Modern Awards Review 2023-24 (AM2023/21)

Submission cover sheet

Name

Nigel Ward, Australian Business Lawyers & Advisors

Organisation

Representing Business NSW and Australian Business Industrial

Contact details:

Street:	Level 7, 8 Chifley Square
Suburb/City:	Sydney NSW
Postcode:	2000
Email:	Nigel.Ward@ablawyers.com.au
Telephone:	0405 539 172

Modern Award Review Stream:

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

RESPONSE TO DISCUSSION PAPER
JOB SECURITY
MODERN AWARDS REVIEW 2023-24
AM2023/21

5 February 2024

BUSINESS NSW

AUSTRALIAN BUSINESS INDUSTRIAL

NSW BUSINESS CHAMBER AND AUSTRALIAN BUSINESS INDUSTRIAL

The New South Wales Business Chamber Ltd (**BNSW**) is New South Wales' peak business organisation with nearly 100,000 members, spanning most industry sectors and sizes. BNSW is a registered state industrial organisation under the *Industrial Relations Act 1996 (NSW),* as well as a recognised organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth).

Australia Business Industrial (**ABI**) is the industrial relations affiliate of BNSW. ABI is federally registered under the *Fair Work (Registered Organisations) Act 2009* (Cth) and engages in policy advocacy on behalf of its membership as well as engaging in industrial advocacy in State tribunals and the Federal tribunal.

MODERN AWARDS REVIEW 2023-24 – JOB SECURITY

ABI AND BNSW RESPONSE TO DISCUSSION PAPER

TABLE OF CONTENTS

I. PROCEDURAL BACKGROUND 5
II. STRUCTURE OF RESPONSE 7
III. PRELIMINARY CONSIDERATIONS 8
IV. RESPONSE TO THE DISCUSSION QUESTIONS 32
V. COMMENTS ON THE CONSULTATION PROCESS 57

I. PROCEDURAL BACKGROUND

1. In a Statement dated 4 October 2023, the Full Bench of the Fair Work Commission (**the Commission**) confirmed the timetable for the Modern Awards Review 2023-24 (**the Review**).[1]

Timetable

2. This submission forms part of the *'job security'* stream. The following timetable was set by the Commission:

18 December 2023:	*Discussion/research paper issued.*
5 February 2024:	*Submissions in response due.*
12 February – 8 March 2024:	*Consultation with interested parties.*[2]

3. A mention to finalise arrangements for the consultation process is listed for 3pm on Tuesday, 6 February 2024.

Responses to the Discussion Paper

4. On 18 December 2023, the Commission issued a Discussion Paper.[3] The Discussion Papers address three topics:

   (a) the context of the Review;

   (b) the issue of job security; and

   (c) analysis of minimum entitlements and employment conditions in modern awards.

5. The Discussions Paper sets out eight questions "for the purposes of framing and focusing submissions in response to this discussion paper and facilitating discussion at the conferences" (**the Discussion Questions**).[4]

6. In addition to providing responses to each of the eight questions, interested parties were invited to provide "any other relevant responses addressing the issue of job security".[5]

---

[1] [2023] FWCFB 179 (**the Statement**).
[2] [2023] FWCFB 179 at [1(2)].
[3] Discussion Paper – Job Security: Modern Awards Review 2023-24 (Fair Work Commission, 18 December 2023) (**Discussion Paper**).
[4] Discussion Paper at 108-109.
[5] Discussion Paper at 7.

Consultation Process

7. In a Statement dated 18 December 2023, the Commission confirmed the dates set aside for the consultation process as follows:

   (a) Thursday 15 February 2024;

   (b) Wednesday 21 February 2024;

   (c) Tuesday 27 February 2024; and

   (d) Monday 4 March 2024.[6]

8. Interested parties are invited to "comment on their intention to participate in the consultation process, the conduct of the consultation process, and the desirability of any additional consultation dates, by no later **than 12pm (AEDT) on Monday 5 February 2024**".[7]

9. The Commission directed that any comments in relation to the consultation process are to be included in the same document setting out a response to the Discussion Paper.[8]

[6] Statement [2023] FWC 3373 at [8].
[7] Statement [2023] FWC 3373 at [9].
[8] Statement [2023] FWC 3373 at [10].

II. STRUCTURE OF RESPONSE

10. This submission adopts the following structure:

    (a) **Part III – Preliminary Considerations.** This part considers the statutory construction of both s 3(a) and s 134(1)(aa) and identifies the relevant authorities that assist with that exercise. This section also considers how the provisions interact with the functions of the Commission under the *Fair Work Act 2009* (Cth) (**FW Act**) and provides a preliminary view as to how modern awards currently address the new provisions.

    (b) **Part IV – Response to the Discussion.** This part sets out the response to each of the Discussion Questions.

    (c) **Part V – Comments on the Consultation Process.** This confirms the intention of BNSW and ABI to participate in the consultation process and comments on the process as requested by the Commission.

III. PRELIMINARY CONSIDERATIONS

The New Provisions

11. The new text in ss 3(a) and 134(1)(aa) followed the assent of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**SJBP Act**). For ease of reference, the new provisions are extracted below.

12. Section 3(a) provides:

> *"The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:*
>
> *(a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations;"*

13. Section 134(1)(aa) provides:

> *"(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:*
>
> *…*
>
> *(aa) the need to improve access to secure work across the economy;"*

14. Both ss 3(a) and 134(1)(aa) will be collectively referred to as **the new provisions.**

15. Caution needs to be exercised in assuming that the language in the new provisions is simply interchangeable and we discuss this first below.

Context of the Review

16. The circumstances that brought about the Review necessarily draw attention to the views expressed by the Minister for Employment and Workplace Relations (**the Minister**) in relation to *'job security'* and *'secure work'.*

17. At the outset it is noted that in the context of statutory interpretation, the statements made by the Minister carry no weight.[9] As French CJ, Hayne, Kiefel and Bell JJ observed:

---

[9] Similarly, the remarks of the Minister in the second reading speech should also attach *"very little weight"*: *Waller v Hargraves Secured Investments Ltd* (2012) 245 CLR 311; [2012] HCA 4 at [61].

"[33] … There is no basis at common law or otherwise for resorting to a ministerial statement, about the effect of a law in force at the time of the statement, as an aid to the interpretation of that law."[10]

18. Part of the Minister's views were set out in the President's Statement as follows:

"[3] The Minister identifies four key priorities for a review of modern awards:

…

(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;"[11]

(the **Job Security Issue identified by the Minister**).

19. The Minister's views are also cited in the Discussion Paper.[12] This includes an indirect reference by observing that the SJBP Act *"included several measures which were **said to be aimed at improving job security**"* (emphasis added).[13]

20. Whilst the Review was initiated on the Commission's own motion and involves the exercise of the following function by the Commission: *"promoting cooperative and productive workplace relations and preventing disputes"*,[14] the Job Security Issue identified by the Minister is under consideration in the Review. So much so, a Discussion Paper was published by the Commission to address the Job Security Issue identified by the Minister.[15]

---

[10] *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1; [2012] HCA 3 at [33].
[11] President's Statement (Fair Work Commission, 15 September 2023) at [3(2)].
[12] See example, Discussion Paper at [9].
[13] Discussion Paper at [9].
[14] FW Act 2009 (Cth) s 576(2)(aa).
[15] President's Statement (Fair Work Commission, 15 September 2023) at [8].

21. At the outset of the Discussion Paper, the intention of the paper is expressed as follows:

> *"[5] The paper is intended to form the basis of a discussion with interested stakeholders about how the modern awards safety net might better support the objectives in the FW Act in relation to promoting job security and improving access to secure work, in line with the stated aims of the Awards Review."*

22. Notwithstanding that intention, the Discussion Paper appears to treat *"promoting job security"* and *"improving access to secure work"* as synonymous considerations at times. There are 244 references to *"job security"* and 18 references to *"secure work"*. The structure of the Discussion Paper also contributes to this view, which broadly consists of the following:

    (a) *"an overview of the issue of job security, its definition, and types of employment that might indicate a lack of job security"*; and

    (b) *"an analysis of award provisions relevant to job security found in the seven most-commonly used modern awards and also examines the standard clauses found in all modern awards"*.[16]

23. Before the interested parties embark upon a discussion centred on either *"job security"* or the Job Security Issue identified by the Minister, it is important that consideration is given to the construction of the new provisions in the FW Act.[17]

24. It is well established that the words of the legislation are the starting point. As such, there is a danger to focus too heavily on either the language of the Minister or the general concept of *"job security"*, especially when seeking to consider the impact of s 134(1)(aa): *"the need to improve access to secure work across the economy"*.

25. We now turn to the principles of statutory construction relevant to the interpretation of both ss 3(a) and 134(1)(aa).

The Objects Clause: s 3(a)

26. Section 3 is an objects clause; it sets out the objects of the *FW Act*. By contrast, s 134 is a provision within Part 2-3 of the *FW Act*; it is described as an *"overarching provision"* within that Part.

---

[16] Discussion Paper at [6]-[7].
[17] FW Act 2009 (Cth) ss 3(a), 134(1)(aa).

27. In the context of seeking to interpret the meaning of ss 3(a) and 134(1)(aa), respectively, we emphasise that the *objects clause* in a piece of legislation does not provide a *"definitive"* guide to interpretation of individual provisions within a statute.[18]

28. That statement of principle is, of course, not at odds with the stipulation in s 578 of the *FW Act*, which provides:

> *"In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this Part), the FWC must take into account:*
>
> *(a) the objects of this Act, and any objects of the part of this Act;*
>
> *…"*

29. The requirement to "*take into account"* ss 3 and 134 does not mean the two provisions merge: they remain to be two distinct considerations. The new provisions require that the construction of both provisions be considered.

30. Returning to the objects clause, the earlier mentioned principle addresses the temptation to automatically elevate or assume that because *"promote job security"* appears in s 3(a), it must necessarily follow that the intention behind referring to *"secure work"* in s 134(1)(aa) is the same thing.

