hours
Pharmacy Award	>88.1% female	12 hours	17 hours
Health Professionals Award	91.2% female	10 hours	Up to 14 hours
Hair and Beauty Award	92.8% female	9 hours (10.5 hours 1 day/wk)	14 hours
Children’s Services Award	96.1% female	8–10 hours	12.5 hours

[125] This tendency for there to be a broader span of hours, amongst other less generous terms, in female-dominated awards raises concerns about work and care balance in connection with gender equality outcomes. The analysis demonstrates that those working in female-dominated awards are often compensated less for their working hours as a larger proportion falls within ordinary hours. This is because span of hours provisions in awards define the boundaries for a range of entitlements, including rostering and overtime.

[126] We consider that further research is required into the issue of potential gender differentiation in the span of hours provisions of modern awards. Accordingly, the Commission will undertake a research project that will identify and categorise spans of hours in modern awards, including:

- modern awards with no spans of hours
- modern awards with expansive spans of hours, 14 hours or more
- modern awards with medium spans of hours, 11–13 hours
- modern awards with limited spans of hours, 10 hours or less.

[127] Upon the completion of this research, it will be published and submissions in response will be invited. The Commission will consider what, if any, further action may be required in light of the research outcomes and the submissions in response.

FAAA’s proposals for the Aircraft Cabin Crew Award 2020

[128] The FAAA has advanced a number of proposals for the variation of the *Aircraft Cabin Crew Award 2020*¹⁶³ (ACC Award) in the work and care stream of the Review. These proposals were also raised in the job security stream of the Review, and in the *Annual Wage Review 2023–24*.¹⁶⁴

¹⁶³ [MA000047](#).

¹⁶⁴ [2024] FWCFB 3500 [126], [128].

[129] There are around 6100 flight attendants in Australia, around 77 per cent of whom are women,¹⁶⁵ which the FAAA submits is significantly higher than the economy-wide average of 49 per cent.¹⁶⁶ Around 42% of flight attendants work part-time.¹⁶⁷ In essence, the FAAA submits that the ACC Award warrants review as to whether it provides a fair and relevant safety net, and contends that the rates of pay are impacted by gender-based undervaluation. On this basis, the FAAA submits that the Commission should on its own initiative commence a review of the ACC Award.¹⁶⁸ While there was no opposition to this proposal during the consultations, we note that Qantas Group wrote to the Commission on 9 May 2024 indicating it did not consent to the variations proposed by the FAAA to the ACC Award.¹⁶⁹

[130] It is not clear that the FAAA's submissions and proposal fall within the scope of this review. We note that the *Annual Wage Review 2023–24* decision determined, in response to the FAAA's submissions, that the Commission would undertake a research project concerning the history of the ACC Award to assist in informing any future proceedings concerning that award.¹⁷⁰ This research project will be undertaken by Commission staff and is likely to commence around September 2024. The FAAA or any other interested party with standing to do so may otherwise make an application to vary the ACC Award under s 158 of the FW Act.

MAKING AWARDS EASIER TO USE

[131] As earlier explained, the 'making awards easier to use' stream of the Review was driven by proposals for award variations in the seven most commonly used awards. The timetable for the Review contemplated parties filing their proposals for variation of awards, with any accompanying submissions, by 22 December 2023. The proposals which were received were, in some cases, concerned with common issues arising with respect to all or at least a number of the subject awards. Such 'common issues' proposals were advanced by ABI/BNSW, the ACCI and the Ai Group. In addition, parties filed proposals specific to the individual awards as follows:

Retail Award: Master Grocers Australia (MGA), Wage Buddy (a legal technology platform), the Australian Workforce Compliance Council (AWCC), the AHA, the Ai Group, Nellers HR Consulting, ABI/BNSW and the National Retail Association (NRA).

Fast Food Award: the AWCC and the Ai Group.

Clerks Award: ABI/BNSW, the AWCC, the Ai Group and the ACCI.

SCHADS Award: the AWCC, the Ai Group, the ASU and the Chamber of Commerce and Industry Western Australia (CCIWA).

Hospitality Award: the AWCC, the CCIWA and the AHA.

Restaurant Award: the AWCC, the AHA and Nellers HR Consulting.

¹⁶⁵ Jobs and Skills Australia, '[Flight Attendants ANZSCO 451711](#)' (Web Page).

¹⁶⁶ [FAAA submission](#) (12 March 2024) [19].

¹⁶⁷ Those who usually work less than 35 hours a week in all their jobs combined. FAAA noted that this figure may be overstated, as the ACC Award defines full-time work as between 33-36 hours per week.

¹⁶⁸ [Transcript, 3 April 2024](#) PN 190.

¹⁶⁹ [Qantas Group correspondence](#) (9 May 2024).

¹⁷⁰ [2024] FWCFB 3500 [129].

Children's Services Award: the AWCC and the Ai Group.

[132] The timetable provided for parties to file submissions in response to the various proposals by 19 February 2024. Submission in reply were filed by:

- ABI/BNSW
- ACCI
- ACTU
- Ai Group
- ARA
- ASU
- AWCC
- HSU
- NECA
- NRA
- RFFWU Inc
- SDA
- UWU
- Wage Buddy.

[133] Consultations with interested parties were then conducted according to the following program:

8 March 2024: Common issues.

12 March 2024: Retail Award and Fast Food Award.

13 March 2024 (AM): Clerks Award.

13 March 2024 (PM): SCHADS Award.

19 March 2024: Hospitality Award and Restaurant Award.

[134] During the consultations, a number of parties were invited to make further submissions to deal with particular issues which arose. Further submissions were made by the following parties:

- ABI/BNSW
- ACCI
- Ai Group
- ASU
- MGA
- Resources for Humans (a human resources business)
- SDA
- UWU.

ARA application

[135] A significant intervening event in the process was that, on 6 February 2024, the ARA filed an application to vary the Retail Award in a number of respects (by way of variations designated A–Q) pursuant to ss 157 and/or 160 of the FW Act.¹⁷¹ The grounds of the application, in brief summary, contend that the Retail Award is the subject of unnecessary

¹⁷¹ [AM2024/9](#).

complexity and is difficult for employers to apply in practice and for employees to understand, resulting in disputes and compliance issues. It is also contended that there are significant problems with the Retail Award in a contemporary retail setting making adaptation, including changes to meet the requests of employees, very challenging, and that the Retail Award includes overly prescriptive restrictions that place undue weight on administratively burdensome processes that deliver little in the way of real benefit for employees. It is intended by the ARA that the variations sought would remedy this and ensure that the Retail Award met the modern awards objective.

[136] All relevant parties recognised at the outset that the grounds of the ARA application overlapped thematically with the ‘making awards easier to use’ stream of the Review and that a number of the variations it sought were similar to or dealt with the subject matter of the proposals advanced concerning the Retail Award in the Review.¹⁷² Variation E was dealt with on an expedited basis and determined on the papers, and a decision varying the Retail Award was published on 2 April 2024.¹⁷³ Variation C was dealt with at an expedited hearing conducted on 1 May 2024, and a decision varying the Retail Award was issued on 7 May 2024.¹⁷⁴ On 26 April 2024 and 17 May 2024, the presiding member conducted conferences with interested parties to discuss the other proposed variations. This led to agreement being reached as to variations M and N, and the Retail Award was consequently varied on 5 July 2024.¹⁷⁵

[137] The current position is that the matter is stood over generally, noting that the ARA’s preference is for the remaining aspects of its application not to be programmed until after the report of this Review is published.¹⁷⁶

Conflicting approaches to ‘making awards easier to use’