31. In *Unions NSW v New South Wales*, the High Court of Australia said:

> *"[172] In circumstances where a statute expressly sets out its own objects or purposes, that express statement will almost always be relevant to identifying the objects and purposes of a particular provision. But* ***a court should not blindly accept that the high-level, abstract purposes of the whole Act must be the exhaustive statement of the purposes of a single provision****.* ***A generally stated objects clause that applies to the entirety of a statute will, usually of necessity, be stated at a high level of generality that might not touch upon, or might barely touch upon, some provisions****. Nor should a court recognise any presumption or strong inference that objects expressly stated are the exclusive, constitutionally valid purposes of every provision, characterised at the appropriate level of generality. The characterisation of the purpose of a provision at the appropriate level of generality, and the adjudication of its legitimacy, are matters for the courts."*[19]

---

[18] See *Williams v Wreck Bay Aboriginal Community Council* (2019) 266 CLR 499; (1977) 14 ALR 257 at 260 (per Barwick CJ).

[19] (2019) 264 CLR 595; [2019] HCA 1 at [172] (emphasis added).

32. Barwick CJ observed that *"courts can resort to [the objects] in case of uncertainty or ambiguity when the operation of the Act of the Parliament, according to its other terms, has been ascertained and applied".*[20]

33. In *S v Australian Crime Commission*, Mansfield J observed:

> *"[22] … An objects clause in legislation, together with other intrinsic indicia to its proper construction, is relevant to the proper construction of the legislation: […]. Dowsett J in Re an Application under the Aboriginal and Torres Strait Islander Commission Act 1989; Re Yanner (2000) 176 ALR 1 at 32 pointed out, however, that* ***such a clause cannot cut down the plain and unambiguous meaning of a provision if that meaning in its textual and contextual surroundings is clear****."*[21]

Text is the Beginning and End of the Process

34. It is well established that the words of the legislation are the guiding principle.

35. In *Fleming v The Queen,* the High Court of Australia said, *"[t]he fundamental point is that close attention must be paid to the language"* of the relevant provision because *"[t]here is no substitute for giving attention* ***to the precise terms***" in which that provision is expressed.[22]

36. In *Baini v The Queen*, the High Court expressed the following caution with respect to reliance on extrinsic materials:

> *"**Paraphrases of the statutory language**, whether found in parliamentary or other extrinsic materials or in cases decided under the Act or under different legislation,* ***are apt to mislead if attention strays from the statutory text. These paraphrases do not, and cannot, stand in the place of the words used in the statute.****"*[23]

---

[20] *Williams v Wreck Bay Aboriginal Community Council* (2019) 266 CLR 499; (1977) 14 ALR 257 at 260 (per Barwick CJ).

[21] (2005) 144 FCR 431; [2005] FCA 1310 at [22] (emphasis added, authorities omitted).

[22] (1998) 197 CLR 250 at 256; [1998] HCA 68 at [12]. See also *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39]

[23] Baini v The Queen [2012] HCA 59 at [14].

Section 3(a) – "promote job security"

37. The reference to *"job security"* – which ordinarily would be a reference to security of tenure in employment – is a phrase that is part of a composite set of terms in s 3(a). It is useful to extract the terms in context below:

> *"The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by:*
>
> *(a) providing workplace relations laws that are fair to working Australians, promote job security and gender equality, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations;"*

38. The following composite phrases arise:

    (a) *"The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians by"*; and

    (b) *"promote job security and gender equality".*

39. Prior to turning to the Revised Explanatory Memorandum (the **REM**) to interpret the meaning of paragraph (a), the appropriate starting point is s 15AB of the *Acts Interpretation Act 1901* (Cth). Subsection (1) provides that "*if any material not forming part of the Act"* is capable of assisting in ascertaining the meaning of a provision, then it may be considered if any one of three limbs are satisfied. By way of summary, those limbs are as follows:

    (a) *"to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act"*;

    (b) to determine the meaning of the provision when the text is *"ambiguous or obscure"*; or

    (c) to determine the meaning of the provision when *"the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable"*.

40. The term *"job security"* is not ambiguous.

41. As it is not defined in the FW Act, it is useful to set out the dictionary definition of both *"job"* and *"security"*:

   (a) *"job"* includes the following meanings:

      (i) "a piece of work; an individual pierce of work done in the routine of one's occupation or trade";

      (ii) "a piece of work of defined character undertaken for a fixed price";

      (iii) "the unit or material being worked upon";

      (iv) "the product or result";

      (v) "anything one has to do";

      (vi) "a post of employment";

      (vii) "enterprise; occupation; industry: the cattle job"; and

      (viii) *"an affair, matter, occurrence, or state of affairs: to make the best of a bad job".*[24]

   (b) *"security"* includes the following meanings:

      (i) "freedom from danger, risk, etc: safety";

      (ii) "freedom from care, apprehension, or doubt; confidence";

      (iii) "something that secures or makes safe; a protection; a defence":

      (iv) "protection from or measures taken against espionage, theft, infiltration, sabotage, or the like"; and

      (v) *"an assurance; guarantee".*[25]

42. Job security concerns safe and protected employment in a position or role with an employer.[26]

43. The term has also frequently appeared in cases before the Commission. Reference to those cases reinforces the *"ordinary meaning"* of the text. By way of example:

---

[24] *Macquarie Dictionary* (8th edition, 2020) (**Macquarie Dictionary**).

[25] *Macquarie Dictionary*.

[26] See *Theiss v Collector of Customs* (2014) 250 CLR 664; [2014] HCA 12 at [23]; *Tal Life Ltd v Shuetrim* (2016) 91 NSWLR 439; [2016] NSWCA 68 at [80].

(a) *"for those who prefer a full-time job, casual employment is often not a path to greater job security later, and many casuals lack access to career progression";*[27]

(b) *"[a]s a casual, he felt obliged to accept any shifts that were offered to ensure his job security";*[28]

(c) *"Ms Grey said that during 2014 she had regular shifts (5 hours per shift, 4 days per week) providing inclusion support for a 5 year-old child, but even then she remained worried about her job security as the work was government funded and could be terminated at any point in time"*;[29]

(d) *"Such employees had told him that, given the choice, they would prefer to be made permanent at the company and talked to him about wanting job security and permanency, and being unable to secure a home loan as a casual employee and the lack of entitlements";*[30]

(e) The Full Bench of the Fair Work Commission has observed:

> *"The suggestion that casual employees benefit from the payment of 'accrued' sick leave whether the employee is sick or not, compared to permanent employees who only receive sick leave when they are sick, misses the point entirely. For many employees, the benefits to be gained from working are not solely financial. A long term casual employee, confronted with the dilemma of needing to care for a sick child, in circumstances where they have no entitlement to sick leave, is in an invidious position**. The payment of a loading does not guarantee job security for that employee who is unable to attend work**."*[31]

(f) Part-time employees referred to the contribution of *"sick leave"* and other leave entitlements as contributing to job security: *"she was able to go on holidays knowing that she is also able to pay for bills and have job security".*[32]

(g) *"She had been a casual employee prior to late 1999 when she converted to permanent part-time, and consequently she enjoyed more regular hours week to week and better job security overall, and she was able to care for her*

---

[27] *4 Yearly Review of Modern Awards - Casual Employment and Part-Time Employment* (2017) 269 IR 125; [2017] FWCFB 3541 at [116] (quoting "the First Markey Report").
[28] Ibid at [144] (citing the evidence of an employee).
[29] Ibid at [149] (citing the evidence of an employee).
[30] Ibid at [177] (citing the evidence of an employee).
[31] Ibid at [245(3)].
[32] Ibid at [447]-[450].

daughter when she was sick and take leave during school holidays without losing pay."[33]

(h) The Full Bench of the Commission observed:

> *"A number of employee witnesses before us gave evidence that the* ***part-time work arrangements which they had entered into under that regime were highly suitable to them, in that they had job security****, a guaranteed level of income, access to leave entitlements, and better access to finance, and that they preferred part-time employment to casual employment. That confirms our view that greater flexibility in part-time employment provisions in the Hospitality Award and the Clubs Award would be in the interests of both employees and employers. It would also make the operation of casual conversion provisions more effective."*[34]

(i) The *Explanatory Memorandum of the Fair Work Bill 2008* also identified the term "job security" in relation to the description of permitted matters for the purposes of s 172(1)(a) of the *FW Act.* An extract appears below:

> *"terms relating to conditions or requirements about employing casual employees or engaging labour hire or contractors if those terms sufficiently relate to employees' job security - e.g. a term which provided that contractors must not be engaged on terms and conditions that would undercut the enterprise agreement"*[35]

(j) The term has also been included in enterprise agreements that were considered by the Commission and Federal Court.[36]

44. The above usage of the term further suggests that *"job security"* is a commonly understood term that relates to the ongoing security of tenure of employment in a role or position itself. Two observations are made:

(a) In the context of casual employees, uncertainty with respect to *"job security"* arises by the nature of the employment: the commitment between the employee and employer is not ongoing. Hence, employee evidence has referred to

---

[33] Ibid at [480] (citing the evidence of an employee).

[34] Ibid at [526].

[35] *Explanatory Memorandum of the Fair Work Bill 2008* at [672].

[36] See example, *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union (CFMEU)* (2018) 262 FCR 527; [2018] FCAFC 77.

choices made to demonstrate their willingness to be available to take on more work – notwithstanding the absence of a firm commitment by the employer.

(b) In the context of part-time and fulltime employees, the issues of job security is addressed by the permanent and ongoing nature of the employment relationship. The evidence of employees, in that respect, frequently cited access to leave entitlements and the right to be absent from the workplace in these cases as a key factor that promotes job security.

45. Further, in the context of s 3(a), the beneficiary of *"promot[ing] job security"* is the "*working Australian"* that is covered by a workplace relations law (i.e. the employee). That context further bolsters the interpretation that *"job security"* is intended to concern a particular role or position.

Section 134(1)(aa) – "the need to improve access to secure work"

Context

46. The key consideration that s 134 is directed to is the provision of *"a fair and relevant minimum safety net of terms and conditions".* The remaining paragraphs are factors that may have relevance to that consideration and are required to be considered.