[138] The parties’ proposals for award variations, submissions, and stated positions at the consultations disclosed no consensus as to the best approach, or even a guiding principle, to make awards ‘easier to use’ while not resulting in any reduction in entitlements for award-covered employees. Even amongst employer-associated groups and payroll provider interests, who advanced nearly all the proposals for award variations, there was no such consensus. For example, the ACCI contended that a ‘text minimisation’ approach was critical to making awards easier to use. It pointed to the sheer length of modern awards as being an impediment to their usability and proposed variations to remedy this. Thus, the ACCI claimed that the variations it proposed to the Clerks Award would make that award easier to use because it would reduce the length of its substantive provisions by 18 per cent. Consistent with this ‘text minimisation’ approach, the ACCI rejected the proposition that it was a legitimate purpose of modern awards to serve as an ‘explanatory guidance document’ and proposed that aspects of awards which are informative should be discarded unless absolutely necessary for the operation of award provisions. By contrast, the AWCC, which is an association representing payroll practitioners and employment technology providers, placed a focus in many of its proposals upon adding explanatory material to awards (and thus lengthening them) to aid the understanding of their operative provisions. For example, in respect of the Hospitality Award, the AWCC submitted:

¹⁷² See [transcript, 29 February 2024](#) PNs 18–22, 33–37, 45–46, 51–53.

¹⁷³ [2024] FWCFB 197; PR772934.

¹⁷⁴ [2024] FWCFB 251; PR774533.

¹⁷⁵ [2024] FWCFB 302; PR776618.

¹⁷⁶ [Transcript, 17 May 2024](#) PN 59. The Ai Group has the same position: PN 61.

The hospitality award deals in complex language and terminology paired with the combination of highly variable operating environments, low qualification and skill-level entry requirements. This means that the award in its complexity is being presented to an audience that is not sufficiently supported with education or tools to comprehend and apply it correctly in all relevant business contexts in its current form. There is a need to holistically revise the approach to the hospitality award and other awards that attract juniors and people of non-English speaking backgrounds who are likely to obtain employment and build skills within the hospitality sector due to the lack of entry-level skill requirements. Legislation must have an Explanatory Memorandum to provide a plain English explanation of the legislation or enable adequate access to such support. The equivalent of an explanatory memorandum with a plain English explanation is what is lacking for Modern Awards. There is currently no such guidance to assist the audience.¹⁷⁷

[139] The MGA took a similar approach to the AWCC. Other employer parties took an approach which was less focused on textual matters and more concerned with the operational effect of award terms on employers. The Ai Group’s proposals, for example, generally had the objective of lessening the compliance burden on employers and increasing their capacity to act flexibly in the use of their labour by reducing the extent of award prescription and permitting a greater degree of employer discretion. Finally, some employer groups took a more pragmatic approach and advanced confined proposals to remedy specific problems in particular awards which they identified.

[140] Only one award variation proposal was advanced by a union (the ASU). Unions generally took an approach which was purely responsive to employer proposals and, in large part, rejected those proposals on the basis that they were not truly directed to making awards easier to use. Unions were only prepared to engage with a very small number of the proposals for change, which were generally those involving minor clarificatory redrafting of existing provisions.

[141] There was also significant disagreement about the proviso attached to this stream of the Review that making awards easier to use should not result in any reduction in entitlements for award-covered employees. The ACCI submitted that this proviso should be treated as referable only to substantive employee entitlements such as minimum wages and overtime rates. It distinguished award obligations that are ‘procedural or facilitative’ in nature, submitting that although such provisions might be capable of being described as entitling an employee to something in a literal sense:

... they are not true ‘entitlements’ in the sense contemplated by the Review, or in the sense which would be commonly understood by the community-at-large.

If this distinction is not drawn, parties will essentially be prevented from successfully advancing any proposals to improve award usability apart from those that merely rephrase existing clauses. The usability of awards cannot be improved in any significant way by merely changing the language of existing clauses.¹⁷⁸

[142] The ACTU rejected this distinction. It submitted that:

Procedural rights — whether the right to a fair trial, the right to a support person or a right to have an outcome recorded in writing — are all vitally important in themselves as well as safeguards for the exercise of substantive rights.¹⁷⁹

¹⁷⁷ [AWCC submission](#) (22 December 2023) [3.1(a)(x)].

¹⁷⁸ [ACCI submission](#) (22 December 2023) [1.8]–[1.9].

¹⁷⁹ [ACTU submission in response](#) (19 February 2024) [10].

[143] More generally, the ACTU submitted that it was a significant matter to reduce the entitlements of employees, particularly where each term of a modern award had been the subject of a detailed process of formation and extensive review, and that the Commission should not approach a finding that the removal of entitlements is necessary to achieve the modern awards objective without a separate application supported by evidence and submissions demonstrating why a term inserted out of necessity to achieve the modern awards objective should now be removed or modified to achieve the modern awards objective.¹⁸⁰

[144] Some employer groups urged us to simply disregard the proviso. The Ai Group submitted that the proviso was merely a reflection of the Australian Government's policy position, was inconsistent with the statutory requirement to include in awards terms that are necessary to meet the modern awards objective, would unfairly and inappropriately confine the scope of matters that can be dealt with in the Review, and was incompatible with the Commission's need to balance the interest of employers and employees.¹⁸¹ ABI/BNSW made submissions to similar effect.¹⁸²

Principal subject matters of proposals

[145] Although the proposals advanced, considered in totality, concerned a diverse range of subject matters, it may be discerned that many of the proposals and the focus of parties' submissions involved more confined and particular areas of concern. The following observations may be made about this.

[146] *First*, we observe that the Retail Award attracted the most proposals for change, and also proposals from the largest number of different parties. This perhaps reflects the fact that the Retail Award covers a higher proportion (11 per cent) of award-reliant workers than any other award. It certainly indicates a degree of concern amongst employers about the useability of this award which is significantly higher than for the other awards the subject of the Review.

[147] *Second*, a major common issue across a number of awards concerns proposals for greater employer flexibility in respect of the hours of work for part-time employees – in particular, their minimum number of working hours, changes to their rosters of working hours, and the circumstances in which additional hours of work may be performed (by agreement or by direction) and the pay rate to apply if this occurs. These proposals overlapped to a significant degree with employer proposals which have earlier been discussed as having been raised in other streams of the Review.

[148] *Third*, a number of proposals concern the adaptation of hours of work provisions to meet the circumstances of work performed other than at the normal workplace – particularly working at home. The contention underlying these proposals is generally that award provisions concerning hours of work (including span of ordinary hours, rostering, continuity of work requirements and meal breaks) are designed for the traditional model of working at the employer's nominated workplace within a designated time period and are not fit for purpose in respect of working at home and other modes of flexible working.

[149] *Fourth*, a number of the major employer parties focused on proposals to vary provisions concerning annualised wage arrangements or to establish provisions exempting employers from a range of award provisions where they pay above an identified wage

¹⁸⁰ Ibid [11].

¹⁸¹ [Ai Group submission](#) (22 December 2023) [14]–[16].

¹⁸² [ABI/BNSW submission](#) (22 December 2023) [5.22]–[5.25].

threshold. Provisions of this nature are said to be a way of making awards easier to use by allowing employers to bypass award provisions by paying higher wages or paying wages according to a globalised methodology.

Consideration

[150] An important part of the context of this stream of the Review is the scope of matters dealt within the 4 yearly review of modern awards conducted from 2014 through to 2022. These matters were summarised at the completion of the 4 yearly review in a statement issued by a Full Bench of the Commission¹⁸³ on 17 October 2022.¹⁸⁴ The 4 yearly review allowed parties an opportunity to participate in a wholesale re-evaluation of all modern awards, and most of the parties which have advanced proposals in this stream of the Review were major participants in the 4 yearly review. As the statement noted at [8], the Commission had throughout the 4 yearly review:

- dealt with approximately 256 individual matters including some 66 applications by industrial parties for substantive changes to particular modern awards.
- held over 1300 days of hearings, conferences and mentions.
- received submissions from thousands of parties, including employers, unions and individual employees.
- published over 25,000 documents (including submissions, witness statements, correspondence, notices of listings and transcript) on the Commission's website.
- issued over 700 Decisions and Statements.
- sent over 1700 emails to subscribers.