47. As to the meaning of *"fair"* in subsection (1), the Full Bench have observed: *"fairness in this context is to be assessed from* ***the perspective of the employees and employers*** *covered by the modern award in question"*.[37]

48. The observations of Giudice J in *Shop Distributive and Allied Employees Association v $2 and Under (No. 2)* are also instructive:

> *"In relation to the question of fairness it is of course implicit that the Commission should consider fairness both from the perspective of the employees who carry out the work and the perspective of employers who provide the employment and pay the wages and to balance the interests of those two groups. This must be done in the context of any broader economic or other considerations which might affect the public interest."*[38]

[37] *Re 4 Yearly Review of Modern Awards - Penalty Rates* (2017) 265 IR 1; [2017] FWCFB 1001 at [117] (emphasis added).

[38] *Shop Distributive and Allied Employees Association v $2 and Under* (2003) 135 IR 1 at [11] (although Giudice J was in dissent, his Honour's observations on this point were consistent with the majority).

49. As to the meaning of *"relevant"*, the Full Bench has observed that it is *"intended to convey that a modern award should be suited to contemporary circumstances".*[39]

50. As to the expression "*minimum safety net of terms and conditions"*, the Full Bench cited the observations of the Commission in the *August 1994 Review of Wage Fixing Principles decision*. The following passage is instructive:

> *"Under the Act the Commission, while having proper regard to the interests of the parties and the wider community, is now required to ensure, so far as possible, that the award system provides for 'secure, relevant and consistent wages and conditions of employment' (s 90AA(2)) so that it is an effective safety net 'underpinning direct bargaining' (s 88A(b))."*[40]

51. Section 134 provides a series of considerations that need to be weighed in the balance in arriving at the fair and relevant minimum safety net for employers and employees.[41]

52. That purpose may be contrasted with the objects listed in s 3 of the FW Act. In particular, the reference to *"promote job security"* in s 3(a), which is focused upon the consideration of whether or not workplace relations laws promote job security for working Australians.

The structure of s 134(1)

53. Each of the factors listed in s 134(1), with the exception of paragraph (a), refers to a specific action and subject matter. The subject matter is sometimes further qualified (e.g. by referring to a specific group). This is illustrated by the below table:

Para	Action	Subject matter	Qualifier
(a)	N/A	relative living standards and the needs…	…of the low paid;
(aa)	the need to improve…	…access to secure work…	…across the economy;
(ab)	the need to achieve…	… gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation;	N/A

---

[39] *Re 4 Yearly Review of Modern Awards - Penalty Rates* (2017) 265 IR 1; [2017] FWCFB 1001 at [120].

[40] *Re 4 Yearly Review of Modern Awards - Penalty Rates* (2017) 265 IR 1; [2017] FWCFB 1001 at [121], citing the *August 1994 Review of Wage Fixing Principles decision* (1994) 55 IR 144 at [147]-[149].

[41] See *Re 4 Yearly Review of Modern Awards - Penalty Rates* (2017) 265 IR 1; [2017] FWCFB 1001.

Para	Action	Subject matter	Qualifier
(b)	the need to encourage…	collective bargaining;	N/A
(c)	the need to promote…	…social inclusion through increased workforce participation;	
(d)	the need to promote…	…flexible modern work practices and the efficient and productive performance of work;	
(da)	the need to provide…	additional remuneration for:	(i) employees working overtime; or (ii) employees working unsocial, irregular or unpredictable hours; or (iii) employees working on weekends or public holidays; or (iv) employees working shifts;
(f)	the likely impact…	…of any exercise of modern award powers …	on business, including on productivity, employment costs and the regulatory burden;
(g)	the need to ensure…	…a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards;	
(h)	the likely impact…	… of any exercise of modern award powers…	on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

54. Structurally, paragraph (aa) follows the existing pattern.

55. At this juncture we note that there needs to be caution in a review such as this as it might encourage the elevation of paragraph (aa) above the other limbs of s 134(1). Such a focus would be flawed. No limb has more work to do or primacy than any other and it is simply one matter to have regard to in formulating the safety net for employees and employers.[42]

56. Returning to the text of paragraph (aa), it introduces *three* new concepts into the *FW Act*, namely:

(a) *"the need to improve"*;

[42] *Re 4 Yearly Review of Modern Awards - Penalty Rates* (2017) 265 IR 1; [2017] FWCFB 1001 at [115].

(b) *"access to secure work"*; and

(c) *"across the economy".*

57. None of these concepts are defined in the FW Act. In light of the preceding analysis in relation to *"promote job security"*, we do not consider that the Commission should treat the promotion of job security as synonymous with the need to improve access to secure work etc. Not only do the new provisions consist of composite phrases, but factors such as their ordinary meaning, respective location and sentence structure has an impact upon their interpretation.

58. In the absence of statutory definitions, a useful starting point is to set out the ordinary meaning by reference to the dictionary definitions. As mentioned earlier, this may assist with identifying the range of meanings associated with the terms during their ordinary usage.[43]

59. The definitions of *"improve", "access"* and *"secure"* appear below:

(a) *"improve"* means:

(i) *"to bring into a more desirable or excellent condition: to improve one's health"*;

(ii) *"to make (land) more profitable or valuable by enclosure, cultivation, etc; increase the value of (property) by betterments, as buildings"*;

(iii) *"to turn into account; make good of: to improve an opportunity*"; and

(iv) *"to increase in value, excellence, etc; become better: the situation is improving".* [44]

(b) *"access"* means:

(i) *"way, means, or opportunity of approach or entry"*; and

(ii) *"(sometimes fol. by to) the act or privilege of coming; admittance; approach: to gain access to a person".* [45]

(c) *"secure"* means:

(i) *"free from or not exposed to danger; safe";*

[43] See *Theiss v Collector of Customs* (2014) 250 CLR 664; [2014] HCA 12 at [23]; *Tal Life Ltd v Shuetrim* (2016) 91 NSWLR 439; [2016] NSWCA 68 at [80].

[44] *Macquarie Dictionary*.

[45] *Macquarie Dictionary*.

(ii) *"not liable to fall, yield, become displaced, etc, as a support or a fastening";*

(iii) *"affording safety, as a place";*

(iv) *"in safe custody or keeping";*

(v) *"free from care; without anxiety";*

(vi) *"sure; certain: to be secure of victory";*

(vii) *"able to be counted on: victory is secure"*; and

(viii) *"self-confident; poised".*[46]

60. The Macquarie Dictionary includes 75 definitions for the term *"work"* (and its derivatives). Unlike *"job"*, the ordinary meaning of *"work"* has broader associations and applications, it also generally associated with an action. Some definitions include:

(a) *"exertion directed to produce or accomplish something; labour; toil"*;

(b) *"that on which exertion or labour is expended; something to be made or done; a task or undertaking"*;

(c) *"productive or operative activity"*;

(d) *"manner or quality of working"*;

(e) *"employment; a job, especially that by which one earns a living"*;

(f) *"materials, things, etc, on which one is working, or is to work"*;

(g) *"the result of exertion, labour or activity; a deed or performance"*; and

(h) *"a product of exertion, labour or activity: a work of art".*[47]

61. The definitions of *"across"* and *"economy"* appear below:

(a) *"across"* means:

(i) *"from side to side"*;

(ii) *"on the other side"*;

(iii) *"from one side to another"*; and

(iv) *"on the other side"*.[48]

[46] *Macquarie Dictionary*.
[47] *Macquarie Dictionary*.
[48] *Macquarie Dictionary*.

(b) *"economy"* means:

(i) *"thrifty management; frugality in the expenditure of consumption of money, materials, etc"*;

(ii) *"an act of means of thrifty saving; a saving"*;

(iii) *"the interrelationship between the factors of production (land, labour and capital and possible also management or enterprise) and the means of production, distribution, and exchange"*;

(iv) *"the management, or science of management, of the resources of a community, etc, with a view to productivity and avoidance of waste: national economy"*;

(v) *"the disposition or regulation of the parts or functions of any organic whole; an organised system or method"*; and

(vi) *"the efficient, sparing, and concise use of something".* [49]

62. Whilst we note the Full Bench in the *Aged Care Work Value Case* suggested the issues of *"secure work"* and *"job security"* are directed to similar purposes, that observation did not apply to composite phrases in both s 3(a) and s 134(1)(aa). Being a neutral consideration in that case, the construction of paragraph (aa) did not attract scrutiny.[50]

63. As to the phrases *"need to improve"* and *"across the economy"*, we repeat the observations made with respect to the principle of consistency. We also set out some observations:

(a) This is the first occasion that the term *"improve"* appears in the *FW Act*.

(b) Paragraph (aa) is the first occasion in the FW Act in which the term *"access"* is being used outside the context of access to a record or document.[51]

(c) Section 134(1)(aa) introduces the first reference to *"economy"* (as opposed to *"the national economy"* or *"economic"* in the FW Act.

(d) Each existing reference to *"the national economy"* (or *"the Australian economy"*) is accompanied by a clear direction as to the scope of considerations. For example:

---

[49] *Macquarie Dictionary*.

[50] See *Aged Care Award 2010* [2023] FWCFB 93 at [171]

[51] See example, FW Act ss 180, 483-483D, 489, 495, 709, 713a.

(i) Section 134(1)(h) directs consideration of the impact to three parts of the national economy: *"sustainability, performance and competitiveness"*.

(ii) Section 284(1)(a) directs consideration of the impact to two parts of the national economy: *"performance and competitiveness".*

(iii) Sections 424 and 431 refer to *"caus[ing] significant damage to the Australian economy or an important part of it".*

(e) The FW Act also includes three references to *"economic prosperity"* and *"economic growth"*:

(i) *First*, in relation to the overarching objective to provide a balanced framework for cooperative and productive workplace relations *"that promotes national economic prosperity and social inclusion for all Australians".*

(ii) Second, in relation s 3(a), which sets outs at action that contributes to the achievement of that objective, namely, by "providing workplace relations laws" that, inter alia, "promote productivity and economic growth for Australia's future economic prosperity".

(f) For completeness, s 530 of the FW Act also refers to reasons of an "economic… or similar nature" as a basis upon which an employer may decide to dismiss 15 or more employees.

64. Secure work can be seen to be a reference to the fixing of and predictability of conditions and processes associated with the work itself.

65. The Commission's awards already do this in many ways from fixing starting and finishing times, to setting minimum notice periods for changing rosters, to classifying work and in other cases establishing clear and predictable process for managing issues such as change.

Is "job security" the same as "secure work"?

66. In light of the surrounding context in both ss 3 and 134(1), the terms *"job security"* and *"secure work"* should not be unduly conflated. This risks displacing the meaning of the precise text of the new provisions, in particular, s 134(1)(aa).

67. The promotion of job security is a broader consideration that relates to the impact of workplace relations laws on working Australians. The *"security"* in that context refers to security of tenure in the employee's role or position.

68. By contrast, s 134(1) is focused upon the content of modern awards and whether they provide a fair and relevant minimum safety net of terms and conditions.

69. *"Secure work"* in the context of paragraph (aa), is concerned with the predictability and stability of the conditions and processes associated with the work itself. It means work that is structured and regulated with certainty, where it cannot be changed arbitrarily or carelessly.

70. Further, the direction to take into account *"the need to **improve** access to secure work"* necessarily builds in an assumption that *"access to secure work"* (and secure work itself) currently exists; as it does.

71. Therefore, as part of ensuring that modern awards provide a fair and relevant minimum safety net of terms and conditions, the Commission is to consider how access to that secure work can be bettered.

72. Ultimately, s 134(1)(aa) is focussed on *improving access* to secure work; the focus is as on creating the opportunity to the secure work as more than the secure work itself.

73. The section can be contrasted with language such as *"ensure that work is as secure as it can be"* for instance.

74. The latter qualification of the section focuses on the "*economy"* as a construct in distinction to the society at large or generally; the section could have replaced economy with *"society"* or not mentioned *"the economy"* at all.

75. The fact that paragraph (aa) does mention it, focusses attention on secure work in the context of the economy; the production and consumption of goods and services and the supply of money etc.

76. The inclusion of the word *"across"* suggests that the improved access is at large and in all areas of the economy rather than limited or isolated. This breadth of scope suggest that we are to focus on matters of broad application rather than limited or isolated sectoral considerations and the system of production and consumption etc that makes up the economy.

77. The construction of ss 3(a) and 134(1)(aa) would benefit from further consideration in the consultative stage to determine whether parties approach the statute in a similar manner.

The Revised Explanatory Memorandum

78. Consistent with the observations of the High Court in *Baini v The Queen*, the following aspects of the Revised Explanatory Memorandum (**REM**) diminish the utility of the REM in interpreting the new provisions (in particular s 134(1)(aa)):

(a) The REM paraphrases the statutory language of s 3(a). In the context of describing the amendments to s 3, it states:

> *"Part 4* ***would amend the modern awards objective*** *to include a new requirement for the FWC to consider job security and gender equality when exercising its powers under Part 2-2"*[52]

(b) Part 4 did not include any amendments to s 134, save for the deletion of s 134(1)(e).

(c) It is incorrect to state that s 3(a) results in either of the following:

(i) an amendment to the modern awards objective; or

(ii) an amendment to the modern awards objective that would require the Commission to consider job security and gender equality.

(d) That interpretation is strangely at odds with the ordinary meaning of the statutory text.[53] If the legislature wanted the Commission to consider *"job security and gender equality"* as a factor under the modern awards objective, it was free to use that text: but it did not.

(e) The REM paraphrases the statutory language of s 134(1)(aa) – albeit in the context of considering the addition of *"job security and gender equality"*. It states:

> *"By requiring the FWC to consider the objective of secure work in exercising its powers under the FW Act, the amendments would promote stable and ongoing employment, protecting the right to work in Article 6 of the ICESCR. The Bill would also promote just conditions of work for all employees, as set out in Article 7 of the ICESCR, by requiring the FWC to consider gender equality in exercising its powers in setting the conditions of work under modern awards. In particular, the objective of gender equality would further Article 7(i) of the ICESCR,*

---

[52] Revised Explanatory Memorandum at [7].

[53] Mason v Parsons (2019) CLR 544; [2019] HCA 21 at [26] (per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

which requires fair wages and equal remuneration for work of equal value without distinction of any kind, including gender."[54]

(f) The above passage is a prime example of how paraphrases of statutory language are *"apt to mislead"*. Either the REM is poorly drafted the first component is intended to relate to s 134(1)(aa), or the REM is using *"job security"* and *"secure work"* interchangeably. The location of the text suggest the latter is more likely.

(g) The REM provide no other 'guidance' as to the intention of parliament in drafting s 134(1)(aa).

79. The approach of the legislature should not be assumed to be thoughtless: the choice of text is a precise and deliberate exercise.

80. The general approach to statutory construction is that words are assumed to be used consistently. That is, if a word is used consistently in legislation, it should be given the same meaning consistently. It follows, where a legislature could have used the same word but chose to use a different words, the intention was to change the meaning.[55]

81. As Gageler J observed in *Baini v The Queen*:

> *"[43] That modern contextual approach ordinarily requires that statutory language re-enacted in an identical form after it has acquired a settled judicial meaning be taken to have the same meaning. It equally requires that, changes of drafting style aside, statutory language re-enacted in an altered form after it has acquired a settled judicial meaning be taken to have a different meaning. Were it otherwise, legislative policy choices would be blurred and orderly legislative reform would be impeded."*

82. The following factors further remove any rebuttal argument that the legislature did not want the new terms to be treated differently:[56]

(a) prior to the SJBP Act, the words *"job security" and "secure work"* did not feature anywhere in the *FW Act*; and

both *"promote job security"* and *"improve access to secure work"* appear in different parts of the *FW Act* and concern different subject matter.[57]

---

[54] Revised Explanatory Memorandum at [63].

[55] D C Pearce, *Statutory Interpretation in Australia* (LexisNexis, 10th edition, 2024) at [4.7].

[56] Cf *Commissioner of Taxes (Vic) v Lennon* (1921) 29 CLR 579 at 590 (per Higgins J).

[57] See *Australian Postal Corporation v Sinnaiah* (2013) 213 FCR 449; [2013] FCAFC 98 at [24].

83. The REM provides the following commentary in relation to *"the reference"* to *"promoting job security"*:

> *"334.* ***The reference to promoting job security recognises the importance of employees and job seekers having the choice to be able to enjoy, to the fullest extent possible, ongoing, stable and secure employment that provides regular and predictable access to beneficial wages and conditions of employment.*** *The reference to promoting gender equality recognises the importance of people of all genders having equal rights, opportunities and treatment in the workplace and in their terms and conditions of employment, including equal pay. The intention of the references to 'gender equality' in each of these provisions is to use language that is consistent with the Convention on the Elimination of All Forms of Discrimination against Women and ILO Convention concerning Discrimination in Respect of Employment and Occupation (No 111). It is also intended to reflect the policy objective of both formal and substantive gender equality.*
>
> *335. Job security and gender equality would sit alongside existing considerations in the object of the FW Act, such as providing workplace relations laws that are flexible for business, assisting employees to balance their work and family responsibilities, and achieving productivity and fairness (see existing paragraphs 3(a), (d) and (f))."*
>
> *(emphasis added)*

84. The aspirational text in the REM suggests the intention behind including *"promoting job security"* was to prompt the Commission to consider:

> *"the importance of employees and job seekers having the choice to be able to enjoy, to the fullest extent possible, ongoing, stable and secure employment that provides regular and predictable access to beneficial wages and conditions of employment".*

85. However, that extract of the REM is not to be equated to a definition in the statute. The following observations are made:

(a) The High Court has made it has made it irrefutably clear that extrinsic materials cannot displace the meaning of the text or be relied upon to fill a gap in a statute

itself.[58] In *Saeed*, the High Court of Australia observed: *"it is erroneous to look at extrinsic materials before exhausting the application of the ordinary rules of statutory interpretation"*.[59]

(b) There appears to be no basis to expand *"job security"* to include considerations about the unemployed and/or *"job seekers"*. Further, paragraph (a) is concerned with *"providing workplace relations laws that are fair to working Australians*".

(c) The reference to *"secure employment"* appears to be another instance of paraphrasing that may lead to error in construction.[60]

(d) Similarly, there appears to be no compelling basis to characterise job security as the provision of *"regular and predictable access to beneficial wages and conditions of employment"*. The new text in paragraph (a) is not so grandiose. Importantly, the text in paragraph (a) is not "providing workplace relations laws that … promote access to job security". Rather, the statutory text is precise and states: *"providing workplace relations laws that … promote job security".*

(e) As the High Court observed in *Fleming v The Queen*:

> *"the fundamental point is that close attention must be paid to the language [of the relevant provision because] …* ***there is no substitute for giving attention to <u>the precise terms</u>*** *[in which that provision is expressed]".*[61]

86. In light of the preceding analysis, including the principles cited, the REM should be provided little to no weight when seeking to interpret the text of s 3(a) and 134(1)(aa). In the context of s 3(a), the use of paraphrasing and aspirational commentary distracts from the ordinary meaning of the text (and, in particular, seeks to expand the meaning beyond the language ultimately adopted by the legislative drafters in s 3(a)).

87. Turning to s 134(1)(aa), the commentary in the REM does not target either the provision or the specific language employed. In these circumstances, there is no basis

---

[58] See *Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39]. See also, *Commissioner of Taxation v Apted* (2021) 284 FCR 93; [2021] FCAFC 45 at [108].
[59] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23 at [33].
[60] See *Baini v The Queen* [2012] HCA 59 at [14].
[61] *Fleming v The Queen* (1998) 197 CLR; [1998] HCA 68 at [12] (emphasis and underlining added).

to not start to task of statutory construction by reference to the ordinary meaning of the text that appears in the new provisions.

88. The balance of this section will focus on the application of the principles of statutory construction to s 134(1)(aa).

Further Considerations

89. Over the remaining two sections of this part, we set out our preliminary consideration as to how *"promotion of job security"* and *"improv[ing] access to secure work"* might be addressed in the context of the Commission exercising its functions under the FW Act. Additionally, we consider how the modern awards and FW Act currently address the subject matter that underlies the new provisions.

Addressing the promotion of job security and improving access to secure work

90. Promoting job security is best achieved by allowing for economic growth and business sustainability at a national and sector level.

91. Improving access to secure work will require within the overall context of s 134 exploring what balanced features of modern awards reflect secure work as opposed to insecure work and then determining how to improve opportunity to access these at large in the economy.