[151] A central focus of the 4 yearly review was the simplification of the language and structure of modern awards and, for this purpose, each modern award was reviewed and redrafted. This process included the complete redrafting in plain language of a number of the most commonly used modern awards. This exercise was completed in respect of nine awards, including the Retail Award, the Clerks Award, the Hospitality Award, the Restaurant Award and the Fast Food Award. It was foreshadowed that this exercise would be continued after the termination of the 4 yearly review in respect of the SCHADS Award, the *Aged Care Award 2010* (Aged Care Award) and the Children's Services Award. In relation to the first two of these awards, it was indicated that the plain language review would not be undertaken until the work value proceedings concerning the aged care sector had been completed.¹⁸⁵ Those proceedings, insofar as they concern the SCHADS Award and the Aged Care Award, will be finalised very shortly. The Commission anticipates being in a position to publish a plain language draft of the Children's Services Award for comment in the near future.

[152] The plain language exercise, as well as the consideration of common issues raised by parties, resulted in the standardisation of key clauses and structure/format across all awards including:

- the redrafting of standard clauses concerning award flexibility, consultation, dispute resolution, termination of employment, and redundancy;
- the inclusion of schedules of rates to provide a calculated wage rate rather than a percentage of the hourly rate and avoid the need for employers and employees to make calculations;

¹⁸³ Ross J, President, Clancy DP and Bissett C.

¹⁸⁴ [2022] FWCFB 189.

¹⁸⁵ [2022] FWCFB 177 [20].

- new model provisions in a number of areas, including for TOIL, annualised wage arrangement, requests for flexible working arrangements, taking annual leave and payment of wages on termination;
- redrafting of facilitative provisions concerning alterations to the span of ordinary hours;
- the standardisation of the National Training Wage Schedule and its incorporation by reference to the *Miscellaneous Award 2020*¹⁸⁶ instead of its inclusion in every award;
- the removal of terms inconsistent with the NES; and
- the removal of outdated transitional provisions.

[153] In its 17 October 2022 statement, the Full Bench made a number of observations about the issue of ‘award complexity’ which are pertinent to the ‘making awards easier to use’ stream of this Review. The Full Bench began its observations with the following comment:

[18] Throughout the Review, the Commission has sought opportunities to further simplify modern awards. While opportunities have been taken and the accessibility of award terms improved, some of the proposals for simplification identified by the Commission have been opposed by the industrial parties for various reasons, including that particular terms in certain awards have a historical or contextual meaning which simplification may disturb. Despite this, the issue of award complexity is regularly raised in public commentary as a barrier to award compliance.

[19] The conclusion of the Review is an appropriate time to reflect on the issue of award complexity. The FWC will continue to be available to assist parties in addressing perceived complexity in modern award terms, upon request.¹⁸⁷

[154] The Full Bench then assessed ‘award complexity’ by reference to three facets: the length of awards, the meaning of award terms, and the complexity of entitlements themselves.¹⁸⁸ The Full Bench noted that the inclusion of provisions concerning hourly rates, schedules of calculated rates, tables of facilitative provisions, examples of the operation of particular clauses, and notes referring to the NES and other relevant legislative provisions had the result of adding to the length of some modern awards. However, the Full Bench considered that the addition of such provisions served the purpose of reducing the regulatory burden for award users, saying:

[31] The redrafting process has extended the length of some modern awards, as complex clauses are ‘unpacked’ into subclauses and expressed in plain language. The insertion of schedules of hourly rates and examples have also added to the length of some modern awards, while ensuring that information about minimum entitlements is provided in a simple and accessible form. However, the Commission’s view is that length per se does not increase complexity. To the contrary, the inclusion of appropriate examples and calculated rates provides assistance to award users.¹⁸⁹

[155] The Full Bench also noted that a number of parties had opposed the inclusion of examples and notes referring to relevant legislative provisions, but concluded that the former ‘would make modern awards easier to understand’ and the latter would assist parties in understanding the interaction between the award and the legislative provision.¹⁹⁰

¹⁸⁶ [MA000104](#).