92. Improving the opportunity to access secure work across the economy is best achieved by ensuring that modern awards and the modern award system is aligned to business performance and growth, mutually beneficial flexibility and a limited number of standards such as minimum engagements, notice to change rosters, fluid classifications that promote contemporary work allocation, reasonable certainty in hours of work etc which will create the environment for secure work to flourish; s 134 (1) (c) (d) (f) and (g) reinforce this balanced approach.

93. The focus of s 134 (1) (aa) is not as we have said above to 'ensure that work is as secure as possible' but rather a balance of predictability and stability of conditions and processes weighed against the other limbs of s 134 and the creation of the safety net conditioned by the limitation in s 138.

How do Modern Awards and the FW Act currently address the promotion of job security and access to secure work

94. The current modern award system, and the FW Act, contain a number of provisions or *machinery* that can be said to condition, or improve access to secure work across the economy.

95. Broadly, this machinery consists of:

(a) Clear and unambiguous characterisation of employment categories.

(b) Classifications and methods of engagement that provide for career progression, skill development (including apprenticeships and traineeships), and social inclusion (such as the Supported Wage System).

(c) Confirmation of award coverage for on-hire labour employees and employers (outside of any enterprise agreement that expressly covers labour hire employees).

(d) Obligations to offer, and rights to request, conversion from casual to permanent employment.

(e) Clear boundaries on the operation of hours of work (e.g. when/how ordinary hours can be worked, engagement of part time employees, shift arrangements, when overtime applies etc).

(f) Minimum engagement provisions.

(g) Requirements to pay employee wages in an orderly and consistent cycle.

(h) Provision of leave entitlements. This includes access to paid leave, but also ability to access forms of leave that do not jeopardise an employee's ongoing employment (i.e. personal leave, family and domestic violence leave).

(i) Facilitative provisions.

(j) Typically standardised clauses across all modern awards about:

    (i) Handling and resolving workplace disputes,

    (ii) Obligations to consult about changes to rosters or hours of work, and in a broader sense consultation on major workplace change, and

    (iii) Access to time off without loss of pay for the purpose of searching for new employment during notice periods, and maintenance of pay (or payment of the difference in pay) where an employee is transferred to lower paid duties in redundancy situations.

96. Additionally, the NES also provides provisions (which may be augmented by modern awards) such as:

(a) minimum notice of termination (in the case of permanent employees).

(b) entitlements to severance pay in certain redundancy circumstances.

(c) access to forms of leave (both paid and unpaid) which enable an employee to be absent from work without jeopardising their further employment; and

(d) the ability to request flexible working arrangements.

97. Further, recent amendments to the FW Act as part of the *Secure Jobs, Better Pay* and *Closing Loopholes* legislative amendments have amplified access to secure work, such as the inclusion of restrictions on the use of fixed term contracts and providing discreet processes for employees to challenge the rejection of flexible work arrangement requests and extension of parental leave through the Commission, up to and including arbitration of disputes.

98. The architecture of each modern award draws together the machinery identified above. Broadly, each provision's intent is largely consistent across each award, notwithstanding that particular provisions may be unique to, or specifically tailored, for certain industries and sectors which is a necessary feature of a fair and relevant minimum safety net in a sector/industry.

IV. RESPONSE TO THE DISCUSSION QUESTIONS

Question 1

Are there specific provisions in the seven modern awards the subject of this review that parties consider are necessary to improve access to secure work across the economy?

Parties are asked to specifically consider provisions dealing with:

a. Types or modes of employment;

b. Rostering arrangements, including rostering restrictions;

c. Payment of wages, in particular pay cycles;

d. Agreed regular patterns of work or guaranteed hours for part-time employees; and

e. Minimum engagement/payment periods.

Response to Question 1

100. As noted in earlier paragraph 95, there are a number of provisions in the modern awards which can be said to improve access to secure work. In our view these are necessary to improving access to secure work across the economy.

101. With reference to the five specific provisions listed above, we say the following.

(a) Types of Employment

102. Different modes or types of employment are integral to an employers' ability to provide working arrangements that are flexible and agile in response to consumer demands (and the needs of certain employee demographics) as well as operational requirements.

103. With the exception of the occupational *Clerks Private Sector Award* (**Clerks Award**), the remaining 6 most commonly used awards cover industries which can, un-controversially, be described as service orientated industries. Work levels are often dictated by consumer demand, peaks and troughs in trade, and employee availability.

104. Given the demographic of these industries employees also demand form of work other than full time and other than permanent.

105. Part time and casual employment categories offer a viable and legitimate alternative for employers to scaling their workforce, providing access to work that aligns with demand, and meeting employee needs. In the case of part time employment, this can provide valuable access to secure work, consistent with the modern award objective while promoting workforce participation especially for employees with caring responsibilities.

106. Part time and casual employment modes are also important in being able to facilitate the implementation of flexible work arrangements, provisions which have been recently boldened in the FW Act as part of the recent *Secure Jobs Better Pay* amendments.

107. Such flexibility in choice of employment modes helps to promote social inclusion in the workforce through increased participation, and also flexible work practices, which are modern award considerations[62].

108. Using the *Social, Community, Home Care and Disability Services Award* (**SCHADS Award**) as an example, having access to different modes of employment can assist both employers and employees in accessing secure work.

109. The SCHADS Award covers a wide range of community services in different sectors, applying to employers who provide social/welfare work, youth work, community development work, foster care, disability services, crisis assistance and supported accommodation, family day care, and home care services.

110. Employers in this sector provide services in response to an individual or community need. Service levels can vary from client to client, subject to demand for the service, and are not always regular and predictable, or viable to perform on a full-time basis.

111. Different modes of employment enable businesses to align work available for employees with client demands and community expectations, but at the same time still provide access to secure work via part time employment (and in the case of casual employees - provide pathways to secure work). Such arrangements are necessary to providing and continuing to improve access to secure work across the economy.

(b) Rostering Arrangements

112. Having flexible and agile rostering provisions in modern awards that are suitable to the needs of business are also integral to generating successful businesses, which we say is critical to improving access to secure work across the economy.

113. The modern awards include mechanisms that allow the employer to arrange the ordinary hours of work in a manner that is relevant to their business and where relevant include facilitative options by agreement.

114. For example, clause 15.6 of the *General Retail Industry Award* (**Retail Award**) provides the ability for employers to arrange ordinary hours of work of full-time employees in a wide variety of ways, subject to an assessment as to the kind of arrangement *that best*

---

[62] See section 134(1)(c) and (d) of the *FW Act 2009* (Cth)

suits the business of the establishment[63]. An employer may also institute different arrangements with different groups of employees[64].

115. This provision provides a high degree of flexibility in the arrangement of the average hours of work each week, the number of weeks those are averaged over, the daily working hours, number of days off in a week or roster cycle, and access to rostered days off, which allow an employer to tailor working arrangements. Further safeguards such as limits on the number of long or short days an employee can work, and number of days off duty (including consecutive days) in the cycle are also provided to present a fair safety net. This all operates within the context of the standard consultation provisions on changing hours.

116. While the arrangement of rosters is important, equally, providing flexible but fair ways to change rosters is important to improving access to secure work providing employees with an opportunity to provide input into any changes (assisted more broadly by section 64 of the FW Act).

117. In service orientated industries, short term or ad-hoc roster changes are common to meet changes in demand (such as peak trading periods), covering other staff in emergency situations or because of illness, or to facilitate the swapping of shifts among employees to suit their convenience (a very common feature for student employees).

118. Permanent/ongoing roster changes may also arise, in response to needs to reorganise hours of work, meet increasing consumer trends, and implement restructures.

119. In modern awards, the ability to change rosters is fettered by requirements to consult with employees[65], subject to obtaining mutual agreement[66], or by providing notice[67].

120. For example, in the Retail Award the roster of any employee other than a part time employee may be changed at any time due to unexpected operational requirements by mutual agreement[68], or in the case of a permanent change, at any time with at least 7 days' notice[69]. Mutuality and fair notice add to the security of work.

---

[63] See clause 15.6a of the Retail Award
[64] See clause 15.6a of the Retail Award
[65] For example clause15.9 (with reference to clause 35) of the *Retail Award*
[66] For example, clause 15.5(d) of the *Hospitality Industry (General) Award*
[67] For example, clause 15.5(d) of the *Hospitality Industry (General) Award*
[68] Clause 15.9(d) of the Retail Award
[69] Clause 15.9(e) of the Retail Award

121. In the case of a part time employee, changes to the regular pattern of work (but not their guaranteed hours) may be changed by the employer with 7 days, or in the case of an emergency, 48 hours, written notice[70].

122. These provisions and their safeguards such as requirements to consult, notice requirements or payment of overtime, are necessary machinery in enabling employers to implement changes in response to operational requirements or emergency situations balanced with reasonable fetters to avoid unfairness to employees.

123. Plainly, without this ability employers would be forced to maintain rosters which are inflexible, leading to increased labour expenditure in periods of slackness of trade, which in turn reduces productivity and efficiency of labour use and with it erosion of the overall security of the business and the work in it.

124. We see providing efficient and flexible rostering arrangements that facilitate the arranging of work in ways that suit the business, and the ability to change rosters where needed, are important to improving access to secure work across the economy, and are necessary to meet the modern awards objective in section 134(1) generally.

(c) Payment of Wages

125. Section 323(1)(c) of the FW Act requires an employer to pay employees in relation to the performance of work *at least monthly.* Modern awards generally take this requirement further by conferring obligations to pay weekly or fortnightly, or providing ability to agree with employees on the frequency and manner of payment.

126. Ensuring there are effective and efficient ways for business to structure pay cycles in a predictable and orderly manner ensures that employees receive their pay when expected allowing them to budget themselves. This indirectly improves access to secure work as there is security of the timing of payment.

127. Ensuring that Awards provide for consistent and practical pay cycle options for both employers and employees is necessary to this concept.

128. By way of example, the Clerks Award allows the employer to determine the pay period as either weekly or fortnightly, or where agreement is reached with an individual or a majority of employees, monthly[71]. Where employees are paid monthly, payment is made on the basis of two weeks in arrears, and two weeks in advance.

[70] See clause 10.10 of the Retail Award
[71] See clause 17.2 of the Clerks Award

129. Comparatively the SCHADS Award, which also provides for clerical and administrative classifications for employees[72], restricts pay cycles to either weekly or fortnightly[73].

(d) Agreed regular patterns of work or guaranteed hours for part time employees

130. Developing on our earlier comments that part time employment is a vital mode of employment that improves access to secure work across the economy, there is also need to ensure appropriate balance between having a fair safety net of conditions for part time employees and the flexibility employers require to be agile and respond to consumer demands.

131. At a conceptual level, having minimum standards as to how part time employee's hours of work are agreed, rostered and worked is a sound policy position, to prevent casualisation.

132. Providing a guarantee of minimum hours, and/or a reasonably predictable arrangement of work from week to week that enables the individual employee to balance their work and personal commitments helps to draw a clear distinction between permanent and casual employment.

133. To this extent, award provisions that address the formation of regular patterns of work or guaranteed hours improve access to secure work, and to also provide a fair and relevant safety net of conditions.

134. However, ensuring that the clauses operates in a flexible, and practical manner is important.

135. For the purpose of addressing this particular question, we focus on why these clauses are necessary to improve access to secure work, rather than identifying the problems these arrangements have for employers. We propose to address these later in our responses to question 3.

136. All of the seven most commonly used modern awards subject of this review contain clauses around the agreement of regular patterns of work and guaranteed hours.

137. We note the analysis of the Commission at paragraphs [194] and [195] of the Discussion Paper in relation to the construction of these clauses in the seven awards, and the broad similarities in their requirements.

138. However, we highlight the specific arrangements in the Hospitality and Restaurants Award which are different to the other awards, and how these seek to provide a more

---

[72] The various classification streams of the SCHADS Award provide for clerical and administrative duties, for example, the Social and Community Services stream.
[73] See clause 24.1 of the SCHADS Award

balanced and practical way of addressing the regular pattern of work and guaranteed hours.

139. It is uncontroversial to say that the majority of employers find difficulty in the setting of a regular pattern of work at commencement of employment, which may then need to be varied at a later point to meet consumer demand, employee availability or changes in operating structure. The ability to change the regular pattern of work is usually confined by reaching mutual agreement with the employee. There are limited provisions which allow the employer to change these unilaterally or provide flexibility in arranging the hours to suit business needs.

140. In comparison to other awards, The *Hospitality Industry (General) Award* (**Hospitality Award**) and *Restaurant Industry Award* (**Restaurants Award**) [74] both require the employer and employee to agree on the number of guaranteed hours over the roster cycle, and also the days of the week the employee is available to work those agreed hours. Both Awards contain a safeguard that the employees guaranteed hours may only be changed with written consent of the employee.

141. The practical application of this provision is that an employer can agree on a number of guaranteed hours, which it can arrange in a roster cycle on the days an employee is available to work.

142. In cases where the employee is available on a wide range of days, an employer has a level of flexibility in rostering the guaranteed hours across this, provided it is within the employee's availability, and the additional safeguards in clause 10.7 are met.

143. During periods of peak trade, an employer has ability to roster employees within their availability, while still being flexible and agile to meet consumer demand and also meeting the employees' guaranteed hours.

144. This flexibility is an important aspect in a service orientated sector like hospitality. Without this, employers who need to arrange rosters to meet consumer demand would likely be faced with the prospect of having to pay overtime for employees to work outside their agreed pattern of work (despite still meeting their guaranteed hours). Obtaining such flexibility would otherwise likely need to be serviced through casual employment, or in the long term, might push employers to reduce hours, or jobs entirely.

145. This provides the necessary flexibility, balanced with a fair and relevant safety net, and is squarely aimed at improving access to secure work for employees. Such

[74] See clause 10.4 of the Hospitality Award and the Restaurant Award.

arrangements are necessary to meet the modern awards objective, and we consider there is merit for including this approach in other modern awards (including those subject of this review).

146. This balanced mutuality in the operation of the provision is more aligned to secure work (it suits both parties).

(e) Minimum Engagements/payment periods

147. Broadly, the purpose of minimum engagement provisions is to ensure employees receive a sufficient amount of work and/or payment for each attendance at work, which justifies the expense and inconvenience associated with attending work[75].

148. Further, minimum engagements also assist in making the performance of work attractive to employees as it creates a certainty of working hours or payment.

149. The Modern award system has, historically, had a tailored approach to minimum engagements, which vary across different industries and awards to the circumstances and contexts. In recent years, the Commission has sought to introduce a standard minimum engagement floor of 2 hours for casual and part time employees across all awards reinforcing stability of work.

150. We agree with the proposition that minimum engagements are important machinery in modern awards to provide a safety net for employees to balance the issues identified in 147 above.

151. However, modern awards should also ensure that any minimum engagement is appropriate for the relevant industry or occupation, and balance the need for flexibility with providing a fair and relevant safety net for both employers and employees.

152. For example, the minimum engagement under the Retail award for casual employees is three (3) hours, or 1.5 hours in circumstances where the employee is a full-time secondary school student, and the student is engaged to work between 3pm and 6:30pm on a day they are required to attend school[76].

153. This provision was introduced into the Retail Award in 2011[77] as a means to facilitate the engagement of school students in circumstances where work would otherwise not be provided because the minimum engagement requirement restricted a longer period of employment. This could be due to the individual's circumstances, such as the time

[75] 4 yearly review of modern awards - Casual and Part-time employment [2017] FWCFB 3541 para [399]
[76] See clause 11.2 and 11.3 of the Retail Award
[77] National Retail Association Limited [2011] FWA 3777

they would be able to commence work after school, impact on study, or the operating hours of an establishment.

154. While the ability for a shorter minimum engagement is fettered by particular circumstances, its purpose ostensibly is to facilitate the access to employment (which may act as a gateway to future employment in the sector) to a group of employees which might otherwise not be able, despite being ready, willing and able to work due to external factors limiting their participation. This accords with the modern awards objective to promote social inclusion[78].

155. Arrangements such as this are, in our view, important machinery in being able to bring employees into the workforce, taking into account their personal circumstances, and providing a flexible and practical option for employers.

156. While not saying that all modern awards should permit the lowering of a minimum engagement simply to drive participation in young workers, we see there is merit in providing ways for an individual and an employer to agree on a lesser minimum engagement (subject to appropriate safeguards), in circumstances where it promotes access to the workforce.

[78] See s134(1)(c) of the FW Act

Question 2

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

Response to Question 2

157. As we note earlier modern awards and the NES currently contain standard and industry/occupation specific machinery that improve access to secure work.

158. Generally, these provide a balanced approach to addressing the needs of employers to promote efficient business operation, through flexible and efficient operational practices, balanced with the requirement to provide a fair and relevant safety net for employees.

159. In addressing this question, we identify two specific provisions which we consider are necessary to improve access to secure work across the economy:

(a) facilitative provisions; and

(b) work organisation, or "multi-skilling".

Facilitative Provisions

160. As these are likely to create mutually beneficial arrangements underscored by some minimum standard they are most likely to drive secure work (predictability tailored to both parties needs) then these should be encouraged as far as practicable in awards to improve access to secure work.

161. As a primary view, work is likely to be more secure if the form of work is mutually beneficial to employers and employees.

162. One way this can be achieved is through the use of facilitative provisions.

163. Facilitative provisions are common in awards and provide a way for the standard award provision to be departed from by agreement, to enable the particular clause to be applied flexibly in practice to meet the particular working or competence requirements within a workplace[79][80].

164. The ability to reach mutual agreement on conditions of work by logic will improve access to secure work as it suits the employer and employee specifically, leading to greater operational efficiency and productivity,

---

[79] *Safety Net Adjustments and Review - September 1994* AIRC L5300, 21 September 1994, para 136

[80] *National Wage Case April 1991* AIRC J7400, 16 April 1991 para 162

165. In our view, broadening the scope and use of facilitative provisions in the awards subject of this review is one way the Commission could optimise secure work across the economy.

Work Organisation/Multi-Skilling

166. Both the Hospitality and Restaurants Award contain a provision that enables the employer to require employees to perform duties across the different classification streams that they are competent to perform in the relevant awards.

167. In the context of the hospitality sector, such provisions have historically been used for the purpose of increasing productivity and flexibility, as well as enhancing opportunities for employees to access work.

168. Employers in service orientated industries require flexibility in the skill of their workforce to meet consumer demand, respond to peaks and troughs in trade, and help address short term needs such as replacing absent workers or covering other employees who may be required to take meal and rest breaks. Enabling employers to direct employees to perform tasks within their skills, qualifications and experience is integral to ensuring continued operational efficiency, and boost productivity.

169. From an employee perspective, being able to perform work across a variety of functions within a hospitality establishment helps to promote upskilling and exposure to different tasks, which can help drive employee engagement and being more useful improve access to secure work.

170. Reflecting on the Schedule R of the Restaurant Award from Covid shows how further classification rationalisation can be achieved promoting additional skilling and security of work and this should be a focus in this review.

171. An example of where such a provision would improve access to secure work, and promote job security is in the SCHADS Award, particularly in relation to the Home Care and Disability Sectors.

172. The SCHADS Award is structured similarly to the Hospitality and Restaurant Awards as it contains different streams.

173. It is not uncommon for larger social and community services organisations to have multiple operations in the various sectors, such as providing home care services, but also disability services for disabled clients in the community.

174. Including a provision that makes clear an employee could be engaged across multiple streams of the Award would improve access to secure work by enabling employers to offer more work to employees who possess the relevant qualifications and skills

needed to perform personal care and domestic assistance roles, which can also be transferred into disability work.

175. This would assist employers in being able to flex its workforce, providing more efficient care to its client, while also giving employees the opportunity to perform more work (accessing additional income).

176. In a sector which experiences staffing shortages, flexibility like this can benefit both employers and employees, and allow businesses to provide more access to secure work.

177. We consider there is sound public policy reasons for addressing this issue in the SCHADS Award.

Question 3

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

Response to Question 3

178. Notwithstanding our comments earlier in response to question 1, we consider that there are aspects of the specific award provisions which are inconsistent with the new modern awards objective.

179. These include:

(a) Minimum engagement provisions that do not allow for agreement to a lesser period of work, particularly in circumstances where an employee requests to work less to meet their own personal circumstances; and

(b) Part time rostering arrangements that require payment of overtime where employees work outside their agreed pattern of work, or do not provide a mechanism for the employer to be able to vary these arrangements without mutual agreement.