¹⁸⁷ [2022] FWCFB 189.

¹⁸⁸ *Ibid* [23].

¹⁸⁹ *Ibid* [31].

¹⁹⁰ *Ibid* [25]–[26].

[156] In relation to complexity said to arise from the meaning of particular award terms, the Full Bench noted that ‘it has been the experience of the Commission that when attempts have been made to address this issue in various awards, they have become grounded in inertia’.¹⁹¹ In relation to the issue of substantive entitlements, the Full Bench said:

[38] We note that complexity here may mean different things. It may mean that a particular entitlement is not expressed clearly and so is deemed to add to complexity. However, on occasion the criticism is directed at the substantive entitlement itself, rather than the way the entitlement is expressed or displayed in a modern award. The Commission has heard argument throughout the Review regarding removing or rationalising entitlements. These have been considered within the legislative framework and determined on the merits of each individual case.¹⁹²

[157] Having regard to the Full Bench’s statement discussed above, it is readily apparent that, to a large degree, parties’ proposals and submissions seek to revisit matters that were the subject of consultation, hearing and determination in the 4 yearly review. For example:

- (1) We have earlier referred to the ACCI’s ‘text minimisation’ approach which rejects the inclusion of ‘explanatory guidance material’ in awards. It is clear that the inclusion in awards of explanatory provisions by way of notes, examples and the calculation of applicable loaded and penalty rates was a deliberate outcome of the 4 yearly review intended to make awards easier to use. This was done with the explicit understanding that, in some cases, it would result in awards becoming longer.
- (2) As stated in paragraph [149] above, a number of proposals were advanced to modify provisions concerning annualised wage arrangements. The current provisions reflect model terms developed by a Full Bench during the 4 yearly review. Those provisions were developed to address identified deficiencies in existing provisions – in particular, a failure to meet the requirement in s 139(1)(f)(iii) of the FW Act. The new provisions (which are only contained in a minority of awards) only took effect in 2022. Some of the proposals effectively seek a reversion to the deficient position which applied before this.
- (3) There was also advanced, as a common issue, a proposal to modify the TOIL clause in a number of awards. The model TOIL clause was established by a Full Bench decision in 2015¹⁹³ in proceedings which involved a wide range of parties. The basis of the model clause was to establish a provision which ‘clearly set out the rights and obligations of the respective parties’ and was ‘simple and easy to understand’.¹⁹⁴ The proposal would require a wholesale revisitation of this decision, and in particular, this conclusion.

[158] We do not consider that this is Review constitutes an opportunity to revisit matters determined in the 4 yearly review in the way described above. To do so would be a recipe for ongoing instability in the award system (see s 134(1)(g) of the FW Act). That of course does not limit the capacity of parties with the requisite standing to make applications for variation of awards pursuant to ss 158 or 160 of the FW Act.

¹⁹¹ Ibid [32].

¹⁹² Ibid.

¹⁹³ [2015] FWCFB 4466.

¹⁹⁴ Ibid [178].

[159] We also note the observation of the Full Bench set out in paragraph [156] above, with which we agree. A number of the proposals advanced by parties under the guise of ‘making awards easier to use’ involve changes to the substantive entitlements of employees. There may be circumstances in which changes of this nature are necessary to achieve the modern awards objective, but we consider it generally more appropriate that such changes be pursued by an application pursuant to s 158 supported by a substantive case rather than in a Review such as this.