180. Firstly, while minimum engagements serve a particular purpose in creating a fair and relevant safety net, there are often times when employees may, due to their personal circumstances, be unavailable to work the minimum number of hours required per engagement.

181. This may arise in situations such as for school students, those with caring responsibilities, or workers who may be suffering from family or domestic violence. It is also conceivable that an employee may utilise the flexible work arrangements provisions to request a shorter engagement period to address situations such as caring responsibilities or domestic violence.

182. Employers may have work available for employees which meets their personal circumstances, however, are restricted from engaging the worker for the period they can work by minimum engagements by their personal circumstances.

183. The position for employers in most cases is to either pay the minimum engagement (despite the worker not working), or to simply not offer the work at all, leading to either:

(a) increased labour costs, which in turn over a sustained period is likely to result in employees losing jobs as employers seek to remain economically viable; or

(b) resulting in workers who are otherwise ready willing or able to work being excluded from the workforce.

184. These situations only seek to drive an untenable arrangement long term, and in our view are contrary to the position of promoting job security and improving access to secure work across the economy.

185. Currently, the Retail Award provides for a level of flexibility in this regard (albeit in specific circumstances relating to casual school students).

186. Facilitative provisions such as this is consistent with the notion of improving access to secure work for employees across the economy and enables access to the workforce.

187. We consider there is good reason to consider extending these provisions to awards such as the *Fast Food Industry Award*; a sector which also employs a high number of workers of a similar demographic.

Part Time Rostering Arrangements - Payment of Overtime

188. While we agree with the proposition that regular patterns and guaranteed hours of work are important safeguards for part time employees, the current award provisions are arguably inconsistent with the new modern awards objective.

189. Of the seven modern awards subject to this review, six require an employer to pay employees at overtime rates where they work outside their regular pattern of work, or guaranteed hours.

190. In service orientated industries, there is often a need to intermittently change rosters and provide additional hours of work in order to meet consumer demand and unexpected emergencies (including employee absence).

191. Often, obtaining employee agreement on a change to their agreed pattern of work cannot be pre-determined, and may arise at short notice as a shift commences or during the course of the shift.

192. While mutual agreement may be reached (and voiding the need to pay overtime), it is often the case an employee does not agree, in the knowledge that they would receive overtime payments if the work were directed.

193. This places employers in a position where they may incur additional labour costs if requiring the employee to work or needing to find another employee to perform the work.

194. The second scenario may often mean the refusing employee misses out on additional income, as the employer attempts to find a more economically viable alternative. This often is in the form of casual labour.

195. The inability to change the roster in an effective way that is economically viable for employers gives rise to amplifying insecure work and promote casualisation in order to address the need for flexibility.

196. This is directly inconsistent with the concept of improving access to secure work.

197. In our view, we consider it is relevant and necessary to vary modern awards to ensure there is adequate flexibility for employers to make roster changes in an efficient and effective manner to improve access to secure work across the economy.

198. This may involve a new consideration of non full time work reflecting what industry often describe as flexible part time versus flexible part time with the latter potentially being additionally recompensed for the flexibility.

199. Adopting two clearly defined categories will add stability and overall predictability to work (with permanent benefits) for those in each category while ensuring business has necessary operational flexibility to operate efficiently.

Part Time Rostering Arrangements - Inflexibility in changing rosters

200. With specific reference to the SCHADS Award, we consider it is relevant and necessary to vary the award, as it is currently inconsistent with the new modern award objective.

201. There are inconsistencies in the architecture of the SCHADS Award which relate to how hours of work of part time employees may be changed, which creates inflexibility and confusion for employers and affects the ability to access secure work.

202. Before commencement of employment, the employer and employee must agree on a regular pattern of work including the number of hours to be worked each week (guaranteed hours), and the days of the week and starting and finishing times each day.

203. The guaranteed hours do not need to be the same number of hours each week. The regular pattern of work can be varied at any time by mutual agreement.

204. The award allows and employer to change the roster on seven days' notice, or at any time to either:

(a) Accommodate the mutually agreed swapping of shifts between employees, or

(b) To enable the service of the organisation to be carried on where another employee is absent due to illness or in case of emergency.

205. While clause 25.5(d) of the SCHADS Award allows for changes to be made by the employer, this clause must be read subject to clause 10.3(e). If the change affects a part time employee's regular pattern of work, then the employee must agree to this.

206. Plainly, if an employee doesn't agree to vary their regular pattern, then the employer is restricted from effecting the change.

207. In the context of the social and community services sector (including the home care sector), the need for flexible and efficient rostering practices is integral for providers to meet their participant's care needs. It is not uncommon that intermittent roster changes arise in order to meet the service requirements of particular NDIS plans.

208. This may involve changing the days on which client services are needed, or the times at which the service is provided.

209. The inability to meet these demands, particularly where such change is necessary to ensure the ongoing care of a participant or the continued operation of an enterprise, can potentially cause serious implications for vulnerable members of the community.

210. Such inflexibility is only likely to continue to promote casualisation of workers, reduce the number of hours of work available for permanent employment.

211. On a longer-term basis, the untenable inflexibility in making changes to regular patterns of work without agreement is likely to place limitations on the ongoing effectiveness of a role.

212. If an employee is not willing to agree on changes, the only option for employers to force the change is to effectively remove the position and make the employee redundant. This only seeks to exacerbate job insecurity, as employees end up losing their jobs.

213. Given the concerns around underemployment in the sector broadly, addressing this inconsistency is relevant and necessary to meeting the new modern award objectives on improving access to secure work.

214. To address this concern, it necessary the SCHADS Award be varied to include a mechanism that, subject to appropriate safeguards such as consultation and notice, an employer can change the regular pattern of work for part time employees.

215. This could be in the form of provisions similar to those that exist in the *Children's Services Award* (**Children's Award**) that allows the days of the week to be altered by the employer without the employees agreement by giving 7 days' notice, or in the Hospitality and Restaurants Award (where an employer can roster the guaranteed hours in accordance with the employee's agreed availability).

216. This would, in our view, provide employers with a means to make roster changes, while at the same time providing a fair and relevant safety net for employees.

Question 4

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

Question 5

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

Response to Questions 4 and 5

217. Casual employment is a legitimate and recognised category of employment. The nature of casual employment, consistent with the definition set out in section 15A of the FW Act, speak to engagement that is on an “as needs” basis, with no advance firm commitment to continuing and indefinite work according to an agreed pattern.

218. As noted by the Full Bench of the (then) Australian Industrial Relations Commission (AIRC) in *Metal, Engineering and Associated Industries Award 1998 - Part 1* (Metals Casual Decision), the notion of casual employment detracts from the integrity of an award safety net in which standards for annual leave, paid public holidays, sick leave and personal leave are fundamental benefits of gaining permanent employment.

219. However, casual work or some form of it (labour hire) is a necessary part of the employment landscape to meet demand changes; without it employers would systematically employ and terminate certain classes of employee which is antithetical to secure work.

220. The inclusion of casual conversion rights in the NES as a standard employment condition militates against the inappropriate use of casuals by employers.

221. Casual employees also have unfair dismissal rights[81] and also are protected from adverse action[82].

222. Turning to the issue of whether the exclusion of casuals from accessing certain NES entitlements should continue, the fact that casual employment is an important and legitimate mode of employment, there should be a distinction between casual and permanent employment.

---

[81] See Chapter 3, Part 3-2 of the *Fair Work Act 2009* (Cth)

[82] See Chapter 3, Part 3-1 of the *Fair Work Act 2009* (Cth)

223. Currently, in addition to the definition of casual work under the FW Act, the casual loading plays an important part in maintaining this difference.

224. The entitlement to a casual loading has been to compensate casual employees for the lack of such paid entitlements, and the insecurity of work which may differ, or cease to exist, from one day to the next.

225. If we are going to contemplate casuals accessing NES entitlements such as paid personal leave or varying modern awards to supplement the NES gaps for casuals, then caution should be adopted as this will require a reduction or removal of the casual loading; many categories of casual employees will likely resist this themselves (students).

226. This brings forward the notion that for some casual employment is not the desired form of employment but for some reason (lack of capability, bad work history) the employee cannot secure a permanent job. For others the casual employment is a desirable form of employment maximising take home pay.

227. If promoting job security and improving access to secure work is the aim, then a better proposition would be to create a flexible part time employment category, that is focused on providing secure employment (through permanency), provide leave entitlements on a pro-rata basis, and a minimum guarantee of hours of work, but includes an additional margin or loading to compensate for the increased flexibility to roster workers according to operational requirements.

Question 6

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

Response to Question 6

228. We are not aware of any evidence that the use of individual flexibility agreements (IFA's) undermines job security, or the access to secure work across the economy.

229. In fact, the capacity of employers and employees to enter into IFA's to meet individual circumstances which are mutually beneficial is more likely to promote job security and access to secure work given the mutuality.

230. Such arrangements address the need to promote flexible modern work practices, and provide access to flexibility for employees to balance their personal circumstances with work responsibilities, without affecting the security of work.

231. It is arguable that absent an IFA mechanism in awards, where awards fetter or restrict the ability to implement a variation that meets the mutual needs of the parties, it is more likely that employees may either need to alter their arrangements to their detriment (such as changing employment type or reducing hours), or potentially result in leaving their employment altogether. This would have a deleterious effect on access to secure work across the economy.

Question 7

Having regard to the following modern award standard clauses:

- Individual flexibility arrangements;
- Consultation about major workplace change;
- Consultation about changes to rosters or hours of work;
- Dispute resolution;
- Termination of employment; and
- Redundancy.

a. Are provisions of the standard clauses consistent with the new modern awards objective?

b. Do any of the standard clauses negatively impact job security? If so, how?

c. Do any or any part of the standard clauses:

i. prevent or limit access to secure work?

ii. enhance access to secure work?

Response to Question 7

232. As we identify above the machinery in modern awards and the NES seek to condition and promote secure employment.

233. The Commission has been progressively doing this since 2010.

234. Even in the context of the new amended modern awards objective to improve access to secure work, we consider these standard modern award clauses still set a fair and relevant minimum safety net of conditions for employers and employees; having considered and balanced the new s134 (1) (aa).

235. Broadly, we consider the current provisions are consistent with the newly framed modern awards objective to improve access to secure work across the economy.