[160] Having said this, we consider that this Review has allowed us to identify a number of issues in the usability of awards which should be the subject of priority consideration and action.

[161] *First*, it is clear that there remain significant concerns about the proper interpretation and application of a number of provisions in the Retail Award which may be said to potentially affect its practical useability. The ARA application raises a number of matters in this respect which will require determination in due course. As earlier stated, there is a significant overlap between the proposals raised concerning the Retail Award in this Review and the matters the subject of the ARA application. The appropriate course is that those proposals advanced in this Review which raise a serious issue as to ambiguity in or the practical operation of provisions of the Retail Award should be joined with the ARA application for consideration and determination. We explain in the conclusions section of this report how this will be done.

[162] *Second*, the issue of whether current award provisions are ‘fit for purpose’ to accommodate working from home arrangements is a significant one. It is readily apparent that the provision of awards which apply to industry sectors where working from home is most prevalent, such as the Clerks Award, do not necessarily match the practical arrangements by which employees work at home in actuality. This may be operating as an impediment to wider access to working at home arrangements. As earlier discussed, working from home has been raised as an important issue relevant to balancing work and care and job security in other streams of this Review, so we consider that award facilitation of access to working at home arrangements is a matter which requires priority consideration. The course we propose to take in this respect is outline in the conclusions section to this report.

[163] *Third*, as with other streams of this Review, the issue of award regulation of part-time employment has emerged as a significant matter said to bear upon the useability of modern awards. In this stream, employer proposals have again, as outlined above, sought greater flexibility as to the working hours of part-time employees. However, this approach is contrary to the greater consistency and stability in the rostering of hours of work which have, in other streams of this Review, been associated with job security and the capacity of employees to balance work and care. These apparently competing approaches to the regulation of part-time employment occur in a context where, as outlined in Table 2 above, there is a great diversity in part-time employment provisions in modern awards pertaining to the setting and alteration of hours of work. It is also important to note that, as part of the 4 yearly review of modern awards, a Full Bench of the Commission established a new model of part-time employment in the Hospitality Award, the Restaurant Award and the *Registered and Licensed Clubs Award 2010* (now the *Registered and Licensed Clubs Award 2020*¹⁹⁵).¹⁹⁶ These provisions attempted to strike a balance between part-time employees’ need for working hours which were reasonably certain and were not inconsistent with their non-work commitments and

¹⁹⁵ [MA000058](#).

¹⁹⁶ [2017] FWCFB 3541 [523]–[538].

employers' need for operational flexibility by allowing an employer to alter an employee's rostered hours but only within the employee's previous nominated scope of hours in which they are available to work. The success, or otherwise, of this new model has not yet been assessed.

[164] We consider that the circumstances described immediately above and in the job security and work and care streams call for a fundamental review of the regulation of part-time employment in modern awards. The employer proposals advanced in this stream of the Review may be considered as part of this further review.

[165] As to other proposals for award variations advanced in this stream of the review, we note the following:

- (1) The plain language redrafting exercises still to be undertaken in relation to the Children's Services Award and the SCHADS Award provide an appropriate opportunity for the resolution of any ambiguous or uncertain provisions in those awards. Proposals concerning these awards advanced in this stream of the Review which seek to resolve ambiguity or uncertainty may therefore arise for further consideration in this context.
- (2) The classification structure in the SCHADS Award will be the subject of fundamental review in the gender undervaluation and related proceedings listed for hearing in December 2024.¹⁹⁷ Any proposals for clarification, reform or modernisation of the SCHADS Award classification structure may appropriately be advanced for determination in these proceedings.
- (3) Parties may otherwise pursue proposals advanced in this stream by application to vary awards pursuant to ss 158 or 160 of the FW Act.

[166] We have dealt with the proposals to make awards easier to use advanced in this stream of the Review at a fairly high level of generality and have mostly avoided expressing any view as to their specific merits. This is because the approach we prefer will involve the future consideration of these proposals, if further pursued, in future proceedings, and we do not wish in this report to prejudge their determination in accordance with the FW Act.