236. In addressing question 7a, we say the following.

Individual Flexibility Arrangements (IFA's)

237. With reference to our response in question 6 above, IFA's provide a valuable mechanism for employers and employees to enter into mutually beneficial arrangements to reflect the individual needs of the parties.

238. Where the changes assist the employee to balance their work commitments with personal responsibilities, which might otherwise impact their ability to stay in work due to otherwise restrictors imposed by award conditions.

Consultation about major workplace change/changes to rosters and ordinary hours of work

239. While the result of workplace change may have an effect on job security for employees in that it can lead to the termination of employment, the obligation to consult about changes is an important mechanism in being able to engage in practical and efficient discussion about the issues at hand.

240. The consultation process allows for input from employees and their representatives before a decision is actioned and this must be meaningful.

241. The provision balances the need for the employer to be allowed to run their business while ensuring employees have real input into decision that could materially affect them.

242. The standard clause is the product of years of evolution and it has been iteratively refined and stands the test of time now in the context of s 134 in its new form as it creates a framework with a predictable and consistent process to be applied in potentially diverse and contextual situations.

Redundancy and notice of termination

243. Whether or not the current redundancy provisions and notice of termination meet the amended modern awards objective to improve access to secure work is nuanced.

244. On a narrow view, redundancy or termination of employment itself is a situation that does not provide access to secure work across the economy, in that it results in the loss of employment.

245. No one could suggest that an employer cannot end the employment relationship where labour is not required or not performing.

246. Unfair dismissal, adverse action provisions and the NES extensively condition this decision making in any event and already act as a disincentive for employers shedding labour even when it is economically compelled.

247. Notice on termination needs to comprehend a broad array of circumstances including when the employee ends the relationship and when the relationship ends for under performance or conduct issues. The NES provides a balanced minimum standard for this which again has been refined and considered over many years.

Dispute Resolution

248. Similar to consultation, the dispute resolution procedures in modern awards provide a mechanism for parties to ventilate concerning award matters and the NES in the workplace and attempt to find ways to resolve conflict and tension.

249. These rights are supplemented by a vast array of other rights to agitate disputes in the workplace, such as anti-bullying[83], sexual harassment[84], adverse action[85] and many more.

250. The current modern award procedure provides means through which issues can be raised and addressed at the workplace level between the parties, and where necessary, access to representation to assist with resolving the dispute. Where disputes cannot be resolved, matters can be escalated to the Commission.

251. The fetters requiring the matter to be raised in the workplace first, allowing for the right of representation and making access to the Commission only in circumstances where the matter cannot be resolved at the enterprise level act as deterrents for wanton reaction to particular issues by either side, which is an important safeguard to ensuring security of work, particularly while a matter is in dispute.

252. This is boldened by the requirements of the procedure for work to continue in accordance with the award and the Act, and requiring employees to not unreasonably refuse to perform work while a matter is in dispute, unless the matter impacts work health and safety etc.

The procedures are clear, stable and create a predictable framework if a dispute arises about the instrument or the NES while adaptive enough to operate in diverse contexts.

b. Do any of the standard clauses negatively impact job security? If so, how?

253. None of the standard clauses promote job insecurity directly or indirectly.

c. Do any or any part of the standard clauses: i. prevent or limit access to secure work? ii. enhance access to secure work?

254. No to the contrary they operate to improve access to secure work in the context of IFAs and otherwise create a clear, stable and predictable framework for dealing with contextual issues as they arise.

---

[83] See Chapter 6, Part 6-4B, Division 2 of the Fair Work Act 2009 (Cth)
[84] See Chapter 3, Part 3-5A of the Fair Work Act 2009 (Cth)
[85] See Chapter 3, Part 3-1 of the Fair Work Act 2009 (Cth)

Question 8

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

Response to Question 8

255. Prior to making a determination to vary or make a modern award, the Commission must be satisfied that *“making the determination or modern award is necessary to achieve the modern awards objective”*.[86]

256. Respectfully, whether the standard clauses could be varied to *“improve access to, or remove barriers to accessing, the standard clauses”* by *“employees who are vulnerable to job insecurity”* is not the consideration set out in s 134(1)(aa).

257. As drafted, Question 8 directs attention away from the relevant factor that appears in s 134(1)(aa), namely, *“the need to improve access to secure work across the economy”.*

258. In responding to Question 8, we make two sets of observations:

(a) the meaning of *“vulnerable”* and the current protections that exist for the *“vulnerable”*; and

(b) the relevance (if at all) s 134(1)(aa) has to the standard clauses.

Vulnerable

259. Obviously, the National Employment Standards (**NES**) recognise that *“employees”* are the more *“vulnerable”* party within the employee-employer relationship. As such to counterbalance the lower bargaining power, the *FW Act* establishes minimum standards that apply to the employment of employees which cannot be displaced.[87]

260. Similarly, the requirement for the Commission to have regard to the modern awards objective and minimum wages objective prior to making or varying a modern award, is another form of ongoing protection.[88]

261. In the context of the modern awards objective, three factors appear to specifically require consideration of the needs of *“vulnerable”* employees, namely:

(a) the “relative living standards and the needs of the low paid”;[89]

(b) “the need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based

[86] FW Act s 157(1).
[87] FW Act s 61.
[88] See generally, FW Act ss 134 and 284.
[89] FW Act s 134(1)(a).

undervaluation of work and providing workplace conditions that facilitate women's full economic participation";[90] and

(c) "the need to promote social inclusion through increased workforce participation". [91]

262. The considerations under s 134(1)(a) and (c) invite considerations relevant to *"access"* to work. For example, the importance of *"entry-level"* positions in modern awards – to ensure inexperienced, young or low-skilled workers have a fair opportunity to enter the workforce. The Commission has also recognised *"the young and low skilled workers"* as a vulnerable classes of employee.[92]

263. As to the identity of the "*low paid"* the following characteristics have been observed as relevant:

(a) their wages are not prescribed in workplace or enterprise agreements;

(b) their award classifications are toward the lower end of the award structure; and

(c) they received no, or only small, over award payments.[93]

Relevance of s 134(1)(aa): the need to improve access to secure work across the economy

264. Considering both s 134(1)(aa) and the standard clauses, the following preliminary observations are made:

(a) **Individual flexibility arrangements (IFAs):**

(i) This clause currently provides employees the ability to agree to an alternative arrangement that is better suited to the employee's circumstances.

(ii) This clause obviously reflects *"the need to promote flexible modern work practices".*[94]

(iii) It may also be argued that absent the IFA mechanism, some employees may need to alter their employment type, hours or role. As such, it may contribute to enabling access to secure work. The expansion of categories that may be subject to IFAs may further improve access to secure work across the economy.

[90] FW Act s 134(1)(ab).
[91] FW Act s 134(1)(c).
[92] *Annual Wages Review 2009-10* (2010) 193 IR 380; [2010] FWAFB 4000 at [275]-[276].
[93] Safety Net Review – Wages – April 1997 (1997) 71 IR 1 at 51.
[94] FW Act s 134(1)(d).

(b) **Consultation about major workplace change:**

(i) As part of running a business, an employer may be required to make "major changes in production, program, organisation, structure or technology".[95]

(ii) The protection afford employees (including vulnerable employees) in that context is that employers must consult with the affected employees.[96]

(iii) The Discussion Paper highlights that "[t]he employer must consider the matters raised by the employees but does not require the consent of the employees to make the change".[97]

(iv) To the extent it is suggested that the absence of employee consent to make "a major workplace change" is considered inconsistent with promoting job security for vulnerable employees – as mentioned above, that is not the consideration required to be made in the context of s 157.

(v) To the extent it is suggested that the absence of employee consent to make "a major workplace change" is considered inconsistent with s 134(1)(aa), BNSW and ABI reject that characterisation and approach to considering whether the clause meets the modern awards objective.

(vi) Each individual provision of a modern award is not required to address each individual factor in s 134. When assessing whether a clause meets the modern awards objective, the obligation to take into account the s 134 consideration means that each factor is treated as a matter of significance – insofar as they are relevant.[98]

(vii) The same observations apply in the context of consultation about changes to rosters or hours of work.

(c) **Dispute Resolution, Termination and Redundancy:**

(i) Each of these clauses are connected to a statutory entitlement or consistent with the NES. They exist to ensure the fair application of certain procedures and processes in the workplace in the context of a dispute or termination/redundancy.

---

[95] See example, Clerks Award clause 38.1.
[96] See example, Clerks Award clause 38.1-38.2.
[97] Discussion Paper at [216].
[98] 4 Yearly Review of Modern Awards – Penalty Rates (2017) 265 IR 1; [2017] FWCFB 1001 at [115].

(ii) The specification of such provisions prevents employees from being subject to unfair or worse conditions, particular in the context of a workplace dispute, termination or redundancy. It ensures that standards set of processes are followed.

(iii) The *"need to improve access to secure work across the economy"* does not appear relevant to these standard clauses other than to say that they provide clear and predictable processes for handling workplace issues.

V. COMMENTS ON THE CONSULTATION PROCESS

Intention to participate in the consultation process

265. We welcome the opportunity to participate in the consultation process.

The conduct of the consultation process

266. As has been done in previous consultation processes facilitated by the Commission, each session should be centred around a pre-determined selection of issues.

267. The selection of issues will be informed by the responses filed by the interested parties.

The desirability of any additional consultation dates

268. Factors that may contribute to the desirability of additional consultation dates include:

   (a) the number of interested parties wishing to participate in the process;

   (b) the number, length and complexity of issues raised by the interested parties in response to the Discussion Paper;

   (c) the nature of any additional issues raised in relation to job security, which may not have been canvassed by the Discussion Papers but would benefit from further discussion amongst the interested parties; and

   (d) availability issues impacting interested parties that have otherwise indicated a desire to participate.

269. This issue should be returned to following the interested parties and the Commission having some time to consider the responses received from the interested parties on 5 February 2024.

Filed on behalf of Business NSW and Australian Business Industrial by Australian Business Lawyers & Advisors:

Nigel Ward
CEO + Director
Australian Business Lawyers & Advisors

Lewis Roper
Senior Workplace Relations Advisor
Australian Business Lawyers & Advisors

Alana Rafter
Senior Associate
Australian Business Lawyers & Advisors

5 February 2024