CONCLUSIONS

[167] This Review has provided parties with a valuable opportunity to identify, within the scope of each stream of the Review, award provisions which they consider require re-evaluation. Given the targeted nature of this Review and the range and number of proposals for change which have been advanced, we have not considered it appropriate to attempt to express a determinative view about each participating party's proposals. Rather, the Review has facilitated us identifying those award provisions which require the Commission's priority attention. In respect of the priorities we have identified, the Commission will initiate proceedings on its own initiative pursuant to ss 157(3)(a) and/or 160(2)(a) of the FW Act to consider and determine variations of modern awards in the following areas:

¹⁹⁷ See *Annual Wage Review 2023–24* [2024] FWCFB 3500 [119]; *Gender Undervaluation — Priority Awards* [2024] FWCFB 291 [8].

(1) Amusement Award

As stated in paragraph [26] above, these proceedings will consider variations to the classification structure and other terms of the Amusement Award to ensure that it clearly and adequately establishes minimum terms and conditions of employment for ‘arts workers’. These proceedings will be initiated in September 2024.

(2) Live Performance Award

The proceedings will consider variations to the Live Performance Award to rectify the deficiencies identified in paragraphs [34]–[41] above which were the subject of a consensus amongst the relevant parties participating in the Review. These proceedings will be initiated in September 2024.

(3) Retail Award

These proceedings will consider proposals advanced in the ‘making awards easier to use’ stream of the Review in respect of the Retail Award which overlap with the matters the subject of the ARA application, or which otherwise raised a seriously arguable case for change. However, the proceedings will not consider proposals concerning the part-time employment provisions of the Retail Award. The Commission-initiated proceedings concerning the Retail Award will be heard and determined together with the outstanding matters in the ARA application (except those matters in the ARA application concerning part-time employment). The proceedings will be initiated in August 2024, and the precise matters to be the subject of the proceedings will be identified at that time.

(4) Working from home — Clerks Award

These proceedings will be concerned with the development of a ‘working from home’ term in the Clerks Award, which we identify as the most commonly used award under which working from home is most likely to occur. The term is intended to be one which facilitates employers and employees making workable arrangements for working at home and removes any existing award impediments to such arrangements. The term that is developed may serve as a model for incorporation in other modern awards, with or without adaptation. The proceedings will be initiated in August 2024.

(5) HE Awards — Fixed-term contracts

As discussed in paragraphs [64]–[69] above, these proceedings will involve a review of the fixed-term contract provisions of the *Higher Education Industry—Academic Staff—Award 2020* and the *Higher Education Industry—General Staff—Award 2020* in light of the provisions concerning the use, extension and renewal of fixed-term contracts now contained in Division 5 of Part 2-9 of the FW Act. These proceedings will be initiated in September 2024.

(6) Part-time employment

Arising from the job security, work and care and ‘making awards easier to use’ streams of this Review, these proceedings will undertake a fundamental review of award provisions regulating part-time employment, focused on the seven awards the subject of the ‘making awards easier to use’ stream. The matters the

subject of review will include the establishment of the hours of employment of part-time employees (including the number of hours to be worked, the days upon which work is to be performed, and the starting and finishing times of work), prescribed daily and weekly minimum hours of work, and the circumstances in which and means by which working hours may be altered and additional hours may be worked. Unless there are good reasons for variation in respect of specific industries or occupations, the objective of such a review will be to establish a standard model for part-time employment in place of the variety of provisions which currently exist. Those aspects of the ARA application concerning part-time employment will be heard and determined together with these proceedings. We anticipate that these proceedings will be wider in scope than the prior proceedings and, having regard to the range of major award matters currently on foot before the Commission, the proceedings will not be initiated until a suitable time in 2025.

[168] We wish to express our appreciation to the parties who participated in this Review for their contributions and to the staff of the Commission for their assistance.



PRESIDENT

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